









THE  
ENGLISH AND EMPIRE DIGEST  
WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS.

VOLUME II.



# THE ENGLISH AND EMPIRE DIGEST

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

## VOLUME II

*AGRICULTURE.*

*ALIENS.*

*ALLOTMENTS.*

*ANIMALS.*

*ARBITRATION.*

AUSTRALIA : BUTTERWORTH & CO. (AUSTRALIA), LTD., SYDNEY.

CANADA : BUTTERWORTH & CO. (CANADA), LTD., WINNIPEG.

INDIA : BUTTERWORTH & CO. (INDIA), LTD., CALCUTTA.

NEW ZEALAND : BUTTERWORTH & CO. (AUSTRALIA), LTD., WELLINGTON.

1919.

THE WHITEFRIARS PRESS, LTD.,  
LONDON AND TONBRIDGE.

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**In this Volume English Cases reported up to 1st January, 1919, are included, and other cases are included so far as the Reports of the same were available in London on that date.**



# TABLE OF CONTENTS

## AND

## TABLE OF CROSS-REFERENCES.

	PAGE
<i>Reports included in this Work and their Abbreviations</i> - - -	xvii
<i>Abbreviations used in this Work</i> - - - - -	xxxiii
<i>Meaning of Terms used in Classifying the Annotating Cases</i> - -	xxxvii
<i>Table of Cases</i> - - - - -	xxxix
 <b>AGRICULTURE</b> - - - - -	 1—117

*For detailed Table of Contents and Table of Cross-References, see pages 1—5.*

### AIR.

*See* EASEMENTS AND PROFITS À PRENDRE.

### ALE AND BEER.

*See* INTOXICATING LIQUORS.

### ALIENATION,

RESTRAINT ON.—*See* HUSBAND AND WIFE ; PERPETUITIES ; PERSONAL PROPERTY ; REAL PROPERTY AND CHATTELS REAL ; TRUSTS AND TRUSTEES.

<b>ALIENS</b>	119—198
---------------	---------

*For detailed Table of Contents and Table of Cross-References, see pages 119, 120.*

### ALIMONY.

*See* HUSBAND AND WIFE.

### ALLEGIANCE.

*See* ALIENS ; CONSTITUTIONAL LAW.

<b>ALLOTMENTS</b>	199
-------------------	-----

### ALLUVION.

*See* WATERS AND WATERCOURSES.

## ALTERATION OF DOCUMENTS.

*See* **DEEDS AND OTHER INSTRUMENTS; WILLS.**

## AMBASSADORS.

*See* ACTION; CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

## AMBIGUITY.

*See* **DEEDS AND OTHER INSTRUMENTS; WILLS.**

**AMENDMENT.**

*See* **CRIMINAL LAW AND PROCEDURE; PLEADING; PRACTICE AND PROCEDURE.**

## AMUSEMENTS.

*See* THEATRES AND OTHER PLACES OF ENTERTAINMENT.

ANCIENT DEMESNE.

*See* REAL PROPERTY AND CHATTELS REAL.

## ANCIENT LIGHTS.

*See* **EASEMENTS AND PROFITS À PRENDRE.**

	PAGE
<b>ANIMALS</b> - - - - -	<b>201—303</b>

*For detailed Table of Contents and Table of Cross-References, see pages 201—203.*

## ANNUITIES.

*See* RENTCHARGES AND ANNUITIES.

## ANTICIPATION.

**RESTRAINT ON.**—*See* HUSBAND AND WIFE; PERPETUITIES; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.

## APOLOGY.

*See* LIBEL AND SLANDER.

**APOTHECARIES.**

*See* MEDICINE AND PHARMACY.

## APPEAL.

*See* CONSTITUTIONAL LAW ; COUNTY COURTS ; COURTS ; CRIMINAL LAW AND  
PROCEDURE ; MAGISTRATES ; PRACTICE AND PROCEDURE.

**AS TO LICENSING.—See INTOXICATING LIQUORS.**

**AS TO RATES AND RATING.**—*See* **RATES AND RATING.**

**APPEARANCE.**

*See* PRACTICE AND PROCEDURE.

APPOINTMENT,

POWERS OF.—*See* PERPETUITIES ; POWERS.  
TRUSTEES, OF.—*See* TRUSTS AND TRUSTEES.

APPORTIONMENT.

*See* LANDLORD AND TENANT ; REAL PROPERTY AND CHATTELS REAL ; RENT-CHARGES AND ANNUITIES ; TRUSTS AND TRUSTEES.

APPRAISERS.

*See* VALUERS AND APPRAISERS.

APPRENTICES.

*See* INFANTS AND CHILDREN ; MASTER AND SERVANT ; POOR LAW.

APPROPRIATION

OF GOODS.—*See* BILLS OF EXCHANGE, -PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS ; SALE OF GOODS.  
OF PAYMENT.—*See* CONTRACT ; MONEY AND MONEY-LENDING.  
OF TRUST FUNDS.—*See* TRUSTS AND TRUSTEES.

<b>ARBITRATION</b> - - - - -	PAGE 305—635
------------------------------	-----------------

*For detailed Table of Contents and Table of Cross-References, see pages 305—312.*

ARCHES,

COURT OF.—*See* COURTS ; ECCLESIASTICAL LAW.

ARCHITECT.

*See* BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS.

ARMORIAL BEARINGS.

*See* NAME AND ARMS, CHANGE OF ; REVENUE ; WILLS.

ARMY.

*See* CONSTITUTIONAL LAW ; ROYAL FORCES.

ARRANGEMENT WITH CREDITORS.

*See* BANKRUPTCY AND INSOLVENCY.

ARREST.

*See* ADMIRALTY ; BANKRUPTCY AND INSOLVENCY ; CRIMINAL LAW AND PROCEDURE ; EXECUTION ; TRESPASS.

ARSON.

*See* CRIMINAL LAW AND PROCEDURE.

## ARTICLES,

OF APPRENTICESHIP.—*See* INFANTS AND CHILDREN ; MASTER AND SERVANT ; SOLICITORS.

OF ASSOCIATION.—*See* COMPANIES.

THIRTY-NINE.—*See* ECCLESIASTICAL LAW.

## ARTISANS' DWELLINGS.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## ASSAULT.

*See* CRIMINAL LAW AND PROCEDURE ; TRESPASS.

## ASSEMBLY.

*See* CONSTITUTIONAL LAW ; CRIMINAL LAW AND PROCEDURE.

## ASSESSMENT.

*See* LANDLORD AND TENANT ; POOR LAW ; RATES AND RATING.

## ASSETS

OF DECEASED PERSONS.—*See* EXECUTORS AND ADMINISTRATORS.

OF INSOLVENT PERSONS.—*See* BANKRUPTCY AND INSOLVENCY.

## ASSIGNMENT

OF CHOSSES IN ACTION.—*See* CHOSSES IN ACTION.

OF LEASEHOLDS.—*See* LANDLORD AND TENANT ; SALE OF LAND.

FOR BENEFIT OF CREDITORS.—*See* BANKRUPTCY AND INSOLVENCY.

## ASSIZES.

*See* COURTS ; CRIMINAL LAW AND PROCEDURE.

## ASSOCIATIONS.

*See* BUILDING SOCIETIES ; CLUBS ; FRIENDLY SOCIETIES ; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES ; LOAN SOCIETIES ; TRADE AND TRADE UNIONS.

## ASYLUMS.

*See* CHARITIES ; LUNATICS AND PERSONS OF UNSOUND MIND ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## ATTACHMENT

OF PERSONS.—*See* CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL.

OF DEBTS.—*See* BANKRUPTCY AND INSOLVENCY ; EXECUTION ; PRACTICE AND PROCEDURE.

## ATTAINDER.

*See* CRIMINAL LAW AND PROCEDURE.



ATTEMPTS TO COMMIT CRIME.

*See* CRIMINAL LAW AND PROCEDURE.

ATTESTATION.

*See* DEEDS AND OTHER INSTRUMENTS ; WILLS.

ATTORNEY.

*See* SOLICITORS.

POWER OF.—*See* AGENCY.

ATTORNEY-GENERAL.

*See* CHARITIES ; CONSTITUTIONAL LAW ; CRIMINAL LAW AND PROCEDURE ;  
PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

ATTORNMENT.

*See* LANDLORD AND TENANT ; MORTGAGE ; SALE OF GOODS.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	Eng.
A. D. ...	South African Law Reports, Appellate Division	S. Af.
A. Jur. Rep. ...	Australian Jurist Reports	Aus.
A. L. T. ...	Australian Law Times	Aus.
A. R. ...	Ontario Appeals	Can.
Ad. & El.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Add. ...	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Agra ...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra F. B. ...	Agra High Court	Ind.
Alc. & N. ...	Agra High Court, Full Bench	Ind.
	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol.,	Ir.
Alc. Reg. Cas. ...	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn ...	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All. ...	New Brunswick Reports (Allen)	Can.
Alta. L. R. ...	Alberta Law Reports	Can.
Amb. ...	Ambler's Reports, Chancery, 2 vols., 1725—1783	Eng.
And. ...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol.,	Eng.
	525	Eng.
Andr. ...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst. ...	Anstruther's Reports. Exchequer, 3 vols., 1792—1797	Eng.
App. Cas. ...	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—	Eng.
	1890	N.Z.
App. Ct. Rep. ...	Appeal Court Reports	Aus.
Argus L. R. ...	Argus Law Reports	Scot.
Arkley ...	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Ir.
Arm. M. & O. ...	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Eng.
Arn. ...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H. ...	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb. ...	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C. ...	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk. ...	Atkins' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan. ...	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par. ...	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B. ...	Barber's Gold Law	S. Af.
B. & Ad. ...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—	Eng.
	1834	Eng.
B. & Ald. ...	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—	Eng.
B. & C. ...	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822	Eng.
B. & S....	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R. ...	British Columbia Reports	Can.
	Bose's Digest	Ind.
B. L. R. ...	Bengal Law Reports	Ind.
B. L. R. A. C....	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C. ...	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. O. ...	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr. ...	Bacon's Abridgment	Eng.
Bail Ct. Cas. ...	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.
	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.

xviii      **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Ball & B. ...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814...	I
Bankr. & Ins. R. .	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng
Bar. & Arn. ...	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng
Bar. & Aust. ...	Barron and Austin's Election Cases, 1 vol., 1842 ...	
Barn. Ch. ...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	
Barn. K. B. ...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734...	Eng
Barnes ...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760 ...	Eng
	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 ...	I
	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	I
Beav. ...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866 ...	
Beav. & Wal. ...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846 ...	
Beaw. ...	Beawes's Lex Mercatoria ...	
Bell, C. C. ...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860 ...	Eng
Bell, Ct. of Sess. .	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792 ...	Scot
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795 ...	Scot
Bell, Dict. Dec. .	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833 ...	Scot
Bell, Sc. App. ...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850 ...	Scot
Bellewe... ..	Bellewe's Cases temp. Richard II., King's Bench, 1 vol. ...	Eng
Belt's Sup. ...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756 ...	Eng
Ben. & D. ...	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Benl. ...	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627 ...	Eng.
Ber. ...	New Brunswick Reports (Berton) ...	Can.
Bing. ...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. C. ...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm. ...	Bissett and Smith's Digest ...	S. Af.
Bitt. Prac. Cas. .	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876 ...	Eng.
Bitt. Rep. in Ch. .	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884...	Eng.
Bl. Com. ...	Blackstone's Commentaries...	Eng
Bl. D. & Osb. ...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848 ...	Ir.
Bli. ...	Bligh's Reports, House of Lords, 4 vols., 1819—1821 ...	Eng.
Bli. N. S. ...	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—	Eng.
Bom. ...	Bombay High Court Reports ...	Ind.
Bom. A. C. ...	Bombay Reports, Appeal Cases ...	Ind.
Bom. O. C. ...	Bombay Reports, Oudh Cases ...	Ind.
Bos. & P. ...	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804 ...	Eng.
Bos. & P. N. R. .	Bosanquet and Puller's New Reports, Common Pleas, 2 vols.,	Eng.
Bourke ...	Bourke's Reports ...	Ind.
	Bracton De Legibus et Consuetudinibus Angliæ ...	
Bro. Abr. ...	Sir J. Brooke's Abridgment...	Eng.
Bro. C. C. ...	W. Brown's Chancery Reports, 4 vols., 1778—1794 ...	Eng.
Bro. Ecc. Rep....	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol.,	Eng.
Bro. N. C. ...	Sir R. Brooke's New Cases, 1 vol., 1515—1558 ...	Eng.
Bro. Parl. Cas....	J. Brown's Cases in Parliament, 8 vols., 1702—1800 ...	Eng.
Bro. Supp. to Mor.	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols. ...	Scot.
Bro. Synop. ...	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827 ...	Scot.
Brod. & Bing. ...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—	Eng.
Brod. & F. ...	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864 ...	Eng.
Broun ...	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Brown. & Lush.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866...	Eng.
Brownl....	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624...	Eng.
Bruce ...	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.
Buch. ...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879...	S. Af.
Buch. A. C. ...	Buchanan's Reports of Appeal Court (Cape) ...	S. Af.
Buchan. ...	Buchanan's Reports, Court of Session and Justiciary (Scotland),	Scot.
	Buck's Cases in Bankruptcy, 1 vol., 1816—1820...	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xix

Bull. N. P.	Buller's Nisi Prius (published, London, 1772) ...	Eng.
	Relatende's Reports, King's Bench, fol., 3 parts in 1 vol., 1610	
Bunb. ...	Bunbury's Reports, Exchequer, fol., 1 vol., ...	Eng.
Burr. ...	Burrow's Reports, King's Bench, 5 vols., 1756—1772 ...	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776 ...	Eng.
Burrell ...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. & P....	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ...	Common Bench Reports, 18 vols., 1845—1856 ...	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865 ...	Eng.
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)	Eng.
C. L. Ch.	Common Law Chambers ...	Can.
C. L. J....	Cape Law Journal ...	S. Af.
C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current) ...	Can.
C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
C. L. R.	Common Law Reports, 3 vols., 1853—1855 ...	Eng.
C. L. R.	Commonwealth Law Reports ...	Aus.
C. L. R.	Calcutta Law Reporter ...	Ind.
C. L. R.	Cape Law Reports ...	S. Af.
C. L. T....	Canadian Law Times ...	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes ...	Can.
C. P. ...	Upper Canada Common Pleas ...	Can.
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880 ...	Eng.
C. P. D.	Cape Provincial Division Reports ...	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases ...	Can.
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope ...	S. Af.
C. W. N.	Calcutta Weekly Notes ...	Ind.
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1609—1607	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates Cases, 1 vol., 1776—1785 ...	Eng.
Calth. ...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas.	Cameron's Supreme Court Cases ...	Can.
Camp. ...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816 ...	Eng.
Can. Com. Cas.	Commercial Law Reports of Canada ...	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated ...	Can.
Can. Ry. Cas.	Canadian Railway Cases ...	Can.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842 ...	Eng.
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842 ...	Eng.
Cart. ...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673 ...	Eng.
	Cases on British North America Act ...	Can.
Carth. ...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 ...	Eng.
Cary ...	Cary's Reports, Chancery, 1 vol. ...	Eng.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697 ...	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775 ...	Eng.
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727 ...	Eng.
Cas. temp. Finch	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680 ...	Eng.
Cas. temp. King	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733 ...	Eng.
Cas. temp. Talb.	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737 ...	Eng.
Cass. Dig.	Cassells' Digest ...	Can.
Ch. (preceded by date).	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875 ...	Eng.
Ch. Cas. in Ch.	Choyce Cases in Chancery, 1557—1606 ...	Eng.
Ch. Ch.	Upper Canada Chancery Chambers Reports ...	Can.
	Law Reports, Chancery Division, 45 vols., 1875—1890 ...	Eng.
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 1 vol., 1875—1876 ...	Eng.
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876 ...	Eng.
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846 ...	Eng.
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases ...	Can.
Clay. ...	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A. ...	Cook's Lower Canada Admiralty Court Cases ...	Can.
Co. Ent.	Coke's Entries ...	Eng.
Co. Inst.	Coke's Institutes ...	Eng.
Co. L. J.	Colonial Law Journal ...	N.Z.
Co. Litt.	Coke on Littleton (1 Inst.) ...	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616 ...	Eng.
Cochran	Nova Scotia Law Reports ...	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833 ...	Eng.
Coll. ...	Collyer's Reports, Chancery, 2 vols., 1844—1846 ...	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols. ...	Eng.

xviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Ball & B. ...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814 ...	Ir.
Bankr. & Ins. R. ...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn. ...	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust. ...	Barron and Austin's Election Cases, 1 vol., 1842 ...	Eng.
Barn. Ch. ...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B. ...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734 ...	Eng.
Barnes ...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760 ...	Eng.
Batt. ...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 ...	Ir.
Beav. ...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav. & Wal. ...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866 ...	Eng.
Beaw. ...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846 ...	Eng.
Bell, C. C. ...	Beawes's Lex Mercatoria ...	Eng.
Bell, Ct. of Sess. ...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860 ...	Eng.
Bell, Ct. of Sess. fol. ...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792 ...	Scot.
Bell, Dict. Dec. ...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795 ...	Scot.
Bell, Sc. App. ...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833 ...	Scot.
Bellewe ...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850 ...	Scot.
Belt's Sup. ...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol. ...	Eng.
Ben. & D. ...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756 ...	Eng.
Benl. ...	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Ber. ...	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627 ...	Eng.
Bing. ...	New Brunswick Reports (Berton) ...	Can.
Bing. N. C. ...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Biss. & Sm. ...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Bitt. Prac. Cas. ...	Bissett and Smith's Digest ...	S. Af.
Bitt. Rep. in Ch. ...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876 ...	Eng.
Bl. Com. ...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884 ...	Eng.
Bl. D. & Osb. ...	Blackstone's Commentaries ...	Eng.
Bli. ...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848 ...	Ir.
Bli. N. S. ...	Bligh's Reports, House of Lords, 4 vols., 1819—1821 ...	Eng.
Bom. ...	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837 ...	Eng.
Bom. A. C. ...	Bombay High Court Reports ...	Ind.
Bom. O. C. ...	Bombay Reports, Appeal Cases ...	Ind.
Bos. & P. ...	Bombay Reports, Oudh Cases ...	Ind.
Bos. & P. N. R. ...	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804 ...	Eng.
Bourke ...	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807 ...	Eng.
Bro. Abr. ...	Bourke's Reports ...	Ind.
Bro. C. C. ...	Bracton De Legibus et Consuetudinibus Angliæ ...	Eng.
Bro. Ecc. Rep. ...	Sir J. Brooke's Abridgment ...	Eng.
Bro. N. C. ...	W. Brown's Chancery Reports, 4 vols., 1778—1794 ...	Eng.
Bro. Parl. Cas. ...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872 ...	Eng.
Bro. Supp. to Mor. ...	Sir R. Brooke's New Cases, 1 vol., 1515—1558 ...	Eng.
Bro. Synop. ...	J. Brown's Cases in Parliament, 8 vols., 1702—1800 ...	Eng.
Brod. & Bing. ...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols. ...	Scot.
Brod. & F. ...	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827 ...	Scot.
Broun ...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822 ...	Eng.
Brown. & Lush. ...	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864 ...	Eng.
Brownl. ...	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Bruce ...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866 ...	Eng.
Buch. ...	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, ...	Eng.
Buch. A. C. ...	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.
Buchan. ...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879 ...	S. Af.
	Buchanan's Reports of Appeal Court (Cape) ...	S. Af.
	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813 ...	Scot.
	Buck's Cases in Bankruptcy, 1 vol., 1816—1820 ...	Eng.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

XIX

Bull. N. P. ...	Buller's Nisi Prius (published, London, 1772) ...	Eng.
Bulst. ...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610-1660	Eng.
Bunb. ...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713-1741	Eng.
Burr. ...	Burrow's Reports, King's Bench, 5 vols., 1756-1772	Eng.
Burr. S. C. ...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733-1776	Eng.
Burrell ...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648-1840	Eng.
C. & P....	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823-1841	Eng.
C. B. ...	Common Bench Reports, 18 vols., 1845-1856	Eng.
C. B. N. S. ...	Common Bench Reports, New Series, 20 vols., 1856-1865	Eng.
C. C. Ct. Cas. ...	Central Criminal Court Cases (Sessions Papers), 1834-(current)	Eng.
C. L. Ch. ...	Common Law Chambers	Can.
C. L. J....	Cape Law Journal	S. Af.
C. L. J. N. S. ...	Canada Law Journal, New Series, 1865-(current)	Can.
C. L. J. O. S. ...	Canada Law Journal, Old Series, 10 vols., 1855-1864	Can.
C. L. R. ...	Common Law Reports, 3 vols., 1853-1855	Eng.
C. L. R. ...	Commonwealth Law Reports	Aus.
C. L. R. ...	Calcutta Law Reporter	Ind.
C. L. R. ...	Cape Law Reports	S. Af.
C. L. T....	Canadian Law Times	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
C. P. ...	Upper Canada Common Pleas	Can.
C. P. D. ...	Law Reports, Common Pleas Division, 5 vols., 1875-1880	Eng.
C. P. D. ...	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases	Can.
C. T. R. ...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N. ...	Calcutta Weekly Notes	Ind.
Cab. & El. ...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882-1885	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates Cases, 1 vol., 1776-1785	Eng.
Calth. ...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609-1618	Eng.
Cam. Cas. ...	Cameron's Supreme Court Cases	Can.
Camp. ...	Campbell's Reports, Nisi Prius, 4 vols., 1807-1816	Eng.
Can. Com. Cas.	Commercial Law Reports of Canada	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated	Can.
Can. Ry. Cas. ...	Canadian Railway Cases	Can.
Car. & Kir. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843-1853	Eng.
Car. & M. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841-1842	Eng.
Carp. Pat. Cas. ...	Carpmael's Patent Cases, 2 vols., 1602-1842	Eng.
Cart. ...	Carter's Reports, Common Pleas, fol., 1 vol., 1664-1673	Eng.
Cart. ...	Cases on British North America Act	Can.
Carth. ...	Carthew's Reports, King's Bench, fol., 1 vol., 1687-1700	Eng.
Cary ...	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch. ...	Cases in Chancery, fol., 3 parts, 1660-1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655-1775	Eng.
Cas. Sett. ...	Cases of Settlements and Removals, 1 vol., 1685-1727	Eng.
Cas. temp. Finch	Cases temp. Finch, Chancery, fol., 1 vol., 1673-1680	Eng.
Cas. temp. King	Select Cases temp. King, Chancery, fol., 1 vol., 1724-1733	Eng.
Cas. temp. Talb.	Cases in Equity temp. Talbot, fol., 1 vol., 1730-1737	Eng.
Cass. Dig. ...	Cassell's Digest	Can.
Ch. (preceded by date).	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. App. ...	Law Reports, Chancery Appeals, 10 vols., 1865-1875	Eng.
Ch. Cas. in Ch.	Choyce Cases in Chancery, 1557-1606	Eng.
Ch. Ch. ...	Upper Canada Chancery Chambers Reports	Can.
Ch. D. ...	Law Reports, Chancery Division, 45 vols., 1875-1890	Eng.
Ch. Rob. ...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798-1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 1 vol., 1875-1876	Eng.
Char. Pr. Cas. ...	Charley's New Practice Reports, 3 vols., 1875-1876	Eng.
	Chitty's Practice Reports, King's Bench, 2 vols., 1770-1822	Eng.
Cl. & Fin. ...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831-1846	Eng.
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases	Can.
	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631-1650	Eng.
Clif. & Rick. ...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873-1884	Eng.
Clif. & Steph. ...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867-1872	Eng.
Co. A. ...	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent. ...	Coke's Entries	Eng.
Co. Inst. ...	Coke's Institutes	Eng.
Co. L. J. ...	Colonial Law Journal	N.Z.
Co. Litt. ...	Coke on Littleton (1 Inst.)	Eng.
Co. Rep. ...	Coke's Reports, 13 parts, 1572-1616	Eng.
Cochran ...	Nova Scotia Law Reports	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	
	Collyer's Reports, Chancery, 2 vols., 1844-1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.

# xx      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Colles ... ..	Colles' Cases in Parliament, 1 vol., 1697—1713 ... ..	Eng.
Colt. ... ..	Coltman's Registration Cases, 1 vol., 1879—1885 ... ..	Eng.
Com. ... ..	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 ... ..	Eng.
Com. Cas. ... ..	Commercial Cases, 1895—(current) ... ..	Eng.
Com. Dig. ... ..	Comyns' Digest ... ..	Eng.
Comb. ... ..	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698 ...	Eng.
Con. & Law. ... ..	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ... ..	Ir.
Cooke & Al. ... ..	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., ... ..	Ir.
Cooke, Pr. Cas. ... ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747 ...	Eng.
Cooke, Pr. Reg. ... ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 ... ..	Eng.
Coop. G. ... ..	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ... ..	Eng.
Coop. Pr. Cas. ....	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838 ...	Eng.
Coop. temp. Brough. ... ..	C. P. Cooper's Cases <i>temp.</i> Brougham, Chancery, 1 vol., 1833—1834 ... ..	Eng.
Coop. temp. Cott. ... ..	C. P. Cooper's Cases <i>temp.</i> Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) ... ..	Eng.
Corb. & D. ... ..	Coryton's Reports ... ..	Ind.
Correspondence Jud. ... ..	Corbett and Daniell's Election Cases, 1 vol., 1819 ... ..	Eng.
Couper ... ..	Correspondence Judiciaries ... ..	Can.
Cout. ... ..	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout. Dig. ... ..	Coutlees' Unreported Cases ... ..	Can.
Cowp. ... ..	Coutlees' Digest ... ..	Can.
Cox & Atk. ... ..	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ... ..	Eng.
Cox, C. C. ... ..	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846 ... ..	Eng.
Cox, Eq. Cas. ... ..	E. W. Cox's Criminal Law Cases, 1843—(current) ... ..	Eng.
Cox, M. & H. ... ..	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ... ..	Eng.
Cr. & J. ... ..	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852 ... ..	Eng.
Cr. & M. ... ..	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & Ph. ... ..	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834 ... ..	Eng.
Cr. App. Rep. ... ..	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. M. & R. ... ..	Cohen's Criminal Appeal Reports, 1908—(current) ... ..	Eng.
Craw. & D. ... ..	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ... ..	Eng.
Craw. & D. Abr. C. ... ..	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846 ... ..	Ir.
Cress. Insolv. Cas. ... ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cripps' Church Cas. ... ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ... ..	Eng.
Cro. Car. ... ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ... ..	Eng.
Cro. Eliz. ... ..	Croke's Reports <i>temp.</i> Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ... ..	Eng.
Cro. Jac. ... ..	Croke's Reports <i>temp.</i> Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ... ..	Eng.
Cru. Dig. ... ..	Croke's Reports <i>temp.</i> James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ... ..	Eng.
Cunn. ... ..	Cruise's Digest of the Law of Real Property, 7 vols. ... ..	Eng.
D. ... ..	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735 ...	Eng.
D. C. A. ... ..	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 ... ..	Eng.
D. L. R. ... ..	Duxbury's Reports of the High Court of the South African Republic ... ..	S. Af.
Dan. & Ll. ... ..	Dorion's Queen's Bench Reports ... ..	Can.
Dav. & Mer. ... ..	Dominion Law Reports ... ..	Can.
Dav. Ir. ... ..	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720 ... ..	Scot.
Dav. Pat. Cas. ....	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Day ... ..	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dea. & Sw. ... ..	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844 ... ..	Eng.
Deac. ... ..	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611 ... ..	Ir.
Deac. & Ch. ... ..	Davies' Patent Cases, 1 vol., 1785—1816 ... ..	Eng.
Dears. & B. ... ..	Day's Election Cases, 1 vol., 1892—1893 ... ..	Eng.
Dears. C. C. ... ..	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
Deas & And. ... ..	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ... ..	Eng.
De G. ... ..	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
De G. & J. ... ..	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856 ... ..	Eng.
	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—	Scot.
	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848 ... ..	Eng.
	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	Eng.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxi

De G. & Sm. ...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—	Eng.
G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—	Eng.
De G. M. & G....	1865... .. De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	Eng.
Delane ... ..	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
	Justinian's Digest or Pandects ... ..	Eng.
Diri. ... ..	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677... ..	Scot.
Dods. ... ..	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly ... ..	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas....	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B. ... ..	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow ... ..	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl. ... ..	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832...	Eng.
Dow. & L. ... ..	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B.	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—	Eng.
Dow. & Ry. M. C.	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—	Eng.
Dow. & Ry. N. P.	1827... .. Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—	Eng.
Dowl. ... ..	Dowling's Practice Reports, 9 vols., 1830—1841... ..	Eng.
Dowl. N. S. ... ..	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal. ... ..	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—	Ir.
	1841... ..	Ir.
Dr. & War. ... ..	Drury and Warren's Reports, Chancery (Ireland), 4 vols. 1841—	Ir.
Dra. ... ..	Draper's King's Bench Reports ... ..	Can.
Drew. ... ..	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm. ... ..	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ..	Eng.
Drinkwater ... ..	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap.	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—	Ir.
	1859 ... ..	Ir.
Drury temp. Sug.	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—	Ir.
	1844 ... ..	Ir.
Dugd. Orig. ... ..	Dugdale's Origines Juridicales ... ..	Eng.
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols.,	Scot.
Dunning ... ..	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie ... ..	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621.	Scot.
Dyer ... ..	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. & A....	Upper Canada Error and Appeal ... ..	Can.
E. & B....	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—	Eng.
	1858... ..	Eng.
E. & E....	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 ...	Eng.
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol.,	Eng.
	1858—1860... ..	Eng.
E. D. C. ... ..	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L. ... ..	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. L. R. ... ..	Eastern Law Reporter ... ..	Can.
E. R. (or Eng. Rep.)	English Reports ... ..	Eng.
E. R. ... ..	Ontario Election Reports ... ..	Can.
Eag. & Y. ... ..	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.
East ... ..	East's Reports, King's Bench, 16 vols., 1800—1812 ...	Eng.
East, P. C. ... ..	East's Pleas of the Crown ... ..	Eng.
Ecc. & Ad. ... ..	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—	Eng.
	1855... ..	Eng.
Eden ... ..	Eden's Reports, Chancery, 2 vols., 1757—1766 ...	Eng.
Edgar ... ..	Edgar's Decisions, Court of Session (Scotland), fol., 1724—	Scot.
	1725... ..	Eng.
Edw. ... ..	Edwards' Reports, Admiralty, 1 vol., 1808—1812 ...	Scot.
Elchies ... ..	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—	Eng.
	1754... ..	Scot.
Eng. Pr. Cas. ... ..	Roscoe's English Prize Cases, 2 vols., 1745—1858 ...	Eng.
Eq. Cas. Abr. ... ..	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ...	Eng.
Eq. Rep. ... ..	Equity Reports, 3 vols., 1853—1855 ...	Eng.
Esp. ... ..	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810 ...	Eng.
Ex. D. ... ..	Law Reports, Exchequer Division, 5 vols., 1875—1880... ..	Eng.
	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856... ..	Eng.
Exch. C. R.	Exchequer Court Reports ... ..	Can.

# xxii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906 ...	Scot.
F.	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880...	S. Af.
F....	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867...	Eng.
F. N. D.	Finnemore's Notes and Digest of Natal Cases, 1863—1867 ...	S. Af.
Fac. Coll. (with date)...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), fol., 1st and 2nd series, 21 vols., 1752—1825 ...	Scot.
Fac. Coll. N. S. (with date).	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), New Series, 16 vols., 1825—1841 ...	Scot.
Falc. ...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751 ...	Scot.
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838...	Eng.
Fenton ...	Fenton, Important Judgments ...	N.Z.
Ferg. ...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev.	Fitzherbert's Natura Brevium ...	Eng.
Fitz-G. ...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731...	Eng.
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842...	Ir.
Fonbl. ...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ...	Eng.
For. ...	Forrest's Reports, Exchequer, 1 vol., 1800—1801 ...	Eng.
Forb. ...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713...	Scot.
Fort. De Laud.	Fortesque, De Laudibus Legum Angliæ ...	Eng.
Fortes. Rep. ...	Fortescue's Reports, fol., 1 vol., 1692—1736 ...	Eng.
Fost. ...	Foster's Crown Cases, 1 vol., 1708—1760...	Eng.
Fount. ...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712...	Scot.
Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825 ...	Ir.
Fox & S. Reg....	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895 ...	Eng.
Fras. ...	Fraser (Simon), Election Cases, 2 vols., 1793 ...	Eng.
Freem. Ch. ...	Freeman's Reports, Chancery, 1 vol., 1660—1706 ...	Eng.
Freem. K. B. ...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., —1704...	Eng.
G. ...	Gregorowski's Reports of the High Court of the Orange Free State from 1883 ...	S. Af.
G. I. Dig.	General Index Digest ...	Can.
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843...	Eng.
Gale ...	Gale's Reports, Exchequer, 2 vols., 1835—1836 ...	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports ...	N.Z.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani ...	Eng.
Giff. ...	Giffard's Reports, Chancery, 5 vols., 1857—1865 ...	Eng.
Gilb. ...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714 ...	Eng.
Gilb. Ch.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—	Eng.
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas ...	Eng.
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686...	Scot.
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828...	Eng.
Glanv. ...	Glanville, De Legibus et Consuetudinibus Regni Angliæ ...	Eng.
Glanv. El. Cas.	Glanville's Election Cases, 1 vol., 1623—1624 ...	Eng.
Glascokk ...	Glascokk's Reports (Ireland), 1 vol., 1831—1832 ...	Ir.
Godb. ...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637 ...	Eng.
Gouldsb.	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601 ...	Eng.
Gow ...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820 ...	Eng.
Gr. ...	Upper Canada Chancery (Grant) ...	Can.
Griffin's Patent Cases...	Griffin's, Patent Cases, 1884—1886 ...	Eng.
Gwill. ...	Gwillim's Tithe Cases, 4 vols., 1224—1824 ...	Eng.
H. ...	Hertzog's Reports of the High Court of the South African Republic, 1893 ...	S. Af.
H. & C....	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866...	Eng.
H. & N.	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862...	Eng.
H. & Tw.	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850 ...	Eng.
H. & W.	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841...	Eng.
H. C. ...	Reports of the High Court of Griqualand West ...	S. Af.
H. E. C.	Hodgin's Election Reports ...	Can.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxiii

H. L. Cas. ...	Clark's Reports, House of Lords, 11 vols., 1847—1866 ...	Eng.
Hag. Adm. ...	Haggard's Reports, Admiralty, 3 vols., 1822—1838 ...	Eng.
Hag. Con. ...	Haggard's Consistorial Reports, 2 vols., 1789—1821 ...	Eng.
Hag. Ecc. ...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833 ...	Eng.
Hailes ...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791 ...	Scot.
Hale, C. L. ...	Hale's Common Law ...	Eng.
Hale, P. C. ...	Hale's Pleas of the Crown, 2 vols. ...	Eng.
Han. ...	New Brunswick Reports (Hannay) ...	Can.
Har. & Ruth. ...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866 ...	Eng.
Har. & W. ...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836 ...	Eng.
Harc. ...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691... ..	Scot.
Hard. ...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669 ...	Eng.
Hare ...	Hare's Reports, Chancery, 11 vols., 1841—1853 ...	Eng.
Hawk. P. C. ...	Hawkins's Pleas of the Crown, 2 vols. ...	Eng.
Hay ...	Hay's Reports ...	Ind.
Hayes ...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832 ...	Ir.
Hayes & Jo. ...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834... ..	Ir.
Hem. & M. ...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865... ..	Eng.
Hob. ...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631 ...	Eng.
Hodg. ...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625 ...	Eng.
Hog. ...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837 ...	Eng.
Holt, Adm. ...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834 ...	Ir.
Holt, Eq. ...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867... ..	Eng.
Holt, K. B. ...	W. Holt's Equity Reports, 2 vols., 1845 ...	Eng.
Holt, N. P. ...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710 ...	Eng.
Home, Ct. of Sess. ...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817 ...	Eng.
Hong Kong L. R. ...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744... ..	Scot.
Hop. & Colt. ...	Hong Kong Reports... ..	Hong Kong.
Hop. & Ph. ...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—	Eng.
Horn & H. ...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—	Eng.
Hov. Supp. ...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839... ..	Eng.
Hud. & B. ...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817 ...	Eng.
Hume ...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831 ...	Ir.
Hut. ...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822 ...	Scot.
Hy. Bl....	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638 ...	
Hyde ...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796 ...	Eng.
I. C. L. R. ...	Hyde's Reports ...	Ind.
I. Ch. R. ...	Irish Common Law Reports, 17 vols., 1849—1866 ...	Ir.
I. Eq. R. ...	Irish Chancery Reports, 17 vols., 1850—1867 ...	Ir.
I. L. R....	Irish Equity Reports, 13 vols., 1838—1851 ...	Ir.
I. L. R. All. ...	Irish Law Reports, 13 vols., 1838—1851 ...	Ir.
I. L. R. Bom. ...	Indian Law Reports, Allahabad ...	Ind.
I. L. R. Calc. ...	Indian Law Reports, Bombay ...	Ind.
I. L. R. Mad. ...	Indian Law Reports, Calcutta ...	Ind.
I. L. T....	Indian Law Reports, Madras ...	Ind.
I. L. T. Jo. ...	Irish Law Times, 1867—(current) ...	Ir.
I. R. (preceded by date)	Irish Law Times Journal, 1867 (current) ...	Ir.
I. R. C. L. ...	Irish Reports, since 1893 ( <i>e.g.</i> [1894] 1 I. R.) ...	Ir.
I. R. Eq. ...	Irish Reports, Common Law, 11 vols., 1866—1877 ...	Ir.
Ind. Awards ...	Irish Reports, Equity, 11 vols., 1866—1877 ...	Ir.
Ind. Jur. N. S. ...	Industrial Awards Recommendations ...	N.Z.
Ind. Jur. O. S....	Indian Jurist, New Series ...	Ind.
Ir. Cir. Rep. ...	Indian Jurist, Old Series ...	Ind.
Ir. Jur. ...	Reports of Irish Circuit Cases, 1 vol., 1841—1843 ...	Ir.
Ir. L. Rec. 1st ser. ...	Irish Jurist, 18 vols., 1849—1866 ...	Ir.
Ir. L. Rec. N. S. ...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831... ..	Ir.
Ir. Term Rep. ...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838 ...	Ir.
Irv. ...	Irish Term Reports ...	Ir.
J. Bridg. ...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867 ...	Scot.
	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621... ..	Eng.

xxiv      **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

J. D. R.	...	Juta's Daily Reporter, Reporting Cases in the Cape Provincial Division	...	...	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	...	...	Eng.
J. R.	...	Jurist Reports	...	...	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	...	...	Scot.
		Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	...	...	Eng.
Jac. & James	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	...	...	Eng.
Jebb & B.	...	Novia Scotia Law Reports (James)	...	...	...	...	Can.
		Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	...	...	Ir.
Jebb Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	...	...	Ir.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—	...	...	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	...	...	Eng.
Just. Inst.	...	Justinian's Institutes	...	...	...	...	Eng.
		Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	...	...	Eng.
K. & J....	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	...	...	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	...	...	Scot.
		Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	...	...	Eng.
		Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	...	...	Eng.
		Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	...	...	Eng.
Kel. W....	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	...	...	Can.
Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol.,	...	...	...	...	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	...	...	...	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	...	...	...	Eng.
		Knox's Reports	...	...	...	...	Aus.
L. & G. <i>temp.</i> Plunk.	...	Lloyd and Goold's Reports <i>temp.</i> Plunkett, Chancery (Ireland), 1 vol., 1834—1839	...	...	...	...	Ir.
L. & G. <i>temp.</i> Sugd.	...	Lloyd and Goold's Reports <i>temp.</i> Sugden, Chancery (Ireland), 1 vol., 1835	...	...	...	...	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol.,	...	...	...	...	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	...	...	...	...	Can.
L. C. J....	...	Lower Canada Jurist	...	...	...	...	Can.
L. C. L. J.	...	Lower Canada Law Journal	...	...	...	...	Can.
L. C. R.	...	Lower Canada Reports	...	...	...	...	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	...	...	...	...	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	...	...	...	...	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	...	...	...	...	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	...	...	...	...	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1822—1875	...	...	...	...	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1822—(current)	...	...	...	...	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	...	...	...	...	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1830—1875	...	...	...	...	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	...	...	...	...	Eng.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxv

L. J. K. B. or Q. B.	Law Journal, King's Bench or Queen's Bench, 1822—(current).	Eng.
L. J. M. C. ...	Law Journal, Magistrates' Cases, 1826—1896 ...	Eng.
L. J. N. C. ...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal) ...	Eng.
L. J. O. S. ...	Law Journal, Old Series, 10 vols., 1822—1831 ...	Eng.
L. J. P. ...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M. ...	Law Journal, Probate and Matrimonial Cases, 1858—1859,	Eng.
L. J. P. C. ...	Law Journal, Privy Council, 1865—(current) ...	Eng.
L. J. P. M. & A.	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo. ...	Law Journal Newspaper, 1866—(current) ...	Eng.
L. L. R. ...	Leader Law Reports ...	S. Af.
L. M. & P. ...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851 ...	Eng.
L. N. ...	Legal News ...	Can.
L. R. ...	Law Reports ...	Eng.
L. R. A. & E. ...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875 ...	Eng.
L. R. C. C. R. ...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875 ...	Eng.
L. R. C. P. ...	Law Reports, Common Pleas, 10 vols., 1865—1875 ...	Eng.
L. R. Eq. ...	Law Reports, Equity Cases, 20 vols., 1865—1875 ...	Eng.
L. R. Exch. ...	Law Reports, Exchequer, 10 vols., 1865—1875 ...	Eng.
L. R. H. L. ...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875 ...	Eng.
L. R. Ind. App. (or L. R. I. A.) ...	Law Reports, Indian Appeals, Privy Council, 1873—(current)...	Eng.
L. R. Ind. App. Supp. Vol.	Law Reports, Indian Appeals, Privy Council, Supplementary Volume, 1872—1873 ...	Eng.
L. R. Ir. ...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893... Ir.	
L. R. P. & D. ...	Law Reports, Probate and Divorce, 3 vols., 1865—1875 ...	Eng.
L. R. P. C. ...	Law Reports, Privy Council, 6 vols., 1865—1875 ...	Eng.
L. R. Q. B. ...	Law Reports, Queen's Bench, 10 vols., 1865—1875 ...	Eng.
L. R. Q. B. ...	Quebec Reports, Queen's Bench ...	Can.
L. R. Sc. & Div. ...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875 ...	Eng.
L. T. ...	Law Times Reports, 1859—(current) ...	Eng.
L. T. Jo. ...	Law Times Newspaper, 1843—(current) ...	Eng.
L. T. O. S. ...	Law Times Reports, Old Series, 34 vols., 1843—1860 ...	Eng.
L. Th. ...	La Themis ...	Can.
Lane ...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611 ...	Eng.
Laws. Reg. Cas.	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628 ...	Eng.
Ld. Raym. ...	Lawson's Registration Cases, 1895—(current) ...	Eng.
Ld. Raym. ...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732 ...	Eng.
Le. & Ca. ...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865 ...	Eng.
Leach ...	Leach's Crown Cases, 2 vols., 1730—1814 ...	Eng.
Lee ...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758 ...	Eng.
Lee temp. Hard.	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.
Leg. Rep. ...	Legal Reporter ...	Ir.
Legge ...	Legge's Reports ...	Aus.
Leon. ...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615 ...	Eng.
Lev. ...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696 ...	Eng.
Lew. C. C. ...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
Ley ...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629 ...	Eng.
Lib. Ass. ...	Liber Assisarum, Year Books, 1—51 Edw. III. ...	Eng.
Lilly ...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol. ...	Eng.
Lilly ...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631 ...	Eng.
Lilly ...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774 ...	Eng.
Long. & T. ...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol.,	Ir.
Lud. E. C. ...	Luder's Election Cases, 3 vols., 1784—1787 ...	Eng.
Lumley, P. L. C.	Lumley's Poor Law Cases, 2 vols., 1834—1842 ...	Eng.
Lumley, P. L. C.	Lushington's Reports, Admiralty, 1 vol., 1859—1862 ...	Eng.
Lumley, P. L. C.	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704 ...	Eng.
Lut. Reg. Cas.	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853 ...	Eng.
Lynd. ...	Lyndwood, Provinciale, fol., 1 vol. ...	Eng.
M. ...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850... S. Af.	
& S....	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
M. & W.	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
M. C. R.	Montreal Condensed Reports ...	Can.
M. H. C. R.	Madras High Court Reports ...	Ind.
M. L. R.	Montreal Law Reports ...	Can.

# xxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

M. M. Cas.	Martin's Reports of Mining Cases ... ..	Can.
Mac. & G. ...	Macassey's New Zealand Reports ... ..	N.Z.
Mac. & H. ...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	Eng.
M'Cle. ...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852 ...	Eng.
M'Cle. & Yo.	M'Cleland's Reports, Exchequer, 1 vol., 1824 ... ..	Eng.
Macfarlane ...	M'Cleland and Younge's Reports, Exchequer, 1 vol., 1824—1825... ..	Eng.
Macl. & Rob. ...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839... ..	Scot.
Macph. (Ct. of Sess.)	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839... ..	Scot.
	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873... ..	Scot.
	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—	Scot.
	Macrory's Patent Cases, 2 parts, 1847—1856 ... ..	Eng.
Mad. ...	Madras High Court Reports ... ..	Ind.
Madd. ...	Maddock's Reports, Chancery, 6 vols., 1815—1821 ... ..	Eng.
Madd. & G. ...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.) ... ..	Eng.
Madox ...	Madox's Formulæ Anglicanum ... ..	Eng.
Madox, Exch. ...	Madox's History and Antiquities of the Exchequer, 2 vols. ...	Eng.
Mag. ...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852 ... ..	Eng.
Man. & G. ...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845... ..	Eng.
Man. & Ry. K. B.	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—	Eng.
Man. & Ry. M. C.	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830...	Eng.
Man. L. J. ...	Manitoba Law Journal ... ..	Can.
Man. L. R. ...	Manitoba Law Reports ... ..	Can.
Man. R. ...	Manitoba Law Reports ... ..	Can.
Mans. ...	Manson's Bankruptcy and Company Cases, 1893—(current) ...	Eng.
Mar. L. C. ...	Maritime Law Reports (Crockford), 3 vols., 1860—1871 ...	Eng.
March ...	March's Reports, King's Bench and Common Pleas, 1 vol.,	Eng.
Marr. ...	Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ... ..	Eng.
Marsh. ...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816 ... ..	Eng.
Marsh. ...	Marshall's Reports ... ..	Ind.
Mayn. ...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326... ..	Eng.
Meg. ...	Megone's Companies Acts Cases, 2 vols., 1889—1891 ... ..	Eng.
Men. ...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850... ..	S. Af.
Milw. ...	Merivale's Reports, Chancery, 3 vols., 1815—1817 ... ..	Eng.
Mod. Rep.	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843 ...	Ir.
	Modern Reports, 12 vols., 1669—1755 ... ..	Eng.
Mont. ...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831 ...	Ir.
Mont. & A. ...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832 ... ..	Eng.
	Montagu and Ayrton's Reports, Bankruptcy, 3 vols.,	Eng.
Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833...	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840... ..	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—	Eng.
Mont. D. & De G.	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols.,	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834... ..	Eng.
Moo. I. A. ...	Moore's Indian Appeal Cases ... ..	Ind.
Moo. Ind. App.	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872 ... ..	Eng.
Moo. P. C. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863 ... ..	Eng.
Moo. P. C. C. N. S.	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873 ...	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830 ...	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844 ... ..	Eng.
Mood. C. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844 ... ..	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827 ...	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620...	Eng.
Mor. Dict. ...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808 ... ..	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893 ... ..	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730 ... ..	Eng.
Mun. Rep. ...	Municipal Reports ... ..	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837 ...	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxvii

Murr. ...	...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830 ...	Scot.
My. & Cr. ...	...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841 ...	Eng.
My. & K. ...	...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835 ...	Eng.
N. A. C. ...	...	Native Appeal Cases ...	S. Af.
N. & S....	...	Nichols and Stop's Reports (Tasmania) ...	Tasmania
N. B. Dig. ...	...	New Brunswick Digest ...	Can.
N. B. Eq. Rep. ...	...	New Brunswick Equity Reports ...	Can.
N. B. R. ...	...	New Brunswick Reports ...	Can.
N. B. R. (All.) ...	...	New Brunswick Law Reports (Allen) ...	Can.
N. B. R. (Ber.)...	...	New Brunswick Law Reports (Berton) ...	Can.
N. B. R. (Han.) ...	...	New Brunswick Reports (Hannay)...	Can.
N. B. R. (Kerr) ...	...	New Brunswick Law Reports (Kerr) ...	Can.
N. B. R. (P. & B.) ...	...	New Brunswick Reports (Pugsley and Burbridge) ...	Can.
N. B. R. (P. & T.) ...	...	New Brunswick Law Reports (Pugsley and Trueman) ...	Can.
N. B. R. (Pug.) ...	...	New Brunswick Reports (Pugsley)...	Can.
N. L. R. ...	...	Natal Law Reports ...	S. Af.
N. S. D. ...	...	Nova Scotia Digest ...	Can.
N. S. L. R. ...	...	Nova Scotia Law Reports ...	Can.
N. S. R. (Old.) ...	...	Nova Scotia Reports (Oldrights) ...	Can.
N. S. R. (R. & C.) ...	...	Nova Scotia Reports (Russell and Chesley) ...	Can.
N. S. R. (R. & G.) ...	...	Nova Scotia Reports (Russell and Goldert) ...	Can.
N. S. W. Adm. or Ad....	...	New South Wales Reports, Admiralty ...	Aus.
N. S. W. B. ...	...	New South Wales Reports, Bankruptcy ...	Aus.
N. S. W. Bkpty. Cas....	...	New South Wales Bankruptcy Cases ...	Aus.
N. S. W. Eq. ...	...	New South Wales Reports, Equity ...	Aus.
N. S. W. Ind. Arbtn. Cas.	...	New South Wales Industrial Arbitration Cases ...	Aus.
N. S. W. L. R. ...	...	New South Wales Law Reports ...	Aus.
N. S. W. Land App. Cts.	...	New South Wales Land Appeal Courts ...	Aus.
N. S. W. S. C. R. ...	...	New South Wales Supreme Court Reports ...	Aus.
N. S. W. S. C. R. N. S.	...	New South Wales Supreme Court Reports, New Series ...	Aus.
N. S. W. W. N. ...	...	New South Wales Weekly Notes ...	Aus.
N. W. ...	...	North-Western Provinces High Court Reports ...	Ind.
N. W. T. R. ...	...	North-West Territories Reports ...	Can.
N. Z. Jur. ...	...	New Zealand Jurist ...	N.Z.
N. Z. Jur. Mining Law	...	New Zealand Jurist Mining Law ...	N.Z.
N. Z. Jur. N. S. ...	...	New Zealand Jurist, New Series ...	N.Z.
N. Z. L. R. ...	...	New Zealand Law Reports ...	N.Z.
Nels. ...	...	Nelson's Reports, Chancery, 1 vol., 1625—1693 ...	
Nev. & M. K. B. ...	...	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836... ..	Eng.
Nev. & M. M. C. ...	...	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836 ...	Eng.
Nev. & P. K. B. ...	...	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838...	
Nev. & P. M. C. ...	...	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas....	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850... ..	Eng.
New Pract. Cas. ...	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848 ...	Eng.
New Rep. ...	...	New Reports, 6 vols., 1862—1865 ...	Eng.
New Sess. Cas....	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ...	Eng.
Nfld. L. R. ...	...	Newfoundland Reports ...	Nfld.
Nolan ...	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793 ...	Eng.
Notes of Cases...	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850... ..	Eng.
Noy ...	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F. ...	...	Ollivier Bell and Fitzgerald's Reports ...	N.Z.
O. B. S. P. ...	...	Old Bailey Session Papers ...	Eng.
O. Bridg. ...	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666... ..	Eng.
O. F. S....	...	Reports of the High Court of the Orange Free State, 1879—1883 ...	S. Af.
O. L. R. ...	...	Ontario Law Reports ...	Can.
O'M. & H. ...	...	O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	...	South African Law Reports, Orange Free State Provincial ...	S. Af.
O. R. ...	...	Ontario Reports ...	Can.
O. R. ...	...	Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	...	Reports of the High Court of the Orange River Colony... ..	S. Af.
O. S. ...	...	Upper Canada Queen's Bench, Old Series... ..	Can.
O. W. N. ...	...	Ontario Weekly Notes ...	Can.
O. W. R. ...	...	Ontario Weekly Reporter ...	Can.
Old. ...	...	Nova Scotia Reports (Oldrights) ...	Can.
Ont. Dig. ...	...	Ontario Digest ...	Can.
Owen ...	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614... ..	Eng.
P. (preceded by date) ...	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e. g.</i> , [1891] P.) ...	

## xxviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

P. & B....	...	New Brunswick Reports (Pugsley and Burbidge)	...	...	Can.
P. & T. ...	...	New Brunswick Law Reports (Pugsley and Trueman)	...	...	Can.
P. D. ...	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890...	...	...	Eng.
P. E. I....	...	Prince Edward Island Reports	...	...	Can.
P. R. ...	...	Ontario Practice	...	...	Can.
P. Wms.	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols.,	...	...	Eng.
Palm. ...	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	...	...	Eng.
Park. ...	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767	...	...	Eng.
Pat. App.	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	...	...	Scot.
Pater. App.	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	...	...	Scot.
Peake ...	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	...	...	Eng.
Peake, Add. Cas.	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	...	...	Eng.
	...	Peckwell's Election Cases, 2 vols., 1803—1806	...	...	Eng.
Pelham...	...	Pelham (S. A.) Reports	...	...	Aus.
Pen. C. S.	...	Penault's Conseil Superieur	...	...	Can.
Pen. P.	...	Penault's Prerosti de Quebec	...	...	Can.
Per. & Dav.	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841...	...	...	Eng.
Per. & Kn.	...	Perry and Knapp's Election Cases, 1 vol., 1833	...	...	Eng.
Ph. ...	...	Phillips' Reports, Chancery, 2 vols., 1841—1849...	...	...	Eng.
Phil. El. Cas.	...	Philipps' Election Cases, 1 vol., 1780	...	...	Eng.
Phillim.	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	...	...	Eng.
Phillim. Eccl. Jud.	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	...	...	Eng.
Phip. ...	...	Phipson's Digest of Natal Reports, 1858—1859	...	...	S. Af.
Pig. & R.	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	...	...	Eng.
Pitc. ...	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	...	...	Scot.
Plowd.	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	...	...	Eng.
Poll. ...	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	...	...	Eng.
Poph. ...	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	...	...	Eng.
Pow. R. & D.	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	...	...	Eng.
Prec. Ch.	...	Precedents in Chancery, fol., 1 vol., 1689—1722...	...	...	Eng.
Price ...	...	Price's Reports, Exchequer, 13 vols., 1814—1824	...	...	Eng.
Price ...	...	Price's Mining Commissioners' Cases	...	...	Can.
Py. R. ...	...	Pykes' Lower Canada Reports	...	...	Can.
	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	...	...	Eng.
Q. B. (preceded by date)	...	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.)	...	...	Eng.
Q. B. D.	...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	...	...	Eng.
Q. J. P....	...	Queensland Justice of Peace Reports	...	...	Aus.
	...	Queensland Law Journal	...	...	Aus.
Q. L. R.	...	Quebec Law Reports	...	...	Can.
Q. L. R. (Beor)	...	Queensland Law Reports by Beor	...	...	Aus.
Q. P. R.	...	Quebec Practice Reports	...	...	Can.
Q. R. (Vol.) K. B. or Q. B.	...	Quebec Reports, King's Bench or Queen's Bench	...	...	Can.
Q. R. (Vol.) S. C.	...	Quebec Reports, Supreme Court	...	...	Can.
Q. S. C. R.	...	Queensland Supreme Court Reports	...	...	Aus.
Q. S. R.	...	Queensland State Reports	...	...	Aus.
Q. W. N.	...	Weekly Notes, Queensland	...	...	Aus.
	...	The Reports, 15 vols., 1893—1895...	...	...	Eng.
R. ...	...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	...	...	S. Af.
R. (Ct. of Sess.)	...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898...	...	...	Scot.
R. A. C.	...	Ramsay, Appeal Cases	...	...	Can.
R. & C....	...	Russell & Chesney, Nova Scotia Reports	...	...	Can.
R. & G....	...	Nova Scotia Reports (Russell and Geldert)	...	...	Can.
R. C. ...	...	Le Revue Critique de Legislation et de Jurisprudence de Canada	...	...	Can.
R. de J.	...	Revue de Jurisprudence	...	...	Can.
R. de L.	...	Revue de Legislation et de Jurisprudence	...	...	Can.
R. E. D.	...	New South Wales, Reserved and Equity Decisions	...	...	Aus.
R. E. D.	...	Ritchie's Equity Decisions	...	...	Can.
R. J. R. Q.	...	Quebec Revised Reports	...	...	Can.
R. L. ...	...	Revue Legale	...	...	Can.
R. L. Q. B.	...	Revue Legale, Queen's Bench	...	...	Can.
R. L. S. C.	...	Revue Legale, Supreme Court	...	...	Can.
R. P. C.	...	Reports of Patent Cases, 1884—(current)...	...	...	Eng.
R. R. ...	...	Revised Reports	...	...	Eng.
Rast. ...	...	Rastell's Entries	...	...	Eng.
Rayn. ...	...	Rayner's Tithe Cases, 3 vols., 1575—1782	...	...	Eng.
Real Prop. Cas.	...	Real Property Cases, 2 vols., 1843—1847...	...	...	Eng.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxix

Rep. Ch. ...	Knapp's Reports, Privy Council, 3 vols., 1829—1836 ...	Eng.
Rep. in C. of A.	Reports in Chancery, fol., 3 vols., 1615—1710 ...	Eng.
Res. & Eq. Jud.	Reports in Courts of Appeal ...	N.Z.
Reserv. Cas. ...	New South Wales Reserved and Equity Judgments ...	Aus.
Rick. & M. ...	Reserved Cases ...	Ir.
Rick. & S. ...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Ridg. L. & S. ...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. Parl. Rep.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795 ...	Ir.
Ridg. temp. H....	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—	Ir.
Ritch. Eq. Rep.	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736 ; Chancery, 1744—1746 ...	Eng.
Rob. Eccl. ...	Ritchie's Equity Reports ...	Can.
Rob. L. & W. ...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ...	Eng.
Robert. App. ...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851 ...	Eng.
Robin. App. ...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Roll. Abr. ...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Rep. ...	Rolle's Abridgment of the Common Law, fol., 2 vols. ...	Eng.
Rose ...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ...	Eng.
Ross, L. C.	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ...	Eng.
Rowe ...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816 ...	Eng.
Rul. Cas.	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ...	Eng.
Rus. E. R.	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ...	Eng.
Russ. & M. ...	Campbell's Ruling Cases, 25 vols. ...	Eng.
Russ. & Ry. ...	Russel's Election Reports ...	Ir.
Ry. & Can. Cas.	Russell's Reports, Chancery, 5 vols., 1824—1829 ...	Eng.
Ry. & Can. Tr. Cas.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ...	Eng.
Ry. & M. ...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
	Searle's Reports of the Supreme Court of the Cape of Good Hope ...	S. Af.
S. A. L. J.	South African Law Journal... ..	S. Af.
S. A. L. R.	South Australian Law Reports ... ..	Aus.
S. A. L. R.	South African Law Reports ... ..	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—	S. Af.
	Reports of the Supreme Court of the Cape of Good Hope from 1883... ..	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 ( <i>c.g.</i> , [1906] S. C.)	Scot.
S. C. (J.) (preceded by date).	Court of Justiciary Cases (Scotland), since 1906 ( <i>c.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R....	Canada, Supreme Court Reports ... ..	Can.
S. L. T....	Scots Law Times, 1893 (current) ... ..	Scot.
S. Q. R.	Queensland State Reports ... ..	Aus.
S. R. ...	Reports of the High Court of Southern Rhodesia ... ..	S. Af.
S. R. C....	Stuart's Lower Canada Reports ... ..	Can.
S. R. N. S. W....	New South Wales, State Reports ... ..	Aus.
S. R. Q.	Queensland Reports, Supreme Court ... ..	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports ... ..	Can.
Salk. ...	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Sask. L. R.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ...	Eng.
Sau. & Sc.	Saskatchewan Law Reports... ..	Can.
	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—	Ir.
Saund. ...	Saunders's Reports, King's Bench, 2 vols., 1666—1672... ..	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current) ...	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ...	Eng.
Sav. ...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say. ...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur....	Scottish Jurist, 46 vols., 1829—1873 ... ..	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—(current) ... ..	Scot.
Sc. R. R.	Scots Revised Reports ... ..	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery eland), 2 vols., 1802—	Ir.
Scott ...	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ... ..	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—	Eng.

# xxx      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Sel. Cas. Ch. ...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ...	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838...	Scot.
Sh. & D ...	Shaw & Dunlop Court of Session Cases ...	Scot.
Sh. & Macl. ...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838...	Scot.
Sh. Dig. ...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ...	Scot.
Sh. Just. ...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ...	Scot.
Sh. Sc. App. ...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct. ...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch. ...	Sheppard's Touchstone of Common Assurances ...	Eng.
Show. ...	Shower's Reports, King's Bench, 2 vols., 1678—1695 ...	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ...	Eng.
Sid. ...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ...	Eng.
Sim. & St.	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. N. S.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Skin. ...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Sm. & Bat.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ...	Ir.
Sm. & G. ...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B. ...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C. ..	Smith's Leading Cases, 2 vols. ...	Eng.
Smith, Reg. Cas	C. L. Smith's Registration Cases, 1895—(current) ...	Eng.
Smythe...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo....	Solicitors' Journal, 1856—(current) ...	Eng.
Spence ...	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ...	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
Stair Rep. ..	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681...	Scot.
Stark. ...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ...	Eng.
State Tr.	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart...	Stewart's Vice-Admiralty Reports ...	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ...	Story's Commentaries on Equity Jurisprudence ...	Eng.
Stra. ...	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. .	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ...	Sessions Cases (Stuart) ...	Scot.
Stuart ...	Stuart's Vice-Admiralty Reports ...	Can.
Sty. ...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655...	Eng.
Sw. ...	Swabey's Reports, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ...	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M....	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851...	Eng.
T. H. ...	Reports of the Witwatersrand High Court (Transvaal Colony)...	S. Af.
T. Jo. ...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685...	Eng.
T. L. R.	The Times Law Reports, 1884—(current)...	Eng.
T. P. D.	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—	Eng.
Taml. ...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Eng.
Tas. L. R. ...	Tasmanian Law Reports ...	Aus.
Taunt. ...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ...	Tax Cases, 1875—(current)...	Eng.
Tay. ...	Taylor's King's Bench Reports ...	Can.
Temp. Wood ...	Manitoba Reports temp. Wood ...	Can.
Term Rep. ...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ...	Territories Law Reports ...	Can.
Thom. ...	Nova Scotia Reports (Thomson) ...	Can.
Toth. ...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town. St. Tr. ...	Townsend Modern State Trials ...	Eng.
Trist. ...	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property ...	Eng.
Turn. & R. ...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxx

U. C. Jur.	Upper Canada Jurist	...	...	...	...	...	...	Can.
U. C. L. J.	Upper Canada Law Journal	...	...	...	...	...	...	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	...	...	...	...	...	...	Can.
Udal	Fiji Law Reports (Udal)	...	...	...	...	...	...	Fiji
V. L. R.	Victorian Law Reports	...	...	...	...	...	...	Aus.
V. R.	Victorian Reports	...	...	...	...	...	...	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	...	...	...	...	...	...	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	...	...	...	...	...	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	...	...	...	...	...	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	...	...	...	...	...	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol. 1786—1788	...	...	...	...	...	...	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	...	...	...	...	...	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	...	...	...	...	...	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	...	...	...	...	...	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	...	...	...	...	...	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	...	...	...	...	...	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	...	...	...	...	...	S. Af.
W. A. L. R.	West Australian Law Reports	...	...	...	...	...	...	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	...	...	...	...	...	...	Aus.
W. & W.	Wyatt and Webb	...	...	...	...	...	...	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	...	...	...	...	...	Eng.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	...	...	...	...	...	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division	...	...	...	...	...	...	S. Af.
W. L. R.	Western Law Reporter	...	...	...	...	...	...	Can.
W. L. T.	Western Law Times	...	...	...	...	...	...	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) (e.g., [1866] W. N.)	...	...	...	...	...	...	Eng.
W. N.	Calcutta Weekly Notes	...	...	...	...	...	...	Ind.
W. R.	Weekly Reporter, 54 vols., 1852—1906	...	...	...	...	...	...	Eng.
W. R.	Sutherland's Weekly Reporter	...	...	...	...	...	...	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	...	...	...	...	...	...	S. Af.
W. R.	Sutherland's Weekly Reporter	...	...	...	...	...	...	Ind.
W. W. & A'B.	Wyatt, Webb and A'Beckett	...	...	...	...	...	...	Aus.
W. W. R.	Western Weekly Reports	...	...	...	...	...	...	Can.
Wallis	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	...	...	...	...	...	Ir.
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1602—1855	...	...	...	...	...	...	Eng.
Welsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	...	...	...	...	...	Ir.
Went. Off. Ex....	Wentworth's Office and Duty of Executors	...	...	...	...	...	...	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	...	...	...	...	...	...	Eng.
West temp. Hard.	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	...	...	...	...	...	Eng.
West. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822	...	...	...	...	...	...	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	...	...	...	...	...	Scot.
White & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols.	...	...	...	...	...	...	Eng.
Wight.	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	...	...	...	...	...	Eng.
Will. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	...	...	...	...	...	Eng.
Will. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	...	...	...	...	...	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	...	...	...	...	...	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	...	...	...	...	...	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	...	...	...	...	...	Eng.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	...	...	...	...	...	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	...	...	...	...	...	Eng.
Wils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	...	...	...	...	...	Scot.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	...	...	...	...	...	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	...	...	...	...	...	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	...	...	...	...	...	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	...	...	...	...	...	...	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	...	...	...	...	...	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	...	...	...	...	...	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	...	...	...	...	...	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	...	...	...	...	...	Eng.
Y. A. D.	Young's Vice-Admiralty Reports	...	...	...	...	...	...	Can.

xxxii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Y. & C. Ch. Cas.	...	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—	
Y. & C. Ex.	...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841 ...	Eng.
Y. & J.	...	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Y. B.	...	...	Year Books ...	Eng.
Yelv.	...	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
You.	...	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, see pp. xvii—xxxii, *ante*.)

Act. . . . .	for Actiengesellschaft.
Admlty. . . . .	„ Admiralty.
Affd. . . . .	„ Affirmed.
Affg. . . . .	„ Affirming.
Akt. . . . .	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon. . . . .	„ Anonymous.
Apld. . . . .	„ Applied.
Appct. . . . .	„ Applicant.
Appln. . . . .	„ Application.
Appln. . . . .	„ Application to Register a Trade Mark.
Applt. . . . .	„ Appellant.
Apprvd. . . . .	„ Approved.
Arbn. . . . .	„ Arbitration.
Archbp. . . . .	„ Archbishop.
Art. . . . .	„ Article.
Assce. . . . .	„ Assurance.
Assocn. . . . .	„ Association.
A.-G. . . . .	„ Attorney-General.
B. C. . . . .	„ Borough Council.
Bkpcy.. . . .	„ Bankruptcy.
Bkpt. . . . .	„ Bankrupt.
Bldg. Soc. . . . .	„ Building Society.
Bp. . . . .	„ Bishop.
C. & S. L. Ry. Co. . . . .	„ Court of Appeal.
C. C. A. . . . .	„ City & South London Railway Co.
C. C. R. . . . .	„ Court of Criminal Appeal.
C. C. R. . . . .	„ County Court Rules.
C. L. P. Act. . . . .	„ Court of Crown Cases Reserved.
C. L. Ry. Co. . . . .	„ Common Law Procedure Act.
Ct. of Eq. . . . .	„ Central London Railway Co.
Ct. of R. . . . .	„ Court.
Cale. Ry. Co. . . . .	„ Court of Equity.
Co. . . . .	„ Court of Review.
Co-op. Assocn. . . . .	„ Caledonian Railway Co.
Comrs. . . . .	„ Company.
Consd. . . . .	„ Co-operative Supply Association.
Corpn. . . . .	„ Commissioners.
D. C. . . . .	„ Considered.
Dbtd. . . . .	„ Corporation.
Deft. . . . .	„ Divisional Court.
Distd. . . . .	„ Doubted.
Eccl. Comrs. . . . .	„ Defendant.
Eccl. Ct. . . . .	„ Distinguished.
Ex. Ch. . . . .	„ Ecclesiastical Commissioners.
<i>Ex p.</i> . . . .	„ Ecclesiastical Court.
Exch. . . . .	„ Exchequer Chamber.
Exor. . . . .	„ <i>Ex parte</i> .
	„ Exchequer.
	„ Executor.



Exorship. . . . .	for Executorship.
Expld. . . . .	„ Explained.
Extd. . . . .	„ Extended.
Extrix. . . . .	„ Executrix.
Folld. . . . .	„ Followed.
G. & S. W. Ry. Co. . . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . . . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co. . . . .	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland. . . . .	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . . .	„ Great Western Railway Co.
Govt. . . . .	„ Government.
Grdns. . . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
Hil. T. . . . .	„ Hilary Term.
I. R. Comrs. . . . .	„ Inland Revenue Commissioners.
Insce. . . . .	„ Insurance.
	„ Justices.
Jud. Act . . . . .	„ Judicature Act.
L. & B. Ry. Co. . . . .	„ London & Brighton Railway Co.
L. & N. W. Ry. Co. . . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . . .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. . . . .	„ London, Chatham & Dover Railway Co.
L. C. C. . . . .	„ London County Council.
L. Elec. Ry. Co. . . . .	„ London Electric Railway Co.
L. G. Board . . . . .	„ Local Government Board.
L.J. . . . .	„ Lord Justice.
L.JJ. . . . .	„ Lords Justices.
L. T. & S. Ry. Co. . . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. . . . .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	„ Magistrates.
Mentd. . . . .	„ Mentioned.
Met. Dist. Ry. Co. . . . .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . . .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . . .	„ Midland Railway Co.
Mtge. . . . .	„ Mortgage.
Mtgee. . . . .	„ Mortgagee.
Mtgor. . . . .	„ Mortgagor.
N. B. Ry. Co. . . . .	„ North British Railway Co.
N. E. Ry. Co. . . . .	„ North Eastern Railway Co.
N. F. . . . .	„ Not Followed.
N. P. . . . .	„ Nisi Prius.
O. . . . .	„ Order.
O. H. . . . .	„ Outer House.
Overd. . . . .	„ Overruled.
	„ Privy Council.
Petn. . . . .	„ Petition or Election Petition.
Pltf. . . . .	„ Plaintiff.
	„ Rural Council.
R. C. . . . .	„ Rural District Council.
R. D. C. . . . .	„ Rural Sanitary Authority.
R. S. A. . . . .	„ Rules of the Supreme Court, 1883.
R. S. C. . . . .	„ Referred.
Refd. . . . .	„ Registrar of Trade Mark.
Regn. of Trade Mk. . . . .	„ Registrar of Trade Marks.
Regr. of Trade Mks. . . . .	„ Respondent.
Resp. . . . .	„ Restoring.
Restg. . . . .	„ Reversed.
Revsd. . . . .	„ Reversing.
Revsg. . . . .	„ Rail. Co. or Railway Co.
Ry. Co. . . . .	

# ABBREVIATIONS.

XXXV

S. C.	.	.	.	.	for Same Case.
S. C. (name of colony following)	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co..	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	„ Same Point.
S.S. Co.	.	.	.	.	„ Steamship Co.
Sect.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	„ Vice-Chancellor.
V. A. C.	.	.	.	.	„ Vice-Admiralty Court.





## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases are listed chronologically except such as are classified as "Referred to" or "Mentioned." These come at the end and are arranged *inter se* in chronological order. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case, without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.



## TABLE OF CASES.

A.								PAGE
(undated) Plowd. Qrs. 9, s. 69	...	...	...	Alexander v. Campbell (1872)	...	...	...	37
(undated), 1 Hale, P. C. 512	...	...	...	— v. Henry (1895)	...	...	...	61
Re (1853), 1 W. R. 150	...	...	...	— v. Mendl (1870)	...	...	...	36
v. Jarman (1824)	...	...	...	Alford v. Lee (1587)	...	...	...	57
v. Mills (1811)	...	...	...	Alivon v. Furnival (1834)	...	...	...	40
Abbot v. Hicks (1694)	...	...	...	Allatt v. Carr (1858)	...	...	...	5
Abbott v. Freeman (1876)	...	...	...	Allday v. Great Western Ry. Co. (1864)	...	...	...	27
— v. Hicks (1694)	...	...	...	Allen (Doe d.) v. Calvert (1802)	...	...	...	8
Abby, The (1804)	...	...	...	— v. Cameron (1833)	...	...	...	...
Abo, The (1854)	...	...	...	— v. Francis (1845)	...	...	...	...
Abrahall v. Bubb (1680)	...	...	...	— v. Greenslade (1875)	...	...	...	...
Abraham v. Bubb (1680)	...	...	...	— v. Harris (1696)	...	...	...	54
— and Westminster Improvements	...	...	...	— v. Lowe (1843)	...	...	...	497, 498, 56
Co. (1849)	...	...	...	— v. Milner (1831)	...	...	...	...
Abrahat v. Brandon (1714)	...	...	...	— v. Pink (1838)	...	...	...	26
Abrathut v. Brandon (1713)	...	...	...	— & Perring, Re (1835)	...	...	...	...
Achilles, The (1857)	...	...	...	Allenby v. Proudlock (1835)	...	...	...	555,
— (1917)	...	...	...	Altman's Case (1577)	...	...	...	1
Ackary, Re, Ex p. Bolland (1876)	...	...	...	Ambler v. Tebbutt (1840)	...	...	...	627, 62
Acland v. Atwell (1630)	...	...	...	— & Fawcett v. Gordon (1905)	...	...	...	460, 46
Act. für Anilin, Ltd. v. Levinstein, Ltd.	...	...	...	Ambrose v. Brooks (1738)	...	...	...	...
(1915)...	...	...	...	Ames v. Milward (1818)	...	...	...	52
Adam, Re (1837)	...	...	...	Amorduct Manufacturing Co. v. Defries & Co.	...	...	...	1
— v. British & Foreign S.S. Co., Ltd.	...	...	...	(1914)	...	...	...	...
(1898)	...	...	...	Anderson v. Buckton (1719)	...	...	...	21
— v. Richards (1795)	...	...	...	— v. Coxeter (1720)	...	...	...	5
v. Roe (Rowe) (1846)	...	...	...	— v. Darcy (1812)	...	...	...	5
Adams v. Adams (1677)	...	...	...	— v. Fuller (1838)	...	...	...	5
— v. Catley (1892)	...	...	...	— v. Wallace (1835)	...	...	...	4
— v. Staley (Statham) (1679)	...	...	...	Andrew v. Glover (1562)	...	...	...	...
— v. Yeoman (1860)	...	...	...	Andrewes & Andrewes, Re (1845)	...	...	...	410, 5
Adcock v. Murrell (1800)	...	...	...	Andrews v. Eaton (1852)	...	...	...	4
Addison v. Grey (1766)	...	...	...	— v. Morgan (1854)	...	...	...	5
— & Spittle, Re (1849)	...	...	...	— v. Palmer (1821)	...	...	...	3
Agar v. Macklew (1825)	...	...	...	— & Glover's Case (1562)	...	...	...	1
Agdeshman v. Hunt (1917)	...	...	...	Angelique, The (1801)	...	...	...	1
Agricultural Holdings Act, 1883, Re,	...	...	...	Angell v. Felgate (1861)	...	...	...	6
Griffiths v. Morris (1895)	...	...	...	Angerstein v. Handson (1835)	...	...	...	...
Ahrbecker v. Frost (1886)	...	...	...	— v. Vaughan (1798)	...	...	...	1
Ailner's Case (1664)	...	...	...	Anglesea (Marquess) v. Peyton (1834)	...	...	...	5
Aina, The (1854)	...	...	...	Anglesey (Marquess) v. Dibben (1834)	...	...	...	67, 5
Ainslie, Re, Swinburn v. Ainslie (1885)	...	...	...	Anglo-Austrian Bank, Re (1864)	...	...	...	4
Aitcheson v. Cargey (1824)	...	...	...	Anglo-Italian Bank, Ltd. & De Rosaz, Re	...	...	...	4
Aitken v. Bachelor (Batchelor) (1893)	...	...	...	(1867)	...	...	...	...
Aitken's Arbitration, Re (1857)	...	...	...	Anglo-Mexican, The (1918)	...	...	...	1
Akt. Robertsfors & Société Anonyme Des	...	...	...	Angus v. Redford (1843)	...	...	...	345, 469, 4
Papeteries De L'Aa, Re (1910)	...	...	...	— v. Smythies (1861)	...	...	...	481, 5
Alardes v. Cambel (1729)	...	...	...	Anna Catharina, The (1802)	...	...	...	4
Albrectht v. Sussmann (1813)	...	...	...	Annan v. Job (1846)	...	...	...	1
Alciator v. Smith (1812)	...	...	...	Anning v. Hartley (1858)	...	...	...	516, 6
Alcinous v. Nigreu (Nygrew, Nygren) (1854)	...	...	...	Anon. (undated), cited Win. 1	...	...	...	448, 4
Alder v. Park (1836)	...	...	...	— (undated), cited in Towers v. Barrett	...	...	...	...
— v. Savill (1814)	...	...	...	(1786)...	...	...	...	2
Aldridge v. Howard (1842)	...	...	...	— (undated), 1 Bro. Abr. 251, pl. 67	...	...	...	2
	...	...	...	— (1870), Y. B. 44, Edw. 3, fo. 44, pl. 58	...	...	...	...
	...	...	...	— (1372), Y. B. 46 Edw. 3, fo. 17, pl. 13...	...	...	...	1
	...	...	...	— (1374), Y. B. 48 Edw. 3, fo. 20, pl. 8	...	...	...	1

	PAGE		PAGE
Anon. (1427), Fitz. N. B. 59 (M.) ...	105	Anon. (1610), 1 Bulst. 95 ...	207
— (1429), Y. B. 7 Hen. 6, fo. 38, pl. 47 ...	77, 79, 105	— (1612), 12 Co. Rep. 101 ...	222, 223
(1433), Y. B. 11 Hen. 6, fo. 1, pl. 3 ...	105, 106	— (1622), 2 Roll. Rep. 255 ...	64
(1466), Y. B. 5 Edw. 4, fo. 100 b (Long Quinto) ...	78, 105, 106	— (1631), Het. 166 ...	223
(1466), Y. B. 6 Edw. 4, fo. 7, pl. 18 ...	65	— (1669), 1 Mod. Rep. 24 ...	348
(1467), Y. B. 7 Edw. 4, fo. 13, pl. 5 ...	147	— (1672), 1 Freem. K. B. 51 ...	339
(1468), Y. B. 8 Edw. 4, fo. 1, pl. 1 ...	462, 498, 499, 530	— (1674), 1 Freem. K. B. 378 ...	415
(1468), Y. B. 8 Edw. 4, fo. 2, pl. 1 ...	476	— (1675), 1 Vent. 264 ...	217
(1468), Y. B. 8 Edw. 4, fo. 6, pl. 8 ...	73	— (1679), 1 Freem. K. B. 329 ...	255
(1468), Y. B. 8 Edw. 4, fo. 11, pl. 9 ...	491	— (1691), 12 Mod. Rep. 8 ...	567
(1468), Y. B. 8 Edw. 4, 4 Mich. 9, pl. 7 ...	114	— (1693) Comb. 212 ...	126, 127
(1468), Jenk. 128 ...	436	— (1696), Freem. Ch. 210 ...	58, 59
— (1469), Jenk. 130 ...	138	— (1697), 12 Mod. Rep. 158 ...	579
— (1471), Y. B. 11 Edw. 4, fo. 6, pl. 10 ...	261, 262, 267, 296	— (1697), 1 Salk. 46 ...	140
— (1472), Y. B. 12 Edw. 4, fo. 8, pl. 20 ...	73	— (1698), 1 Salk. 71 ...	438, 547
— (1476), Y. B. 16 Edw. 4, fo. 8, pl. 5 ...	499	— (1698), 12 Mod. Rep. 257 ...	579
— (1477), Y. B. 17 Edw. 4, fo. 3, pl. 1 ...	541	— (1700), 12 Mod. Rep. 423 ...	499
— (1477), Y. B. 17 Edw. 4, fo. 5, pl. 3 ...	476	— (1701), 12 Mod. Rep. 555 ...	244
— (1478), Y. B. 18 Edw. 4, fo. 22, pl. 3 ...	476	— (1702), 2 Ld. Raym. 789 ...	348
— (1480), Y. B. 20 Edw. 4, fo. 10, pl. 10 ...	223	— (1703), 1 Salk. 73 ...	577
— (1481), Jenk. 136 ...	486	— (1704), 11 Mod. Rep. 68 ...	67
— (1481), Y. B. 21 Edw. 4, fo. 75, pl. 8 ...	476	— (1704), Freem. Ch. 278 ...	89
— (1482), Jenk. 161 ...	225	— (1705), 11 Mod. Rep. 94 ...	67
— (1494), Y. B. 9 Hen. 7, fo. 15, pl. 7 ...	491	— (1729), Mos. 237 ...	81
— (1494), Y. B. 10 Hen. 7, fo. 2, pl. 3 ...	105	— (1737), 1 Atk. 19 ...	133
— (1494), Y. B. 10 Hen. 7, fo. 5, pl. 7 ...	105	— (1738), Andr. 299 ...	577
— (1496), Keil. 3 ...	223	— (1748), 3 Atk. 644 ...	430
— (1496), Keil. 30 ...	205	— (1754), 1 Keny. 118 ...	578
— (1497), Y. B. 13 Hen. 7, fo. 20, pl. 3 ...	105, 112	— (1770), 3 Wils. 126 ...	225
— (1498), Y. B. 13 Hen. 7, fo. 9, pl. 4 ...	112	— (1773), Lofft, 146 ...	265
— (1510), Keil. 159 ...	57	— (1773), Lofft, 151 ...	110
— (1514), 1 Dyer, 2 b ...	130	— (1774), Lofft, 391 ...	598, 599
(1527) Y. B. 18 Hen. 8, 2 pl. 11 ...	210	— (1774), Lofft, 451 ...	577
— (1536), Jenk. 204 ...	58	— (1774), Lofft, 554 ...	521
— (1537), 1 Dyer, 25 b ...	224	— (1790), 1 Ves. 93 ...	110
(1537), 1 Dyer, 29 a ...	224	— (1804), 1 Smith, K. B. 358 ...	559
— (1542), Moore, K. B. 3 (11) ...	476	— (1804), 1 Smith, K. B. 426 ...	600, 603
— (1544), Bro. N. C. 57 ...	126	— (1814), 2 Chit. 44 ...	447, 448
— (1549), Moore, K. B. 9 ...	74	— (1819), 1 Chit. 38 ...	537
— (1550), Moore, K. B. 6, pl. 23 ...	77	— (1819), 1 Chit. 674 ...	521
— (1550), Moore, K. B. 23, pl. 80 ...	77	— (1822), 1 L. J. O. S. Ch. 33 ...	83
— (1550), Bro. N. C. 189 ...	76	— (1826), 5 L. J. O. S. K. B. 16 ...	467
— (1552), 1 And. 25; Benl. 10 ...	132, 133	— (1827), 5 L. J. O. S. K. B. 247 ...	417
— (1553), 1 And. 25 ...	130	— (1875), Bitt. Prac. Cas. 46 ...	621
— (1553), 1 Dyer, 79 a ...	97	— (1875), 1 Char. Cham. Cas. 26 ...	620
— (1559), Moore, K. B. 18, pl. 65 ...	98	— v. Corham (1592) ...	75
— (1561), Ben. & D. 30 (8) ...	58	Ansall v. Evans (1796) ...	314
— (1562), Ben. & D. 43 (27) ...	504	Anthon v. Fisher (1795) ...	156
— (1562), 2 Dyer, 224 a ...	88	Anthony v. Halstead (1877) ...	267
— (1563), Moore, K. B. 71 ...	88	— v. Moline (1814) ...	181
— (1572), 3 Leon. 15 ...	215	— v. Seger (1789) ...	138
— (1572), 3 Leon. 16 ...	76	— v. Waters (1814) ...	181
— (1572), 3 Dyer, 317 b ...	95, 96	Antoine v. Morshead (1815) ...	165
— (1573), 3 Leon. 29 ...	95, 96	Antram v. Chace (1812) ...	313, 341, 342
— (1573), Ben. & D. 102 (38) ...	63, 76, 80, 106	Antrobus (Doe d.) v. Jepson (1832) ...	24
— (1581), Godb. 4 ...	63, 76, 80, 106	Anwyl v. Owens (1853) ...	111
— (1581), Godb. 12 ...	5	Aplin v. Porritt (1893) ...	287
— (1581), 3 Dyer, 374 b ...	75, 76	Applebee v. Percy (1874) ...	246
— (1584), 1 Leon. 275 ...	95	Aramayo Francke Mines, Ltd., Re (1917) ...	149, 150
— (1584), Godb. 28 ...	78	Arbuckle v. Price (1835) ...	338, 431
— (1586), Godb. 98 ...	97	Archdeacon v. Jenner (1599) ...	99
— (1587), Cro. Eliz. 55 ...	61, 62	Archer v. Owen (1841) ...	517
— (1587), Cro. Eliz. 61 ...	59	Arkwright v. Stoveld (1824) ...	385
— (1589), Cro. Eliz. 142 ...	158	Armitage v. Borgmann (1914) ...	153, 154
— (1595), Moore, K. B. 420 ...	206, 228	— v. Coates (1849) ...	422, 423, 510
— (1597), 1 Roll. Abr. 508, tit. Copyholds, D., pl. 20 ...	69	— v. Walker (1855) ...	483, 531, 589
— (1597), Noy, 2 ...	68	Armitt v. Breame (Breame) (1704) ...	486
— (1607), Cro. Jac. 199 ...	62	Armote v. Breame (Breame) (1704) ...	486
— (1608), Godb. 159 ...	59	Armstrong v. Marshall (1836) ...	450
		— v. Mitchell (1903) ...	285
		— (Doe d.) v. Wilkinson (1840) ...	8
		Arnote v. Breame (Breame) (1704) ...	486
		Arthur v. Lamb (1865) ...	88
		— v. Owen (1841) ...	528
		Arundel's (Countess) Case (1424) ...	13
		Ashburton (Lord) v. Gray (1916) ...	585
		Ashby v. Hincks (1888) ...	108

## TABLE OF CASES.

xli

	PAGE		PAGE
Ashendon v. London, Brighton and South Coast Ry. Co. (1880) ...	279	Badley v. Loveday (1797) ...	577
Ashmead v. Ranger (1699-1700) ...	66, 69, 70, 75, 213	Baggalay v. Borthwick (1861) ...	457, 562, 629
— v. — (1702) ...	66, 69, 70, 75	Baglehole, <i>Ex p.</i> (1812) ...	181
Ashmond v. Ranger (1699-1700) ...	66, 69, 70, 213	— v. Walters (1811) ...	275
— v. — (1702) ...	66, 69, 70	Bagot v. Bagot (1863) ...	79, 83, 84, 85, 86, 87, 106
Ashton v. Poynter (Pointon) (1834) ...	527	Baguley (Baguelly) v. Markwick (Marthwick) (1861) ...	457, 562, 629
Ashworth v. Heathcote (1830) ...	628	Bailey v. Curling (1851) ...	580
Aspasia, The (1857) ...	143	— v. Forrest (1845) ...	266
Aspinwall v. Leigh (1690) ...	101	— v. Hobson (1869) ...	15, 23
Astley v. Joy (1839) ...	594	— v. Lechmere (1795) ...	536
— & Tyldesley Coal & Salt Co. & Tyldesley Coal Co., <i>Re</i> (1899) ...	349	— v. Stephens (Stevens) (1862) ...	96, 101
Aston v. Aston (1750) ...	82, 83, 86, 87, 113	Baillie v. Edinburgh Oil Gas Light Co. (1835) ...	493, 498
— v. George (1819) ...	397, 398	Bainbrigge v. Houlton (1804) ...	559
Athelston v. Moon (1736) ...	341	Baker v. Bulstrode (1673) ...	567
Atkins v. Temple (1626) ...	17	— v. Cotterill (1849) ...	438, 510
Atkinson v. Abraham (1797) ...	445	— v. Hunter (1847) ...	445, 469
— v. Bury St. Edmunds District Recruiting Officer (1916) ...	125	— v. Rochester (1668) ...	567
— v. Jones (1843) ...	479	— v. Sebright (1879) ...	109
Atkyns v. Baldwyn (1816) ...	431	— v. Snell (1908) ...	240
Atterbury v. Fairmanner (1823) ...	273	— v. Stephens (1867) ...	409, 410
Attersoll v. Stevens (1808) ...	75	— v. Stevens (1866) ...	424, 425, 564
A.-G. v. Birmingham, Tame & Rea Drainage Board (1912) ...	614, 615, 616	— v. Townsend (1817) ...	324, 597
— v. Boothby (1860) ...	103	— v. Webberly (1631) ...	224
— v. Clements (1823) ...	584	— v. Wells (1841) ...	577
— v. Davison (1825) ...	434	— v. Yorkshire Fire & Life Assurance Co. (1892) ...	315
— v. Duplessis (1752) ...	136	Baldwin v. Casella (1872) ...	246
— v. Eastlake (1853) ...	112	Ball v. Ray (1873) ...	251
— v. Fea (1819) ...	323	Balmain v. Lickford (1875) ...	590
— v. Geary (1817) ...	91	Baltic Co. v. Simpson (1876) ...	621
— v. Hallett (1847) ...	111	Baltica, The (1855) ...	141
— v. Hewitt (1804) ...	584	— (1857) ...	141, 144
— v. Jackson (1846) ...	89, 107	Banbury Borough Case (1866) ...	139
— v. Marlborough (1816) ...	102	— Urban Sanitary Authority v. Page (1881) ...	251
— v. Marlborough (Duke) (1820) ...	134	Banfill v. Leigh (1800) ...	340
— v. Sands (1669) ...	251	Bank für Handel und Industrie, <i>Re</i> (1915) ...	151, 152
— v. Squire (1906) ...	96	Bankruptcy Notice, <i>Re</i> , <i>Re</i> A Judgment Debtor (1907) ...	567
— v. Stawell (Lord) (1795) ...	196	— Petition, A, <i>Re</i> , <i>Ex p.</i> Caucasian Trading Corp., Ltd. (1896) ...	567
— v. Sutcliffe (1907) ...	147	Banks v. Banks (1835) ...	449
— v. Weeden & Shales (1699) ...	193, 194	— (Doe d.) v. Holmes (1848) ...	565
— for Canada v. Cain (1906) ...	193, 194	Barber v. Giles (1618) ...	414
— v. Gilhula (1906) ...	550	Barbre's Case, Middlesex Election Case (1804) ...	138
Aubert v. Maze (1801) ...	62	Bargrave v. Atkins (1695) ...	514
Aubrey v. Fisher (1809) ...	127, 128	Baring Brothers & Co. & Doulton & Co., <i>Re</i> (1892) ...	392
Auchmuty (Doe d.) v. Mulcaster (1826) ...	31	Baring-Gould v. Sharpington Combined Pick & Shovel Syndicate (1899) ...	410
Auriol v. Smith (1823) ...	376	Barker v. Barker (1576) ...	584
Austin v. Moyle (1606) ...	364	— v. Hempstead (1889) ...	591
— & Whiteley, Ltd. v. Bowley & Sons (1913) ...	150	Barlow v. M'Intosh (1810) ...	184
Austrian Lloyd S.S. Co. v. Gresham Life Assurance Society, Ltd. (1903) ...	599	— v. Teal (1885) ...	9
Auto-Piano Co. v. Kastner & Co., <i>Re</i> Kastner & Co. (1917) ...	485	Barnard v. King (1651) ...	410, 414
Autothreptic Steam Boiler Co., Ltd., & Townsend, Hook & Co., <i>Re</i> (1888) ...	339	— v. Moss (1789) ...	608
Avelett v. Goddard (1843) ...	68	Barnardiston v. Fowler (1714) ...	340, 341
Ayland v. Nicholls (1679) ...		Barnes v. Braithwaite & Nixon (1857) ...	428
Ayray v. Bellingham (1675) ...		— v. Greenwel (1601) ...	338
		— v. Hayward (1857) ...	425
		— v. Lucille, Ltd. (1907) ...	245
		— v. Youngs (1898) ...	368, 369
		Barnett v. Aldridge Colliery Co., Ltd. (1887) ...	432, 628, 629
		— & Eccles Corp., <i>Re</i> (1901) ...	585
		Barret v. Barret (1628) ...	62, 105
		Barrett v. Parry (1812) ...	417, 605
		— v. Rosenthal (1875) ...	620
		— v. Wilson (1834) ...	528
		Barrey v. Penring (Perin, Perry, Perrie) (1616) ...	463
		Barrick v. Buba (1855) ...	169
		— v. — (1857) ...	163
		Barrington v. — (1615) ...	94, 95
		— v. Turner (1681) ...	214

## B.

BACKHOUSE & Taylor, <i>Re</i> (1851) ...	406
Bacon v. Bacon (1641) ...	123
— v. Cresswell (1835) ...	
— v. Dubarry (Debarry) (1697) ...	328, 499
— v. Gyrling (1612) ...	98
— v. Smith (1840) ...	517
Badger, <i>Re</i> (1819) ...	434, 472
Badham v. Badham (1848) ...	553
Badische Anilin und Soda Fabrik v. Levinstein (1883) ...	613, 619
Badische Anilin und Soda Fabrik v. Levinstein (1887) ...	613



	PAGE		PAGE
Barrington's Case (1611) ...	94, 95	Benson v. Heathorn (1842) ...	352
Barrow v. Wadkin (1857), 24 Beav. 1 ...	137	Benton v. Lever & Co. (1885) ...	609
— v. — (1857), 24 Beav. 327 ...	138	Benwell v. Hinxman (1835) ...	419, 483
Barry v. Barry (1820) ...	111	Berks v. Trippet (1666) ...	503
— v. Rush (1787) ...	349	Berney (Bernie) v. Read (1845) ...	313
Bartholomew v. Wiseman (1891) ...	291	Berridge v. Bechstein (1914), 58 Sol. Jo. 863 ...	153
Bartle v. Musgrave (1841) ...	589	— v. — (1914), 58 Sol. Jo. 864 ...	153
Barton v. Ranson (1838) ...	494, 582	Berrie v. Penring (Perin, Perry, Perrie) (1616) ...	463, 504
— v. Ruislip Dog Sanatorium, Ltd. (1917) ...	219	Berriman v. Peacock (1832) ...	74, 75
Barwick v. Buba (1855) ...	169	Berry v. Dunn (1843) ...	564
— v. — (1857) ...	163	— v. Heard (1622) ...	74, 75
Baspole's Case (1611) ...	499, 502	— v. Penring (Perin, Perry, Perrie) (1616) ...	463, 504
Baspoole v. Freeman (1611) ...	468, 472, 499, 502	— v. South Eastern & Chatham Dover Ry. Co.'s Managing Committee (1901) ...	282
Bassett v. Collins (1810) ...	265	Bery v. Heard (1622) ...	74, 75
Bateman v. Hotchkin (1862) ...	79, 86, 87	Besozzi v. Harris (1858) ...	238
Bates v. Cooke (1829) ...	413, 465	Besset, <i>Re</i> (1844) ...	129
— v. Townley (1847) ...	435	Best v. Osborn (1825) ...	266, 270
— v. — (1848) ...	544, 612	Beurse Van Koningsberg, The (1800) ...	182
Bath v. Bowles (1905) ...	29, 30	Bevan v. Bevan (1790) ...	581
Baxter v. Hozier (1839) ...	473, 478	Bewick v. Whitfield (1734) ...	86, 102
Baxters & Midland Ry. Co., <i>Re</i> (1906) ...	525, 635	Bexley Local Board v. West Kent Main Sewerage Board (1882) ...	460
Baynall v. Whitehouse (1846) ...	618, 619	Bhear v. Harradine (1852) ...	506, 606
Bayntine v. Sharp (1696) ...	243	Bibye v. Huxley (1724) ...	61
Bays v. Bird (1726) ...	92, 93	Biddell v. Dowse (1827) ...	395
Beale v. Beale (1634) ...	468	Bidder & North Staffordshire Ry. Co., <i>Re</i> (1878) ...	462
Bean v. Newbury (Newberry) (1664) ...	341	Biggs v. Hansell (1855) ...	449, 512
Beard v. Egerton (1846) ...	133	Biglin v. Clark (1905) ...	414, 455
— v. Haydock (1838) ...	527	Bignall v. Gale (1841) ...	448
Bearup v. Peacock (1845) ...	512	Billington (J. H.), Ltd. v. Billington (1907) ...	633
Beaty v. Gibbons (1812) ...	39	Bingley v. Quest (1907) ...	300
Beaufort (Duke) v. Welch (1839) ...	495	Binstead v. Buck (1777) ...	204
— & Swansea Harbour Trustees, <i>Re</i> (1860) ...	504	Birch, <i>Re, Ex p. Caucasian Trading Corpn., Ltd.</i> (1896) ...	567
Beaumont v. Salisbury (Marquis) (1854) ...	93	— v. Stephenson (1811) ...	19
Beavan v. Delahay (1788) ...	37	Birch-Wolfe v. Birch (1870) ...	82, 83
Bechoff, David & Co. v. Bubna, <i>Re</i> Sutherland (Duchess) (1915) ...	142	Bird v. Bird (1703) ...	475
Bechstein, <i>Re</i> , Berridge v. Bechstein, London County & Westminster Bank v. Bechstein (1914) 58 Sol. Jo. 863 ...	153	— v. Cooper (1835) ...	518
Bechstein, <i>Re</i> , Berridge v. Bechstein, London County & Westminster Bank v. Bechstein (1914), 58 Sol. Jo. 864 ...	153	— v. Penrice (1840) ...	444, 511, 512
Beck v. Dyson (1815) ...	244	— v. Relph (1833) ...	13
— v. Sargent (1812) ...	415, 465	Birdsall v. Bradley (1863) ...	579
— & Jackson, <i>Re</i> (1857) ...	464	Birks v. Trippet (1666) ...	503, 575
Beckett v. Taylor (1669) ...	327	Birmingham & Staffordshire Gas Co. v. Ratcliff (1871) ...	622
Beckwith v. Shordike (1767) ...	228	— Corpn. v. Allen (1887) ...	615
Bedam v. Clerkson (1696) ...	475, 486, 532	Bishop v. Bishop (1639) ...	498, 584
Bedborough v. Army & Navy Hotel Co. (1884) ...	632	— v. — (1841) ...	88
Beddall v. Page (1827) ...	465	— v. Webster (1704) ...	584
Beddow v. Beddow (1878) ...	379	— Auckland Ry. Co. & Richardson, <i>Re</i> (1844) ...	452
Bedell v. Moor (1588) ...	471	Black v. Christchurch Finance Co. (1894) ...	63
Bedington v. Southall (1817) ...	442, 446	— v. Clay (1894) ...	42, 46
Bedwell v. Wood (1877) ...	595	— v. Munday (Mundy) (1861) ...	432
Beer v. Santer (1861) ...	28	Blackburne v. Thompson (1812) ...	178, 179
Behren v. Bremer (1854) ...	438	Blackett v. Bates (1865) ...	584
Belcher v. Roedean School Site & Buildings, Ltd. (1901) ...	392	— v. Lowes (1814) ...	70
Belchier v. Reynolds (1754) ...	394	Blackman v. Simmons (1827) ...	238, 239, 241
Bell v. Barchard (1852) ...	27	Blackwell (R. W.) & Co., Ltd. v. Derby Corpn. (1909) ...	370
— v. Buller (1813) ...	164	Blades v. Higgs (1865) ...	206, 210, 211
— v. Gilson (1798) ...	167	Blagrove v. Bristol Waterworks Co. (1856) ...	551
— v. Gipps (1705) ...	340	Blair v. Jones (1851) ...	566
— v. Postlethwaite (1855) ...	586, 587, 625	Blake v. Peters (1863) ...	71
— v. Reid (1813) ...	164	Blaker v. Anscombe (1804) ...	91, 112, 113
Belton v. Jarrett (1843) ...	581	Blanchard v. Lilley (1808) ...	496
Benbow v. Jones (1845) ...	318	— v. Sun Fire Office (1890) ...	549
Benford (Benfield) v. Sims (Simms) (1898) ...	284, 291	Bland & Co., Ltd. v. Russian Bank for Foreign Trade (1906) ...	550
Benjamin v. Storr (1874) ...	251	Blewett v. Jenkins (1862) ...	68
— Franklin, The (1806) ...	169	Blewitt (Doe d.) v. Phillips (1841) ...	95
Bennett v. Brighton Corpn. (1868) ...	560	Block v. Palgrave (1600) ...	330
— v. Skardon (1829) ...	556	Blower v. Great Western Ry. Co. (1872) ...	276
— v. Watson (1860) ...	416, 422	Bloxam v. Elsee (1827) ...	148
— & Harvey v. Bowness (1858) ...	473, 506		
Bennett's Claim, Erskine v. Adeane (1873) ...	11, 66		

## TABLE OF CASES.

xliii

	PAGE		PAGE
Bloxam v. Favre (1884) ...	138	Brandon v. Nesbitt (1794) ...	165
Bluck v. Boyes (1853) ...	480	— v. Smith (1853) ...	313
— v. Clossman (1853) ...	480	Brandt & Co. & Boutcher & Co., <i>Re</i> (1890) ...	474
— v. Munday (Mundy) (1861) ...	320, 393, 394	Braunstein v. Accidental Death Insurance Co. (1861) ...	356
Blundell v. Brettargh (1810) ...	629	Brazier v. Bryant (1825) ...	578
Blunt v. Cooke (1842) ...	629	— v. — (1833) ...	428
Blyth v. Bampton (1826) ...	406	— v. Jones (1828) ...	582
— v. Lafone (1859) ...	273	Brazilian Submarine Telegraph Co., Ltd. & Western & Brazilian Telegraph Co., Ltd., <i>Re</i> (1880) ...	346, 407
— v. Topham (1608) ...	362	Breadalbane (Marquess) v. Stewart (1904) ...	40
& Tyne Ry. Co. & Wilson, <i>Re</i> (1863) ...	229	Brearcy v. Kemp (1855) ...	568
Blythe v. Bampton (1826) ...	261, 296	Bree (Roe d.) v. Lees (1777) ...	6, 9
— v. Lafone (1859) ...	481, 514	Bree v. Andrew (Audars) (1587) ...	579
Boden v. Roscoe (1894) ...	542	Brett's Case (1587) ...	579
Bodger v. Nicholls (1873) ...	265	Bretton v. Prat (1600) ...	476
Bodger v. Nicholls (1873) ...	432	Briddon v. Great Northern Ry. Co. (1858) ...	275, 276
Body (Doe d.) v. Cox (1846) ...	298	Bridge v. Parsons (1863) ...	287
Boisloe v. Baily (1704) ...	515, 516	Bridges v. Stephens (1817) ...	90
Bolden v. Brogden (1838) ...	481	Briggs v. Oxford (Earl) (1852) ...	92
Bolland, <i>Ex p.</i> , <i>Re</i> Ackary (1876) ...	48	Bright v. Durnell (1836) ...	387, 389
Bollard, <i>Ex p.</i> , <i>Re</i> Ackary (1876) ...	365	— v. River Plate Construction Co., Ltd. (1900) ...	400
Bolton v. Hodgkinson (1866) ...	588, 602	— & Brothers v. Gibson & Co. (1916) ...	330
Bonner v. Charlton (1804) ...	584	Brighton Marine Palace & Pier, Ltd. v. Woodhouse (1893) ...	367, 376
— v. Liddell (1819) ...	34, 37	Brightside Bierlow Overseers v. West Riding JJ. (1867) ...	301
Bonnett & Fowler, <i>Re</i> (1913) ...	520, 557	Bristol Corpn. v. Aird (John) & Co. (1913) ...	370, 374
Bonnin v. Neame (1910) ...	321	Bristow v. Binns (1823) ...	395
Boodle v. Davies (1835) ...	455	— v. Towers (1794) ...	165
Booth v. Garnett (1737) ...	5	British Asscn. of Glass Bottle Manufacturers, Ltd. v. Foster & Sons, Ltd. (1917) ...	177, 178
— v. Peckover (1639) ...	411	— Chartered Co. of South Africa v. Lennon, Ltd. (1915) ...	221
Boraston v. Green (1812) ...	250	— Commercial Insurance Co. v. British Nation Life Assurance Asscn., <i>Re</i> European Assurance Society Arbitration (1878) ...	355
Borowdale v. Hitchener (1802) ...	215, 250	— Empire Shipping Co., Ltd. v. Soames (Somes) (1857) ...	628
Bos v. Helsham (1866) ...	215	— Nation Life Assurance Asscn. Liquidators, <i>Ex p.</i> , <i>Re</i> European Society Arbitration Acts (1878) ...	355
Botfield v. Dixon (1836) ...	155	Westinghouse Electric & Manufacturing Co. v. Underground Electric Rys. Co. of London (1912) ...	459, 522
Bottomley v. Ambler (1877) ...	189	Britt v. Pashley (1847) ...	627, 631
— v. Buckley (1845) ...	507	Broad v. Sloggatt (1856) ...	597
Boughton v. Butter (1680) ...	507	Broadwater v. Blot (1817) ...	252
Boulston v. Hardy (1597) ...	121, 122	Brock v. Beare (1610) ...	68
Boulston's Case (1597) ...	189	— v. Copeland (1794) ...	239
Boulton v. Banks (1632) ...	507	— v. Spencer (1611) ...	68
— v. Dobree (1808) ...	157	Brockington v. Saunders (1864) ...	33
Bourgoise, <i>Re</i> (1889) ...	526	Brocks v. Phillips (1599) ...	158
Bourke v. Lloyd (1842) ...	421	Broder v. Saillard (1876), 2 Ch. D. 692 ...	251
Boussmaker, <i>Ex p.</i> (1806) ...	579	— v. — (1876), 24 W. R. 456 ...	614, 615
Bouttilier v. Thick (1822) ...	568	Broennenburgh v. Haycock (1817) ...	265
Bowen v. Bowen (1862) ...	394, 520, 521	Broggref (Brogrefe) v. Hawke (1837) ...	593, 594
— v. Williams (1848) ...	22	Bromfield, <i>Ex p.</i> (1792) ...	72, 103
Bower, <i>Re</i> (1823) ...	472, 505	Brook, <i>Re</i> , Sykes v. Brook (1881) ...	618
— v. Bower (1862) ...	396	— v. Cobb (1612) ...	106
— v. Taylor (1816) ...	81, 87, 89	— Delcomyn & Badart, <i>Re</i> (1864) ...	446
Bowers v. Nixon (1848) ...	250	Brooke v. Denton (1633) ...	17
Bowes v. Fernie (1838) ...	289	— v. Fearn (1833) ...	571
Bowker v. Evans (1885) ...	455, 524, 525, 560	— v. Mitchell (1840) ...	395, 468, 531
Bowles v. Berrie (1615) ...	318	— (Lord) v. Rounthwaite (1846) ...	93, 94
Bowles' Case (1615) ...	480	Brooks v. Parsons (1843) ...	507
Bowlston v. Hardy (1597) ...	580	Brown v. Brown (1683) ...	521, 528
Bowyer v. Morgan (1906) ...	460	— v. Collins (1883) ...	121
Bowyers' Society v. Mills (1856) ...	460, 517	— v. Crump (1815) ...	13
Boyd v. Emmerson (1834) ...	12, 32	— v. Elkington (1841) ...	266
Boyes v. Bluck (1853) ...	442, 443	— v. Emerson (1856) ...	622
— v. Hewetson (1836) ...	504	— v. Giles (1823) ...	227
Bradbee v. Christ's Hospital Governors (1842) ...	7		
— v. London Corpn. (1842) ...	569		
Bradburn v. Foley (1878) ...	569		
Braddick v. Thompson (1807) ...	442		
Bradford v. Bryan (Brien) (1741) ...	442		
— (Doe d.) v. Watkins (1806) ...	442		
— v. Woollam (1864) ...	442		
Bradley v. Ibbetson (1851) ...	442		
— v. Phelps (1851) ...	442		
— v. Tunstow (1797) ...	442		
— v. Wallaces, Ltd. (1913) ...	442		
Bradly v. Strachy (1740) ...	442		
Bradsey v. Clyston (1639) ...	442		
Bradshaw v. Walker (1620) ...	442		
Braggs (Doe d.) v. Holmes (1848) ...	442		
Brander v. Penleaze (1814) ...	442		
Brandon v. Brandon (1799) ...	442		

	PAGE		PAGE
<i>Brown v. Girard</i> (1868) ... ..	622	<i>Butler, Baker &amp; Masters, Re</i> (1849) ...	577
— <i>v. Goodman</i> (1789) ... ..	422	<i>Butterfield v. Burroughs</i> (1706) ...	261
— <i>v. Hellaby</i> (1857) ... ..	509, 529	<i>Buxentine v. Sharp</i> (1696) ...	243
— <i>v. Hudson</i> (1844) ... ..	507	<i>Byrne v. Brown</i> (1889) ...	629, 630
— <i>v. Llandovery Terra Cotta Co., Ltd.</i> (1909) ... ..	427	<i>Bywater v. Richardson</i> (1834) ...	267
— <i>v. Nelson</i> (1844) ... ..	598		
— <i>v. Overbury</i> (1856) ... ..	384	C.	
— <i>v. Pellegrini</i> (1856) ... ..	361	<i>CABLE v. Rogers</i> (1625) ... ..	343
— <i>v. Smith</i> (1840) ... ..	533	<i>Cadle v. Smart</i> (1836) ... ..	612
— <i>v. Somerset &amp; Dorset Ry. Co.</i> (1865) ...	520	<i>Caerleon Tinplate Co. v. Hughes</i> (1891) ...	315
— <i>v. Tanner</i> (1825) ... ..	398	<i>Cage v. Dod</i> (1650) ... ..	67
— <i>v. Vawser</i> (1804) ... ..	468, 531	<i>Caldecott v. Smythies</i> (1837) ... ..	37
— <i>v. Watson</i> (1839) ... ..	340	<i>Caldwell v. Vanvlissengen</i> (1851) ...	129
— & <i>Collyer, Re</i> (1851) ... ..	420	<i>Caledonian Insurance Co. v. Gilmour</i> (1893)	358
— & <i>Croydon Canal Co., Re</i> (1839) ...	340	— <i>Ry. Co. v. Greenock &amp; Wemyss</i> <i>Bay Ry. Co.</i> (1874) ...	354
<i>Browne v. Emerson</i> (1856) ... ..	622	— <i>v. Lockhart</i> (1860) ...	324, 395, 422, 437, 515
— <i>v. Marsden</i> (1789) ... ..	597	— <i>v. Turcan</i> (1898) ... ..	535
— <i>v. Meverell</i> (1561) ... ..	462, 500	<i>Callard v. Patterson</i> (1812) ... ..	571
— <i>v. Somerset &amp; Dorset Ry. Co.</i> (1865)	520	<i>Calt v. Smith</i> (1645) ... ..	584
— & <i>Collyer, Re</i> (1851) ... ..	420	<i>Calvin's Case</i> (1608) ...	121, 122, 126, 127, 133, 134, 139, 154, 188, 190
<i>Brownlow v. Lambert</i> (1599) ... ..	222	<i>Camelo v. Britten</i> (1820) ... ..	181
<i>Bruce, Re</i> (1832) ... ..	121	<i>Cameron v. Cuddy</i> (1914) ... ..	382, 383
— <i>v. Caulfield</i> (1918) ... ..	66	<i>Camillo Eitzen &amp; Jewson &amp; Sons, Re</i> (1896) ... ..	434, 447
<i>Brunsdon v. Staines Local Board</i> (1884)	381, 382	<i>Campbell v. Allgood</i> (1853) ... ..	92
<i>Bryan v. Eaton</i> (1875) ... ..	217, 294	— <i>v. Hall</i> (1774) ... ..	122
<i>Brydges v. Stephens</i> (1821) ... ..	80	— <i>v. Twemlow</i> (1814) ... ..	451
<i>Bryson's Executors v. National Provident</i> <i>Institution</i> (undated) ... ..	608	<i>Canaan v. Fowler</i> (1853) ... ..	335
<i>Bubb v. Yelverton, Ex p. Hastings</i> (1870)	110	<i>Candilis &amp; Sons v. Victor &amp; Co.</i> (1916)	160
<i>Buccleuch (Duke) v. Metropolitan Board of</i> <i>Works</i> (1870) ... ..	462, 472	<i>Candler v. Fuller</i> (1738) ... ..	586, 588, 606
<i>Buccleuch (Duke) v. Metropolitan Board of</i> <i>Works</i> (1872) ... ..	462, 472, 533	<i>Cann v. Facey</i> (1835) ... ..	222
<i>Buchanan v. Parnshaw</i> (1788) ... ..	266	<i>Cannan v. Fowler</i> (1853) ... ..	...
<i>Buckton v. Higgs</i> (1879) ... ..	600	<i>Canterbury (Archbp.) v. Kemp</i> (1597)	88
<i>Budd v. Fairmaner</i> (1831) ... ..	260, 263	<i>Cap Blanco, The</i> (1913) ... ..	364
<i>Budge v. Parsons</i> (1863) ... ..	287	<i>Card v. Case</i> (1848) ... ..	242
<i>Bull v. Trevor-Batye, Re Trevor-Batye's</i> <i>Settlement</i> (1912) ... ..	90	<i>Cardigan (Earl) &amp; Henderson, Re</i> (1852)	580
<i>Bullen v. Denning</i> (1826) ... ..	61, 97	<i>Cardinall v. Cardinall</i> (1884) ... ..	615
— <i>v. King</i> (1877) ... ..	586	<i>Cargey v. Aitcheson</i> (1823) ... ..	470
<i>Bulwer v. Bulwer</i> (1819) ... ..	59	<i>Carlebach, Ex p., R. v. Albany Street Police</i> <i>Station Superintendent</i> (1915) ...	125
<i>Burbago v. King</i> (1813) ... ..	26	<i>Carlisle, Re, Clegg v. Clegg</i> (1890) ...	371
<i>Burdon, Re</i> (1858) ... ..	421, 422	— (Lord) (Doe d.) <i>v. Morpeth</i> (Bailiff, etc.) (1811) ... ..	553
<i>Burges v. Lamb</i> (1809) ... ..	91, 107	<i>Carmichael v. Houchen</i> (1834) ... ..	555
<i>Burgess v. Morton</i> (1896) ... ..	317	<i>Caroon's Case</i> (1625) ... ..	158
<i>Burk v. Brown</i> (1742) ... ..	134	<i>Carpenter &amp; Bristol Corpn., Re</i> (1907)	310
<i>Burley v. Stephens</i> (Stevens) (1836)	418, 419	<i>Carr v. Allatt</i> (1858) ... ..	56
<i>Burlington v. Richardson</i> (1852) ...	487	— <i>v. Smith</i> (1843) ... ..	531, 532
<i>Burnand &amp; Wainwright, Re</i> (1850)	562, 563	— <i>Brothers v. Dougherty</i> (1898) ...	604
<i>Burnard v. Haggis</i> (1863) ... ..	256	<i>Carrington v. Roots</i> (1837) ... ..	52
<i>Burney v. Macdonald</i> (1845) ... ..	137	— <i>v. Taylor</i> (1809) ... ..	208
<i>Burnham, Ex p., R. v. Stewart</i> (1896)	303	<i>Carruthers v. Hollis</i> (1838) ... ..	217, 218
<i>Burrard v. Calisher</i> (1882), 19 Ch. D. 644	618	<i>Carter v. Carter</i> (1684) ... ..	341
— <i>v. ———</i> (1882), 51 L. J. Ch. 223	615	<i>Cartwright v. Blackworth</i> (1832) ...	...
<i>Burroughes v. Clarke</i> (1831) ... ..	426	<i>Carus-Wilson &amp; Greene, Re</i> (1886) ...	312, 319
<i>Burrowes v. Forrest</i> (1881) ... ..	571	<i>Cary v. Cary</i> (1862) ... ..	...
<i>Burslem v. Burns</i> (1823) ... ..	394	<i>Casamajor v. Strode</i> (1823) ... ..	93
<i>Burt, Re</i> (1826) ... ..	556	<i>Case v. Dare</i> (1682) ... ..	415
— <i>v. Wigley</i> (Wigmore) (1835) ... ..	484	— <i>v. Midland Ry. Co.</i> (1859) ... ..	613
<i>Burtlet v. Smith</i> (1734) ... ..	434, 463, 464	<i>v. Willis</i> (Wallis) (1892) ... ..	623
<i>Burton v. Atkinson</i> (1908) ... ..	249	<i>Case of Swans</i> (1592) ... ..	206, 210, 213
— <i>v. Ellington</i> (1791) ... ..	551	<i>Cassell, Re</i> (1829) ... ..	405
— <i>v. Knight</i> (1705) ... ..	434, 446	<i>Casseres v. Bell</i> (1799) ... ..	162
— <i>v. Wigley</i> (Wigmore) (1835) ... ..	484	<i>Casterton Estates, Re, Re Wilson &amp; Greene</i>	...
<i>Bury v. Dunn</i> (1843) ... ..	595		
<i>Bush v. Freeman</i> (1887) ... ..	258, 267	<i>Caswell v. Coare</i> (1809) ... ..	271, 272
<i>Busk v. Bell</i> (1812) ... ..	184	<i>v. Groucutt</i> (Grovatt) (1862) ...	595
<i>Bussfield v. Bussfield</i> (1620) ... ..	472	<i>Catchpole v. Minster</i> (1913) ... ..	235
<i>Bustros v. Lenders</i> (1871) ... ..	368	<i>Cathcart v. Chalmers</i> (1911) ... ..	45, 46
— <i>v. White</i> (1876) ... ..	317	<i>Catherina Maria, The</i> (1809) ... ..	186
<i>Butler v. Borton</i> (1820) ... ..	90	<i>Catling v. Great Northern Ry. Co.</i> (1869)	604
— <i>v. Kynnersley</i> (1828) ... ..	344, 345	<i>Caucasian Trading Corpn., Ltd., Ex p., Re A</i> <i>Bankruptcy Petition</i> (1896) ...	567
— <i>v. ———</i> (1829–30) ... ..	84, 113, 535		
— <i>v. Masters</i> (1849) ... ..	577, 578		
— <i>v. Wigge</i> (1667) ... ..	330		



## TABLE OF CASES.

xlv

	PAGE		PAGE
Caucasian Trading Corpn., Ltd., <i>Ex p.</i> , <i>Re</i>		Clapcott v. Davy (1700) ...	542
<i>Birch</i> (1896) ...	567	Clapham v. Higham (Hyam) (1822) ...	398
Cavallotti v. Carruthers & Co. (1916) ...	461	S.S. Co., Ltd. v. Handels-en-Trans-	
Cave v. Coleman (1820) ...	260	port-Maatschappij Vulcaan of Rotterdam	177
Cavendish, <i>Re</i> , Cavendish v. Mundy (1877)...	83	Clare v. Maynard (1837) ...	272
Cayhill v. Fitzgerald (1744) ...	503	Clarence Ry. Co. v. Great North of England,	
Cayme v. Watts (1823) ...	502	Clarence & Hartlepool Junction Ry. Co.	
Cedes Electric Traction, Ltd., <i>Re</i> (1918) ...	151	(1845) ...	530
Chace v. Westmore (1814) ...	526	Clark v. Hague (1859) ...	287
Chalke v. Peters (1610) ...	94, 95	— v. Sonnenschein (1890) ...	632
Chamberlain, <i>Re</i> (1840) ...	583	— v. Ware (1867) ...	622
— v. Dummer (1782) ...	107	— v. Webster (1823) ...	214
Chamberlayne v. — (1782) ...	107	— & Bath Corpn., <i>Re</i> (1884) ...	607
— v. — (1792) ...	107	Clarke v. Crofts (1827) ...	395
Chambers v. Goldthorpe (1901) ...	322, 429	— v. Hague (1859) ...	287
Champion v. Wenham (1754) ...	548	— v. Hunt (1849) ...	259
Chandos (Duke) v. Talbot (1731) ...	61, 62, 100	— v. Owen (1836) ...	603
Chanler v. Driver (1699) ...	579	— v. Roystone (1845) ...	27
Channon v. Patch (1826) ...	75, 112	— (Doe d.) v. Stillwell (1838) ...	581
Chanter v. Hopkins (1838) ...	262	— v. Stocken (1836) ...	390
Chapelries (Two) v. W. & P. (1360) ...	80	— v. Westrope (1856) ...	26, 384
Chapman v. Allen (1631) ...	254	Claxton v. Claxton (1690) ...	101
— v. Chambers (1866) ...	297	Clay v. Rufford (1849) ...	535
— v. Gwyther (1866) ...	267	Clayton, <i>Ex p.</i> (1830) ...	88
— v. Lansdown (1794) ...	610	— v. Westminster Brymbo Coal &	
— v. Smith (1907) ...	25	Coke Co., Ltd. (1864) ...	566
— v. Withers (1888) ...	271	Cleesby v. Peese (1824) ...	560
Chappell v. North (1891) ...	362, 375	Clegg v. Clegg, <i>Re</i> Carlisle (1890) ...	371
— (Chapple) v. Purday (1845) ...	133	v. Dearden (1848) ...	538, 539
Charles v. Shepherd (1892) ...	613	Clements v. Fuller (1847) ...	511
Charleton v. Spencer (1842) ...	345	Clemontson (Clementson) v. Blessig (1855) ...	169
Charlotta, The (1914) ...	178	Cleobury v. Tattersall (undated) ...	267
Charlotte, The (1813) ...	147, 157	Cleverton v. Uffernel (1887) ...	246
Charlwood v. Grieg (1851) ...	245	Clews & Middleton, <i>Re</i> (1845) ...	448
Charnley v. Winstanley (1804) ...	396, 397	Clink v. Hickie, Borman & Co. (1898) ...	332
Charter v. Trevelyan (1844) ...	538	Clinton v. Lyons & Co., Ltd. (1912) ...	236
Chateau Thierry (Duke), <i>Ex p.</i> , R. v. Home		Clio, The ( <i>alias</i> The William Pitt) (1805) ...	185
Secretary (1917) ...	196	Clithero v. Higgs (1636) ...	78, 224
Chatfield v. Sedgwick (1879) ...	601	Clossman v. Bluck (1853) ...	480
Cheater v. Cater (1918) ...	65, 75	Clough v. County Live Stock Insurance	
Cheltenham Borough Case (1880) ...	139	Assocn., Ltd. (1916) ...	367, 371
Chennet v. Cooper (1845) ...	570	Clout & Metropolitan & District Ry. Cos., <i>Re</i>	
Chepeler v. Durant (1854) ...	161	(1882) ...	549, 550
Cheslyn v. Dalby (1836) ...	411	Clow v. Harper (1878) ...	622
— v. — (1840) ...	411	Coates v. Stephens (1838) ...	265
Chesterfield Corpn. & Brampton Local		Coatsworth v. Johnson (1886) ...	6
Board (1886) ...	606	Cochrane v. Willis (1865) ...	100
Chesterman v. Lamb (1834) ...	272	Cock v. Gent (1845) ...	477
Chew v. Jones (1847) ...	256	Cockburn v. Newton (1841) ...	501
Chichester v. M'Intire (1830) ...	583	Cockerell v. Cholmeley (1830) ...	71
(Bp.) & Strodwick's Case (1613) ...	69	Cocks v. Macclesfield (Macclesfelde) (1562) ...	468
Chicot v. Lequesne (1751) ...	434	— v. Purday (1848) ...	134
Child v. Greenhill (1639) ...	205, 207	Codd v. Brown (1867) ...	32
v. Hearn (1874) ...	236	Coffin v. Coffin (1821) ...	108
Childe v. Greenhill (1639) ...	205, 207	Cohen v. Arthur (1912) ...	376
Childs v. Hearn (1874) ...	236	— v. Cohen (1912) ...	376
China Steam Navigation Co., Ltd., v. Van		Colam v. Pagett (1883) ...	288
Laun (1905) ...	568	Cole v. Peyson (1637) ...	17, 74
Ching v. Ching (1801) ...	526	Cole, Marchant & Co. v. Firth (1879) ...	591
Chittenden v. Walker (1835) ...	600	Coles & Ravenshear, <i>Re</i> (1907) ...	561
Cholke v. Peters (1610) ...	94, 95	Colget v. Norris (1886) ...	246
Cholmeley v. Paxton (1830) ...	71	Collingwood v. Pace (1664) ...	123, 134, 135,
— v. — (1832) ...	71	136, 189	
Chownes v. Brown (1845) ...	627, 631	Collins v. Collins (1858) ...	312, 319
Christ College (Christ's Hospital), Brecknock		— v. Locke (1879) ...	361
(Governors) v. Martin (1877) ...	556	— v. Paddington Vestry (1880) ...	459
Christie v. Hamlet (1828) ...	470	— v. Powell (1788) ...	541
— v. Noble (1880) ...	386	— Co. v. Brown (1857) ...	131
Christina Sophia, The (1801) ...	182, 183, 185	— v. Cohen (1857) ...	131
Chuck v. Cremer (1848) ...	546	v. Reeves (1858) ...	131
Church v. Roper (1639) ...	469	Collyer-Bristow & Co., <i>Re</i> , Crossley v. Lowes-	
Churcher v. Stringer (1831) ...	577	toft Water & Gas Co. (1901) ...	426
<i>Re</i> (1831) ...	577	Colman & Watson, <i>Re</i> (1908) ...	321, 568
Churchward v. Studdy (1811) ...	211	Colson's Trusts, <i>Re</i> (1853) ...	89
Citto, The (1800) ...	144	Colston v. Harris (1602) ...	499
City of Calcutta, The (1898) ...	363, 370, 371	Coltherd v. Puncheon (1822) ...	266
Clan Grant, The (1915) ...	142		

	PAGE		PAGE
Columbel <i>v.</i> Columbel (1676)...	467	Craven <i>v.</i> Craven (1817) ...	553
Combe <i>v.</i> London & South-Western Ry. Co. (1874)...	276, 277	Craw <i>v.</i> Ramsey (1670) ...	127, 135
Commings <i>v.</i> Heard (1869) ...	542	Crawshaw <i>v.</i> York & North Midland Ry. Co. (1852) ...	510, 511
Compagnie du Sénégal et de la Côte Occidentale D'Afrique <i>v.</i> Smith & Co. & Woods & Co. (1883) ...	367, 629	Crawshay <i>v.</i> Collins (1818) ...	431
Company, A, <i>Re</i> (1915) ...	152	Cremer <i>v.</i> Churt (Chuck) (1846) ...	520
Consett <i>v.</i> Bell (1842) ...	102	Creswick <i>v.</i> Harrison (1850) ...	568
Constable & Cranswick, <i>Re</i> (1899) ...	34, 38	Crichton & Law Car & General Insurance Corpn., Ltd., <i>Re</i> (1910) ...	452
Constable's Case (1601) ...	207	Croasdell & Cammell, Laird & Co., Ltd., <i>Re</i> (1906) ...	462
Continho Caro & Co. <i>v.</i> Vermont & Co. (1917) ...	...	Crockford <i>v.</i> Alexander (1808) ...	93
Cooch <i>v.</i> Maltby (1854) ...	595	Crockley <i>v.</i> Clay (1848) ...	456
Cook, <i>Re</i> (1849) ...	473, 566	Crofton <i>v.</i> Connor (1770) ...	502
— <i>v.</i> Cook (1638) ...	62	Crofts <i>v.</i> Harris (1691) ...	541
— & Songate's Case (1588) ...	313	Crogat <i>v.</i> Morris (1610), 2 Brownl. 55 ...	224
Cooke <i>v.</i> Cooke (1867) ...	352, 546	Crogate <i>v.</i> Morris (1610) 1 Brownl. 197 ...	70
— <i>v.</i> Newcastle & Gateshead Water Co. (1882) ...	617, 618	Croker <i>v.</i> Pugh (1832) ...	501
— <i>v.</i> Waring (1863) ...	295	Cromer <i>v.</i> Churt (Chuck) (1846) ...	520
— <i>v.</i> Whaley (1701) ...	89	Croomes <i>v.</i> Easton (1856) ...	609
— <i>v.</i> Whorwood (1671) ...	476	— <i>v.</i> Gore (1856) ...	609
— <i>v.</i> Winford (1701) ...	89	Cropper <i>v.</i> Matthews (1659) ...	242, 243
Coombs & Freshfield & Fernley, <i>Re</i> (1850) ...	423, 428	Crosbie (Crosby) <i>v.</i> Holmes (1846) ...	509
Cooper <i>v.</i> Barton (1810) ...	255, 256	Crosby <i>v.</i> Wadsworth (1805) ...	52
— <i>v.</i> Butcher of Croydon (1671) ...	498	Cross <i>v.</i> Cross (1862) ...	595
— <i>v.</i> Hirst (1700) ...	499	— <i>v.</i> Leeds Corpn. (1902) ...	370
— <i>v.</i> Johnson (1819) ...	394	— <i>v.</i> Metcalfe (1836) ...	70
— <i>v.</i> Langdon (1841) ...	497	Crosse <i>v.</i> Abbot (1605) ...	95
— (1842) ...	497	— <i>v.</i> Duckers (1873) ...	70, 94, 100
— <i>v.</i> Pearse (1896) ...	42	Crossley <i>v.</i> Clay (1848) ...	447, 456
— <i>v.</i> Pegg (1855) ...	593	— <i>v.</i> Lowestoft Water & Gas Co., <i>Re</i> Collyer, Bristow & Co. (1901) ...	426
— <i>v.</i> Shuttleworth (1856) ...	...	Crow <i>v.</i> Ramsey (1670) ...	127, 135
— <i>v.</i> Woolfitt (1857) ...	59	— Pledge & Waterhouse, <i>Re</i> (1895) ...	513
Cooth <i>v.</i> Jackson (1801) ...	430, 431	Crowfoot <i>v.</i> London Dock Co. (1834) ...	478
Cope <i>v.</i> Cope (1885) ...	338, 372	Crowhurst <i>v.</i> Amersham Burial Board (1878) ...	65
Coppin (Copping) <i>v.</i> Hurnard (Harriard, Hernault, Hernall) (1669) ...	414	Crown S.S. Co. <i>v.</i> Admiralty Comrs. (1917) ...	458
Corbett (Corbet) <i>v.</i> Packington 1827) ...	252	Cruikshank <i>v.</i> Floating Swimming Baths Co. ...	631
Corn Trade Assocn. & Couvela & Volkart, <i>Re</i> (1888) ...	550	Crump <i>v.</i> Adney (1833) ...	330
Cornell <i>v.</i> Haws (1666) ...	62	Cudliff <i>v.</i> Walters (1839) ...	413
Corner <i>v.</i> Champneys (1814) ...	215	Cuerton, <i>Ex p.</i> (1826) ...	561
Cornish <i>v.</i> New (1675) ...	70	Cuffly <i>v.</i> Pindar (1616) ...	62
Cornu <i>v.</i> Blackburne (1781) ...	156	Cullen <i>v.</i> Trimble (1872) ...	302
Cornwall <i>v.</i> Haws (1666) ...	62	Culling <i>v.</i> Tufnal (1694) ...	50
Cosmopolite, The (1801) ...	180	Cumberland <i>v.</i> Bowes (1854) ...	26
Cotterill <i>v.</i> Hobby (1825) ...	78, 79	— <i>v.</i> Glamis (Lady) (1854) ...	26
Coultherd <i>v.</i> Puncheon (1822) ...	266	Cumberland's (Countess) Case (1610) ...	62, 77, 79, 86
County Theatres & Hotels, Ltd. <i>v.</i> Knowles ...	376	Cummings <i>v.</i> Heard (1869) ...	542
Coupe Co. <i>v.</i> Maddick (1891) ...	256	Cummins <i>v.</i> Birkett (1858) ...	621, 627
Courtauld <i>v.</i> Legh (1869) ...	461	Cundall & Vavasour, <i>Re</i> (1906) ...	48
Courteen's Case (1618) ...	129	Curtis <i>v.</i> Hannay (1800) ...	268, 269
Courtenay <i>v.</i> Fisher (1826) ...	69	— <i>v.</i> Mills (1833) ...	240
Courthope <i>v.</i> Mapplesden (1804) ...	110	— <i>v.</i> Potts (1814) ...	412
Couston, Thomson & Co. <i>v.</i> Chapman (1872) ...	270		
Coutinho, Caro & Co., <i>Re</i> (1918) ...	174, 175		
Cowel <i>v.</i> Waller (1732) ...	415		
Cowell <i>v.</i> Amman (Aberdare) Colliery Co., Ltd. (1865) ...	590		
— <i>v.</i> Betteley (1834) ...	349		
— <i>v.</i> Mumford (1886) ...	250		
— <i>v.</i> Snow (1834) ...	349		
Cowley (Earl) <i>v.</i> Wellesley (1866) ...	80, 85		
Cox <i>v.</i> Burbidge (1863) ...	233, 243		
— <i>v.</i> Dugdale (1823) ...	38		
— <i>v.</i> Great Eastern Ry. Co. (1869) ...	277, 299, 300		
— <i>v.</i> Kerslake (1867) ...	345, 480, 490, 554		
— <i>v.</i> Walker (1835) ...	272		
— & Hopgood, <i>Re</i> (1858) ...	407		
Craik, <i>Re</i> (1839) ...	580		
Cramp <i>v.</i> Symons (1822) ...	526		
Crampton & Holt <i>v.</i> Ridley & Co. (1887) ...	427		

## D.

DAGGET (Doe d.) <i>v.</i> Snowden (1775) ...	6, 7
Daglish <i>v.</i> Barton (1900) ...	633
Daie <i>v.</i> Wood (1582) ...	584
Daimler Co., Ltd. <i>v.</i> Continental Tyre & Rubber Co. (Gt. Britain), Ltd. (1916) ...	145, 146
Dalby <i>v.</i> Cheslyn (1836) ...	411
— <i>v.</i> — (1840) ...	411
— <i>v.</i> Hirst (1819) ...	31
Dale <i>v.</i> Mottram (1733) ...	493
Dalling <i>v.</i> Matchett (1740) ...	464, 578
D'Alteyrac, <i>Ex p.</i> , Parfitt <i>v.</i> Chambre (1872) ...	535
Danes <i>v.</i> Monsay (1735) ...	412
Daniel <i>v.</i> Janes (1877) ...	217, 294
Danous, The (1802) ...	163, 164
Danvillier <i>v.</i> Myers (1881) ...	630
Darbey <i>v.</i> Whitaker (1857) ...	385, 386
Darcy (Lord) <i>v.</i> Askwith (1618) ...	17, 78
Dare <i>v.</i> Hopkins (1788) ...	104

## TABLE OF CASES.

xlvii

	PAGE		PAGE
Dare Valley Ry., Co., <i>Re</i> (1868) ..	525, 560	Delver v. Barnes (1807) ...	526
— <i>Re</i> (1869) ..	635	Delves v. Fry (1826) ...	522
— v. Rhys (1869) ...	635	Den of Airlie S.S. Co., Ltd. v. Mitsui & Co., Ltd. & British Oil & Cake Mills, Ltd. (1912) ...	378, 379, 393
Dargan v. Davies (1877) ...	288	Dench v. Bampton (1799) ...	67
Darlington Wagon Co., Ltd. v. Harding & Trouville Pier & Steamboat Co., Ltd. (1891) ...	631	Dendy v. Durling (1850) ...	264
Darnley (Earl) v. London, Chatham & Dover Ry. Co. (1867) ...	383, 416	Denn d. Joddrell v. Johnson (1808) ...	68
Darwin, <i>Re</i> (1831) ...	578, 583	— d. Willan v. Walker (1800) ...	8
Dashwood v. Magniac (1891) ...	11, 17, 18, 61, 62, 63, 80, 81, 90, 101, 105	Denovan v. Maschall (Marshall, Mascall) (1670) ...	414
Daubigny v. Davallon (1794) ...	121, 130, 154, 155, 162	Denton v. Denton (1844) ...	91
Daubuz v. Morshead (1815) ...	148	— v. Richmond (1833) ...	19
— v. Rickman (1835) ...	600	— v. Strong (1874) ...	420
Daunt v. Lazard (1858) ...	361, 362	Derby (Earl) & Fergusson's Contract, <i>Re</i> (1912) ...	42
Dauvillier v. Myers (1881) ...	630	De Ricci v. De Ricci (1891) ...	346, 347
Davenport v. Davenport (1849) ...	111	De Rosaz v. Anglo-Italian Bank, Ltd. (1869) ...	407
— (Doe d.) v. Rhodes (1843) ...	7	Derrier v. Arnaud (1695) ...	162
— v. Vickery (1861) ...	564	Derry, <i>Ex p.</i> , R. v. Board of Trade (1917) ...	148
Davidson v. Hill (1901) ...	131	De Tastet v. Taylor (1812) ...	183
— (1848) ...	441	Deutsche Springstoff Act. v. Briscoe (1889) ...	363
Davidsson v. Hill (1901) ...	131	Devonshire (Duke) v. Lodge (1827) ...	209
Davies v. England & Curtis (1864) ...	297	Dew v. Harris (1847) ...	402, 403
— v. Mann (1842) ...	598	De Wahl v. Braune (1856) ...	147
— (Doe d.) v. Morgan (1838) ...	208	De Wall's (Count) Case (1848) ...	136, 190
— v. Powell (1738) ...	531, 569	Dewclas v. Kendal (1610) ...	74, 96
— v. Pratt (1855) ...	451	Dewell v. Sanders (1618) ...	216
— v. Price (1864) ...	84	Diana, The (1803) ...	192
— v. Wescomb (1828) ...	37, 38	— (1811) ...	186
Davis v. Connop (1814) ...	58	Dibben v. Anglesey (Marquess) (1834) ...	67, 508
— v. Eyton (1830) ...	546	Dicas v. Jay (1828) ...	542
— v. Getty (1823) ...	109	— v. — (1830) ...	521, 536
— v. Girder (1846) ...	598	Dick v. Milligan (1792) ...	521, 536
— v. Leo (1802) ...	571	— v. — (1794) ...	75
— v. Mann (1842) ...	208	— v. Norton (1916) ...	354
— (Doe d.) v. Morgan (1838) ...	334, 377	Dickens v. Spence (1908) ...	569
— v. Potter (1852) ...	419, 581	Dickenson v. Allsop (1845) ...	452
— v. Powell (1738) ...	418	— v. Rooke (1852) ...	88
— v. Rea (1680) ...	68	Dickin v. Hamer (1860) ...	101
— v. Starr (1889) ...	320, 321	Dickins v. Hampstead (1729) ...	496, 582, 607
— v. Tankerville (Lord) (1843) ...	347	— v. Jarvis (1826) ...	496, 582, 607
— v. Vass (1812) ...	361	Dickinson v. Follet (1833) ...	266
Davison v. Gauntlett (1841) ...	192	Dickson v. Great Northern Ry. Co. (1886) ...	280
Dawbridge v. Cocks (1594) ...	546	— v. Oliphant (1846) ...	577
Dawdy, <i>Re</i> (1885) ...	503	— v. Zizinia (1851) ...	262
Dawlish, The (1910) ...	108	Dieckmann, <i>Re</i> (1918) ...	150
Dawson v. Fitzgerald (1876) ...	609	Dierden's Arbitration, <i>Re</i> (1864) ...	313
— v. Meuli (1918) ...	111	Digby v. West Ham Local Board of Health (1858) ...	250
— v. Sadler (1823) ...	616, 617	Dike & Dunston's Case (1586) ...	65
Day v. Bonnin (1836) ...	50	Dilley (Dilly) v. Polhill (1732) ...	573
— v. Merry (1810) ...	255	Dillon v. Fraine (1595) ...	136
— v. Norris (1841) ...	256	Dimmock v. Allenby (1810) ...	227
Dayrell v. Champness (1700) ...	215, 216	— v. Randall (1889) ...	622, 623
Deacon v. Dolby (1882) ...	69	Dinham v. Bradford (1869) ...	385
Dean v. Allalley (1709) ...	139	Dinn v. Blake (1875) ...	525
— v. Branthwaite (1803) ...	129	Dippins v. Anglesea (Marquis) (1834) ...	461
— v. Keate (1811) ...	130, 190	Direction Der Disconto, Gesellschaft v. Brandt (A. H.) & Co. (1915) ...	148, 149
Deane v. Clayton (1817) ...	292	Distington Hematite Iron Co., Ltd. v. Possehl & Co. (1916) ...	175
Dearden v. Evans (1839) ...	598	Dixie v. Alexandre (1850) ...	425, 427
De Barthes' Case, Reading Election Case (1838) ...	185	Dobson v. Groves (1844) ...	438, 446, 448
De Carriere v. De Calonne (1799) ...	124, 127	Dockwray & Beal's Case (1614) ...	76, 95
De Conway's (Countess) Case (1834) ...	561, 566	Dod v. Herring, <i>Ex p.</i> Herring (1829) ...	326
Dee v. Yorke (1914) ...	163	— v. —, <i>Ex p.</i> — (1830) ...	326
Deere v. Kirkhouse (1850) ...	101, 102	Dodd v. Platt (1859) ...	556
Defflis v. Parry (1802) ...	414	Dodington v. Hudson (1823) ...	443, 444
De Geer v. Stone (1882) ...	145	— & Bailward, <i>Re</i> (1839) ...	414, 419
Delagoa Bay Ry. Co. & Tancred, <i>Re</i> (1889) ...	561, 566	Dodsley v. Dodsley (1822) ...	469
De la Motte's Case (1781) ...	7	Doe d. Wilton v. — (1788) ...	123
Delapole v. Delapole (1810) ...	20, 21	— Thomas v. Acklam (1824) ...	568, 570
Dellovan v. Maschall (Marshall, Mascall) (1670) ...	414	— Thomson v. Amey (1840) ...	
De Luneville v. Phillips (1806) ...	145	— v. Amey (1841) ...	



	PAGE		PAGE
Doe d. Rodd v. Archer (1811)...	8	Drew v. Drew & Leburn (1855)	392, 446, 449
— Rigge v. Bell (1793) ...	6	— v. Josolyne (1888) ...	609
— Hall v. Benson (1821)...	12	— v. Woolcock (1854) ...	570
— Wetherell v. Bird (1833) ...	99	Drewe v. E. (1412) ...	261
— Winnall v. Broad (1841) ...	15	Dreyfus & Sons & Paul, <i>Re</i> (1893)	393, 432
— Turnbull v. Brown (1826) ...	553	Drummond v. Decker (1724) ...	133
— Allen v. Calvert (1802) ...	7	Drummond's Case (1834) ...	123
— Mains v. Cannell (Cannew) (1853)	565	Drury v. Molins (1801) ...	13
— Maynes v. Cannell (Cannew) (1853)...	565	Dryden v. Robinson (1826)	540
— Mayo v. Cannell (Cannew) (1853) ...	565	Du Bouchet (Marquis) v. Claims on France	
— Mays v. Cannell (Cannew) (1853) ...	565	Comrs. (1834)	135, 136, 190
— Body v. Cox (1846) ...	481, 514	Duckworth v. Harrison (1838)	511
— Oxenden v. Cropper (1839) ...	531	— v. — (1839)	511
— Jones v. Crouch (1810) ...	99	Dudgeon v. Thomson (1854) ..	
— Hughes & Corbett v. Derry (1840) ...	9	Duell v. Sanders (1618) ...	216
— Stimpson v. Emmerson (1847) ...	527	Duhammel (Administrator of Tailleue) v.	
— Lloyd v. Evans (1827) ...	312	Pickering (1817) ...	165
— Hopkinson v. Ferrand (1851) ...	20	Du Hourmelin v. Sheldon (1839) ...	136
— Starling v. Hillen (1843) ...	518	Duncan v. Carleton (1895) ...	246
— Banks v. Holmes (1848) ...	565	— v. Knill (1907)	
— Braggs v. Holmes (1848) ...	565	— v. Pope (1899)	285, 289
— Madkins v. Horner (1838) ...	490, 506	— v. Toms (1887)	291
— Waters v. Houghton (1827) ...	6	Dunhill v. Moore (1867) ...	601
— Heapy v. Howard (1809) ...	6, 7	Dunkirk Colliery Co. v. Lever (1878)	618
— Williams v. Howell (1850) ...	580	— v. Lever (1879)	618
— Kindersley v. Hughes (1840)...	7	Dunlop v. Waugh (1792)	267
— Williams v. Humphreys (1802) ...	9	Dunlop Pneumatic Tyre Co., Ltd. v. New	
— Antrobus v. Jepson (1832) ...	24	Garage & Motor Co., Ltd. (1913) ...	634
— Duroure v. Jones (1791) ...	121, 135	Dunn v. Murray (1829) ...	537
— Madkins & Long v. Law (1838)	490, 506	— v. Warlters (1842) ...	503, 555
— Spicer v. Lea (1809) ...	6	— v. West (1850) ...	612
— Douglas v. Lock (1835) ...	71, 95, 97	Dunnett v. Howard (1853) ...	512
— Plumer v. Mainby (1847) ...	6	Dunstan v. Norton (1866) ...	416
— Davies v. Morgan (1838) ...	598	Duplessis v. A.-G. (1753) ...	136
— Carlisle (Lord) v. Morpeth (Bailiff,		Durham & Sunderland Ry. Co. v. Walker	
etc.) (1811) ...	552, 553	(1842)...	98
— Auchmuty v. Mulcaster (1826)	127, 128	Durham County Permanent Benefit Building	
— Blewitt v. Phillips (1841) ...	95	Society, <i>Re, Ex p.</i> Wilson (1871)	318
— Jones v. Powell (1839) ...	420, 431	Durham's (Bp.) Case (1307) ...	71
— Haxby v. Preston (1846) ...	560	Duroure (Doe d.) v. Jones (1791) ..	121, 135
— Rogers v. Price (1849)...	99	Dutton v. Cole (1844) ...	264
— Davenport v. Rhodes (1843)...	7	Duxbury v. Isherwood (1864) ..	329, 620
— Williams v. Richardson (1819)	496, 497	Dyer v. Dawson (1822) ...	574
— Miller v. Rogers (1844) ...	136, 137	— v. Dyer (1865) ...	71, 103
— Morris v. Rosser (1802) ...	539	Dyke v. Cannell (1883)...	632
— Fisher v. Saunders (1832) ...	383	Dynamit Act. v. Rio Tinto Co. (1918)	176, 323
— Swinton v. Sinclair (1836) ...	612		
— Dagget v. Snowden (1775) ...	6, 7		
— Strickland v. Spence (1805) ...	7		
— Moody v. Squire (1842) ...	535, 570		
— Clarke v. Stillwell (1838) ...	581		
— Stone v. Stone (1837) ...	506		
— Bradford v. Watkins (1806) ...	7		
— Armstrong v. Wilkinson (1840) ...	8		
— Foley v. Wilson (1809) ...	69		
Doherty v. Allman (Allen) (1878) ...	113		
Doleman & Sons v. Ossett Corpn. (1912)	353, 541		
Doley v. Pitstow (1755) ...	415		
Donavan v. Maschall (Marshall, Mascall)			
(1670)...	414		
Donegani v. Donegani (1835) ...	122		
Donkin & Leeds, etc. Canal Co. of Proprietors,			
<i>Re</i> (1893) ...	392, 393		
Donlan v. Brett (1834)...	497		
Doran v. Wiltshire (1792) ...	84		
Dorrington v. Edwards (1621) ...	262		
Dossett v. Gingell (1841) ...	427, 428		
Douglas (Doe d.) v. Lock (1835) ...	71, 95, 97		
Dowglas v. Kendal (1610) ...	74, 96		
Downshire (Marquis) v. Sandys (Lady) (1801)	106,		
	107, 108		
Dowse v. Coxe (1825) ...	395		
Doyley v. Burton (1700) ...	468, 483, 484, 499, 567		
Drake v. Brown (1835) ...	626		
Dree Gebroeders, The (1802)...	145, 164		
Dresser v. Finnis (1855) ...	492		
— v. Stansfield (1845) ...	574		

# TABLE OF CASES.

xlix

	PAGE
Edwards v. Aberayron Mutual Ship Insurance Society, Ltd. (1876)	354, 356, 357
— v. Davies (1854)	421
— v. Great Western Ry. Co. (1851)	473
— v. — (1852)	598
— v. Heather (1724)	70, 74
— v. Pearson (1890)	263
— v. Smyth, <i>Re</i> Smyth (1918)	82
Effurth v. Smith (1814)	186
Elders & Fyffes, Ltd. v. Hamburg Amerikanische Packetfahrt Act. (1917)	176
— v. Hamburg-Columbien Bananen Act. (1917)	176
Elleman v. Williams (1844)	607
Elletson v. Cummins (Comyns) (1740)	342
Elliman v. Williams (1844)	607
Elliot v. Johnson (1866)	35
— & South Devon Ry. Co., <i>Re</i> (1848)	549
Elliott v. Chevall (1699)	415
— v. Johnson (1866)	30, 35
— v. Longden (1901)	247
— v. Osborn (1891)	284, 289
— v. Royal Exchange Assurance Co. (1867)	357, 358
— & South Devon Ry. Co., <i>Re</i> (1848)	549
Ellis v. Banyard (1911)	234
— v. Chinnoek (1835)	272
— v. Desilva (1881)	601
— v. Giles (1836)	579
— v. Hopper (1858)	318
— v. Loftus Iron Co. (1874)	227
— Lever & Co. v. Dunkirk Colliery Co. (1880)	618
Ellison v. Ackroyd (1850)	424, 599
— v. Bray (1864)	492
Ellitson v. Cummins (Comyns) (1740)	342
Elphick v. Barnes (1880)	258
Elson v. Rolfe (1805)	502
Elton v. Brogden (1815)	265
Elvin v. Drummond (1827)	316
Elwes v. Maw (1802)	49
Ely (Dean & Chapter) v. Steward (1740)	40
Emanuel, The (1799)	163
Emerson v. Amell (Annison, Emerson) (1672)	57
Emery v. Emery (1599)	491
— v. Wase (1801)	437
— v. — (1803)	437
Emet v. Ogden (1831)	—
Emmerson v. Heelis (1809)	53
Emmett v. Ogden (1831)	558
— & Co. v. Heyes (1887)	590, 591
Empey v. King (1844)	542
Empson v. Soden (1833)	50, 78
Endraught, The (1798)	143
England v. Davison (1841)	507
— v. Shearburn (1884)	33
Enoch & Zaretsky, Bock & Co., <i>Re</i> (1910)	434
Erazquin & Meek, <i>Re</i> (1851)	435
Erpe v. Smith (1838)	18
Erazquin & Meek, <i>Re</i> (1851)	435
Erskine v. Adeane, Bennett's Claim (1873)	11, 66
— v. Wallace (1863)	565
Ertel Bieber & Co. v. Rio Tinto Co. (1918)	176, 323
Esposito v. Bowden (1857)	163, 168
Eumaeus, The (1915)	142, 173
European & American S.S. Co., Ltd. v. Crosskey (1860)	392, 405
European Assurance Society Arbitration, <i>Re</i> , British Commercial Insurance Co. v. British Nation Life Assurance Assn.	—
European Society Arbitration Acts, <i>Re</i> , <i>Ex p.</i> British Nation Life Assurance Assn. Liquidators (1878)	355
Eustace v. Sargeant (1866)	297, 298

	PAGE
Evans v. Davies (Davis) (1835)	384
— v. Evans (1810)	75, 79
— v. George & Rowe (1825)	62
— v. Ogilvie (1828)	—
— v. Prosser (1865)	570
— v. Rees (1839)	544
— v. Richardson (1817)	163
— v. Roberts (1826)	55
— v. Rowe & George (1825)	62
— v. Saunders (1887)	625
— v. Senor (1814)	625
— v. Thomson (Thompson) (1804)	422
— & Howell, <i>Re</i> (1842)	—
— Davies & Caddick, <i>Re</i> (1870)	320, 407
Evelyn's (Lady) Case (undated)	81, 82
Everard v. Paterson (1816)	467
Everest v. Ritchie (1862)	477
Everett v. Grapes (1861)	250
Everitt v. Davies (1878)	286
Evershed v. Evershed (1882)	346
Everth v. Tunno (1817)	188
Everwike (Duke) v. Everwike (Duchess) (1431)	—
Evington v. Brimston (1593)	228
Ewart v. Graham (1859)	205
Eyre v. Good (1669)	545
— v. Palsgrave (1811)	182
— & Leicester Corpn., <i>Re</i> (1892)	408

## F.

FAGAN v. Harrison (1849)	327, 328
Fairlie v. Parker (1828)	608
Fairmaner v. Budd (1831)	264
Falkingham v. Victorian Railways Comr. (1900)	451, 471
Falkland Islands Co. v. R. (1864)	209, 210
Falmouth (Earl) v. Thomas (1832)	32, 52, 53
Farquharson v. Morgan (1894)	47, 48
Farrant v. Lovel (1750)	73
— v. Olmius (1820)	19
Farrar v. Cooper (1890)	378
Farrer v. Bates (1647)	541
Faviell (Farrill) v. Eastern Counties Ry. Co. (1848)	338, 392
— v. Gaskoin (1852)	29
Fawlknor v. Faulknor (1681)	70
Fayle v. Bourdillon (1811)	185
Fearon & Flinn, <i>Re</i> (1869)	588, 605
Feise v. Bell (1811)	185
— v. Newnham (1812)	184
— v. Waters (1810)	185
Feize v. Thompson (1808)	180
Fenn v. Forbes (1853)	444
Fennell v. Ridler (1826)	258, 259
Fenner & Lord, <i>Re</i> (1897)	560
Fennings v. Grenville (Lord) (1808)	211
Fenton v. Dimes (1840)	495
— v. Pearson (1812)	181
Ferguson v. Norman (1837)	457
Fergusson v. Davison (1882)	590
— v. Norman (1837)	457
Fermier v. Maund (1638)	17
Fernley v. Branson (1851)	428
Feron v. Ladd (1779)	162
Ferrand v. Wilson (1845)	87, 88, 92
Ferrer & Rollason v. Oven (1827)	313, 573
Fetherstone v. Cooper (1803)	438, 439, 447
Feversham (Lord) v. Emerson (1855)	543
Fial v. Varier (1613)	414
Field v. Brown (1859)	103
Fielden v. Tattersall (1863)	25
Fielder v. Starkin (1788)	268
Figg v. Wilkinson (1853)	274
Filburn v. People's Palace & Aquarium Co., Ltd. (1890)	238
Filmer v. Delber (1811)	328, 329
Filow's Case (1521)	204

## TABLE OF CASES.

	PAGE		PAGE
Fines v. Spencer (1572) ...	206	Furly v. Newnham (1780) ...	157
Finlayson v. M'Leod (1818) ...	587	Furnis v. Hallow (1749) ...	486, 488, 513, 606
Firth v. Bowling Iron Co. (1878) ...	218	Furser v. Prowd (1617) ...	493, 575
— v. Howlett (1850) ...	454	Furtado v. Rogers (1802) ...	
— v. Midland Ry. Co. (1875) ...	385, 411	Fyall v. Varier (1613) ...	414
— v. Robinson (1823) ...	586		
Fish v. Klein (1817) ...	190		
Fisher v. Forbes (1734) ...	59		
— v. Pimbley (1809) ...	341, 476		
— v. Pyne (1840) ...	633		
(Doe d.) v. Saunders (1832) ...	383		
Fitch v. Weber (1847) ...	124, 137, 138, 191		
Fitton's Estate, Re, Hardy v. Fitton (1893) ...	618		
Fitzgerald, Ex p. (1897) ...	248, 249		
— v. Firbank (1897) ...	207		
— v. Graves (1814) ...	425		
Fitzhardinge (Lord) v. Pritchett (1867) ...	63		
— v. Purcell (1908) ...	208, 209		
Fitzsimmons v. Mostyn (Lord) (1904) ...	599		
Flag-Lane Chapel, Re, Sunderland (Owners) v. Sunderland Corpn. (1859) ...	453		
Flamenco, The (1915) ...	142		
Fleeming v. Orr (1855) ...	224, 242		
Fleming v. Carlisle (Bp.) (undated) ...	82		
— v. Snook (1842) ...	20		
Fletcher v. Rylands (1866) ...	223, 228, 237		
Flindt v. Crockatt (1814) ...	180, 184		
— v. Scott (1814) ...	180, 184		
— v. Waters (1812) ...	162		
Flower v. Watts (1910) ...	283		
Flynn v. Robertson (1869) ...	525, 526		
Foley (Doe d.) v. Wilson (1809) ...	69		
Ford v. Jones (1832) ...	405		
— v. Tynte (1861) ...	208		
— v. Wiley (1889) ...	107, 316 288, 289		
Ford's Hotel Co., Ltd. v. Bartlett (1896) ...	376		
Forman, Ex p., R. v. Knockaloe Camp (Com- mandant) (1917) ...	198		
Forrest, Re, Burrowes v. Forrest, Forrest v. Burrowes (1881) ...	571		
— v. Todd (1897) ...	632		
Forshaw v. De Wette (1871) ...	592		
Forster v. Brunetti (1696) ...	579		
— v. Peacock (1581) ...	62		
Forwood & Co. v. Watney (1880) ...	346		
Foster v. Spooner (1583) ...	98		
— & Dicksee v. Hastings Corpn. (1903) ...	336		
Fourdrin v. Gowdey (1834) ...	136, 188, 189		
Fowler v. Johnstone (1892) ...	78		
— v. Lock (1874) ...	257		
Fox v. Railway Passengers' Assurance Co. (1885) ...	366		
Francis v. Maas (1878) ...	115		
Francke & Rasche, Re (1918) ...	150, 151		
Frankenberg & Security Co., Re (1894) ...	393, 401		
Fraser v. Ehrensperger (1883) ...	389		
— v. Fraser (1905) ...	633		
Freame v. Pinniger (1774) ...	556		
Frean v. Sargent (1863) ...	590		
Frederick, The (1813) ...	156		
Freeland v. Walker (1812) ...	186		
Freeman v. Baspoule (1611) ...	499, 502		
— v. Bernard (1697) ...	499, 541, 542		
— & Sons v. Chester Rural District Council (1911) ...	367, 370		
Frere & Staveley Taylor & Co. & North Shore Mill Co., Ltd., Re (1905) ...	459		
Freyberger, Ex p., R. v. Middlesex Regiment (30th Battalion Commanding Officer) (1917) ...	192		
Fried Krupp Act., Re, [1916] 2 Ch. 194 ...	152, 153		
Fried Krupp Akt., Re (1916), 32 T. L. R. 695 ...	152		
Fronde & Batt's Case (1589) ...	576		
Frowde v. Frowde (1591) ...	532		
Fryer v. Sturt (1855) ...	598, 609		
Fuller v. Fenwick (1846) ...	22, 527		
— v. Spackman (1587) ...	472		





	PAGE		PAGE
<i>Halden v. Glasscock</i> (1826) ...	582	<i>Harris v. Reynolds</i> (1845) ...	352
<i>Hale v. Phillips</i> (1832) ...	384	— <i>v. Smith</i> (1879) ...	303
<i>Hales v. Stevenson</i> (1863) ...	349	— <i>v. Thomas</i> (1836) ...	587
— <i>v. Taylor</i> (1726) ...	576	— <i>Brothers v. Smyth</i> (1888) ...	474
<i>Halestrap v. Gregory</i> (1895) ...	253	<i>Harrison v. Creswick</i> (1853) ...	504, 568
<i>Halfhide v. Fenning</i> (Jenning) (1788) ...	351	— <i>v. Greenwood</i> (1845) ...	325, 384
<i>Hall v. Alderson</i> (1825) ...	531	— <i>v. Harrison, Re Harrison's Trusts</i>	
— (Doe d.) <i>v. Benson</i> (1821) ...	12	(1884) ...	61, 63, 87
— <i>v. Brand</i> (1883) ...	432	— <i>v. Lay</i> (1863) ...	478
— <i>v. Hardy</i> (1733) ...	583	— <i>v. London, Brighton &amp; South Coast</i>	
— <i>v. Lawrence</i> (1792) ...	455	Ry. Co. (1862) ...	279, 280, 281
— <i>v. Phillips</i> (1832) ...	384	— <i>v. Oliver</i> (1739) ...	578
— <i>v. Rouse</i> (1838) ...	384	— <i>v. Wright</i> (1845) ...	317
— <i>v. Skeet</i> (1839) ...	576	<i>Harrison's Trusts, Re, Harrison v. Harrison</i>	
— & <i>Hinds, Re</i> (1841) ...	524	(1884) ...	61, 63, 87
<i>Hallen v. Runder</i> (1834) ...	60	<i>Harrow School (Governors) v. Alderton</i>	
<i>Hallett v. Hallett</i> (1839) ...	418	(1800) ...	17
<i>Halliday v. Morgan</i> (1858) ...	266	<i>Harrowby (Earl) v. Leicester Corpn.</i> (1915) ...	336
<i>Hallifax v. Chambers</i> (1839) ...	16	<i>Hart v. Duke</i> (1862) ...	391
<i>Halliwell v. Phillips</i> (1858) ...	81, 107	— <i>v. Hart</i> (1881) ...	354
<i>Halsey v. Lowenfeld</i> (1916) ...	157, 177	— <i>v. Herwig</i> (1873) ...	132
— <i>v. Windham</i> (1882) ...	368	<i>Hart Dyke, Ex p., Re Morrish</i> (1882) ...	10, 30, 31
<i>Hambly v. Trott</i> (1776) ...	113	<i>Hartley v. Burkitt</i> (1838) ...	15, 16
<i>Hamilton v. Bankin</i> (1850) ...	430, 448, 449	— <i>v. Harriman</i> (1818) ...	242, 246
— <i>v. Master</i> (1857) ...	622	— <i>v. Pendarves</i> (1901) ...	103, 104
— <i>Merchants' Marine Insurance</i>		<i>Hartnell v. Hill</i> (1801) ...	497, 588, 589
Co. (1889) ...	620, 621	<i>Harvey v. Grabham</i> (1836) ...	25, 26
— (Duke) & <i>Cambridge's (Earl) Case</i>		— <i>v. Shelton</i> (1844) ...	447
(1649) ...	127	<i>Hastings (Lord), Ex p., Re Wilson</i> (1893) ...	30, 461
— & Co. <i>v. Mackie &amp; Sons</i> (1839) ...	331	— <i>Ex p., Rubb v. Yelverton</i> (1870) ...	110
<i>Hamlyn v. Betteley</i> (1880) ...	326	<i>Hattersley v. Hatton</i> (1862) ...	362
— & Co. <i>v. Talisker Distillery</i> (1894) ...	335	<i>Hawes v. Cornwall</i> (1666) ...	62
<i>Hammack v. White</i> (1862) ...	230	<i>Hawke v. Brear</i> (1885) ...	601
<i>Hammond v. Colls</i> (1845) ...	21	<i>Hawker v. Wood</i> (1853) ...	322
— <i>v. Hammond</i> (1854) ...	529	<i>Hawkins v. Benton</i> (1844) ...	570
— <i>v. Kirkby</i> (1867) ...	479, 480	— <i>v. ———</i> (1846) ...	327
— & <i>Waterton, Re</i> (1890) ...	321	— <i>v. Colclough</i> (1757) ...	496, 532
<i>Hampton v. Boyer</i> (1597) ...	467	— <i>v. Rigby</i> (1860) ...	609
— <i>v. Hodges</i> (1803) ...	73	— <i>v. Walrond</i> (1876) ...	55
<i>Hancock v. Reid (Reede)</i> (1851) ...	345, 346, 517	<i>Hawksworth v. Brammall</i> (1840) ...	417, 502, 584
— <i>v. Southall</i> (1824) ...	290	<i>Hawkyard v. Greenwood</i> (1845) ...	477
<i>Hands v. Burton</i> (1808) ...	273	— <i>v. Stocks</i> (1845) ...	477
<i>Hannam v. Mockett</i> (1824) ...	209	<i>Hawley &amp; North Staffs. Ry. Co., Re</i> (1848) ...	453, 454
<i>Hannan v. Jube</i> (1846) ...	469, 626	<i>Haxby (Doe d.) v. Preston</i> (1846) ...	560
<i>Hansby v. Evans</i> (1839) ...	383	<i>Hay, Ex p., Re Application for Mandamus</i>	
<i>Hansloh &amp; Reinhold, Pinner &amp; Co., Re</i> (1895) ...	456	<i>Haycocks, Ltd. v. Mulholland</i> (1904) ...	591, 594, 633
<i>Hanson v. Boothman</i> (1810) ...	576	<i>Haydock v. Beard</i> (1838) ...	527
<i>Hanway v. Boulton</i> (1830) ...	213, 214	<i>Hayes v. Allen</i> (1583) ...	225
<i>Harcourt v. Ramsbottom</i> (1820) ...		— <i>v. Hayes</i> (1636) ...	328
— <i>v. White</i> (1860) ...	114	<i>Hayling v. Okey</i> (1853) ...	56
<i>Hardey v. Dartnell</i> (1849) ...	324	<i>Hayllar v. Ellis</i> (1829) ...	503
<i>Harding, Ex p., Re Pickering</i> (1854) ...	520	<i>Hayman v. Hewitt</i> (1798) ...	230, 231
— <i>v. Forshaw</i> (1836) ...	477, 501	<i>Hayward v. Moss</i> (1885) ...	587, 588
— <i>v. Harrison</i> (1827) ...	341, 469	— <i>v. Mutual Reserve Assocn.</i> (1891) ...	630
— <i>v. Pitcroft</i> (1730) ...	523	— <i>v. Phillips</i> (1837) ...	516, 552, 557, 559
— <i>v. Watts</i> (1812) ...	415	— <i>Brothers, Ltd. v. Daniel &amp; Son</i>	
— <i>v. Wickham</i> (1861) ...	394, 546	<i>Haywood v. Marsh</i> (1847) ...	435, 497
<i>Hardy v. Dartnell</i> (1849) ...	324	<i>Head v. Tattersall</i> (1871) ...	270, 271
— <i>v. Fitton, Re Fitton's Estate</i> (1893) ...	618	<i>Heap v. Burnley Union Sanitary Authority</i>	
— <i>v. Ringrose</i> (1835) ...	528	<i>Heapy (Doe d.) v. Howard</i> (1809) ...	6, 7
<i>Hare v. Fleay</i> (1851) ...	570, 571, 580	<i>Heath's Garage, Ltd. v. Hodges</i> (1916) ...	234, 235
— <i>Milne &amp; Haswell, Re</i> (1839) ...	396, 437	<i>Heathcote v. Wing (Wynn)</i> (1855) ...	571, 572
<i>Harland v. Newcastle-on-Tyne Corpn.</i> (1869) ...	594	<i>Heatherington v. Robinson</i> (1839) ...	465
<i>Harlow v. Read</i> (1845) ...	470	<i>Hegelberg (W.) Akt., Re</i> (1916) ...	150
— <i>v. Winstanley</i> (1850) ...	316	<i>Hellaby v. Brown</i> (1857) ...	509, 529
<i>Harman v. Kingston</i> (1811) ...	139, 162	<i>Hellyer &amp; Snook, Re</i> (1818) ...	553
<i>Harmony, The</i> (1800) ...	140, 144	<i>Heming v. Swinnerton</i> (1846) ...	546
<i>Harper, Ex p.</i> (1874) ...	316	<i>Hemming v. Parker</i> (1866) ...	443
— <i>v. Abrahams</i> (1819) ...	411	<i>Hemsoth (Wilhelm), Ltd., Re, Ex p. Ville S.S.</i>	
— <i>v. Aplin</i> (1886) ...	73	Ltd. (1915) ...	152
— <i>v. Marcks</i> (1894) ...	288	<i>Hemsworth v. Brian</i> (1844) ...	558
— & <i>Great Eastern Ry. Co., Re</i> (1875) ...	316, 514	— <i>v. ———</i> (1845) ...	397, 580, 603
<i>Harries v. Thomas</i> (1836) ...	587	<i>Henderson (Roe d.) v. Charnock</i> (1790) ...	9
<i>Harris v. Mantle</i> (1789) ...	14	— <i>v. Williamson</i> (1718) ...	471
— <i>v. Midland Ry. Co.</i> (1876) ...	279, 281		
— <i>v. Mitchell</i> (1704) ...	404		



## TABLE OF CASES.

lii

	PAGE		PAGE
Hendrick, The (1810) ...	182	Hindley v. Wilkinson (1834) ...	224
Henfree v. Bromley (1805) ...	530	Hindustan S.S. Co. v. Birkenhead JJ. & Pocock (1897) ...	300
Henkle v. Royal Exchange Assurance Co.		Hinsley v. Wilkinson (1834) ...	224
Henley v. Orphan Working School Trustees (1858)...	627	Hinton v. Mead (1855) ...	465, 554
Henning v. Parker (1866) ...	443	Hippesley v. Spencer (1820) ...	72, 73
Henry v. Staniforth (1815) ...	181	Hirsch v. Im Thurn (Thurm) (1858)...	369, 372
Henshaw & Falk, <i>Re</i> (1865) ...	327	Hobbs v. Ferrars (1840) ...	397
Hentig v. Ralling (1840) ...	450	Hobdell v. Miller (1840) ...	482, 483, 511
Henty v. Rally (1840)...	450	Hobson v. Stewart (1847) ...	508
Herbert v. Bulkeley (1745) ...	540	Hoch v. Boor (1880) ...	623
Herlakenden's Case (1589) ...	73, 74, 77, 80	Hocken v. Grenfell (1837) ...	561
Herman, The (1802) ...	164	Hoddesdon v. Gryssel (Gresil) (1607) ...	207
Hern v. Dryden (1710) ...	476	Hodgkinson v. Fernie (1857) ...	527, 562
Herne & Crowe's Case (1584)...	132, 133	Hodgman v. West Midland Ry. Co. (1864) ...	278
Herring, <i>Ex p.</i> , <i>Dod v. Herring</i> (1829) ...	326	— v. — (1865) ...	278
—, <i>Ex p.</i> , — v. — (1830) ...	326	Hodgson v. Brown (1856) ...	447
— v. St. Paul's (Dean & Chapter) (1819)...	71, 96	— v. Harris (Harridge, Harwich) (1669) ...	535
Hetherington v. Robinson (1839) ...	465	— v. Railway Passengers' Assurance Co. (1882) ...	365, 366
— v. Woodin (1845) ...	272	— & Brown, <i>Re</i> (1856) ...	447
Hetley v. Hetley (1789) ...	433	— & Drewry, <i>Re</i> (1838) ...	406
Hetley's Case (1788) ...	433	Hodsden v. Harris (Harridge, Harwich) (1669)...	535, 572
Hewett v. Hewett (1765) ...	93, 103	Hodson & Drewry, <i>Re</i> (1838)...	406
Hewit v. Hewit (1765)...	103	Hoe v. Taylor (1595) ...	69, 70
— v. Knowel (1844) ...	442	Hoffnung, The (1799) ...	181, 182, 187
Hewitt v. Clements (1844) ...	522, 523	Hogan v. Sharpe (1837) ...	211
— v. Hewitt (1841) ...	489	Hogarth v. Jackson (1827) ...	529, 562
— v. Isham (1851) ...	96, 98	Hogg v. Burgess (1858) ...	6
— v. Penny (1753) ...	404	— v. Norris & Berrington (1860)...	529, 562
— & Portsmouth Waterworks Co., <i>Re</i> (1862)...	440	Hogge v. Burgess (1858) ...	426, 427
Hewlett v. Laycock (1827) ...	449, 452	Hoggins v. Gordon (1842) ...	
Heydon v. Smith (1610) ...	69, 70	Hohenzollern Act für Locomotivban & City of London Contract Corp'n., <i>Re</i> (1886) ...	346
Heyl Brothers, Ltd., <i>Re</i> (1918) ...	151	Holcroft v. Manby (1844) ...	329, 568
Heynes v. Brown (1853) ...	12	Holder v. Coates (1827) ...	64
Heyworth v. Hutchinson (1867) ...	473	Holdesden v. Gryssel (Gresil) (1607)...	207
Hick, <i>Re</i> (1819) ...	418, 446	Holdgate v. Killick (1861) ...	560
Hickman v. Kent or Romney Marsh Sheep-Breeders' Assocn. (1915) ...	315	Holdgate v. Killick (1861) ...	36, 37
Hicks v. Richardson (1797) ...	611, 612	Holding v. Pigott (1831) ...	610, 611
Hide v. Cooth (1689) ...	500	Holdsworth v. Wilson (late Barsham) (1863) ...	87, 88
— v. Petit (1670) ...	388, 500, 501	Hole v. Thomas (1802) ...	619
— v. Whistler (1619) ...	94, 95	Holford v. Lawrence (1695) ...	225, 226
Higgen & Willis, <i>Re</i> (1828) ...	577	Holgate v. Bleazard (1917) ...	560
Higginbotham v. Hawkins (1872) ...	113, 114	— v. Killick (1861) ...	578
— v. Searle (1909) ...	581	Holland v. Brooks (1795) ...	509, 630
— v. Street (1856) ...	487, 577	— v. Judd (1858) ...	607
— v. Willes (1828) ...	572	— v. Vincent (1853) ...	459
Higginson v. Nesbitt (1797) ...	410	— S.S. Co. & Bristol Steam Navigation Co., <i>Re</i> (1906) ...	62
Higham & Jessop, <i>Re</i> (1841) ...	611	Holliday v. Lee (1598) ...	266
Highgate Archway Co. v. Nash (1819) ...	146	— v. Morgan (1858) ...	461
Hilckes, <i>Re, Ex p.</i> Muhesa Rubber Plantations, Ltd. (1917) ...	287	— & Wakefield Corp'n., <i>Re</i> (1888) ...	584
Hill, <i>Ex p.</i> (1827) ...	574	Hollis v. Young (1909) ...	559
— v. Ball (1828) ...	296	Holloway v. Francis (1861) ...	232, 233
— v. Balls (1857) ...	93	— & Monk, <i>Re</i> (1838) ...	48
— v. Buckley (1811) ...	605	Holmes v. Higgins (1822) ...	153
— v. Fisher (1843) ...	463	— v. Mather (1875) ...	173
— v. Langley (1670) ...	325	— & Formby, <i>Re</i> (1895) ...	173
— v. Levey (1858) ...	567	Holt v. A. E. G. Electric Co., Ltd. (1918) ...	61, 79, 84, 87, 89, 104
— v. Lindsay (1857) ...	278	— (William A.), Ltd., <i>Ex p.</i> , R. v. Bolton JJ. (1916) ...	16, 76
— v. London & North Western Ry. Co. (1880) ...	414	— R. v. Walmsley (1916) ...	286
— v. Marshall (1827) ...	116	Honywood v. Honywood (1874) ...	155, 178, 179
— v. Phoenix Veterinary Supplies, Ltd. (1911) ...	532	Hood (Viscount) v. Kendall (1855) ...	211
— v. Slocombe (1841) ...	339	Hooker v. Gray (1907) ...	478
— v. Thorn (1678) ...	572	Hoop, The (1799) ...	348, 349
— v. Townsend (1810) ...	139	Hooper v. Clark (1867) ...	339
Hill's Trusts, <i>Re</i> (1874) ...	14	— v. Hooper (1825) ...	
Hills v. Rowland (1853) ...	439	— v. Hooper (1861) ...	
Hilton v. Hill (1863) ...	419	— v. Pierce (1697) ...	
— v. Hopwood (1814) ...	258	— & Co. v. Balfour, Williamson & Co. (1890)...	576
Hinchcliffe v. Barwick (1880)...	27	Hopcraft v. Fernor (1823) ...	
Hindle v. Pollitt (1840) ...			

			PAGE
Hopcraft v. Hickman (1824) ...	...	...	436, 488
Hope v. Hope (1854) ...	...	...	124
Hopkins v. Crowe (1836) ...	...	...	290
----- v. Davies (1835) ...	...	...	486, 487
----- v. Tanqueray (1854) ...	...	...	260
Hopkinson (Doe d.) v. Ferrand (1851) ...	...	...	20
Hopper, <i>Re</i> (1867) ...	...	320, 404, 405,	456
Horridge v. Willoughby (1852) ...	...	...	275
Hort v. Newry (Lord) (1823) ...	...	...	266
Horton v. Benson (1875) ...	...	...	324
----- v. Sayer (1859) ...	...	...	350, 351
Hosdell v. Harris (Harridge, Harwich) (1669) ...	...	...	535
Hoskins v. Featherstone (1789) ...	...	...	72
Houghton, <i>Re</i> (1828) ...	...	...	581
----- v. Bankart (1861)...	...	...	626
Houriet v. Morris (1812) ...	...	...	165
Howard v. Kaye (1826) ...	...	...	398
----- (Lord) v. Ridler (1621) ...	...	...	17
Howell v. Coupland (1876) ...	...	...	55, 56
Howett v. Clements (1844) ...	...	...	522, 523
Howlett v. Haswell (1814) ...	...	...	268
Huddersfield Corpn. & Jacomb, <i>Re</i> (1874) ...	...	...	557
Hudson v. Bray (1917)...	...	...	114
----- v. Roberts (1851) ...	...	...	241 244
Huggins, <i>Ex p.</i> , <i>Re</i> Woodward (1886) ...	...	...	255
----- v. Ward (1873) ...	...	...	302
Hughes v. Richman (1774) ...	...	...	20
----- v. Thomas (1811) ...	...	...	84, 113
----- & Corbett (Doe d.) v. Derry (1840)...	...	...	9
----- & Emett, <i>Re</i> (1825) ...	...	...	557
Hull & Meux (Lady), <i>Re</i> (1905) ...	...	...	45
Hullman v. Scott (1815) ...	...	...	183
----- v. Whitmore (1815)...	...	...	183
Humphery & Humphery, <i>Re</i> (1917) ...	...	...	620
Humphrey v. Pearce (1852) ...	...	...	507 509
Humphreys v. Harrison (1820) ...	...	...	73
----- v. Pearce (1852) ...	...	...	507, 509
Humphries' Case (1824) ...	...	...	579, 580
Hunt v. Hunt (1836) ...	...	...	484, 507
Hunter v. Miller (1863) ...	...	...	34, 35
----- v. Nockolds (1846) ...	...	...	73
----- v. Rice (1812) ...	...	...	545
Huntig v. Ralling (1840) ...	...	...	527
Huntley, <i>Re</i> (1853) ...	...	...	445
Hurlbatt v. Barnett & Co. (1893) ...	...	...	623
Hurst, <i>Re</i> (1835) ...	...	...	451
----- v. Hurst (1849) ...	...	...	99
Hussey v. Hussey (1820) ...	...	...	88, 102
Hutcheson v. Eaton (1884) ...	...	...	474
Hutchins v. Hutchins (1738) ...	...	...	548
Hutchinson v. Blackwell (1832) ...	...	...	477
----- v. Hayward (1866) ...	...	...	550
----- v. Shepperton (Shepperson) (1849) ...	...	...	528, 529
Huth v. Clarke (1890) ...	...	...	301
Hutton v. Warren (1836) ...	...	...	31, 32
Hyatt v. Griffiths (1851) ...	...	...	34
Hyde v. Beardsley (1886) ...	...	...	594
----- v. Hill (1582) ...	...	...	123
----- v. Warden (1877) ...	...	...	18
Hypatia, The (1917) ...	...	...	142

I.

ILLIDGE <i>v.</i> Goodwin (1831)	...	...	...	231
Imhof <i>v.</i> Sutton (1867)	...	...	...	622
Imperial Gas Light & Coke Co. <i>v.</i> Broadbent (1859)...	...	...	...	534
Imperial Royal Chartered Azienda Assicuratrice of Trieste <i>v.</i> Funder (1872)	...	...	...	529, 550
Indian Chief, The (1801)	...	...	...	164, 168
Ingham <i>v.</i> Agnew (1812)	...	...	...	180
———— <i>v.</i> Frenton (1893)	...	...	...	46
Ingle (W. L.), Ltd. <i>v.</i> Mannheim Insurance Co. (1915)	...	...	...	140, 172, 173, 174
Ingram <i>v.</i> Milnes (1807)	...	...	...	476, 502

	PAGE
Ingram <i>v.</i> Rouche (1479)	
<i>v.</i> Webb (1623)	513, 514, 532
Ingrave <i>v.</i> Web (1623)	513, 514, 532
Insull <i>v.</i> Moojen (1857)	... .. 630
Ionian Ships, The (1855)	... .. 164
Ireland <i>v.</i> Higgins (1588)	... .. 204
Irvine <i>v.</i> Elnon (1806)...	... .. 530
Isaacson <i>v.</i> Durant, <i>Re</i> Stepney Election Petition (1886)	... .. 121
Isitt <i>v.</i> Railway Passengers' Assurance Co. (1889)...	... .. 460
Ismay, Imrie & Co. <i>v.</i> Blake (1892) ..	300
Ive <i>v.</i> Sams (Sammes) (1597)...	.. 94
Ive's Case (1597)	... .. 94
Ives <i>v.</i> Medcalfe (1737)	... .. 440
—— <i>v.</i> Sams (Sanimes) (1597)	.. 94
—— & Barker <i>v.</i> Willans (1894)	370, 374, 376

J.

JACK v. Bell (1892)	...	...	368
Jackson v. Barry Ry. Co. (1893)	.	379,	380
————— v. Cator (1800)	...	...	75
————— v. Clarke (1824)	...	477,	580
(1825)		477,	497, 574
— v. Cummins (1839)	.	...	254
— v. Jackson (1853)	.	...	385
v. Smithson (1846)	.	...	243
— v. Yabsley (1822)			496
& Co., Ltd. v. Henderson, Craig Co., Ltd. (1916)			349
Jacob v. Gaviller (1902)	...	...	222
Jacobs, <i>Ex p.</i> , <i>Re</i> Radeke (1915)		...	160
v. Seward (1872)	...	...	57
Jaffé v. Keel (1916)		125,	190
Jager v. Tolme & Runge & London Produce Clearing House (1915)	...	...	360
———— v. Tolme & Runge & London Produce Clearing House (1916)	...	...	360
James, <i>Re</i> , <i>Ex p.</i> Swansea Mercantile Bank, Ltd. (1907)	...	...	255
———— v. Attwood (1839)	...	...	390
———— v. Crane (1846)	...	...	395
———— v. Hales (1692)	...	...	86
———— v. James & Bendall (1889)	...	...	392
———— & Sons, <i>Re</i> (1903)	...	...	425, 426
Jamieson & Binns & Dean, <i>Re</i> (1836)		405,	406
Janson v. Brown (1807)	...	...	214
———— v. Driefontein Consolidated Mines, Ltd. (1902)	...	128, 144, 145, 166,	179
Jay v. Byles (1833)	...	...	469
Jebb v. McKiernan (1829)	...	...	531
Jefferson v. Durham (Bp.) (1797)	...	71,	114
———— v. Jefferson (1683)	...	...	70
Jefferys v. Boosey (1854)	...	131, 133,	134
Jeffryes v. Evans (1865)	..		76
Jenkins v. Betham (1855)	..	...	429
———— v. Turner (1696)	..	243, 244,	246
———— & Leggo, <i>Re</i> (1841)	..	454,	455
Jenney v. Brook (1844)	..	97,	98
Jennings v. Rundall (1799)	..	...	256
———— v. Vandeputt (1632)	.	...	414
Jephson v. Howkins (1841)	..	...	460
v. Riera (1835)	.	...	128
Jessop v. Huddersfield Industrial Society (1899)...	... ..	403, 634,	635
Jesus College v. Bloom (1745)	...	...	78
Jewell v. Christie (1867)	...	...	504
Joddrell (Denn d.) v. Johnson (1808)		...	68
Johann Christoph, The (1854)	...	...	141
Johanna Emilie, The (1854)	...	143, 144,	147
Johannes, The (1860)	...	...	129
Johnson, <i>Re</i> , Roberts v. A.-G. (1903)		...	127
———— v. Colam (1875)	...	...	288
———— v. Durant (1831)	...	...	527
———— v. Goldswaine (1796)	...	18,	24
———— v. Hopper (1858)	...	...	

## TABLE OF CASES.

lv

	PAGE		PAGE
Johnson v. Latham (1850)	436, 492	Kendal v. Symonds (1855) ... ..	487, 519
(1851)	... 436	Kendall v. London & South Western Ry. Co.	
v. Needham (1909) ..	... 292	(1872) ... ..	276
v. Warren (1730) ... ..	... 339	Kendil v. Merrett (1856) ... ..	572, 625
v. Wilson (1740) ... ..	... 487	Kendrick v. Davies (1837) ... ..	514, 587, 589, 605
& Collie (Colley), <i>Re</i> (1854)	... 420	Kenisham & Reding's (Redding's) Case (1591)	96
Johnston v. Cheape (1817)	442, 471	Kennard v. Harris (1824) ... ..	553
Johnstone v. Symons (1847) ...	... 11	Kennedy, Ltd. v. Barrow-in-Furness Corpn.	
Joliff v. Bendell (1824) ...	265, 266	(1909) ... ..	322
Jones v. Beaumont (1858) ...	... 621	Kennet v. Hornor (1581) ... ..	584
—— v. Bennett (1713) ...	553, 554	Kenrick v. Phillips (1841) ... ..	516
—— v. Bright (1829) ...	... 262	Kensam & Reding's (Redding's) Case (1591)	96
—— v. Corry (Corrie) (1839)	341, 523	Kensington v. Inglis (1807) ... ..	166, 182
—— v. Cowley (1825) ...	... 274	Kenson v. Reading (1591) ... ..	96
—— (Doe d.) v. Crouch (1810)	... 99	Kent v. Elstob (1802) ... ..	522
—— v. Flint (1839) ...	55, 252	—— (Earl) v. Walters (1699) ... ..	67
—— v. Green (1829) ...	... 21	—— County Council & Sandgate Local	
—— v. Ives (1850) ...	... 611	Board, <i>Re</i> (1895) ... ..	457, 458, 635
—— v. Jones (1860) ...	... 590	Kenworthy v. Queen Insurance Co. (1892) ...	336
—— v. Lee (1911) ...	... 234	—— & Queen Insurance Co., <i>Re</i> (1893)	549
—— v. Owen (1871) ...	... 233	—— & Roberts, <i>Re</i> (1856) ... ..	512, 513, 532
—— v. Perry (1796) ...	... 244	Kenyon v. Grayson (1804) ... ..	579
—— v. Powell (1838) ...	553, 604	Kerr v. Jeston (Geeston) (1841) ... ..	568
—— (Doe d.) v. Powell (1839)	420, 431	—— v. Jeston (1842) ... ..	410
—— v. Victoria Graving Dock Co. (1877) ...	461, 462, 631	Kerslake v. Cox (1867) ... ..	345, 480, 490, 554
—— v. Wedgewood (1881) ...	... 571	Kettle v. Grove (1742) ... ..	572
—— v. Williams (1839) ...	... 568	Kiddell v. Burnard (1842) ... ..	265
—— (James) & Sons, Ltd. v. Tankerville		Kilburn v. Kilburn (1845) ... ..	510
(Earl) (1909) ...	93, 100, 101	Kill v. Hollister (1746) ... ..	350
Jonge Arend, The (1803) ...	187	Kindersley (Doe d.) v. Hughes (1840) ...	7
—— Johannes, The (1802) ...	182	King v. Boston (1794) ... ..	269
—— Klassina, The (1804) ...	183	—— v. Bowen (1841) ... ..	471
—— Pieter, The (1801) ...	168	—— v. Braine (1596) ... ..	267
Jordan v. Norton (1838) ...	259	—— v. Dundonald (Earl) (1837) ... ..	489
Jordin v. Crump (1841) ...	216	—— v. Eversfield (1897) ... ..	42
Josephine, The (1810) ...	182	—— v. Hammerton (1729) ... ..	502
Jowett v. Neath Rural District Council (1916)	322	—— v. Joseph (1814) ... ..	387
Joyner v. Weeks (1891) ...	633	—— v. Phoenix Assurance Co. (1910) ...	359
Judge v. Cox (1816) ...	244	—— v. Rose (1673) ... ..	214, 225
Judgment Debtor, A, <i>Re</i> , <i>Re</i> Bankruptcy		—— v. Smith (1843) ... ..	73
Notice (1907) ...	567	—— & Duveen, <i>Re</i> (1913) ... ..	528
Juffrow Catharina, The (1804) ...	178, 185	Kingham v. Lee (1846) ... ..	80
Jungheim, Hopkins & Co. v. Foukelmann		Kingsbury v. Collins & Elmes (1827) ...	60
(1909) ...	401	Kingston v. Phelps (1794) ... ..	326
Juno, The (1799) ...	188	Kingwell v. Elliott (1839) ... ..	439, 448
Jupp v. Grayson (1834) ...	603	Kinnior v. Davies (1637) ... ..	242
Jurcidini v. National British & Irish Millers		Kirby v. Great Western Ry. Co. (1868) ...	279
Insurance Co., Ltd. (1915) ..	333	—— v. Sadgrove (1797) ... ..	69
		—— & Eccles Case (1589) ... ..	254
K.		Kirby's Trust, <i>Re</i> (1852) ... ..	614
KAHNWEILER v. Dobson (1863) ...	621, 622	Kirchner & Co. v. Gruban (1909) ... ..	364
Kaiser, Wilhelm II., The (1915) ...	157	Kirk v. East & West India Dock Co. (1887) ...	391
Karberg (Arnold) & Co. v. Blythe, Green,		—— v. Unwin (1851) ... ..	417, 605
Jourdain & Co. (1915) ...	461	—— & Randall v. East & West India Dock	
Karberg (Arnold) & Co. v. Blythe, Green,		Co. (1886) ... ..	479
Jourdain & Co. (1916) ...	181, 182, 461	Kirkby v. Coles (1589) ... ..	254
Kastner & Co., <i>Re</i> , Auto-Piano Co. v. Kastner		Kirkleatham Local Board & Stockton &	
& Co. (1917) ...	150	Middlesborough Water Board, <i>Re</i> (1893) ...	462
Kaye v. Banks (1770) ...	110	Kitchen v. Turnbull (1871) ... ..	365
Keane's Award, <i>Re</i> (1847) ...	470	Kitchin, <i>Re</i> , <i>Ex p.</i> Young (1881) ... ..	539
Keble v. Hickeringhall (1706) ...	208	Kite v. Lowe (1849) ... ..	273
Keck v. Halstead (1699) ...	213	Kittley's Case (1584) ... ..	212
Kedwell & Flint & Co., <i>Re</i> (1911) ...	43	Kitts v. Moore (1895) ... ..	378
Keeble v. Hickeringhall (1706) ...	208	Murray, Wiles & Son, Ltd. & Cater	
Keen v. Batshore (1794) ..	544, 545	& Co., Ltd., <i>Re</i> (1917) ... ..	406
—— v. Godwin (1728) ...	339	Klingender v. Bond (1811) ... ..	180
Keighley, Maxsted & Co. & Durant & Co., <i>Re</i>		Knapp v. Harvey (1911) ... ..	247
(1893) ...	186	—— v. Salsbury (1810) ... ..	232
Keir v. Andrade (1816) .	324	Knige v. Fines (1661) ... ..	493
—— v. Leeman (1846) .	81, 90, 91	Knight v. Benett (1826) ... ..	37
Kekewich v. Marker (1851) .	600	—— v. Burton (1704) ... ..	490, 496
Kelcey v. Stupples (1862) .	166	—— v. Coales (1887) ... ..	623
Kellner v. Le Mesurier (1803) .	59, 60	v. Duplessis (1751) ... ..	92, 134, 136
Kelly v. Webber (1860) .		v. Mosely (1753) ... ..	72
Kemp v. Rose (1858) ...		& Tabernacle Permanent Building	
		Society, <i>Re</i> (1892) ... ..	459



	PAGE		PAGE
Knott v. Long (1735) ... ..	606	Lee v. Alston (1783) ... ..	80
Knowle v. Harvey (1616) ... ..	72	(1789) ... ..	80, 86
Knowles v. Holden (1855) ... ..	627	— v. Elkins (1701) ... ..	340, 499, 500, 514
— v. Nunns (1866) ... ..	296	— v. Hemingway (1834) ... ..	319
— & Sons, Ltd. v. Bolton Corpn. (1900)	420	— v. Lingard (1801) ... ..	519, 571
Knox v. Simmonds (Symmonds) (1791)	410, 433	— v. Page (1861) ... ..	...
Koenigs, <i>In the Estate of</i> (1914) ... ..	158	— v. Riley (1865) ... ..	226, 228
Kopelowitz v. McLaughlan (1916) ... ..	125, 197	— & Hemingway, <i>Re</i> (1834) ... ..	319
Koppers Coke Oven & Bye-Product Co., <i>Re</i> (1914) ... ..	149	Leeds (Duke) v. Amherst (Earl) (1846)	113
Korten v. West Sussex County Council (1903)	115	— v. ——— (1850) ... ..	113
Kreglinger v. Samuel (S.) & Rosenfeld (1915)	140,	— v. Burrows (1810) ... ..	26, 320
141, 155, 156, 157, 158, 159, 160		Leeming & Fearnley, <i>Re</i> (1833) ... ..	509
— & Co. v. Cohen (Trading as Samuel & Rosenfeld) (1915) ... ..	176	Lees v. Hartley (1840)... ..	471
Krevett v. Pool (1596) ... ..	58	— v. Laforest (1851) ... ..	...
Kupfer v. Kupfer (1915) ... ..	154	Leevin v. Cormac (1811) ... ..	186
Kyle v. Jewers (1914) ... ..	116	Legge v. Legge (1863) ... ..	79, 83, 84, 85, 86, 87, 106
— & Gregson, <i>Re</i> (1838) ... ..	439	Leggett v. Finlay (1829) ... ..	418
Kynaston v. Liddell (1823) ... ..	511	Leggo v. Young (1855) ... ..	524, 586
		— v. ——— (1856) ... ..	524
		Legh v. Heald (1830) ... ..	95
		— v. Hewitt (1803)... ..	11, 16
		— v. Lillie (1860) ... ..	25
		Leicester v. Grazebrook (1879) ... ..	566
		Leifield v. Tysdale (1614) ... ..	68
		Leigh, <i>Re</i> , Rowcliffe v. Leigh (1876).	623
		— v. Brooks (1877) ... ..	622
		— v. Leigh (1690) ... ..	83
		— v. Lillie (1860) ... ..	25
		Lemmon v. Webb (1894) ... ..	64
		London v. Keen (1916) ... ..	47
		Lepage v. San Paulo Copper Estates, Ltd. (1917)... ..	154
		Leslie v. Richardson (1848) ... ..	420
		Leucade, The (1855), 2 Ecc. & Ad. 212	164
		— (1855), 2 Ecc. & Ad. 228	164
		Levey v. Hill (1858) ... ..	325
		Lewin v. Holbrook (1843) ... ..	396, 431
		Lewis v. Branthwaite (1831) ... ..	67
		— v. Fermor (1887) ... ..	289
		— v. Jones (1884) ... ..	...
		— v. Peake (Peat) (1816) ... ..	265, 271
		— v. Rossiter (1875) ... ..	339, 514, 515, 611
		— v. Walker (1891) ... ..	...
		- v. Winter (1837) ... ..	...
		Lewknor & Ford's Case (1586) ... ..	75
		Liddard v. Kain (Cain) (1824) ... ..	269
		Liebenrood v. Vines (1815) ... ..	12, 31
		Liebmann, <i>Ex p.</i> , <i>R. v.</i> Vine Street Police Station Superintendent (1916) ... ..	141, 142, 157
		Lievesley v. Gilmore (1866) ... ..	314
		Lilford's Case (1614) ... ..	74, 88, 94, 95
		Lindley v. Paget (1848) ... ..	323
		Lindsay v. Direct London & Portsmouth Ry. Co. (1850) ... ..	483
		Line v. Royal Society for Prevention of Cruelty to Animals (1902)... ..	290
		— v. Taylor (1862) ... ..	245
		Linegar v. Pearce (1854) ... ..	600
		Ling & Dühr, <i>Re</i> (1918) ... ..	152
		Lingood v. Croucher (1742) ... ..	429, 430
		— v. Eade (1742) ... ..	438, 488, 491, 541, 606
		Linnegan v. Pearce (1854) ... ..	600
		Lipton, Ltd. v. Ford (1917) ... ..	57, 58
		Lister v. Eastwood (1855) ... ..	534
		— v. Hone (Home) (1639) ... ..	206
		Little v. Newton (1840) ... ..	606
		— v. Newton (1841) ... ..	434, 435, 464
		— v. Philpotts (1862) ... ..	612, 613
		Livingstone (Livingston) v. Ralli (1855)	323, 381
		Llandrindod Wells Water Co. v. Hawksley (1904)... ..	428
		Llanelly Railway & Dock Co. v. London & North Western Ry. Co. (1873) ... ..	337, 338
		Llanelly Railway & Dock Co. v. London & North Western Ry. Co. (1875) ... ..	337, 338
		Llewellyn, <i>Re</i> , Llewellyn v. Williams (1887)	85, 105

	PAGE
LACY v. Whetston (1594) .. ..	491
Laing & Todd, <i>Re</i> (1853) .. ..	475, 568, 569, 604
Laird v. Dobell (1906)... ..	115, 116
Lambe v. Jones (1860) ... ..	570
Lambert v. Hutchinson (1841) ... ..	420
Lancaster v. Hemington (1835) ... ..	528
— & Macnamara, <i>Re</i> (1918) ... ..	42
— & Topping, <i>Re</i> (1846) ... ..	405
Land v. North (Lord) (1785) ... ..	147
Landauer v. Asser (1905) ... ..	522
Lane v. Moeder (1885)... ..	31
— v. Newton (1837) ... ..	433
Lang v. Brown (1855) ... ..	417, 418
— & Todd, <i>Re</i> (1853) ... ..	475
Langman v. Holmes (1775) ... ..	579
Langridge v. Campbell (1877) ... ..	600
Lansdowne (Marquis) v. Lansdowne (Mar- chioness Dowager) (1815) ... ..	107
Lanza v. Weiner (1917) ... ..	588
Lapierre v. M'Intosh (1839) ... ..	138
Lapthorne v. — (1616) ... ..	61
Larchin v. Ellis (1863)... ..	444
Larkin v. Lloyd (1891) ... ..	617
Lascelles v. Butt (1876) ... ..	623
Lashbrooke v. Saunders (1599) ... ..	98
Lashmer v. Avery (1606) ... ..	...
Latham v. Atwood (1638) ... ..	58
Lathom (Latham) v. Spillers & Bakers, Ltd. (1913)... ..	...
Laugher v. Laugher (1831) ... ..	580
Launton's Case (1578)... ..	58, 59
Law v. Blackburnurrow (1853) ... ..	477, 497
— v. Garrett (1878)... ..	363
— v. Lawley (1717) ... ..	108
Lawrence v. Aberdeen (1821) ... ..	221
— v. Bristol & North Somerset Ry. Co. (1867) ... ..	506, 507
— v. Hodgson (1826) ... ..	416, 485
— v. ——— (1827) ... ..	416, 485
— v. Jenkins (1873) ... ..	218
— & Hill, <i>Re</i> (1846) ... ..	437
Lawson v. Wallasey Local Board (1883)	351, 352
Lawson's Case (1633) ... ..	467
Lawton v. Lawton (1743) ... ..	59
— v. Rodgers (1844) ... ..	442
Lax v. Darlington Corpn. (1879) ... ..	219
Layfield v. Cowper (1694) ... ..	62
Layman v. Gowan (1841) ... ..	559
Leader, Plunkett & Leader v. Direction der Discontogesellschaft (1914) ... ..	159, 160
Leathley v. MacAndrew & Co. (1876) ... ..	372
Le Bret v. Papillon (1804) ... ..	161
Le Cheminant v. Allnutt (1812) ... ..	187
— v. Pearson (1812) ... ..	187

## TABLE OF CASES.

lvii

	PAGE		PAGE
Lloyd (Doe d.) v. Evans (1827) ... ..	312	Lupart v. Welson (1708) . . . . .	347
— v. Harris (1849) ... ..	579	Lury v. Pearson (1857) . . . . .	368
— v. Lewis (1876) ... ..	571	Lushford v. Sanders (1599) . . . . .	98
— v. Mansell (1850) ... ..	315	Lushington v. Boldero (1815)	92
— v. Mansell (1853) ... ..	328		108
& Spittle, Re (1849) ... 470, 475, 476, 569,	570, 589		109
— & Tooth, Re (1899) ... ..	48		109
— (Edward), Ltd. v. Sturgeon Falls Pulp		Luttrel v. Wood (1599)	68
Co., Ltd. (1901) ... ..	452	Lutzow, The (1918) ... ..	144
Lobitos Oilfields, Ltd. v. Admiralty Comrs.		Lybbe v. Hart (1885) ... ..	
(1917)... ..	458	Lygon v. Beauchamp (Earl) (1832) ...	102
Lock v. Army, Navy & General Assurance		Lynch v. Nurdin (1841) ... ..	231
Assocn., Ltd. (1915)... ..	371	— & Templeman v. Clemence	328, 476
v. Vulliamy (1833) ... ..	485	Lyng v. Sutton (1836) ... ..	557
Lockett v. Withey (1908) ... ..	248	Lyon v. Johnson (1889) ... ..	366
Lockwood v. Smith (1862) ... ..	529	— v. Wilkinson (1823) ... ..	110
Lodg (Lodge) v. Weeden (1647) ... ..	297	Lyons Corpn. v. East India Co. (1837)	122
Lodge v. Porthouse (1774) ... ..	578	Lyster v. Hone (Home) (1639) ... ..	206
London (Bp.) v. N. (1522) ... ..	94, 97		
London v. Southwell Collegiate Church			
(Chapter) (1618) ... ..	95		
London & Blackwall Ry. Co. v. Cross (1886)	377,		
	378		
London & Lancashire Fire Insurance Co.			
v. British American Assocn. (1885) ...	620		
London & Northern Estates Co. v. Schlesinger			
(1916)... ..	177		
London & Provincial Electric Theatres, Ltd.,			
Ex p., R. v. London County Council (1915)	148		
London & Provincial Laundry Co., Ltd. v.			
Ballard (1888) ... ..	273		
London, Brighton & South Coast Ry. Co. v.			
Walton (1866) ... ..	231		
London Corpn. v. Wolff (1916) ... ..	174		
London County & Westminster Bank v.			
Bechstein (1914), 58 Sol. Jo. 863 ... ..	153		
London County & Westminster Bank v.			
Bechstein (1914), 58 Sol. Jo. 864 ... ..	153		
London Dock Co. v. Shadwell Parish (1862)..	457, 565		
London Road Car Co. v. Harrison (1900) ...	292		
Long v. Preston (1828)... ..	271		
Longman v. East (1877) ... 613, 614, 615, 620			
Lonsdale (Lord) v. Littledale (1794)... ..	545, 546		
— (Earl) v. Nelson (1823) ... ..	64		
— v. Rigg (1856) ... ..	209, 211		
— v. Whinnay (1834) ... ..	577		
Lord v. Hawkins (1857) ... ..	566		
— v. Lee (1868) ... ..	421		
— v. Lord (1855) ... ..	404		
— & Co. of Copper Miners in England, Re			
(1854)... ..	406, 407		
Louth v. Enderby (1824) ... ..			
Lovat (Lord) v. Leeds (Duchess) (1862) ...	103		
Love v. Honeybourne (1824) ... ..	487		
— v. Pares (1810) ... ..	98, 99		
Lovejoy, Ex p., R. v. Hopkins (1911) ... ..	283		
Low v. Routledge (1865) ... ..	129		
— v. ——— (1868) ... ..	129		
— v. Ward (1868) ... ..	134		
Lowe v. Allen (1843) ... ..	497, 498, 560		
— v. Holme (1883) ... ..	601, 602		
Lowery v. Walker (1911) ... ..	241		
Lowes v. Kermode (1818) ... ..	542		
Lowndes v. Bettle (1864) ... ..	110		
— v. Fountain (1855) ... ..	24		
— v. Lowndes (1801) ... ..	556		
— v. Norton (1876) ... ..	80		
— v. Norton (1877) ... ..	85		
— v. Stamford & Warrington (Earl)			
(1852)... ..	360		
Lozon v. Pryse (1840) ... ..	62, 63		
Lucas d. Markham v. Wilson (1758) ... ..	315		
Ludlam v. Mousley (1851) ... ..	40		
Lumley v. Hutton (1617) ... ..	342, 343		
Lund v. Campbell (1885) ... ..	602		
— v. Hudson (1843) ... ..	510		

	PAGE		PAGE
Mandamus, <i>Re</i> Application for, <i>Ex p.</i> Hay (1886)...	...	Maunder, <i>Re</i> (1883) ...	440, 441
Manisty v. Archdale, <i>Re</i> Powers (1890) ...	10	Maunsell v. Midland Great Western (Ireland) Ry. Co. (1863) ...	378
Manley v. Bray (1847) ...	570	Mawe v. Samuel (1618) ...	339
Manly, The (1813) ...	188	Maxted, Keighley & Co. & Bryan Durant & Co., <i>Re</i> (1893) ...	563
Manning v. Warren (1665) ...	339	Maxwell v. Grunhut (1914) ...	153
Mansel v. Norton (1883) ...	29	May v. Burdett (1846) ...	237, 238
Mansell v. Burreddge & Roberts (1797) ...	328, 533	— v. Harcourt (1884) ...	421
Manser v. Heaver (1832) ...	492, 493	— v. Mills (1914) ...	338
Mansfield v. Baddeley (1876) ...	240, 241	Mayer v. Farmer (1878) ...	561, 633
— v. Partington (1824) ...	430, 450, 560	Mayfield v. Wadsley (1824) ...	54
Mansfield Union Guardians v. Wright (1882) ...	616	Maynard v. Gibson (1876) ...	208
Manwood's Case (1573) ...	76	Maynes (Doe d.) v. Cannell (Cannew) (1853) ...	565
Manzoni v. Douglas (1880) ...	230	Mayo (Doe d.) v. Cannell (Cannew) (1853) ...	565
Maplin Sands, <i>Re</i> (1894) ...	618	Mays (Doe d.) v. Cannell (Cannew) (1853) ...	565
March v. Culpepper (1627) ...	349	— v. Cannell (1854) ...	487, 497
Marder v. Cox (1774) ...	589	Mears v. Callender (1901) ...	43, 44, 51
Mardiner v. Elliot (1788) ...	68	Medcalfe v. Medcalfe (1737) ...	551
Margetson v. Wright (1831) ...	266	Meggeson v. Groves (1917) ...	24
— v. — (1832) ...	262, 266	Meister Lucius & Bruning, Ltd., <i>Re</i> (1914) ...	149
Maria v. Hall (1807) ...	156	Mellin v. Monico (1877) ...	613, 614, 615, 620
Maria Magdalena, The (1779) ...	163	Mendell (Menden) v. Tyrrell (1841) ...	577, 578
Maria Theresa, The (1813) ...	156	Mennett v. Bonham (1812) ...	184
Marker v. Kekewich (1850) ...	90	Mercedes Daimler Motor Co., Ltd. & Daimler Motoren Gesellschaft v. Maudslay Motor Co., Ltd. (1915) ...	161
— v. Marker (1851) ...	92, 93, 107, 109, 110, 112	Mercier v. Pepperell (1881) ...	555
Markes v. Marriot (Marryott) (1696) ...	339, 483, 514, 539, 540	Merrifield, Ziegler & Co. v. Liverpool Cotton Asscn., Ltd. (1911) ...	567
Markham (Lucas d.) v. Wilson (1758) ...	315	Merten's Patents, <i>Re</i> (1915) ...	140, 141, 155, 156, 157, 158, 159, 160
Marks v. Marriot (Marryott) (1696) ...	339, 483, 514, 539, 540	Mervyn v. Lyds (1553) ...	95
Markwald, <i>Ex p.</i> , <i>R. v.</i> Francis (1918) ...	189, 190	Mesnard v. Aldridge (1801) ...	270
Marlborough (Duke) v. St. John (1852) ...	114	Metcalf v. Ives (1737) ...	551
Marlor v. Ball (1900) ...	238	Metropolitan Building Act, <i>Re, Ex p.</i> McBryde (1876) ...	407
Marrach v. Ellis (1827) ...	27	Metropolitan District Ry. Co. v. Sharpe (1880) ...	611
Marrie v. Camac (1833) ...	606	Metropolitan Saloon Omnibus Co., <i>Re</i> (1860) ...	392
Marryat v. Broderick (1837) ...	465	Mette v. Mette (1859) ...	189, 191
— v. Wilson (1799) ...	191	Meux v. Cobley (1892) ...	16
Marsack v. Webber (1860), 6 H. & N. 1 ...	612	Mexborough (Earl) v. Bower (1843) ...	352
— & Webber, <i>Re</i> (1860), 2 E. & E. 637 ...	602	Meyers (Fr.) Sohn, Ltd., <i>Re</i> (1918) ...	150
Marsh, <i>Re</i> (1847) ...	435, 452, 497	Michell (Michael) v. Allestry (Alestree) (1676) ...	229, 240
— v. Bulteel (1822) ...	387	— v. Harris (1793) ...	351
— v. Wood (1829) ...	398	Michelotte v. Dillon (1798) ...	155
Marshall v. Green (1875) ...	53	Michie, <i>Ex p.</i> , <i>Re</i> Geddes (1840) ...	329
— v. Murgatroyd (1870) ...	128	Micklethwait v. Micklethwait (1857) ...	108
— v. Powell (1846) ...	55	Middlesex Election Case (Barbre's Case) (1804) ...	138
— & Dresser, <i>Re</i> (1843) ...	490	— (Solomons' Case) (1804) ...	138, 139
Marshall of the King's Bench (Case of) (1455) ...	139	Middleton v. Weeks (1607) ...	501
Martha, The (1859) ...	349	Middleton's Case (1823) ...	577
Martin v. Boulanger (1883) ...	539, 543	Midland Ry. Co. v. Freeman (1884) ...	298
— v. Burge (1836) ...	516, 557	— & Hemming, <i>Re</i> (1848) ...	512
— v. Coulman (1834) ...	38	Mildmay v. Mildmay (1792) ...	89, 101
— v. Fyfe (1883) ...	622	Miles v. Hutchings (1903) ...	216, 294
— v. Thornton (1802) ...	502, 533	— v. Sheward (1806) ...	273
Martyn v. Clue (1852) ...	15, 16	Millar's Karri & Jarrah Co. (1902) v. Weddel, Turner & Co. (1908) ...	474
— v. Knollys (1799) ...	88	Millen v. Fawen (Fawtrey, Fawdry) (1626) ...	65, 215, 224
Marum, <i>Ex p.</i> , <i>Re</i> Wilson & Wilson (1915) ...	157	— v. Hawery (1625-26) ...	65, 215, 224
Mary's Case (1612) ...	224	Miller v. De Burgh (1850) ...	493
Mason v. Haddan (1859) ...	362, 371	— v. Fawen (Fawtrey, Fawdry) (1626) ...	65, 215, 224
— v. Keeling (1699) ...	243	— v. Hawery (1625-26) ...	65, 215, 224
— v. Wallis (1829) ...	418, 419	— v. Kimbray (1867) ...	246
Mason, Ltd. v. Lovatt (1907) ...	426	— v. Pilling (1882) ...	631
Massey v. Aubry (1652) ...	488	— v. Robe (1811) ...	425, 451
— v. Goodall (1851) ...	25	— (Doe d.) v. Rogers (1844) ...	136, 137
Master v. Hamilton (1857) ...	622	— v. Shuttleworth (1849) ...	457
Masters v. Butler & Baker (1849) ...	577, 578, 583	— v. Spurrs (1833) ...	394
— v. De Croismar (Marquis) (1848) ...	135	— Gibb & Co. v. Smith & Tyrer, Ltd. (1916) ...	408
— v. Pollie (1620) ...	63, 64	Milligan v. Wedge (1840) ...	224
Matchless, The (1822) ...	129		
Mathew v. Davies (1842) ...	481		
Matlock Gas Light & Coke Co. v. Peters (1856) ...	601		
Matson v. Trower (1824) ...	455, 465, 469		
Matthew v. Ollerton (1693) ...	399		
Maule v. Maule (1816) ...	434		



## TABLE OF CASES.

lix

	PAGE		PAGE
Millis v. Turner (1848) ... ..	32	Moule v. Stawell (1812) ... ..	581
Millns v. Garratt (1906) ... ..	233	Mount v. Taylor (1868) ... ..	592
Mills v. Bayley (1863) ... ..	387	Mousley v. Ludlam (1851) ... ..	40
Mills v. Bowyers' Society (1856) ...	455, 524, 525, 560	Moyle v. Mayle (1599) ... ..	106, 206
— v. Scott (1873) ... ..	301	Mucklestone v. Griffith (1853) ...	594
Milne v. Gratrix (1806) ... ..	387, 388	Muhesa Rubber Plantations, Ltd., <i>Ex p.</i> , <i>Re</i>	
Milnes v. Gery (1807) ... ..	385	Hilckes (1917) ... ..	146
Minifie v. Railway Passengers Assurance Co.		Muir v. Hore (1877) ... ..	300
(1881) ... ..		— v. Parrott (1845) ... ..	507, 519
Minister & Co. v. Apperley (1902) ...	631	Mullett v. Mason (1866) ... ..	296, 297
Minors v. Leeford (1606) ... ..	61	Muncey v. Dennis (1856) ... ..	23
Minshal v. Minshal (1663) ... ..	80	Munday v. Bluck (Black) (1861) ...	432
Miramis v. Our Dogs Publishing Co., Ltd.		— v. Norton (1892) ... ..	633
(1901) ... ..	204	Mundy v. Bluck (Black) (1861) ...	432
Mitchell v. Harris (1701) ... ..	413	Munro v. Bognor Urban District Council	
— v. — (1793) ... ..	351	(1915) ... ..	373
— v. Staveley (1812) ... ..	505	Murdock & Cameron v. Bournemouth Corp'n.	
— & Izard & Governor of Ceylon, <i>Re</i>		(1897) ... ..	633
(1888) ... ..	390	Murphy v. Leigh (1837) ... ..	489
Mitchil v. Alestree (1676) ... ..	229, 240	— v. Manning (1877) ... ..	287
Mitten v. Faudrye (1626) ... ..	65, 215, 224	Murray v. Mann (1848) ... ..	269, 270
Moffat v. Cornelius (1878) ... ..	363, 386	— v. Sunderland Dock Co. (1858) ...	622
— v. Great Western Ry. Co. (1867) ...	276	Musgrave v. Horner (1874) ... ..	14
Mogg v. Mogg (1786) ... ..	110	Musgrove v. Chun Teeong Toy (1891) ...	193
Monmouth Election Case (1624) ... ..	139	Musselbrook v. Dunkin (1833) ... ..	467, 468
Monro v. Bognor Urban District Council		Myer, <i>Re</i> , <i>Ex p.</i> Pascal (1876) ... ..	130
(1915) ... ..	347, 373	Mylne v. Dickinson (1815) ... ..	378
Montague (Lord) v. Sheppard (1582) ...	68	Mysore West Gold Mining Co., <i>Re</i> (1889)	432, 634
Montgomery, Jones & Co. v. Liebhenthal & Co.			
(1898) ... ..	456, 458		
Moody (Doe d.) v. Squire (1842) ... ..	570		
Moor & Bedell's Case (1587) ... ..	338		
Moore v. Booth (1797) ... ..	433		
— v. Butlin (1837) ... ..			
— v. Clarke (1898) ... ..	214		
— v. Darley (1845) ... ..			
— v. Watson (1867) ... ..	590		
Morant v. Sign (1836) ... ..	113		
Mordue v. Palmer (1870) ... ..	530, 589		
Morel v. Byrne (1873) ... ..	599		
Morgan v. Abergavenny (Earl) (1849) ...	208		
— v. Ainslie (1873) ... ..	619, 620		
— v. Bolt (Boult) (1863) ... ..	405, 435		
— v. Harrison (W.), Ltd. (1907) ...	334, 335		
— v. Mather (1792) ... ..	472, 548		
— v. Miller (1839) ... ..	383		
— v. Milman (1853) ... ..	385		
— v. Morgan (1832) ... ..	549		
— v. Oswald (1812) ... ..	181, 186		
— v. Smith (1842) ... ..	605		
— v. Symonds (1837) ... ..	232		
— v. Tarte (1855) ... ..	626		
— v. Thomas (1845) ... ..	511, 512		
— v. Thorn (1845) ... ..	512		
Morley v. Carter (1898) ... ..	46		
— v. Greenhalgh (1863) ... ..	287		
— v. Newman (1824) ... ..	344		
Morphett, <i>Re</i> (1845) ... ..	340, 412, 439		
Morrice v. Baker (1616) ... ..	64		
Morris v. Bosworth (1853) ... ..	592		
— v. Lithgoe (1805) ... ..	274		
— v. Morris (1847) ... ..	108		
— v. Nugent (1836) ... ..	214		
— v. Reynolds (1703) ... ..	440		
— (Doe d.) v. Rosser (1802) ... ..	539		
— & Morris, <i>Re</i> (1856) ... ..	441, 562		
Morrish, <i>Re</i> , <i>Ex p.</i> Hart Dyke (1882) ...	10, 30, 31		
Morrison v. Sheffield Corp'n. (1917) ...	114, 115		
Morrison Tinplate Co. v. Brooker, Dore & Co.			
(1908) ... ..	361		
Morse v. Merest (1821) ... ..	386		
— v. Sury (1724) ... ..	342, 514		
— & Dixon, <i>Re</i> (1917) ... ..	43, 48, 49, 78		
Mortin v. Burge (1836) ... ..	516, 557		
Moseley v. Simpson (1873) ... ..	436, 456		
Moss v. Donohoe (1916) ... ..	170		
Motteram (Mottram) v. Jolly (1675) ...	98		

## N.

N. v. J. (1520) ... ..	76, 77, 106
Nagale, <i>Ex p.</i> , R. v. Denison (1916) ...	198
Nalder v. Batts (1843) ... ..	452, 520
Nares v. Drury (1864) ... ..	444
Nash v. Derby (Earl) (1705) ... ..	70
National Assurance & Investment Assoc'n.	
v. Best (1857) ... ..	633, 634
National Folding Box & Paper Co. v. National	
Folding Box Co., Ltd. (1894) ... ..	131
National Mercantile Bank, <i>Ex p.</i> , <i>Re</i> Phillips	
(1880) ... ..	73
Nayade, The (1802) ... ..	164, 182
Naylor, Benzon & Co., Ltd. v. Hirsch & Son	
(1917) ... ..	175
— v. Krainische In-	
dustrie Gesellschaft (1918) ... ..	176
Neale v. Clarke (1879) ... ..	591
— v. Cripps (1858) ... ..	89, 111
— v. Ledger (1812) ... ..	404, 405
— & Locke, <i>Re</i> (1847) ... ..	341
Needham & Co. v. Worcestershire County	
Council (1909) ... ..	116
Nelly, The (1800) ... ..	144
Nelson v. Bael (1739) ... ..	475
Neptune, The (1855) ... ..	167, 180
Neptunus, The (1807) ... ..	164
Netherlands South African Ry. Co., Ltd. v.	
Fisher (1901) ... ..	144
Neve v. Lyne (1596) ... ..	381
Newall v. Elliot (1863) ... ..	543
Newbold v. East Lancashire Ry. Co. (1852) ...	445
Newburgh Peerage Case (1858) ... ..	139
Newby v. Eckersley (1899) ... ..	44
Newcastle (Duke) v. Vane (undated) ... ..	86
Newcastle's (Duke) Estate, <i>Re</i> (1883) ... ..	85
Newdegate v. Newdigate (1826) ... ..	109
— v. — (1834) ... ..	82
Newgate v. Degelder (1666) ... ..	398
Newnham (Newman) v. Parbery (Parbury)	
(1841) ... ..	420
Newry (Viscount) v. Kilmorey (Earl) (1870) ...	82
— & Enniskillen Ry. Co. v. Ulster Ry.	
Co. (1856) ... ..	546, 547
Newson v. Smythies (1859) ... ..	16
Newton v. Allin (1841) ... ..	20
— v. Taylor (1874) ... ..	596

	PAGE
Newton & Hetherington, <i>Re</i> (1865)	315
Nicholas v. Chapman (1692) ...	539
——— v. Simonds (1625) ...	
Nicholls v. Hall (1873) ...	
——— v. Jones (1851) ...	521
Nichols v. Charlie (1807) ...	521, 546
——— v. Hall (1873) ...	
——— v. Roe (1834) ...	
Nicholson v. Sykes (1854) ...	511
Nickalls v. Warren (1844) ...	444, 445, 561, 562
Nickels v. Hancock (1855) ...	482, 494, 583, 584
Nissler v. Hull Corpn. (1880) ...	300, 301
Nobel Brothers Petroleum Production Co. v. Stewart & Co. (1890) ...	372
Nolan v. Copeman (1873) ...	609, 610
Norgate v. Ponder (1627) ...	551
Norman v. Great Western Ry. Co. (1915) ...	221
Norris v. Baker (1616) ...	64
——— v. Daniel (1834) ...	507, 508
North v. Smith (1861) ...	233
——— v. Williams (1848) ...	20
——— v. Wood (1914) ...	240
North & South Western Junction Ry. Co. v. Brentford Union Assessment Committee (1888) ...	460
North British Ry. Co. & Trowsdale, <i>Re</i> (1866)	559
North Eastern Ry. Co. v. Richardson & Sisson (1872) ...	275
North London Ry. Co. v. Great Northern Ry. Co. (1883) ...	377
North Metropolitan Tramways Co. v. Leyton Urban District Council (1908) ...	495
North Western Rubber Co., Ltd. & Hütten- bach & Co., <i>Re</i> (1908) ...	312, 475
Northampton Gas Light Co. v. Parnell (1855)	321, 322
Northumberland (Earl) v. Wheeler (1610) ...	68
Northumberland's (Earl) Case (1617) ...	208
Norton v. Counties Conservative Permanent Benefit Society (1895) ...	382
——— v. Mascall (1687) ...	584
Nott v. Long (1735) ...	606
Nuby v. Sabb (1601) ...	514
Nugate v. Degelder (1666) ...	398
Nugent v. Smith (1876) ...	276
Nuttall v. Manchester Corpn. (1892) ...	369
—— & Lynton & Barnstaple Ry. Co., <i>Re</i> (1899) ...	458
Nye v. Niblett (1918) ...	294

## O.

OAKFORD v. European & American Steam Shipping Co., Ltd. (1863)	...	...	...	326
Oates v. Bromell (Bromhill) (1704)	...	...	...	467
v. Moore (1847)	...	...	...	406
O'Brien v. O'Brien (1751)	...	...	...	109
Ocean, The (1804)	...	...	...	145
Ochs v. Ochs Brothers (1909)	...	...	...	376
Odel v. King (1729)	...	...	...	79
Odin, The (1799)	...	...	...	168
O'Driscoll v. Manchester Insurance Committee (1915)	...	...	...	634
Oetl, <i>In the Estate of</i> (1915)	...	...	...	158
O'Flanagan v. Geoghegan (1864)	...	...	...	432
Ogden v. Peck (1825)	...	...	...	
Oland v. Burdwick (1602)	...	...	...	59
Oland's Case (1602)	...	...	...	50
Oldacre v. Smith (1853)	...	...	...	
Oldfield v. Price (1859)	...	...	422,	529
Oliver v. Collings (1809)	...	...	...	404
—— & Scott, <i>Re</i> (1889)	...	...	...	558
Olympia Oil & Cake Co., Ltd., & MacAndrew, Moreland & Co., Ltd., <i>Re</i> (1918)	...	...	...	494
O'Mealey v. Wilson (1808)	...	...	...	145
Omychund v. Barker (1744)	...	...	...	140
Onslow v. —— (1809)	...	...	...	23

	PAGE
Onslow v. Eames (1817) ... ..	265
Openheimer v. Levy (1737) ... ..	162
Orconera Iron Ore Co., Ltd. v. Fried Krupp Akt. (1918) ... ..	175, 176
Orduna, The (1915) ... ..	142
Orient Steam Navigation Co. v. Ocean Marine Insurance Co. (1887) ... ..	609
Ormelade v. Coke (1614) ... ..	500
Ormerod v. Todmorden Joint Stock Mill Co., Ltd. (1882) ... ..	620
Ormond (Marquis) v. Kynnersley (1824) ...	584
——— v. Kynnersley (1829-30) ... 84, 113,	535
Ormonde v. Kynersley (1820) ... ..	113
O'Rourke v. Railways' Comr. (1890) ...	533, 596
Orphan Board v. Van Reenen (1829) ...	395
——— Working School Trustees v. Henley (1858)... ..	627
Osborne (Osborn) v. Chocqueel (1896) ...	245
O'Shea, <i>Ex p.</i> , R. v. Cable (1906) ... ..	291
Oswald v. Grey (Earl) (1855)... ..	38, 446, 560
O'Toole v. Pott (1857)... ..	572
Owen v. Hurd (1788) ... ..	325, 326, 620
Oxenden v. Compton (Lord) (1793) ... ..	72, 103
——— (Doe d.) v. Cropper (1839) ... ..	531
Oxenham v. Leman (1823) ... ..	348

P.

PACKER v. Newell (Lady) (1609)	...	...	17
Packington v. Packington (1745)	...	108,	109
Packington's Case (1744)	...	81,	108, 109
Padley v. Lincoln Waterworks Co. (1850)	...		430
Paget v. Vossius (1677)	...	...	136
Paget's Case (1593)	...	...	79
Pagit v. Vossius (1677)	...	...	136
Pain v. Massey (1824)	...	...	521
Paine v. Warwick (Countess) (1914)	...	208,	213
Palgrave Gold Mining Co. v. McMillan (1892)	...		485
Palmer, <i>Re</i> , Palmer v. Hardwick (1890)	...		629
———— v. Stone (1759)	...	...	297
———— & Co. & Hosken & Co., <i>Re</i> (1898)	...	456,	564
		457, 550,	564
Palmer's Case (1611)	...	61,	62, 106
Palmes v. Page (1612)	...	...	78
Palucer v. Cotton (1734)	...	...	578
Panariellos, The (1915)	...	162, 163,	178
———— (1916)	...	162, 163, 168,	178
Pappa v. Rose (1872)	...	...	429
Parbery (Parbury) v. Newnham (Newman)			
(1841)	...	...	420
Pardoe v. Pardoe (1900)	...	...	83
Parfitt v. Chambre, <i>Ex p.</i> D'Alteyrac (1872)	...		535
Park v. Fifield (1697)	...	...	97
Parker v. Great Western Ry. Co. (1850)	...		596
———— v. Parker (1595)	...	...	468
———— v. Reynolds (1906)	...	...	252
———— v. Staniland (1809)	...	...	54
———— v. Walsh (1885)	...	...	247
Parkes v. Smith (1850)	...	420,	540
Parkinson v. Lee (1802)	...	...	263
———— v. Smith (1861)	...	424,	569
Parks v. Eames (1890)	...	...	620
Parr v. Winteringham (Witherington) (1859)	...		318
Parrott v. Shellard (1868)	...	...	554
Parry v. Liverpool Malt Co. (1900)	...	...	334
Parsloe v. Baily (1704)	...	...	542
Parsons v. King (1891)	...	...	245
———— v. Parsons (1591)	...	...	532
Parteriche v. Pawlet (1736)	...	...	82
Partridge v. Pawlet (1736)	...	...	82
———— v. Pawlet (1744)	...	...	84
Pascal, <i>Ex p.</i> , <i>Re</i> Myer (1876)	...	...	130
Paschal v. Terry (1733)	...	...	453
Pascoe v. Pascoe (1837)	...	...	480
Paterson v. Clayton (1845)	...	...	442
———— v. Gross (1732)	...	...	577
Pateshall v. Tranter (1835)	...	...	268



## TABLE OF CASES.

lxi

	PAGE		PAGE
Pathow v. King (1733) ... ..	490	Phillips, <i>Ex p.</i> (1812) ... ..	
Patten v. West of England Iron, Timber & Charcoal Co. (1894) ... ..	597	———, <i>Re, Ex p.</i> National Mercantile Bank (1880) ... ..	73
Patteshall v. Tranter (1835) ... ..	268	——— v. Barlow (1844) ... ..	103
Paul, <i>Re, Ex p.</i> Portarlington (Earl) (1889) ...	46	——— v. Edwards (1843) ... ..	524
—— (Goodtitle d.) v. Paul (1760) ... ..	96	——— v. Evans (1843) ... ..	524
Paull (Paul) v. Paull (Paul) (1833) ...	469, 577, 578	——— v. Higgins (1851) ... ..	498, 509
Paxton v. Great North of England Ry. Co. (1846) ... ..	557	——— v. Knightley (1731) ... ..	485
Payne v. Bailey (1822) ... ..	608	——— v. Patterson (1907) ... ..	
—— v. Cook (undated) ... ..	500	——— v. Smith (1845) ... ..	61, 76, 80, 104, 105, 106
—— v. Deakle (1809) ... ..	417	——— v. Wood (1833) ... ..	254
—— v. Massey (1824) ... ..	521	——— & Gill, <i>Re</i> (1875) ... ..	571
—— v. Whale (1806) ... ..	270	Phipps v. Ingram (1835) ... ..	390, 442
Payner v. Hatton (1840) ... ..	582	——— v. Jackson (1887) ... ..	40
Pearce v. Grosse (1843) ... ..	506	Pickering, <i>Re, Ex p.</i> Harding (1854) ... ..	520
—— v. O'Brien (1867) ... ..	298	———, <i>Re, Ex p.</i> Thornthwaite (1854) ... ..	520
Pearman v. Carter (1815) ... ..	625	——— v. Cape Town Ry. Co. (1865) ... ..	379
Pearse v. Cameron (1813) ... ..	516	——— v. Marsh (1874) ... ..	247
—— v. Pearse (1829) ... ..	496	——— v. North Eastern Ry Co. (1889) ... ..	277
Pearson, <i>Re</i> (1864) ... ..	566	——— v. Rudd (1815) ... ..	65
—— v. Archbold (1843) ... ..	510	——— v. Watson (1776) ... ..	540
—— v. Henry (1792) ... ..	349	Pickthall v. Merthyr Tydvil Local Board ... ..	369
—— v. Overell (1864) ... ..	566	Pidgeley v. Rawling (1845) ... ..	79
—— v. Ripley (1884) ... ..	602	Piercy v. Young (1879) ... ..	337, 364, 371, 372, 377, 386
—— & I'Anson, <i>Re</i> (1899) ... ..	44	Pieschell v. Allnutt (1813) ... ..	185
—— & Son v. Great Western Ry. Co. (undated) ... ..	459	——— v. Lavie (1813) ... ..	185
Peat v. Green (1844) ... ..	564, 565	Pigot v. Bullock (1792) ... ..	79, 83
Pedler v. Hardy (1902) ... ..	565	—— v. Stibs (1733) ... ..	
Pedley v. Goddard (1796) ... ..	493, 578	Pike v. Newman (1854) ... ..	580, 581
Peebles v. Hay (1844) ... ..	571	—— & Newman, <i>Re</i> (1854) ... ..	580, 581
Peel v. Peel (1869) ... ..	584	Pilmore v. Hood (1839) ... ..	551
Peirs v. Peirs (1750) ... ..	80	Pincomb v. Thomas (1619) ... ..	95
Pell v. Addison (1860) ... ..	621	Pini v. Roncoroni (1892) ... ..	367, 368
Pellatt v. Markwick (1858) ... ..	621	Pinkerton v. Caslon (1819) ... ..	
Pelling v. Langden (1601) ... ..	215	Pinn v. Rew (1916) ... ..	
Pemberton & Cooper & Cooper, <i>Re</i> (1912) ...	20	Piper v. Winniffrith & Leppard (1917) ... ..	229
Pembroke (Earl) v. Syms (Simons) (1600) ...	95	Pisani v. Lawson (1839) ... ..	131
Pena Copper Mines, Ltd. v. Rio Tinto Co., Ltd. (1911) ... ..	335, 336	Pitcher v. Rigby (1821) ... ..	534
Pengelly v. Terrell (1903) ... ..	291	Pits & Wardal's Case (1610) ... ..	514
Pennell v. Walker (1856) ... ..	365	Pitt v. Dawkra (undated) ... ..	441
Penrice v. Williams (1883) ... ..	432, 628	Pitts v. Millar (1874) ... ..	287
Penton v. Murduck (1870) ... ..	295, 296	Planter's Wensch, The (1803) ... ..	180
—— v. Robart (1801) ... ..	50, 51	Platt v. Hall (1837) ... ..	516, 517
Pepper v. Gorham (1820) ... ..	440	Plews & Middleton, <i>Re</i> (1845) ... ..	448
Perch v. Hopkins (1843) ... ..	516, 517	Plumer (Doe d.) v. Mainby (1847) ... ..	6
Percival, <i>Re</i> (1885) ... ..	393	Plumley v. Isherwood (1843) ... ..	545
—— v. Oldacre (1865) ... ..	260, 261	Plummer v. Lee (Leigh) (1837) ... ..	489
Pering & Keymer, <i>Re</i> (1835) ... ..	464	—— v. Webb (1619) ... ..	223
Perriman v. Steggall (1833) ... ..	450	Plymouth (Countess Dowager) v. Archer (Lady Dowager) (1782) ... ..	82
Perring v. Keymer (1834) ... ..	558	Polack Tyre & Rubber Co., Ltd., <i>Re</i> (1918) ...	151
—— & Keymer, <i>Re</i> (1835) ... ..	464	Pollexfen v. Crispin (1671) ... ..	207
Perrot v. Perrot (1744) ... ..	83, 84, 105	Pollitt (Pollett) v. Forrest (1848) ... ..	24
Perry v. Berry (1616) ... ..	504	Pollyes' Case (1620) ... ..	87
—— v. Dunn (1843) ... ..	595	Polyxphen v. Crispin (1671) ... ..	207
—— v. Mitchell (1844) ... ..	489, 502	Pomfret v. Ricroft (1669) ... ..	74
—— v. Nicholson (1757) ... ..	572, 573, 575	Pompe v. Fuchs (1876) ... ..	337
Perryman (Peryman) v. Steggall (1833) ...	450, 527	Ponsford v. Swaine (Swayne) (1861) ... ..	427, 430
Pescod v. Pescod (1887) ... ..	405	Pontifex v. Severn (1877) ... ..	613, 614, 615, 620
Petch v. Fountain (1839) ... ..	341	Ponting v. Noakes (1894) ... ..	65, 66
—— v. Tutin (1846) ... ..	56	Poole v. Selwood (1815) ... ..	608
Peters v. Anderson (1814) ... ..	536	Poona, The (1915) ... ..	146
—— v. Blake (1837) ... ..	103	Pope v. Brett (1671) ... ..	488
—— (Goodright d.) v. Vivian (1807) ... ..	76, 106	—— v. Duncannon (Lord) (1838) ... ..	398
Peterson v. Ayre (1854) ... ..	435, 436	Porch v. Hopkins (1844) ... ..	384
—— v. — (1855) ... ..	466	Portarlington (Earl), <i>Ex p.</i> , <i>Re</i> Paul (1889) ...	46
Pethick Brothers v. Metropolitan Water Board (1911) ... ..	372	Porter v. Drew (1880) ... ..	51
Petrie v. Daniel (1804) ... ..	35	—— v. Freudenberg (1915) ... ..	140, 141, 155, 156, 157, 158, 159, 160
Pharaon et Fils, <i>Re</i> (1916) ... ..	152	Portishead Warehouse Co. v. Bristol & Portishead Pier & Ry. Co. (1887) ... ..	461
Philips v. Knightley (1731) ... ..	485	Portland, The (1800) ... ..	143
Phillip v. Evans (1843) ... ..	524	Portland Urban District Council & Tilley & Co., <i>Re</i> (1896) ... ..	393
Phillipps v. Smith (1845) ... ..	61, 76, 80, 104, 105, 106		

	PAGE		PAGE
Portsmouth, The (1911) ... ..	331, 332	R. v. Chalkley (1813) ... ..	292
Postilion, The (1779) ... ..	148	— v. Chantrell (1875) ... ..	290
Potter v. Challans (1910) ... ..	286, 289	— v. Chapple (1804) ... ..	293
— v. Newman (1835) ... ..	419, 453	— v. Cheafor (1851) ... ..	211
Potts v. Bell (1800) ... ..	167, 168	— v. Chiswick Police Station Superintendent, <i>Ex p.</i> Sacksteder (1918) ... ..	196, 197
— v. Potts (1825) ... ..	107	— v. Clay (1819) ... ..	293
— v. Ward (1814) ... ..	394	— v. Colam (1872) ... ..	290
Poulter v. Killingbeck (1799) ... ..	53	— v. Coombs (1797) ... ..	324
Powel v. Peacock (1803) ... ..	67, 68	— v. Corbishley (1824) ... ..	547
Powell v. Knight (1878) ... ..	286	— v. Cory (1864) ... ..	210
— v. Salisbury (1828) ... ..	217	— v. Cotesbatch (Inhabitants) (1823) ... ..	547
— & Gwyer, <i>Re</i> (1840) ... ..	612	— v. Cotton (1813) ... ..	544
Power v. Wells (1778) ... ..	258, 268	— v. Coulman (1883) ... ..	302
Powers, <i>Re</i> , Manisty v. Archdale (1890) ... ..	10	— v. Dant (1865) ... ..	240
Powlett v. Bolton (Duchess) (1797) ... ..	84	— v. De Guiscard (Marquis) (1710) ... ..	163
Powley v. Walker (1793) ... ..	12	— v. De Mierre (1771) ... ..	138
Pownall v. Moores (1822) ... ..	26	— v. Denison, <i>Ex p.</i> Nagale (1916) ... ..	198
Poyner v. Hatton (1840) ... ..	582	— v. Dobson (1844) ... ..	438, 446, 448
Pratt v. Brett (1817) ... ..	13	— v. Dymock (1901) ... ..	247
— v. Salt (1735) ... ..	596, 597	— v. Eastbourne (Inhabitants) (1803) ... ..	129
Prebble & Robinson, <i>Re</i> (1892) ... ..	424, 605	— v. Eastern Union Ry. Co. (1852) ... ..	571
Prentice v. Reed (1808) ... ..	516	— v. Edwards & Walker (1822) ... ..	204
— v. Taylor (1859) ... ..	254	— v. Ferguson (1911) ... ..	194
Preston v. Eastwood (1797) ... ..	531	— v. Ferrybridge (Inhabitants) (1823) ... ..	63
Price v. Hollis (1813) ... ..	485	— v. Fine (1912) ... ..	196
— v. James (1833) ... ..		— v. Fontaine Moreau (1848) ... ..	544
— v. Jones (1828) ... ..		— v. Fordham (1839) ... ..	293
— v. Popkin (1839) ... ..	470, 481, 490	— v. Francis, <i>Ex p.</i> Markwald (1918) ... ..	189, 190
— v. Price (1841) ... ..	520	— v. Friedman (1914) ... ..	195
— v. Williams (1791) ... ..	536	— v. Gallcars (1849) ... ..	211
Pringle v. Gloag (1879) ... ..	613	— v. Garnham (1861) ... ..	210, 213
Printing Machinery Co., Ltd. v. Linotype & Machinery Ltd. (1912) ... ..	373	— v. Garrett, <i>Ex p.</i> Sharf (1917) ... ..	198
Prior v. Hembrow (1841) ... ..	396	— v. Gilham (1884) ... ..	
Pritchard v. Leech (1856) ... ..	560	— v. Gillbrass (1836) ... ..	205
Proctor v. Williams (Williamson) (1860) ... ..	438	— v. Goodrich (1806) ... ..	431
Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd. (1916) ... ..	475	— v. Gore (1839) ... ..	572
Prosser v. Goringe (1811) ... ..	481, 482	— v. Grunspan (1913) ... ..	196
Protheroe v. Mathews (1833) ... ..	214	— v. Halliday, <i>Ex p.</i> Zadig (1917) ... ..	198
Proudfoot v. Hart (1890) ... ..	632	— v. Holloway (1823) ... ..	204
Pullen-Burry & Lancing College (Provost & Fellows), <i>Re</i> (1915) ... ..	31	— v. Hardey (Hardy) (1850) ... ..	324, 390
Pulteney v. Shelton (1799) ... ..	26	— v. Haughton (1833) ... ..	294
Purisima Concepcion, The (1849) ... ..	353	— v. Haywood (1801) ... ..	292
Purslow v. Baily (1704) ... ..	512	— v. Head (1857) ... ..	210
Pylie v. Stephen (Stevens) (1840) ... ..	274	— v. Hemsworth (1846) ... ..	
Pyne v. Dor (1785) ... ..	112	— v. Henson (1852) ... ..	2
		— v. Hill (1819) ... ..	302
		— v. Holland (1647) ... ..	417
		— v. Home Secretary, <i>Ex p.</i> Chateau Thierry (Duke) (1917) ... ..	136
		— v. Hopkins, <i>Ex p.</i> Lovejoy (1911) ... ..	19
		— v. Howel (1676) ... ..	283
		— v. Howell (1830) ... ..	250
		— v. Huggins (1730) ... ..	211
		— v. Hughes (1826) ... ..	236, 237, 238
		— v. Humphries (1648) ... ..	293
		— v. Hundson (1781) ... ..	436
		— v. Huntingdon JJ. (1879) ... ..	210
		— v. Huntley (1854) ... ..	248
		— v. Jeans (1844) ... ..	445
		— v. Josephson (1914) ... ..	293
		— v. King (1843) ... ..	196
		— v. Kleiss (1910) ... ..	294
		— v. Knockaloe Camp (Commandant), <i>Ex p.</i> Forman (1917) ... ..	194, 195
		— v. Kupfer (1915) ... ..	198
		— v. Labouchere (1884) ... ..	170, 171, 177
		— v. Lancashire JJ. (1872) ... ..	131
		— v. Leppard (1864) ... ..	302
		— v. Leycester, <i>Ex p.</i> Greenbaum (1914) ... ..	253, 254
		— v. London County Council, <i>Ex p.</i> London & Provincial Electric Theatres, Ltd. (1915) ... ..	196
		— v. Lonsdale (1864) ... ..	148
		— v. Lynch (1903) ... ..	205
		— v. M. (1915) ... ..	191
		— v. Maffey (1833) ... ..	1

## TABLE OF CASES.

lxiii

	PAGE		PAGE
<i>R. v. Mallison</i> (1902) ... ..	212	<i>Ramnad v. Gettiapooram</i> (1859)	
— <i>v. Manning</i> (1849) ... ..	189	<i>Randall v. Gurney</i> (1819) ... ..	433
— <i>v. Medlor</i> (1879) ... ..	250	— <i>v. Randall</i> (1805) ... ..	500
— <i>v. Metz</i> (1915) ... ..	173	— <i>v. Thompson</i> (1876) ... ..	302, 387, 388
— <i>v. Middlesex Regiment</i> (30th Battalion, Commanding Officer), <i>Ex p. Frey-</i> <i>berger</i> (1917) ... ..	192	<i>Randegger v. Holmes</i> (1866) ... ..	371
— <i>v. Minchin - Hampton</i> (Inhabitants) (1762) ... ..	61, 62	<i>Randell v. Thompson</i> (1876) ... ..	302, 387, 388
— <i>v. Moate</i> (1832) ... ..	588, 597	<i>Ranger v. Great Western Ry. Co.</i> (1854) ... ..	400
— <i>v. Moger</i> (1901) ... ..	247	<i>Rankin v. Lay</i> (1860) ... ..	14
— <i>v. Money</i> (1847) ... ..	294	<i>Ranne v. Patison</i> (1596) ... ..	62
— <i>v. Mott</i> (1783) ... ..	292	<i>Raphael, Re, Warburg v. Raphael</i> (1916) ... ..	148
— <i>v. Mumford</i> (1845) ... ..	294	<i>Rapier v. London Tramways Co.</i> (1893) ... ..	251, 252
— <i>v. Narberth North</i> (Inhabitants) (1839) ... ..	63	<i>Rasch &amp; Co. v. Wulfert</i> (1904) ... ..	507
— <i>v. Newland</i> (1847) ... ..	293, 294	<i>Rasdall v. Coleman</i> (1909) ... ..	249, 250
— <i>v. Oppenheimer &amp; Colbeck</i> (1915) ... ..	170	<i>Ratcliffe v. Bartholomew</i> (1892) ... ..	291
— <i>v. Owen, Ex p. Scovell</i> (1907) ... ..	248	— <i>v. Hall</i> (1835) ... ..	598, 609
— <i>v. Owens</i> (1828) ... ..	292	<i>Rathven Parish v. Elgin Parish</i> (1875) ... ..	400, 401
— <i>v. Paget</i> (1841) ... ..	582	<i>Ravee v. Farmer</i> (1791) ... ..	538
— <i>v. ———</i> (1889) ... ..	291	<i>Rawling v. Wood</i> (1735) ... ..	467
— <i>v. Parry</i> (1900) ... ..	293	<i>Rawlinson v. Janson</i> (1810) ... ..	183
— <i>v. Paty</i> (1770) ... ..	292	<i>Rawsthorn v. Arnold</i> (1827) ... ..	555, 557
— <i>v. Pell</i> (1885) ... ..	291	<i>Rawtree v. King</i> (1821) ... ..	626
— <i>v. Petch</i> (1878) ... ..	212	<i>Raymond v. Fitch</i> (1835) ... ..	99, 112
— <i>v. Phillips &amp; Strong</i> (1801) ... ..	204	<i>Rayner v. Stone</i> (1762) ... ..	26
— <i>v. Pratt</i> (1855) ... ..	227	<i>Raynor v. Childs</i> (1862) ... ..	
— <i>v. Price</i> (1766) ... ..	61	— <i>v. Horne</i> (1866) ... ..	302
— <i>v. Prosser</i> (1848) ... ..	132	<i>Read v. Dutton</i> (1836) ... ..	418
— <i>v. Rant</i> (1797) ... ..	324	— <i>v. Edwards</i> (1864) ... ..	227
— <i>v. Rawson</i> (1909) ... ..	291, 292	— <i>v. Garnett</i> (1744) ... ..	520
— <i>v. Read</i> (1878) ... ..	212	— <i>v. King</i> (1858) ... ..	52
— <i>v. Robinson</i> (1859) ... ..	205	<i>Reade v. Dutton</i> (1836) ... ..	418
— <i>v. Roe</i> (1870) ... ..		<i>Reading Election Case</i> ( <i>De Barthes' Case</i> )	139
— <i>v. Rough</i> (1779) ... ..	210	<i>Rebecca, The</i> (1804) ... ..	161
— <i>v. St. Katharine Dock Co.</i> (1832) ... ..	559	<i>Redfern v. Smith</i> (1823) ... ..	105
— <i>v. Schiever</i> (1759) ... ..	143	<i>Reece v. Chaffers</i> (1863) ... ..	
— <i>v. Searing</i> (1818) ... ..	210, 211	— & <i>Smith, Re</i> (1849) ... ..	509, 519
— <i>v. Sheriff</i> (1903) ... ..	211	<i>Reed v. King</i> (1858) ... ..	
— <i>v. Shickle</i> (1868) ... ..	211	<i>Rees v. Phelps</i> (1689) ... ..	
— <i>v. Shillibeer</i> (1836) ... ..	389, 390	— <i>v. Rees</i> (1856) ... ..	578
— <i>v. Slade</i> (1888) ... ..	204	— <i>v. Waters</i> (1847) ... ..	342, 483, 502, 518
— <i>v. Smith</i> (1836) ... ..	253	<i>Reeves v. M'Gregor</i> (1839) ... ..	587, 588
— <i>v. South Devon Ry. Co.</i> (1850) ... ..	427	<i>Reid v. Ashby</i> (1853) ... ..	
— <i>v. South Western Ry. Co.</i> (1852) ... ..	560	— <i>v. Fryatt</i> (1813) ... ..	418
— <i>v. Spencer</i> (1914) ... ..	170	<i>Reignolds v. Latham</i> (1578) ... ..	584
— <i>v. Speyer</i> (1916) ... ..	139	<i>Renfrew (Provost) v. Hoby</i> (1856) ... ..	317
— <i>v. Stewart, Ex p. Burnham</i> (1896) ... ..	303	<i>Rennie v. Mills</i> (1839) ... ..	508, 610
— <i>v. Stride &amp; Millard</i> (1908) ... ..	211	<i>Renshaw v. Queen Anne Residential Mansions</i> <i>Co., Ltd.</i> (1897) ... ..	334
— <i>v. Surrey JJ.</i> (1892) ... ..	290, 291	<i>Restell v. Nye</i> (1901) ... ..	322, 429
— <i>v. Sutton</i> (1838) ... ..	293	<i>Reuss (Princess) v. Bos</i> (1871) ... ..	129, 130
— <i>v. Tate</i> (1833) ... ..	204	<i>Reynolds v. Askew</i> (1837) ... ..	558
— <i>v. Tivey</i> (1844) ... ..	294	— <i>v. Gray</i> (1697) ... ..	412, 414, 415
— <i>v. Totnes JJ.</i> (1879) ... ..	291	— <i>v. Harris</i> (1858) ... ..	601
— <i>v. Townley</i> (1871) ... ..	212	— <i>v. Woodham Walter</i> (1872) ... ..	67
— <i>v. Trafford-Rawson</i> (1909) ... ..	291, 292	<i>Rhind v. Wilkinson</i> (1810) ... ..	182
— <i>v. Vine Street Police Station Superinten-</i> <i>dent, Ex p. Liebmann</i> (1916) ... ..	141, 142, 157	<i>Rhodes v. Airedale Drainage Comrs.</i> (1876) ... ..	459, 460, 544
— <i>v. Walmsley, Ex p. Holt</i> (William A.), <i>Ltd.</i> (1916) ... ..	173	— <i>v. Haigh</i> (1823) ... ..	394
— <i>v. Warwickshire JJ.</i> (1856) ... ..	290	— <i>v. Muswell Hill Land Co.</i> (1861) ... ..	354
— <i>v. Weare</i> (1840) ... ..	294	<i>Rhys &amp; Richards &amp; Dare Valley Ry. Co., Re</i> (1868) ... ..	525, 560
— <i>v. Welch</i> (1875) ... ..	293	<i>Riccard v. Kingdom</i> (1846) ... ..	557
— <i>v. Wheeler &amp; Cowley</i> (1835) ... ..	293	<i>Rich (Lord) v. Makepeace</i> (1618) ... ..	76
— <i>v. Whitney</i> (1824) ... ..	294	<i>Richard v. Talbot</i> (1890) ... ..	632
— <i>v. Wigg</i> (1705) ... ..	250	<i>Richards, Ex p.</i> (1850) ... ..	205
— <i>v. Williams</i> (1825) ... ..	205, 293	— <i>v. Bluck</i> (1848) ... ..	24
— <i>v. ———</i> (1866) ... ..	298	— <i>v. Cullerne</i> (1881) ... ..	431, 432
— <i>v. Williamson</i> (1672) ... ..	147	— <i>v. Noble</i> (1807) ... ..	67
— <i>v. Woodward</i> (1796) ... ..	254	— <i>v. Payne &amp; Co.</i> (1916) ... ..	347
— <i>v. Wordsworth</i> (1867) ... ..	298	— <i>v. Symons</i> (1845) ... ..	254
— <i>v. Zausmer</i> (1911) ... ..	195, 196	<i>Richardson v. Brown</i> (1823) ... ..	267
<i>Radcliffe (Radclyffe) v. Bartholomew</i> (1892) ... ..	291	— <i>v. Kensit</i> (1843) ... ..	607
<i>Radeke, Re, Ex p. Jacobs</i> (1915) ... ..	160	— <i>v. Le Maitre</i> (1903) ... ..	376
<i>Rafael v. Verelst</i> (1776) ... ..	131	— <i>v. Leslie</i> (1848) ... ..	420
<i>Rainforth v. Hamer</i> (1855) ... ..	314, 485, 486	— <i>v. North Eastern Ry. Co.</i> (1872) ... ..	275
<i>Ramkissenseat v. Barker</i> (1737) ... ..	130	— <i>v. Nourse</i> (1819) ... ..	526
		— <i>v. Smith</i> (1870) ... ..	385



	PAGE		PAGE
Richardson v. Worsley (1850)	603	Rose v. Spark (1648)	509
Richfeild v. Udal (1667)	158	Ross v. Boards (1838)	480, 506
Rickard v. Kingdom (1846)	557	—— v. Clifton (1841)	486
Ricord v. Bettenham (1765)	156	Rotch v. Edie (1795)	167
Riddell v. Sutton (1828)	350, 575	Roumanian, The (1915)	146, 147, 148
Rider & Fisher, Re (1837)	513	(1916)	146, 147, 148
Ridgway v. Lloyd (1847)	477, 478	Round v. Hatton (1842)	484, 491
Ridoat v. Pye (1797)	449	Rous v. Nun (1663)	...
Ridout v. Payne (1747)	521	Rouse & Co. & Meier & Co., Re (1871)	388
Rigby v. Okell (O'Rell) (1827)	598	Routledge v. Low (1868)	132
Rigg v. Lonsdale (Earl) (1857)	209, 211	v. Thornton (1812)	404
Rigge (Doe d.) v. Bell (1793)	6	Rowcliffe v. Devon & Somerset Ry. Co. (1873)	438,
Right v. Baynard (1674)	225	—— v. Leigh (1876), 25 W. R. 56	587
Riley v. Lee (1865)	...	—— v. —— (1877), 37 L. T. 557	628.
Ringer v. Joyce (1815)	443	Leigh (1876), 3 Ch. D.	628
Ringland v. Lowndes (1864)	416, 417		
Risden v. Inglet (1601)	500	Rowe Brothers & Co., Ltd. v. Crossley	
Rishton v. Nisbett (1834)	433	Brothers, Ltd. (1912)	371
Rittson v. Stordy (1855)	137, 191	Rowles v. Mason (1612)	68
—— v. —— (1856)	137	Rowney's Case (1694)	59
Roberts v. A.-G., Re Johnson (1903)	127	Roxburghe (Duke) v. Robertson (1820)	24
—— v. Barker (1833)	39	Royle v. Williams (1835)	386
—— v. Eberhardt (1858)	424	Ruben, Re (1915)	151
—— v. Hardy (1815)	140	Rucker v. Ansley (1816)	184, 185
Robertson v. Hatton (1857)	...	Rule v. Bryde (1847)	509
v. Sterne (1862)	593	Rumely v. Irwin (1856)	594
Robin v. Hoby (1856)	317	Rumhelon v. Whalley (1849)	452
Robinson v. Bisse (1610)	500	Rumley v. Irwin (1856)	594
—— v. Cheesewright (1813)	183	Runciman & Co. v. Smyth & Co. (1904)	331
—— v. Davis (1722)	581	Rush v. Lucas (1910)	18
—— v. Henderson (1817)	423	Rushworth v. Waddington (1859)	444
—— v. Litton (1744)	70, 71	Russel v. Headington (1815)	533
—— v. London & South Western Ry.	...	Russell v. London & South Western Ry. Co.	...
Co. (1865)	278	(1908)	281, 282
—— v. Morris (1814)	183	—— v. Pellegrini (1856)	361
—— v. Postlethwaite (1855)	586	—— v. Russell (1880)	368
—— v. Robinson (1876)	630	—— v. Yorke (1837)	578
—— v. Touray (1813)	183	—— & Co v. Harris 1891	621
—— & Co. v. Continental Insurance Co.	...	Rybott v. Barrell (1762)	430
of Mannheim (1915)	158, 159	Rylands v. Fletcher (1868)	228, 237
—— v. Davies & Co. (1879)	391	Ryley v. Brown (1890)	247
Robson v. —— (1813)	350		
—— v. Premier Oil & Pipe Line Co., Ltd.	...		
(1915)	169, 170, 173		
& Railston, Re (1831)	503		
Rochefoucauld v. Boustead (1897)	623		
Rockey v. Huggens (1628)	68		
Rodd (Doe d.) v. Archer (1811)	8		
Rodgers v. Pickersgill (1910)	289, 290		
—— v. Richards (1892)	291		
Rodriguez v. Speyer Brothers (1918)	160, 161		
Rodwell v. Phillips (1842)	53, 54		
Roe d. Henderson v. Charnock (1790)	9		
—— Wood v. Doe (1788)	413, 586		
—— Bree v. Lees (1777)	6, 9		
Rogers v. Dallimore (1815)	556		
—— v. Hull (1896)	217		
—— v. Kearns (1860)	624, 625		
—— v. Price (1849), 13 L. T. O. S. 463	14		
—— (Doe d.) v. Price (1849), 8 C. B. 894	99		
—— v. Richards (1892)	291		
—— v. Stanton (1816)	576		
Roland v. Hall (1835)	537		
Rolfe v. Peterson (1772)	19		
Rolles v. Mason (1609)	68		
Rolls v. Rock (1729)	95		
Rolt v. Somerville (1737)	113		
Rombach v. Rombach (1914)	154		
Rombach Baden Clock Co. v. Gent & Son	...		
(1915)	154		
Rooth v. North Eastern Ry. Co. (1867)	279		
v. Wilson (1817)	218, 254		
Roper v. Lendon (1859)	360, 361		
—— v. Levy (Levi) (1851)	313, 314, 543		
Roscoe v. Boden (Roden) (1894)	229		
Roscorla v. Thomas (1842)	274		
Rose v. Redfern (1861)	424, 550, 564		

## TABLE OF CASES.

lxv

	PAGE		PAGE
Sanders v. Teape & Swan (1884) ...	227, 228, 236, 246	Sharp v. Nowell (Noel) (1848) ...	436
Sanford v. Stevens & Smith (1617) ...	69	— v. St. Sauveur (1871) ...	137, 189
Sarch v. Blackburn (1830) ...	239, 241	Sharpe v. Bickerdyke (1815) ...	443
Sarno, <i>Ex p.</i> , <i>R. v.</i> Brixton Prison (Governor) (1916) ...	196	— v. San Paulo Ry. Co. (1873) ...	359
Saunders v. Damer (1850) ...	528	Shaw & Pitt, <i>Re</i> (1856) ...	524
Saunders Davies v. Baillie (1907) ...	618	— & Ronaldson, <i>Re</i> (1892) ...	432
Saunderson v. Griffiths (1826) ...	15	— & Sims, <i>Re</i> (1851) ...	401
Savage v. Ashwin (1838) ...	508	Sheard v. Learoyd (1886) ...	625
Savil v. Saville (Savil) (1727) ...	88	Shedden v. Patrick (1854) ...	123, 124
Saville (Lady) v. Saville (1720) ...	80	Sheldon v. Cox (1824) ...	258
— v. Saville (Savil) (1727) ...	88	Shelf v. Baily (1709) ...	328
Sawyer v. Kropp (1916) ...	126, 192	Shelley v. Ford (1832) ...	256
Saxby v. Gloucester Wagon Co. (1880) ...	621	Shephard v. Brand (1734) ...	548
Saxty v. Wilkin (1843) ...	274	Shepheler v. Durant (1854) ...	161
Scales v. East London Waterworks Co. (1835) ...	441	Shepherd v. Brand (1734) ...	548
— v. Petham (1835) ...	440	— v. Bristol & Exeter Ry. Co. (1868) ...	277
Scarfe v. Morgan (1838) ...	257	Sheppard v. Brand (1734) ...	548
Scetchet v. Eltham (1681) ...	243	Sherlock v. Barned (Barnard) (1831) ...	599
Schaffenius v. Goldberg (1916) ...	156	Sherry v. Okes (1835) ...	557
Schawel v. Reade (1912) ...	261	— v. Richardson (1593) ...	410, 493
Schepeler v. Durant (1854) ...	161	Shiffner v. Gordon (1810) ...	179, 180
Schiff, <i>In the Estate of</i> (1915) ...	158	Shillitoe v. Claridge (1816) ...	265
Schliemann's Oil & Ceresine Co., Ltd., <i>Re</i> (1918) ...	151	Shipway v. Broadwood (1899) ...	259, 260
Schlumberger, <i>Re</i> , <i>Re</i> Gibson's Patent (1853) ...	132	Shombeck v. De la Cour (1808) ...	162
Schmitz (Schmidt) v. Van Der Veen & Co. (1915) ...	161, 172	Short v. Turffontein Estates, Ltd. (1905) ...	27
Schnakoneg v. Andrews (1814) ...	185	Shother v. Stephenson (1847) ...	418
Schneider (Theodor) & Co. v. Burgett & Newsam (1915) ...	461	Shrewsbury v. Shrewsbury (1907) ...	459
Schneider (Theodor) & Co. v. Burgett & Newsam (1916) ...	181, 182, 461	Shrub v. Lee (1888) ...	47
Schofield v. Allen (1904) ...	412, 424	Shubrook v. Tufnell (1882) ...	459, 633
— v. Hincks (1888) ...	41, 46	Sidney v. North Eastern Ry. Co. (1916) ...	461
Scholefield v. Robb (1839) ...	265	Siffken v. Allnutt (1813) ...	187
Schroeder v. Vaux (1812) ...	186	Siffkin v. Glover (1813) ...	187
Scorell v. Boxall (1827) ...	53	Silcock v. Farmer (1882) ...	10
Scot v. Schawrtz (1739) ...	121	Silverman v. Hunt (1915) ...	197
Scotland v. South African Territories, Ltd. (1917) ...	141	Silvester v. Bradley (1842) ...	90
Scott v. Avery (1856) ...	350, 355, 356	— v. Brown (1916) ...	48
— v. Bennett (1871) ...	628	Sim v. Edwards (1856) ...	598
— v. Liverpool Corpn. (1858) ...	359	— v. Oliver (1854) ...	621
— v. Mercantile Accident & Guarantee Insurance Co., Ltd. (1892) ...	358	— & Lenders, <i>Re</i> (1887) ...	451
— v. Van Sandau (1841) ...	391	Simeon v. Thompson (1798) ...	161
— v. — (1844) ...	440	Simmonds v. Swaine (1809) ...	493, 494, 500, 514
— v. Williams (1835) ...	486, 487	Simmons, <i>Re</i> (1885) ...	616
— v. Wray (1634) ...	532	— v. Norton (1831) ...	17, 78
Scougull v. Campbell (1819) ...	430	Simon v. Gavil (1703) ...	339, 495, 496
Scovell, <i>Ex p.</i> , <i>R. v.</i> Owen (1907) ...	248	— v. Phillips (1916) ...	197
Seagram v. Knight (1867) ...	86, 102, 114	Simpson v. Brook (1855) ...	95
Searle v. Reynolds (1866) ...	299	— & Hornsby, <i>Re</i> (1868) ...	528
Scars v. Lyons (1818) ...	217	Simson (Simpson) v. London General Omnibus Co. (1873) ...	233
Seaward & Howey, <i>Re</i> (1838) ...	487	Sinclair v. Great Eastern Ry. Co. (1870) ...	425, 609
Seccombe v. Babb (1840) ...	515, 589	Sinidino, Ralli & Co. v. Kitchen & Co. (1883) ...	473
Secheverel v. Dale (1627) ...	81	Sissons v. Oates (1894) ...	380
Seckham v. Babb (1840) ...	515, 589	Skee v. Coxon (1830) ...	388
Sego v. Young (1855) ...	586	Skeete, <i>Ex p.</i> (1839) ...	576
Selby v. Robinson (1788) ...	101	Skelton v. Skelton (1677) ...	81, 82, 89
— v. Russell (1697) ...	492	Skidnes v. Huson (1608) ...	112
— v. Whitbread & Co. (1917) ...	327, 515	Skinner v. Lambert (1850) ...	253, 254
Seligman v. Eagle Insurance Co. (1917) ...	172	— v. Uzielli (E.) & Co., Ltd. (1908) ...	366
Seligmann v. Le Boutillier (1866) ...	362	Skipper v. Grant (1861) ...	480
Sell v. Carter (1833) ...	557	Skipworth v. Green (1724) ...	18
Senior v. Armytage (1816) ...	11, 12, 31	— v. Skipworth (1846) ...	523, 550
Serle v. Fardell (1890) ...	632	Slack v. Midland Ry. Co. (1880) ...	614, 634
Seward v. Howey (1838) ...	487	Slatford v. Erlebach (1912) ...	604
Seyerstadt, The (1813) ...	181	Slowman v. Wiggins (1848) ...	345, 471
Sharf, <i>Ex p.</i> , <i>R. v.</i> Garrett (1917) ...	198	Smailes v. Wright (1815) ...	415
Sharley v. Richardson (1593) ...	410, 493	Small v. Warr (1882) ...	284
Sharman v. Bell (1816) ...	521	Sinalley v. Blackburn Ry. Co. (1857) ...	537
Sharp v. Bury (1813) ...	552	Smallman v. Onions (1792) ...	87
— v. Eveleigh (1851) ...	594	Smart v. Hyde (1841) ...	267
		Smith, <i>Re</i> , <i>Ex p.</i> Edwards (1886) ...	397
		— v. Acock (1885) ...	46
		— v. Allen (1862) ...	321, 333, 334
		— v. Baynard (1674) ...	225
		— v. Bole (1618) ...	71
		— v. Briscoe (1822) ...	554
		— v. Brown (1859) ...	103

	PAGE		PAGE
Smith v. Bryant (1864) ...	266	Sowton v. Spry (1673) ...	465
— v. Callander (1901) ...	42, 43	Spain v. Cadell (Caddell) (1841) ...	477, 594
— v. Chance (1819) ...	23	Spalding v. Lodde, <i>Re</i> Gaudig & Blum (1915) ...	152
— v. Collyer (1803) ...	111	Sparenburgh v. Bannatyne (1797) ...	143, 156, 161, 162
— v. Cook (1875) ...	253	Spartali & Co. v. Van Hoorn (1884) ...	362
— v. Dear (1903) ...	294	Speak v. Taylor (1894) ...	538
— v. Edge (1863) ...	592	Speed v. Money & Musson (1904) ...	64
— v. Festiniog Ry. Co. (1837) ...	488, 489	Spence v. Clarkson (1842) ...	569
— v. Fielder (1833) ...	396	— v. Eastern Counties Ry. Co. (1839) ...	469
— v. Giddy (1904) ...	64, 65	— v. Stuart (1802) ...	433
— v. Great Eastern Ry. Co. (1866) ...	240	Spencer v. Newton (1837) ...	433
— v. Green (1875) ...	272, 296	— v. Spencer (1828) ...	537, 538
— v. Hailey (1872) ...	595	Spencer's Case (1622) ...	59
— v. Hartley (1851) ...	484, 485	Spettigue v. Carpenter (1735) ...	442
— v. Johnson (1812) ...	537	Spicer (Doe d.) v. Lea (1809) ...	6
— v. Lockwood (1862) ...	529	Spigurnell v. Jene (1660) ...	476, 503
— v. London General Omnibus Co. ...		Spillers & Baker, Ltd. & Leetham & Sons, <i>Re</i> (1897) ...	458
— v. Midland Ry. Co. (1887) ...	277	Spitta v. Woodman (1810) ...	188
— v. Muller (1790) ...	343, 344	Spivey v. Webster (1832) ...	603
— v. O'Bryan (1864) ...	266	Spivy v. Webster (1833) ...	330, 331
— v. Parkside Mining Co. (1880) ...	557, 558	Spooner v. Payne (1847), 4 C. B. 328 ...	523
— v. Pelah (1747) ...	239	— v. — (1847), 11 Jur. 242 ...	611
— v. Peters (1875) ...	386	Sprague v. Allen & Sons (1899) ...	564
— v. Pinder (1837) ...	490	Sprigens v. Nash (1816) ...	414
— v. Read (1737) ...	135	Sprigwell v. Allen (1648) ...	262
— v. Reeves (1836) ...	582	Spurr v. Rayson (Rayner) (1839) ...	349
— v. Sparrow (1847) ...	441	Spurrier v. La Cloche (1902) ...	335, 358, 359
— v. Stone (1647) ...	225	Squire v. Grevell (Grevett) (1703) ...	339, 495, 496
— v. Surman (1829) ...	54	Stafford v. Coxon (1877) ...	613
— v. Thorpe (1850) ...	229	— v. Gardner (1872) ...	33
— v. Troup (1849) ...	570	— v. Stafford (1871) ...	558
— v. Whitmore (1864) ...	554	Stahlwerk Becker Aktiengesellschaft's Patent, <i>Re</i> (1917) ...	157, 159
— v. Williams (1892) ...	216, 295	Stains v. Wild (1614) ...	339
— & Blake, <i>Re</i> (1838) ...	423, 558, 559	Staite v. Haddon (1841) ...	422
— & Co. v. British Marine Mutual Insurance Assocn. (1883) ...	376	Stalworth (Stallworth) v. Inns (1844) ...	466
— & Devonshire (Duke), <i>Re</i> (1906) ...	43, 44, 45	Stamford & Warrington (Earl) v. Lowndes (1852) ...	360
— & Reece, <i>Re</i> (1849) ...	509, 519	Stammers v. Tomkins (1852) ...	446
— & Reeves, <i>Re</i> (1836) ...	582	Stanbury v. Exeter Corpn. (1905) ...	301
— & Service & Nelson & Sons, <i>Re</i> (1890) ...	386, 390, 408	Standley v. Hemmington (1816) ...	579
— & Wilson, <i>Re</i> (1848) ...	604	Stanesby, <i>Ex p.</i> (1845) ...	570
— Coney & Barrett v. Becker, Gray & Co. (1916) ...	379	Stanford v. Hurlstone (1873) ...	110, 111
Smurthwaite v. Richardson (1863) ...	391, 626	Stanhope v. Thorsby (1866) ...	298
Smyth, <i>Re</i> , Edwards v. Smyth (1918) ...	82	Staniforth v. Coombe (1814) ...	188
Smythe v. Smythe (1818) ...	80	Stanley v. White (1811) ...	64
Smythies v. Angus (1861) ...	440	Stanley Brothers, Ltd. & Nuneaton Corpn., <i>Re</i> (1914) ...	603, 604
Snap v. Manley (1764) ...	35	Stanniforth v. Ryall (1844) ...	477, 589
Sneesby v. Lancashire & Yorkshire Ry. Co. (1875) ...	220, 221	Stansbury v. Matthews (1838) ...	55
Snell v. Snell (1825) ...	99	Stansfeld v. Bolling (1870) ...	217
Snook v. Hellyer (1818) ...	397, 476	Stansfield v. Habbergham (1804) ...	71, 83
Société Anonyme Belge des Mines D'Aljustrel (Portugal) v. Anglo-Belgian Agency, Ltd. (1915) ...	146, 153	Stanyslaw Krejewsky, <i>In the Estate of</i> (1918) ...	158
Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co., Ltd. (1901) ...	131, 132	Staples (Staple) v. Hay (Hey, Hague) (1843) ...	555
Soglasie, The (1854) ...	141	Star v. Rookesby (1711) ...	226
Soilleux v. Herbst (1801) ...	322	Starling (Doe d.) v. Hillen (1843) ...	518
Solomons' Case, Middlesex Election Case (1804) ...	138, 139	Stead v. Salt (1825) ...	328
Soudon v. Mills (1861) ...	515, 517	Stebbing v. Gosnal (1599) ...	68
Soulsby v. Hodgson (1764) ...	465	— v. Liverpool & London & Globe Insurance Co., Ltd. (1917) ...	333
South Eastern Ry. Co. v. Abinger Overseers (1852) ...	522	Steel v. Houghton (1788) ...	60
— v. Warton (1861) ...	478, 479	Steele v. Rogers (1912) ...	290
South Sea Co. v. Bumstead (1734) ...	551	Steeple v. Bonsall (1836) ...	519, 520
South Wales Ry. Co. v. Wythes (1854) ...	382	Steers v. Lashley (1794) ...	347, 348
Southerne v. Howe (1617) ...	274	— v. Manton (1893) ...	251
Sowdon v. Mills (1861) ...	515, 517	Steff v. Andrews (1816) ...	526
Sowerby v. Fryer (1869) ...	72	Stephens v. Commercial Assurance Co. (1888) ...	363
		— v. Lowe (1832) ...	315, 418
		— v. Strick (1832) ...	315, 418
		—, Smith & Co. & Liverpool & London & Globe Insurance Co., <i>Re</i> (1892) ...	425
		Stephenson v. Browning (1739) ...	533
		Stepney Election Petition, <i>Re</i> , Isaacson v. Durant (1886) ...	121
		Steven v. Buncle (1902) ...	376



## TABLE OF CASES.

lxvii

	PAGE		PAGE
Stevens v. Chapman (1871) ... ..	591	Swinford v. Burn (1818) ... ..	423, 426, 534, 535, 573, 574
Stevenson v. Watson (1879) ... ..	429	Swinglehurst v. Altham (1789) ...	592, 595, 599
— (Hugh) & Sons v. Akt. Für Carton-		Swinton (Doe d.) v. Sinclair (1836) ...	612
nagen Industrie (1918) ... ..	177	Sybray v. White (1836) ... ..	318, 532, 543, 544
Steward v. Coesvelt (1823) ... ..	260, 275	Sykes v. Brook, <i>Re</i> Brook (1881) ...	618
(Stewart) v. Williamson (1829) ...	389,	— v. Haigh (1835) ... ..	580
	398	Sylvester v. Brown (1916) ... ..	48
Stewart v. Williamson (1910)... ..	45	Sylvester's Case (1703) ... ..	139, 147, 161
Sticklehorne v. Hatchman (1585) ...	106	Symes v. Goodfellow (1836) ... ..	450
Stiles v. Cardiff Steam Navigation Co. (1864)	245,	Symonds (Symons) v. Marine Society (1860)	56
	246	Synge v. Jervoise (1807) ... ..	557
— v. Triste (1661) ... ..	485		
Still v. Halford (1814) ... ..	573	T.	
Stimpson (Doe d.) v. Emmerson (1847) ...	527	TABBS v. Bendelack (1801) ... ..	140
Stock v. De Smith (Smith) (1735) ...	577	Tabernacle Permanent Building Society v.	
Stockley v. Shopland (1872) ... ..	587	Knight (1892) ... ..	390, 391, 456, 457, 634
Stockton & Middlesbrough Water Board v.		Talbot v. Fisher (1857) ... ..	568
Kirkleatham Local Board (1893) ...	462	— (Earl) v. Hope Scott (1858) ...	111
Stoke-upon-Trent Corpn. v. Staffordshire Coal		— v. Shrewsbury (Earl) (1873) ...	535
& Iron Co. (1916) ... ..	597	— v. Woodhouse (1699) ... ..	78
Stokes v. Lewis (1804)... ..	612	Tamworth (Lord) v. Ferrers (Lord) (1801)	109
Stokoe v. Hall (1864) ... ..	356	Tandy & Tandy, <i>Re</i> (1841) ... ..	493
Stone v. Knight (1626)... ..	486	Tanner v. Washburne (1858) ... ..	30
— v. Philipps (1837) ... ..	506	Tappin v. Healey (1863) ... ..	398
— (Doe d.) v. Stone (1837) ... ..	506	Tasker v. Keary (1733) ... ..	453, 454, 455
Stonehewer v. Farrar (1845) ... ..	486, 487, 507	Tattersall v. Groote (1800) ... ..	381
Stooke v. Taylor (1880) ... ..	591, 592, 601	— v. Parkinson (1848) ... ..	569
Storey v. Garry (Galley) (1840) ... ..	582	Taverner v. Cuff (1907) ... ..	443, 451, 452
Storke v. De Smeth (1737) ... ..	515	Tavernor v. Skingle (1631) ... ..	476
Story v. Garry (Galley) (1840) ... ..	582	Taylor v. Marling (1840) ... ..	389, 397, 518
— v. Reynolds (1731) ... ..	440	— v. Shuttleworth (1840) ... ..	397, 519
Strachan v. Cambrian Railways (1905) ...	363	Taylor, <i>Re</i> , Turpin v. Pain (1890) ...	615
Strachy v. Francis (1741) ... ..	71, 72	— v. Backhouse (1851) ... ..	406
Strangford v. Green (1677) ... ..	328	— v. Brooke (1846) ... ..	605
Strathmore (Countess) v. Bowes (1786) ...	109	— v. Denny, Mott & Dickson, Ltd.	
Stratton v. Green (1832) ... ..	586	(1912) ... ..	408
Street v. Blay (1831) ... ..	269	— v. Dutton (1823) ... ..	605
— v. Rigby (1802)... ..	351, 382	— v. Gordon (Lady) (1833) ... ..	586, 597
— v. Street (1900)... ..	591, 633	— v. Gregory (1831) ... ..	384
Strickland v. Maxwell (1834)... ..	33, 34	— v. Miles (1860)... ..	91
(Doe d.) v. Spence (1805) ... ..	7	— v. Newman (1863) ... ..	216, 294
Stringer & Riley Brothers, <i>Re</i> (1901) ...	562	— v. Parry (1840) ... ..	326, 327
Stripping's Case (1621) ... ..	106	— v. Rogers (1881) ... ..	282, 283
Stroud v. Cooper (1845) ... ..	523	— v. Shuttleworth (1840) ... ..	397, 519
Strutt v. Rogers (1816) ... ..	586	— v. Western Valleys' (Monmouthshire)	
Stuart v. Crawley (1818) ... ..	275	Sewerage Board (1911)... ..	373
— v. Nicholson (1836) ... ..	313	v. Yielding (1912) ... ..	319
— v. Wilkins (1778) ... ..	263, 268	Teal v. Auty & Dibb (1820) ... ..	54
Stubbs v. Boyle (1876) ... ..	633	Tebbutt v. Ambler (1843) ... ..	580
Stukeley v. Butler (1615) ... ..	93, 96	Temperley Steam Shipping Co. v. Smyth	
Sturges v. Curzon (1851) ... ..	365	Co. (1905) ... ..	331
Styles v. Cardiff Steam Navigation Co. (1864)	245,	Templeman v. Haydon (1852) ... ..	230
	246	— & Reed, <i>Re</i> (1841) ... ..	453
Styring (Styrling) v. Lloyd (1864) ...	570, 571	Terry, <i>Re</i> , Terry v. Terry (1918) ...	103, 104
Sucksmith v. Wilson (1866) ... ..	32	Tew v. Harris (1847) ... ..	402, 403
Suevic, The (1908) ... ..	301	Thaire v. Thaire (1620) ... ..	466, 467
Sullivan v. Rivington (1880) ... ..	617	Thames Iron Works & Shipbuilding Co., Ltd.	
Sumpter v. Life (1774) ... ..	548	v. R. (1869) ... ..	470, 472
Sunderland (Owners) v. Sunderland Corpn.,		Tharsis Sulphur & Copper Co. v. Loftus (1872)	429
<i>Re</i> Flag-Lane Chapel (1859) ... ..	453	Thayer v. Thayer (1620) ... ..	466, 467
Sutherland (Duchess), <i>Re</i> , Bechoff, David &		Theyer v. Purnell (Parnell) (1918) ...	295
Co. v. Bubna (1915)... ..	142	Thielbar v. Craigen (1905) ... ..	285, 286, 289
Sutton v. Buck (1810) ... ..	254	Thinne v. Rigby (1612) ... ..	486, 492
— v. Moody (1697) ... ..	205	Thirsby v. Halburt (Helbert, Helbot) (1689)...	493
— v. Sutton (1830) ... ..	138	Thomas (Doe d.) v. Acklam (1824) ...	123
— v. Temple (1843) ... ..	11, 221	— v. Atherton (1878) ... ..	327
Swaine v. Becket (1608) ... ..	68, 69	— v. Fredricks (1847) ... ..	381, 402
Swan v. Sanders (Saunders) (1881) ...	288	— v. Harrop (1823) ... ..	463
Swansea Mercantile Bank, Ltd., <i>Ex p.</i> , <i>Re</i>		— v. Hawkes (1841) ... ..	597
James (1907) ... ..	255	— v. Lewis (1837) ... ..	608
Swayne & Bovill v. White & Ponsford (1862)	570	— v. Morris (1867) ... ..	448
Swayne's Case (1608) ... ..	68, 69	— v. Rawlings (1859) ... ..	579
Swift v. David (1912) ... ..	100	— & Co., Ltd. v. Portsea S.S. Co., Ltd.	
Swinburn v. Ainslie, <i>Re</i> Ainslie (1885)	72	(1912)... ..	331, 332
Swinford, <i>Re</i> (1817) ... ..	410		

	PAGE		PAGE
Thomlinson v. Arriskin (1719) ...	471	Trufort, <i>Re</i> , Trafford v. Blanc (1887) ...	191
Thompsett (Thompson) v. Bowyer (1860) ...	626	Trusloe v. Yewre (1591) ...	545
Thompson v. Charnock (1799) ...	351	Tryer v. Shaw (1858) ...	440
— v. Jennings (1825) ...	557	Tubervil v. Stamp (1697) ...	66
— — v. Noel (1738) ...	584	Tucker v. Linger (1882) ...	11
Thoms v. Hawkes (1839) ...	520	— v. — (1883) ...	11, 12
Thomson (Doe d.) v. Amey (1840) ...	20, 21	Tudgay v. Sampson (1874) ...	10
— v. Anderson (1870) ...	320, 387	Tuerloote v. Morris (Morrison) (1611) ...	131
— — v. Noel (1738) ...	325	Tullis v. Jacson (1892) ...	349
Thorburn v. Barnes (1867) ...	441	Tullit v. Tullit (1759) ...	84
Thornby v. Fleetwood (1720) ...	135	Tulloch v. Boyd (1817) ...	187
Thornthwaite, <i>Ex p.</i> , <i>Re</i> Pickering (1854) ...	520	Tunbridge's Case (1582) ...	228
Thornton v. Hornby (1831) ...	487	Tunno & Bird, <i>Re</i> (1833) ...	405, 455, 553
Thorp v. Cole (1835) ...	574	Turbervill v. Stamp (1697) ...	66
— — v. Cole (1836) ...	323, 574	Turnbull (Doe d.) v. Brown (1826) ...	553
Thorpe v. Cole (1835) ...	574	— v. Wieland (1916) ...	235
— v. Cole (1836) ...	574	Turner v. Blundell (1848) ...	579
— v. Cooper (1828) ...	538	— v. Coates (1917) ...	235
— v. Eyre (1834) ...	9, 37, 544, 545	— — v. Goulden (1873) ...	320, 429
Three Spanish Sailors' Case (1779) ...	157	— v. Stallibrass (1898) ...	253
Threlfall v. Fanshawe (1850) ...	423, 424, 437, 438	— — v. Swainson (1836) ...	476, 477
Threlkeld v. Smith (1901) ...	212	— v. Turner (1827) ...	504
Thurn & Taxis (Princess) v. Moffitt (1915) ...	156	— — v. Wright (1860) ...	71
Thurnell v. Balbirnie (1837) ...	385	Turnock v. Sartoris (1889) ...	374, 375
Thursby v. Halbutt (Helbert, Helbot) (1689) ...	493	Turnor v. Smith (1880) ...	63
Thyatt v. Young (1800) ...	162	Turpin v. Pain, <i>Re</i> Taylor (1890) ...	615
Tidswell, <i>Re</i> (1863) ...	437, 447, 486	Twisleton v. Travers (1666) ...	412, 413
Tillam v. Copp (1847) ...	452	Two Chapelries v. W. & P. (1360) ...	80
Tillett v. Charing Cross Bridge Co. (1859) ...	384, 385	Twort v. Twort (1809) ...	88
— — v. Ward (1882) ...	152	Twyn v. Twinn (1597) ...	584
Tillman, <i>Re</i> (1918) ...	181, 183	Tyerman v. Smith (1856) ...	416
Timson v. Merac (1807) ...	142, 171, 172, 176, 177	Tyler v. Campbell (1839) ...	583
Tingley v. Müller (1917) ...	139	— v. Hook (1855) ...	39
Tipperary Case (1875) ...	415	— — v. Jones (1824) ...	395, 419
Tippet v. Eyres (1689) ...	485	Tyley v. Stephen (Stevens) (1840) ...	274
Tipping v. Smith (1735) ...	131	Tyringham's Case (1584) ...	215
Tirlot v. Morris (Morrison) (1611) ...	439, 540		
Tittenson v. Peat (1747) ...	236		
Toby v. Lovibond (1848) ...	102		
Tolhausen v. Davies (1888) ...	453		
Tollemache v. Tollemache (1842) ...	520		
Tollit v. Saunders (1821) ...	313 491		
Tomes v. Hawkes (1839) ...	57		
Tomlin v. Fordwich Corp'n. (1836) ...	102, 104		
Tompkinson v. Russell (1821) ...	9		
Tooker v. Annesley (1832) ...	223		
— v. Smith (1857) ...	96		
Topladye v. Stalye (1649) ...	221		
Topping v. King (1622) ...	394		
Torrance v. Ilford Urban District Council (1909) ...	268		
Toussaint v. Hartop (1817) ...	216		
Towers v. Barrett (1786) ...	437		
Townsend v. Wathen (1808) ...	17		
Trachsall & Clayton v. Wilson (1865) ...	191		
Tracy v. Tracy (1681) ...	356		
Trafford v. Blanc, <i>Re</i> Trufort (1887) ...	534, 630, 631		
Trainor v. Phoenix Fire Assurance Co. (1891) ...	412, 413		
Travers v. Stafford (Lord) (1750) ...	356		
— v. Twisleton (1666) ...	98		
Tredwen v. Holman (1862) ...	597		
Tregmiell v. Reeve (1636) ...	17		
Tregoning v. Attenborough (1831) ...	538		
Tregonwell v. Lawrence (1674) ...	90		
Tresham v. Gerrard (1627) ...	470, 531, 581		
— v. Lamb (1610) ...	497, 505, 506		
Trevelyan v. Charter (1835) ...	630		
Trevor-Batye's Settlement, <i>Re</i> , Bull v. Trevor-Batye (1912) ...	540		
Trew v. Burton (1833) ...	559		
Tribe & Upperton, <i>Re</i> (1835) ...	162		
Trickett v. Green (1865) ...			
Trimingham v. Trimingham (1835) ...			
Trowsdale, <i>Ex p.</i> (1866) ...			
Truckenbrodt v. Payne (1810) ...			



## lxix

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	PAGE		PAGE
Wells v. Williams (1697) ... ..	130, 155	Williams (Doe d.) v. Humphreys (1802) ...	9
Welsh v. Lawrence (1818) ... ..	229, 230	----- v. Jones (1829) ... ..	523
Wenlock (Baroness) v. River Dee Co. (1883)...	615, 617	----- v. Ladner (1798) ... ..	223
Wenman (Lady) v. Mackenzie (1855) ...	544	----- v. Lewis (1857) ... ..	328, 627
Wentworth v. Turner (1795) ... ..	80	----- v. ----- (1915) ... ..	13, 15
West v. Downman (1879) ... ..	539	----- v. London Commercial Exchange	
West London Dairy Society, Ltd. v. Abbott		Co. (1854) ... ..	349
(1881) ... ..	376	v. M'Namara (1802) ... ..	109
West London Extension Ry. Co. v. Fulham		v. Marshall (1817) ... ..	187
Union Assessment Committee (1870) ...	587	v. Midland Ry. Co. (1908) ... ..	280
Westbrook v. Field (1887) ... ..	284	v. Mouldsdales (1840) ... ..	495
Westmore v. Forbes (1811) ... ..	526	v. Pritchard (1845) ... ..	496
Weston v. Downes (1778) ... ..	258	v. Richards (1907) ... ..	247, 248
----- v. Potter (1846) ... ..	261, 262, 264, 265	(Doe d.) v. Richardson (1819) ...	496, 497
Westwood v. Secretary of State for India in		--- v. Thomas (1847) ... ..	439
Council (1863) ... ..	359	--- v. Wallis & Cox (1914) ... ..	47, 48
Westwood, Baillie & Co. & Cape of Good Hope		--- v. Williams (1810) ... ..	89
Government, <i>Re</i> (1886) ... ..	425, 610	--- v. ----- (1830) ... ..	431
Wetherell (Doe d.) v. Bird (1833) ... ..	99	----- v. Wilson (1853) ... ..	604, 605
Whaley v. Laing (1860) ... ..	603	----- & Stepney, <i>Re</i> (1891) ... ..	585
Whalley v. Halley (1829) ... ..	428, 429	----- Brothers v. Agius (E. T.), Ltd.	
Wharton v. King (1831) ... ..	484, 494	(1914) ... ..	475
Whatley v. Morland (1834) ... ..	441	Williamson v. Lock (1845) ... ..	508
Wheatley v. Westminster, Brymbo Coal &		Willingale v. Maitland (1867) ... ..	101
Coke Co., Ltd. (1865) ... ..	374	Willis v. Osborne (1819) ... ..	593, 600
Whilster v. Paslow (1619) ... ..	94, 95	----- v. Wakeley Brothers (1891) ...	427
Whitcher v. Hall (1826) ... ..	257	Willison v. Patteson (1817) ... ..	165
White v. Buccleuch (Duke) (1866) ... ..	317	Willmer v. Oldfield (1587) ... ..	494
----- v. Paine (1914) ... ..	208, 213	Willmot v. Rose (1854) ... ..	55
----- v. Peto (1886) ... ..	614	Willoughby, <i>Re</i> (1885) ... ..	124
----- v. Sharp (1844) ... ..	464	----- v. Horridge (1852) ... ..	275
----- v. Steadman (1913) ... ..	257	----- v. Willoughby (1847) ... ..	406
Whitechurch v. Holworthy (1815) ... ..	66	Wills v. Maccarmick (1763) ... ..	573
Whitehand's Case (undated) ... ..	70	Willson v. Love (1896) ... ..	24, 25
Whitehead v. Firth (1810) ... ..	581, 589	Wilmer v. Oldfield (1587) ... ..	494
----- v. Smithers (1877) ... ..		Wilmot v. Allen (1731) ... ..	451
----- v. Tattersall (1834) ... ..	536, 537	----- v. Rose (1854) ... ..	55
Whiteley & Roberts, <i>Re</i> (1891) ... ..	560	Wilson, <i>Ex p.</i> , <i>Re</i> Durham County Permanent	
Whitfield v. Bewit (1724) ... ..	83	Benefit Building Society (1871) ...	318
Whiting v. Ivens (1915) ... ..	285	<i>Ex p.</i> Hastings (Lord) (1893) ...	30, 461
Whitmore v. Smith (1861) ... ..	436, 574	v. Barton (1671) ... ..	382
Whittaker v. Barker (1832) ... ..	33	v. Blyth & Tyne Ry. Co. (1863) ...	406
Whittle v. Holmes (1857) ... ..	446	v. Constable (1698) ... ..	467
Whitty v. Dillon (Lord) (1860) ... ..	61, 63, 100	v. Foster (1843) ... ..	571
Whitwham Trustees, etc., & Wrexham, Mold		v. Hinckley (1868) ... ..	430, 512
& Connah's Quay Ry. Co., <i>Re</i> (1895) ...	411, 412, 438	(late Barsham) v. Holdsworth (1863) ...	610, 611
Whitworth v. Hulse (1866) ... ..	513	v. King (1834) ... ..	527
Whurr v. Devenish (1904) ... ..	263	v. Martin (1834) ... ..	527
Wickham v. Harding (1859) ... ..	334	v. Morrell (1855) ... ..	392
----- v. Wickham (1815) ... ..	85, 102, 104	v. Newberry (1871) ... ..	65
Wicks v. Cox (1847) ... ..	453, 476	v. Ragsone & Co., Ltd. (1915) ...	172
----- v. Jordan (1614) ... ..	59, 60	----- v. Thorpe (1840) ... ..	325
Wigens (Wigans) v. Cook (1859) ... ..	593	----- & Greene, <i>Re</i> , <i>Re</i> Casterton Estates	
Wiggston Hospital & Stephenson, <i>Re</i> (1885)	561	(1886) ... ..	312, 319
Wigglesworth v. Dallison (1779) ... ..	35	----- & Son & Eastern Counties Navigation	
Wight v. Hopetoun (Earl) (1864) ... ..	7, 8	& Transport Co., <i>Re</i> (1892) ...	331, 408
Wilcox v. Wilcox (1849) ... ..	518	----- & Wilson, <i>Re</i> , <i>Ex p.</i> Marum (1915)...	157
Wild v. Holt (1841) ... ..	517	----- Sons & Co. v. Conde D'Eau Ry. Co.	
Wilkins v. Wood (1848) ... ..	12	(1887) ... ..	452
Wilkinson v. Calvert (1878) ... ..	8, 9	Wilton (Doe d.) v. ----- (1788) ...	7
----- v. Page (1842) ... ..	504	Wiltshier v. Cottrell (1853) ... ..	50
----- v. Time (1835) ... ..	384	Wimshurst, Hollick & Co. v. Barrow Ship-	
Wilks v. Davis (1817) ... ..	385	building Co. (1877) ... ..	596
Willan (Denn d.) v. Walker (1800) ... ..	8	Winch v. Sanders (Saunders) (1620) ...	492
Willcox & Storkey, <i>Re</i> (1866) ... ..	315	Winchester (Bp.) v. Knight (1717) ...	67
Willesden Local Board v. Wright (1896)	567	----- v. Wolgar (1629) ... ..	72
& Wright, <i>Re</i> (1896) ... ..	567	Winn v. Nicholson (1849) ... ..	625
Willesford v. Watson (1873) ... ..	338, 364, 365, 373, 375, 377	Winnall (Doe d.) v. Broad (1841) ...	15
William Pitt, The (1805) ... ..	185	Winter v. Garlick (1704) ... ..	488
Williams v. Bolton (Duke) (1784) ... ..	86	v. Iethbridge (1824) ... ..	484, 514, 536, 553
----- v. Great Western Ry. Co. (1885) ...	298	--- v. Munton (1818) ... ..	504
----- v. Groucott (1863) ... ..	218, 219	--- v. White (1818) ... ..	504
----- v. Gwynne (1836) ... ..	348	(1819) ... ..	342, 462
----- (Doe d.) v. Howell (1850) ... ..	580	Winteringham v. Robertson (1858) ...	413
		Winwood v. Houlst (Holt, Hall) (1845)	570
		Wirth's Patent, <i>Re</i> (1879) ... ..	133





# AGRICULTURE.

	PAGE
PART I. DEFINITIONS . . . . .	5
PART II. COMMENCEMENT, DURATION AND TERMINATION OF AGRICULTURAL TENANCY . . . . .	5
SECT. 1. COMMENCEMENT OF TENANCY . . . . .	5
SECT. 2. HOLDING OVER . . . . .	6
SECT. 3. TERMINATION OF TENANCY . . . . .	6
SUB-SECT. 1. AT WHAT DATE TENANCY MAY BE DETERMINED . . . . .	6
A. In General . . . . .	6
B. Different Parts entered at different Times. What is substantial Entry . . . . .	6
SUB-SECT. 2. SUFFICIENCY OF NOTICE TO QUIT . . . . .	8
A. In General . . . . .	8
B. Length of Notice required . . . . .	8
SUB-SECT. 3. TERMINATION WITH REFERENCE TO NOTICE OF CLAIMS FOR COMPENSATION . . . . .	9
SUB-SECT. 4. BREACH OF COVENANT INVOLVING FORFEITURE OF LEASE . . . . .	9
SUB-SECT. 5. EFFECT OF TERMINATION OF TENANCY : <i>see</i> BANKRUPTCY & INSOLVENCY ; DISTRESS : LANDLORD & TENANT. . . . .	
SUB-SECT. 6. OTHER CASES . . . . .	9
PART III. COVENANTS AND CUSTOMS OF THE COUNTRY . . . . .	10
SECT. 1. IN GENERAL . . . . .	10
SUB-SECT. 1. COVENANTS AND IMPLIED COVENANTS IN GENERAL . . . . .	10
SUB-SECT. 2. IMPLIED WARRANTIES . . . . .	11
SUB-SECT. 3. CUSTOMS OF THE COUNTRY IN GENERAL . . . . .	11
SUB-SECT. 4. CUSTOMS OF THE COUNTRY AS APPLIED TO PARTICULAR MATTERS . . . . .	12
SECT. 2. EFFECT DURING TENANCY . . . . .	12
SUB-SECT. 1. CULTIVATION IN HUSBANDLIKE MANNER . . . . .	12
A. When Implied . . . . .	12
B. Express Covenants . . . . .	13
SUB-SECT. 2. CULTIVATION ACCORDING TO CUSTOM OF THE COUNTRY . . . . .	15
A. When Implied . . . . .	15
B. Express Covenants . . . . .	16
SUB-SECT. 3. BREAKING UP OR MOWING MEADOW AND PASTURE, ETC. . . . .	16
A. Waste . . . . .	16
B. Express Covenants . . . . .	18
SUB-SECT. 4. CROPPING . . . . .	20

	PAGE
SUB-SECT. 5. DISPOSAL OF HAY, STRAW, FODDER AND ROOTS . . . . .	22
A. Custom . . . . .	22
B. Under Contract . . . . .	23
SUB-SECT. 6. MANURE AND DUNG . . . . .	26
SUB-SECT. 7. ASSIGNING, SUB-LETTING AND SUB-DIVIDING . . . . .	27
SUB-SECT. 8. ADDITIONAL RENTS AND PENALTIES . . . . .	27
SUB-SECT. 9. ENTRY AND VIEW : <i>see</i> LANDLORD & TENANT.	
SUB-SECT. 10. LIVE STOCK . . . . .	27
SUB-SECT. 11. DRAINAGE . . . . .	28
SUB-SECT. 12. REPAIRS : <i>see</i> LANDLORD & TENANT.	
SUB-SECT. 13. FENCES : <i>see</i> BOUNDARIES, FENCES, & PARTY WALLS.	
SUB-SECT. 14. RENT : <i>see</i> LANDLORD & TENANT.	
SUB-SECT. 15. FIXTURES . . . . .	28
SUB-SECT. 16. OTHER MATTERS . . . . .	28
SECT. 3. EFFECT AT OUTGOING . . . . .	29
SUB-SECT. 1. IN GENERAL . . . . .	29
SUB-SECT. 2. TILLAGES (INCLUDING FALLOWING) . . . . .	31
SUB-SECT. 3. WAY-GOING CROPS . . . . .	33
SUB-SECT. 4. MANURE AND DUNG . . . . .	38
A. Where no Covenant . . . . .	38
B. Where Covenant to leave Dung but none as to Payment therefor . . . . .	39
C. Where Covenant to leave Dung and be Paid therefor . . . . .	39
SUB-SECT. 5. LIVE STOCK . . . . .	39
SUB-SECT. 6. DRAINAGE . . . . .	40
SUB-SECT. 7. IMPROVEMENTS . . . . .	40
PART IV. DISTRESS AND EXECUTION : <i>see</i> DISTRESS ; EXECUTION.	
PART V. COMPENSATION . . . . .	41
SECT. 1. BY AGREEMENT . . . . .	41
SECT. 2. BY CUSTOM OF THE COUNTRY . . . . .	41
SECT. 3. BY STATUTE . . . . .	41
SUB-SECT. 1. RIGHT TO COMPENSATION FOR IMPROVEMENTS . . . . .	41
A. Who may claim Compensation . . . . .	41
B. Who is liable for Compensation . . . . .	42
C. In respect of what Holdings . . . . .	42
D. In respect of what Improvements . . . . .	42
E. Effect of Agreement . . . . .	44
F. Counterclaim by Landlord . . . . .	45
G. Notice of Claim . . . . .	46
H. Arbitration . . . . .	46
(a) Necessity for . . . . .	46
(b) Practice and Procedure . . . . .	46
SUB-SECT. 2. COMPENSATION FOR DISTURBANCE . . . . .	48
SUB-SECT. 3. COMPENSATION FOR DAMAGE BY GAME : <i>see</i> GAME.	
SUB-SECT. 4. MARKET GARDENS . . . . .	48
PART VI. FIXTURES . . . . .	49
PART VII. BANKRUPTCY OF TENANT : <i>see</i> BANKRUPTCY & INSOLVENCY.	
PART VIII. GROWING CROPS AND CROPS, EMBLEMENTS, AND GLEANING . . . . .	52
SECT. 1. GROWING CROPS AND CROPS . . . . .	52
SECT. 2. EMBLEMENTS . . . . .	58



SECT. 3. GLEANING . . . . .	60
-----------------------------	----

SECT. 4. MUSHROOMS : *see* CRIMINAL LAW & PROCEDURE.

PART IX. TREES AND TIMBER . . . . .	61
-------------------------------------	----

SECT. 1. DEFINITION AND CLASSIFICATION OF TREES, TIMBER, UNDERWOOD, ETC.. . . .	61
---	----

SECT. 2. PROPERTY IN TREES AND LIABILITIES OF DIFFERENT CLASSES OF OWNERS . . . .	63
---	----

SUB-SECT. 1. ADJOINING OWNERS . . . . .	63
---	----

SUB-SECT. 2. COPYHOLDERS . . . . .	66
------------------------------------	----

SUB-SECT. 3. DEVISEES IN FEE WITH GIFT OVER. . . . .	70
--	----

SUB-SECT. 4. DONEES OF POWERS OF SALE, ETC. . . . .	71
---	----

SUB-SECT. 5. ECCLESIASTICAL OWNERS . . . . .	71
--	----

SUB-SECT. 6. EXECUTOR AND HEIR OR DEVISEE. . . . .	72
--	----

SUB-SECT. 7. MORTGAGOR AND MORTGAGEE . . . . .	72
--	----

SUB-SECT. 8. TENANTS AT WILL . . . . .	73
--	----

SUB-SECT. 9. LANDLORD AND TENANT . . . . .	73
--	----

A. Ownership and Rights generally . . . . .	73
---	----

B. Landlord . . . . .	74
-----------------------	----

C. Tenant for Years or Lives . . . . .	75
--	----

SUB-SECT. 10. TENANT FOR LIFE AND REMAINDERMAN . . . . .	79
--	----

A. Impeachable for Waste. . . . .	79
-----------------------------------	----

B. Unimpeachable for Waste . . . . .	80
--------------------------------------	----

C. Partially unimpeachable for Waste . . . . .	82
--	----

D. Rights and Remedies of Remainderman . . . . .	83
--	----

E. Right to Proceeds of Timber Cut or Sold . . . . .	84
--	----

(a) Rightfully . . . . .	84
--------------------------	----

(b) Under Order of Court . . . . .	86
------------------------------------	----

(c) Wrongfully . . . . .	86
--------------------------	----

F. Rights in respect of Windfalls . . . . .	86
---	----

SUB-SECT. 11. TENANTS IN COMMON . . . . .	87
---	----

SUB-SECT. 12. TENANT IN DOWER . . . . .	88
---	----

SUB-SECT. 13. TENANTS IN TAIL . . . . .	88
---	----

SUB-SECT. 14. TENANTS OF TIMBER ESTATES . . . . .	89
---	----

SUB-SECT. 15. TRUSTEES AND EQUITABLE TENANTS FOR LIFE, ETC. . . . .	90
---	----

SUB-SECT. 16. VENDORS AND PURCHASERS . . . . .	93
--	----

SECT. 3. CONTRACTS RELATING TO TREES AND TIMBER . . . . .	93
---	----

SUB-SECT. 1. APPLICATION OF STATUTE OF FRAUDS AND SALE OF GOODS ACT, 1893 . . . .	93
---	----

SUB-SECT. 2. CONSTRUCTION . . . . .	93
-------------------------------------	----

SUB-SECT. 3. EFFECT OF SALE . . . . .	93
---------------------------------------	----

SUB-SECT. 4. REMEDIES FOR BREACH . . . . .	93
--	----

SECT. 4. CONSTRUCTION AND EFFECT OF GRANTS, LEASES, ETC., OF TREES AND OF COVENANTS AND CONTRACTS RELATING TO TREES . . . . .	94
--	----

SUB-SECT. 1. WHAT PASSES UNDER GRANTS, LEASES, ETC. . . . .	94
---	----

A. Whether the Soil passes or does not pass . . . . .	94
---	----

B. What passes other than the Soil . . . . .	95
--	----

SUB-SECT. 2. EFFECT OF GRANTS, ETC. . . . .	96
---	----

SUB-SECT. 3. EFFECT OF EXCEPTIONS, RESERVATIONS AND PROVISOS, ETC. . . . .	97
--	----

SUB-SECT. 4. COVENANTS RELATING TO TREES . . . . .	98
--	----

SUB-SECT. 5. CONTRACTS RELATING TO TREES . . . . .	100
--	-----



	PAGE
SECT. 5. CUSTOMS, USAGES AND PRESCRIPTION RELATING TO TREES . . . . .	101
SECT. 6. CROWN GRANTS AND LICENCES . . . . .	101
SECT. 7. MANAGEMENT BY COURT . . . . .	101
SUB-SECT. 1. POWER TO ALLOW CUTTING . . . . .	101
SUB-SECT. 2. APPLICATION OF PROCEEDS . . . . .	103
SECT. 8. WASTE AS REGARDS TREES . . . . .	104
SUB-SECT. 1. GENERAL PRINCIPLES . . . . .	104
SUB-SECT. 2. PARTICULAR ACTS . . . . .	105
SUB-SECT. 3. EQUITABLE WASTE—ORNAMENTAL AND OTHER TIMBER . . . . .	106
SECT. 9. REMEDIES IN RESPECT OF TREES WRONGFULLY CUT OR TO BE CUT . . . . .	110
SUB-SECT. 1. INJUNCTION . . . . .	110
SUB-SECT. 2. ACTION FOR BREACH OF COVENANT OR CONTRACT . . . . .	112
SUB-SECT. 3. ACTION FOR TRESPASS . . . . .	112
SUB-SECT. 4. ACTION FOR TROVER . . . . .	112
SUB-SECT. 5. ACTION FOR DAMAGES IN NATURE OF ACTION FOR WASTE . . . . .	113
SUB-SECT. 6. ACTION FOR ACCOUNT . . . . .	113
SUB-SECT. 7. ACTION FOR PROCEEDS AS MONEY HAD AND RECEIVED . . . . .	113
SUB-SECT. 8. PROHIBITION . . . . .	114
SUB-SECT. 9. EFFECT OF LAPSE OF TIME . . . . .	114
SECT. 10. TREES ON HIGHWAYS . . . . .	114
SECT. 11. TREES ON COMMONS : <i>see</i> COMMONS & RIGHTS OF COMMON.	
SECT. 12. CRIMES RELATING TO TREES : <i>see</i> CRIMINAL LAW & PROCEDURE.	
SECT. 13. TIMBER LICENCES : <i>see</i> REAL PROPERTY & CHATTELS REAL.	
PART X. FERTILISERS, FEEDING STUFFS AND SEEDS . . . . .	115
PART XI. MISCELLANEOUS . . . . .	
SECT. 1. AGRICULTURAL GANGS, ETC. : <i>see</i> EDUCATION ; PUBLIC HEALTH & LOCAL ADMINISTRATION.	
SECT. 2. DESTRUCTION OF CROPS, ETC., BY SPARKS FROM LOCOMOTIVES : <i>see</i> RAILWAYS & CANALS.	
SECT. 3. DOGS : <i>see</i> ANIMALS ; REVENUE.	
SECT. 4. MALICIOUS DAMAGE TO CROPS AND THRESHING MACHINERY : <i>see</i> CRIMINAL LAW & PROCEDURE.	
SECT. 5. POISONED FLESH AND GRAIN : <i>see</i> ANIMALS.	
SECT. 6. REGULATIONS AS TO SALE AND ADULTERATION . . . . .	117
SUB-SECT. 1. FERTILISERS AND FEEDING STUFFS . . . . .	117
SUB-SECT. 2. HAY AND STRAW : <i>see</i> MARKETS & FAIRS.	
SUB-SECT. 3. HOPS : <i>see</i> FOOD & DRUGS.	
SUB-SECT. 4. SEEDS . . . . .	117
SECT. 7. SALE OF CATTLE BY WEIGHT : <i>see</i> MARKETS & FAIRS.	
SECT. 8. SUNDAY TRADING : <i>see</i> TIME.	
SECT. 9. THISTLES AND NOXIOUS WEEDS . . . . .	117
SECT. 10. CLEARING LAND BY FIRE . . . . .	117

## PART I.—DEFINITIONS.

<i>Agistment</i> . . .	See ANIMALS.	<i>Game, Ground Game and Sporting Rights</i> . .	See GAME.
<i>Agricultural Labourers, Compensation for Accidents</i> . . .	„ MASTER & SERVANT.	<i>Land Tax</i> . . .	„ LAND TAX.
<i>Agricultural Rates</i> . . .	„ RATES & RATING.	<i>Leases of Glebe Lands</i> . .	„ ECCLESIASTICAL LAW.
<i>Allotments</i> . . .	„ ALLOTMENTS ; SMALL HOLDINGS & SMALL DWELLINGS.	<i>Leases under Settled Land Acts</i> . . .	„ SETTLEMENTS.
<i>Animals, generally</i> . . .	„ ANIMALS.	<i>Milk, Sale and Adulteration of</i> . . .	„ FOOD & DRUGS.
<i>Butter, Cheese and Cream</i> . . .	„ FOOD & DRUGS.	<i>Produce, Inspection of</i> . .	„ PUBLIC HEALTH & LOCAL ADMINISTRATION.
<i>Carriage of Cattle</i> . . .	„ ANIMALS.	<i>Produce, Storage and Transportation of</i> . .	„ CARRIERS.
<i>Common Pasture</i> . . .	„ COMMONS & RIGHTS OF COMMON.	<i>Small Dwellings</i> . . .	„ SMALL HOLDINGS & SMALL DWELLINGS.
<i>Cruelty to Animals</i> . . .	„ ANIMALS.	<i>Small Holdings</i> . . .	„ SMALL HOLDINGS & SMALL DWELLINGS.
<i>Customs, generally</i> . . .	„ CUSTOM & USAGES ; LANDLORD & TENANT.	<i>Tithes</i> . . .	„ ECCLESIASTICAL LAW.
<i>Dairies, Regulation of</i> . .	„ FOOD & DRUGS.	<i>Trespass by Cattle and Distress Damage Feasant</i> . . .	„ ANIMALS ; DISTRESS.
<i>Dangerous and Vicious Animals</i> . . .	„ ANIMALS.	<i>Truck Acts, Application to Agricultural Labourers</i> . . .	„ FACTORIES & SHOPS.
<i>Diseases of Animals</i> . . .	„ ANIMALS.		
<i>Drugging Animals</i> . . .	„ ANIMALS.		
<i>Fences</i> . . .	„ BOUNDARIES, FENCES, & PARTY WALLS.		

NOTE.—The Act now in force in England is “Agricultural Holdings Act, 1908 (c. 28),” herein referred to as A. H. Act, 1908. The Act repealed (*inter alia*) A. H. Acts of 1875 (c. 92), 1883 (c. 61), 1900 (c. 50) and 1906 (c. 56), and also Market Gardeners’ Compensation Act, 1895 (c. 27). In considering the cases set out in this title regard must be had to their date, the Act under which they were decided, and the effect of the subsequent Acts.

## Part I.—Definitions.

**Whether farmer** —“Cowkeeper.”]—See PUBLIC HEALTH & LOCAL ADMINISTRATION.  
 — “Trader.”]—See BANKRUPTCY & INSOLVENCY.  
**Whether farming** — “Business.”] — See COMPANIES.  
 — “Trade.”] — See TRADE & TRADE

UNIONS ; FACTORY & WORKSHOP ACT, 1878 (c. 16).  
**Whether farming for pleasure** — “Trade or business.”]—See BANKRUPTCY & INSOLVENCY.  
**Meaning of agricultural terms.**] — See Nos. 34, 47, 106, 121, 159, 196, 214, 223, *post*.  
 — **Used in weighing & measuring farm produce.**]—See WEIGHTS & MEASURES.

## Part II. Commencement, Duration, and Termination of Agricultural Tenancy.

### SECT. 1.—COMMENCEMENT OF TENANCY.

**What is substantial entry as determining date at which possession terminates.**]—See Nos. 9—17, *post*.

**What is date of entry as determining when**

**notice of claim for compensation must be given.**]—See Nos. 245—250, *post*.

**What is date of entry as determining what is last year of tenancy.**]—See Nos. 1—8, *post*.

See also LANDLORD & TENANT.

## SECT. 2.—HOLDING OVER.

Rights of parties where tenant continues from year to year after expiry of lease.]—See Nos. 68, 180, 193, 194, 198, 208, 210, 212, 246, *post*.

## SECT. 3.—TERMINATION OF TENANCY.

### SUB-SECT. 1.—AT WHAT DATE TENANCY MAY BE DETERMINED.

#### A. In General.

1. Taking from Old Lady Day — Entry to arable at Candlemas.]—A custom that on a taking from Old Lady Day, Apr. 5, the tenant should enter on the arable at Candlemas to prepare for the Lent corn:—*Held*: not an objection to the validity of a notice to quit ending at Old Lady Day.—DOE d. DAGGET v. SNOWDEN (1775), 2 Wm. Bl. 1224; 96 E. R. 720.

*Annotations*:—*Consd.* Doe d. Allen v. Calvert (1802), 2 East, 376. *Folld.* Doe d. Strickland v. Spence (1805), 6 East, 120. *Refd.* Rutland v. Wythe (1842-43), 10 Cl. & Fin. 419, H. L.

2. Custom that tenancy for three years — Unreasonable.]—*Held*: a custom that, if a tenant took a farm in which there was any open field land for an uncertain term, the holding of the whole was to be considered as a holding from three years to three years, the duration of the local course of husbandry, was unreasonable.—ROE d. BREE v. LEES (1777), 2 Wm. Bl. 1171; 96 E. R. 691.

3. Holding under void agreement — Terms as to quitting determine.]—If a landlord lease a farm for seven years by parol, & agree that the tenant shall enter at Lady Day & quit at Candlemas, though the lease be void by Stat. Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects, & the landlord can only put an end to the tenancy at Candlemas.—DOE d. RIGGE v. BELL (1793), 5 Term Rep. 471; 101 E. R. 265.

*Annotations*:—*Distd.* Doe d. Warner v. Browne (1807), 8 East, 165. *Refd.* Doe d. Rogers v. Pullen (1836), 3 Scott, 271; Beale v. Saunders (1837), 3 Hodg. 147; Cattley v. Arnold (1859), 1 John. 651. *Mentd.* Arden v. Sullivan (1850), 19 L. J. Q. B. 268; Adams v. Clutterbuck (1883), 10 Q. B. D. 403.

4. Feast of St. Michael — Old or new style — Admissibility of evidence.]—A lease of lands by deed, since the new style, to hold from the feast of St. Michael, must be taken to mean from New Michaelmas, & cannot be shown by extrinsic evidence to refer to a holding from Old Michaelmas; & a notice to quit at Old Michaelmas, though given half a year before New Michaelmas, is bad.—DOE d. SPICER v. LEA (1809), 11 East, 312; 103 E. R. 1024.

*Annotations*:—*Distd.* Doe d. Hall v. Benson (1821), 4 B. & Ald. 585; Doe d. Peters v. Hopkinson (1823), 2 L. J. O. S. K. B. 11. *Apprvd. & Distd.* Smith v. Flower (1826), 11 Moore, C. P. 264. *Folld.* Smith v. Walton (1832), 8 Bing. 235. *Distd.* Doe d. Willis v. Perrin (1840), 9 C. & P. 467. *Refd.* Cadby v. Martinez (1840), 11 Ad. & El. 720; Sidebotham v. Holland, [1895] 1 Q. B. 378, C. A.

5. Until Michaelmas next & no longer — With use of part till Lady Day.]—Upon a demise “until

Michaelmas next & no longer,” with the privilege of using part of the premises for specific purposes till Lady Day following, ejectment may be brought for those parts to which the privilege does not extend, in the interval between Michaelmas & Lady Day. Such an agreement containing an express provision for giving up the farm at Michaelmas, the lessor with the assent of the lessee adds the words “house & buildings”:—*Semble*: this alteration, being merely an expression of what was before implied, does not require a new stamp.—DOE d. WATERS v. HOUGHTON (1827), 1 Man. & Ry. K. 208; 6 L. J. O. S. K. B. 86.

6. Stipulations not excluding right to terminate.]—Premises were demised under a written agreement, dated Aug. 4, 1845, “the tenancy to be from year to year from Michaelmas next,” at the rent of £55 payable half-yearly “except the last half-year, which portion of rent shall be paid on or before Aug. 1, in that year, & to be deemed then due for all legal remedies for recovering rent in arrears”; the tenant “to allow the landlord, or incoming tenant, in the last year, to enter on May 1 to make fallows, & carry out the manure,” for which compensation was to be paid, etc.; the tenant to have “the use of the barns for stacking & threshing the crops of the last year till May 1 after the tenancy”:—*Held*: these stipulations did not necessarily import that the tenancy was to be extended beyond the first year, & the tenancy was determined by a notice dated Mar. 24, 1846, to quit at Michaelmas that year.—DOE d. PLUMER v. MAINBY (1847), 10 Q. B. 473; 16 L. J. Q. B. 303; 11 Jur. 308; 116 E. R. 180.

7. Custom to show when tenancy determines.]—The custom of the country is not admissible to prove that a notice to quit, served on Apr. 5, is a good notice to quit, by reason of the tenancy being a Michaelmas tenancy, but it must be proved by direct evidence that such is the case.—HOGG v. NORRIS & BERRINGTON (1860), 2 F. & F. 246.

8. Possession under agreement for lease — No rent paid—Tenancy at will.]—Pltf. entered into possession of a farm under an agreement for a lease for twenty-one years from deft. Before any rent was due or had been paid deft. gave pltf. notice to quit, & turned him out of possession, because he had done that which amounted to a breach of a covenant contained in the agreement & intended to be inserted in the lease. The tenant brought an action for trespass:—*Held*: (1) pltf. not entitled to recover; (2) as he was in possession under an agreement for a lease for twenty-one years & had paid no rent, he was only a tenant at will, & his landlord was entitled so to determine that tenancy, which was not subject to or controlled by Conveyancing Act, 1881 (c. 41), s. 14.—COATSWORTH v. JOHNSON (1886), 55 L. J. Q. B. 220; 54 L. T. 520; 2 T. L. R. 351, C. A.

*Annotation*:—*Refd.* Swain v. Ayres (1888), 21 Q. B. D. 289, C. A.

#### B. Different Parts entered at different Times—What is substantial Entry.

9. Question for jury.]—Where house & land are let together to be entered upon at different times, & it does not appear from the terms of the

ant's possession continued until Whit-Sunday, 1869.—UDNY v. ESSON (1869), 6 Sc. L. R. 576.—SCOT.

#### PART II. SECT. 3, SUB-SECT. 1.—B.

d. Grass at Whit-Sunday — Arable land at separation of crop.]—Under an improving lease, the terms of removal in which were Whit-Sunday as to the grass, and the separation of the crop as to the arable land:—*Held*: (1) the tenant was not bound to remove at

#### PART II. SECT. 3, SUB-SECT. 1.—A.

a. Tenant removing from arable lands at Michaelmas.]—A tenant removing from arable lands at Michaelmas is not entitled to retain possession of the barns or stables after that term.—ANDERSON v. TOD (1809), Hume, 842.—SCOT.

b. Entry at Whit-Sunday—Rent paid annually at Martinmas.]—A tenant under a lease for seven years from Whit-Sunday, 1855, of land occupied as grass

parks, paid the rent annually at Martinmas:—*Held*: the landlord was not entitled to remove the tenant from the lands at Martinmas, 1861, in order to prepare the land by tillage for the next year's crop.—ADDIE v. YOUNG (1862), 24 D. 799.—SCOT.

c. Lease from Whit-Sunday—First grain crop specified.]—A farm was let for nineteen years from Whit-Sunday, 1850, the crop of 1850 being declared to be the first grain crop:—*Held*: the ten-

demise from what time the whole is to be taken as let together, it is a question of fact for the jury, which is the principal & which the accessory subject of demise, in order for the judge to decide whether the notice to quit the whole is given in time.—*DOE d. HEAPY v. HOWARD* (1809), 11 East, 498 ; 103 E. R. 1096.

*Annotation* :—*Refd.* *Doe d. Kindersley v. Hughes* (1840), 7 M. & W. 139.

**10. *Primâ facie* entry to land — Not to houses.]—**A farm was held by a tenant from year to year, as to the lands from Feb. 2, & as to the house & buildings from May 1. On Feb. 16, 1838, the tenant received a notice to quit “at the end of your present year’s holding.” On the trial of an ejectment to recover possession of the farm, no evidence was given by the tenant that the house & buildings & not the land were the principal subject of demise. The judge who tried the cause treated the land as the principal & the house & buildings as the accessory, & he was not required by defts. to leave that question to the jury :—*Held* : (1) the notice was sufficient to put an end to the tenancy in 1839 ; (2) the *primâ facie* presumption in the case of a farm was that the land was the principal & the buildings the accessory.—*DOE d. KINDERSLEY v. HUGHES* (1840), 7 M. & W. 139 ; H. & W. 147 ; 10 L. J. Ex. 185 ; 151 E. R. 711.

*Annotation* :—*Mentd.* *Belaney v. Kelly* (1871), 24 L. T. 738.

**11. Day of payment of rent.]—***Semble* : the day of payment of the rent may always be considered as the substantial time of entry.—*DOE d. STRICKLAND v. SPENCE* (1805), 6 East, 120 ; 2 Smith, K. B. 255 ; 102 E. R. 1232.

*Annotations* :—*Mentd.* *Doe d. Bradford v. Watkins* (1806), 7 East, 551 ; *Sidebotham v. Holland*, [1895] 1 Q. B. 378, C. A.

**12. Pasture at Old Lady Day — Meadow at Old May Day.]—**An agreement to take a farm, the arable from Old Candlemas, the pasture from Old Lady Day, & the meadow from Old May Day, paying rent half-yearly at Old Michaelmas & Lady Day, is substantially a taking of the whole from Old Lady Day ; & notice to quit & deliver before Old Michaelmas is sufficient to determine the tenancy.—*DOE d. DAGGET v. SNOWDEN* (1775), 2 Wm. Bl. 1224 ; 96 E. R. 720.

*Annotations* :—*Consd.* *Doe d. Allen v. Calvert* (1802), 2 East, 376. *Folld.* *Doe d. Strickland v. Spence* (1805), 6 East, 120. *Refd.* *Rutland v. Wythe* (1842-43), 10 Cl. & Fin. 419, H. L.

**13. Arable land at Candlemas — Buildings & pastures at May Day.]—**In an action of ejectment by a landlord of a farm, it was shown that deft. held the farm as to the arable lands from Candlemas, & as to the buildings & pastures from May Day, & that the rent was payable at Michaelmas & Lady Day. The notice to quit was given six months before May Day, but not six months before Candlemas :—*Held* : plff. could not recover, since the notice must be given half a year before Candlemas.—*DOE d. WILTON v. —* (1788), cited in *DOE d. ALLEN v. CALVERT* (1802), 2 East, 376 ; 102 E. R. 413.

*Annotation* :—*Consd.* *Doe d. Allen v. Calvert* (1802), 2 East,

**14. Housing at Old Lady Day — Land at Candlemas.]—**On a lease from year to year of a farm, the tenant was to enter on the housing at Old Lady Day,

Whit-Sunday from arable land which had been natural pasture at the commencement of the lease, but brought in by him in the course of it ; (2) the tenant was bound at that time to remove from all grass, whether growing on arable or pasture land ; (3) “grass” did not include the penult crop & yielding the first crop in the year of removal.—

*KEITH v. LOGIE’S HEIRS* (1825), 4 Sh. (Ct. of Sess.) 267.—*SCOT.*

*e. Entry at Whit-Sunday—Presumption arising from.]—*There is no presumption that a Whit-Sunday entry means an entry to the houses, grass, & fallow at Whit-Sunday, & to the arable land under crop at Martinmas, or at the separation of the crop from the ground

& the land at Old Candlemas, etc., with an agreement to quit at the times of entering, the rent being payable at Old Lady Day & Michaelmas :—*Held* : a notice to quit half a year before Old Lady Day, which was the substantial entry on the farm, was good, the entry on the land at Old Candlemas Day being only in the nature of a liberty.—*DOE d. STRICKLAND v. SPENCE* (1805), 6 East, 120 ; 2 Smith, K. B. 255 ; 102 E. R. 1232.

*Annotations* :—*Folld.* *Doe d. Bradford v. Watkins* (1806), 7 East, 551 ; *Refd.* *Sidebotham v. Holland*, [1895] 1 Q. B. 378, C. A.

**15. Meadow on December 25 — Pasture on March 25—Housing, mills, etc., on May 1—Manufacturing premises.]—**Under an agreement of demise, dated in Jan., of a dwelling-house & other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, & bleaching grounds, water-courses, etc., for a term of thirty-five years, the tenancy was to commence as to the meadow ground, from Dec. 25 preceding, as to the pasture, from Mar. 25 following, & as to the housing, mills, & all the rest of the premises, from May 1, reserving the first half-year’s rent on the Day of Pentecost, & the other half-year’s rent at Martinmas :—*Held* : (1) the substantial subject of demise being the house & buildings for the purpose of the manufacture, May 1 was the substantial time of entry to which a notice to quit ought to refer, & not Dec. 25, when the incoming tenant had liberty of entering on the meadow, which was merely auxiliary to the other & principal subject of demise : (2) a notice to quit served on Sept. 28 (which would have been sufficient with reference even to Mar. 25, the day of entry on the pasture ground, Sept. 29 being the corresponding half-yearly day of holding to Mar. 25) to quit at expiration of the current year of holding, was sufficient.—*DOE d. BRADFORD v. WATKINS* (1806), 7 East, 551 ; 3 Smith, K. B. 517 ; 103 E. R. 213.

*Annotation* :—*Refd.* *Rutland v. Wythe* (1842-43), 10 Cl. & Fin. 419, H. L.

**16. Lands on February 2 — House on May 1.]—***Qu.* : whether, where a tenant holds a farm from year to year, the lands from Feb. 2, & the house from May 1, a notice to quit the whole, given half a year before Feb. 2, is sufficient to entitle the landlord to recover the whole in ejectment, on a demise dated Feb. 3.—*DOE d. DAVENPORT v. RHODES* (1843), 11 M. & W. 600 ; 12 L. J. Ex. 382 ; 1 L. T. O. S. 289 ; 152 E. R. 945.

*Annotations* :—*Refd.* *Doe d. Bowman v. Lewis* (1841), 13 M. & W. 241. *Mentd.* *Alcock v. Wilshaw* (1860), 6 Jur. N. S. 628.

**17. House & grass at Whit-Sunday—Arable land at separation of crop.]—**A lease was declared to commence “as to the houses & grass at Whit-Sunday, & as to the arable land at the separation of the crop from the ground.” It was to last for nineteen years, perpetually renewable on requisition, to be made twelve months before its expiration :—*Held* : (1) the expiration of the lease was at Whit-Sunday, 1861, & the requisition for renewal ought to have been made at or before Whit-Sunday, 1860 : (2) a requisition postponed till Aug. 1, 1860 (though before “the separation of the crop from the ground”), was too late.

The lease, if its expiration were at the separation of the crops, would not have a certain & definite termination, but separate endings, as to different &

in the case of the subjects let being in the natural possession of the proprietor.

Under missives of lease, with entry at Whit-Sunday :—*Held* : entry had been given as well to the arable land as to the houses, grass, & fallow at that term, the whole being at the time in the possession of the proprietor.—*DUFF v. WILSON* (1864), 3 M. 173.—*SCOT*



**Sect. 3.—Termination of tenancy: Sub-sects. 1, B., 2, A. & B., 3, 4, 5 & 6.]**

unknown portions of the arable lands at different & uncertain periods; & consequently there would be no possibility of computing either the beginning or the ending of the last year, & no certainty as to the day when the notice of renewal ought to be given, or when it would expire (LORD WESTBURY, C.).

It appears to me that the term of nineteen years expired at Whit-Sunday, 1861, that the period between Whit-Sunday & the separation of the crop from the ground was not a continuance of the term, but only a continuance of the possession (LORD CHELMSFORD).—WIGHT v. HOPETOUN (EARL) (1864), 4 Macq. 729, H. L.

*Annotation* :—Dist. Black v. Clay, [1894] A. C. 368, H. L.

**SUB-SECT. 2.—SUFFICIENCY OF NOTICE TO QUIT.**

Notice served by agent. See AGENCY, Vol. I., pp. 327, 328.

Notice served by one of several co-lessors. See LANDLORD & TENANT.

On whom notice must be served. See LANDLORD & TENANT.

*A. In General.*

**18. Notice to quit Lady Day — Good for Old or New Lady Day.]**—A notice to quit on Lady Day is a good termination of a holding, either from Lady Day old or Lady Day new style.—DENN d. WILLAN v. WALKER (1800). Peake, Add. Cas. 194.

**19. Notice to quit part—Bad at common law—Good under particular agreement.]**—A farm was leased for twenty-one years, at a rent of £180 per annum, consisting, as described in the lease, of the Town Barton, & its several parcels described by name, at the rent of £83, other closes named at other rents of £5, £5, & £1, the Shippen Barton, & its several parcels described by name, at £86, with a power reserved to either party to determine the lease at the end of fourteen years, on giving two years' previous notice :—*Held* : (1) a notice by the landlord to his tenant to quit "Town Barton, etc., agreeably to the terms of the covenant between us

on expiration of the 14th year of your term," given in due time, was sufficient; (2) a notice to quit a part only of premises leased together is bad at common law.—DOE d. RODD v. ARCHER (1811), 14 East, 245; 104 E. R. 595.

*Annotation* :—Dist. Giddins v. Dodd (1856), 20 J. P. 580.

**20. Mistake in description of lands — Lessee not misled.]**—In ejectment to recover a farm at H. the notice to quit described the premises to be at D., which was a distinct parish, but as it did not appear that deft. was misled by the notice :—*Held* : it was sufficient.—DOE d. ARMSTRONG v. WILKINSON (1840), 12 Ad. & El. 743; Arn. & H. 39; 4 Per. & Dav. 323; 5 J. P. 45; 113 E. R. 995.

**21. Agricultural Holdings Act, 1883 — Notice by registered letter.]**—*Held* : a year's notice to quit a holding, to which A. H. Act, 1883, applied, made necessary & sufficient by virtue of s. 33 of that Act, was a notice under the Act within s. 28 of the Act, & might be served upon the person to whom it was to be given by being sent through the post in a registered letter addressed to him at his last known place of abode in England.—VAN GRUTTEN v. TREVENEN, [1902] 2 K. B. 82; 71 L. J. K. B. 544; 87 L. T. 344; 50 W. R. 516; 18 T. L. R. 575; 46 Sol. Jo. 482, C. A.

*B. Length of Notice required.*

**22. Agricultural Holdings Act, 1875 — Notice given before commencement of Act.]**—A landlord on Feb. 3 gave notice to quit to his tenant, who held under him as a tenant from year to year, & on Feb. 13 the above Act came into operation :—*Held* : by virtue of the notice to quit so given on Feb. 3 there was no contract of tenancy from year to year current at the commencement of the Act.—VANSITTART v. ALLEN (1877), 41 J. P. 441.

**23. — Agreement for "six months' notice."]**—Where premises were demised by deed at a yearly rent for "the term of one year, & so on from year to year, determinable at the end of the first or any subsequent year on six months' notice to quit," & six months' notice was given by the lessor to the lessee :—*Held* : such notice was sufficient to determine the tenancy, since s. 51 of the above Act was not applicable to a case where the parties had expressly

**PART II. SECT. 3, SUB-SECT. 2.—A.**

**i. Notice by letter.]**—W. was tenant from year to year to L. of certain lands. L.'s agent wrote a letter to W. as follows : "Sir, I have just been looking over your farm, & I find you have not complied with the terms of your agreement, viz., to lay out £300 in permanent improvements and buildings, within two years, from May 1, 1852, to May 1, 1854. I therefore, on the part of Mr. L., beg to say he does not now consider himself in any way bound to you, & will require possession of his farm on May 1 next." Subsequently pltf. attempted to serve W. regularly, but service was not effected, owing to a mistake of the process-server :—*Held* : the letter was a sufficient notice to quit.—LANGLEY v. WILLIAMS (1856), 28 L. T. O. S. 24.—IR.

**g. Tenant of two farms with onstead on each—Warning served on one sufficient.]**—S. granted a lease of lands at W. to K., who resided at another farm called L., & who was so described in the lease from S. Warning was given at W. :—*Held* : (1) the Act of 1555 meant the warning to be served at the onstead or dwelling-house on the lands, & a tenant who had two farms, with an onstead on each, had two dwelling-houses; (2) the warning was properly given.—STEWART v. KERR (1805), Hume, 571.—SCOT.

**PART II. SECT. 3, SUB-SECT. 2.—B.**

**h. Agricultural Holdings (Scotland) Act, 1908 (c. 64)—"Land for b**

**or other purposes" —(Grazing purposes.)**—A landlord let a park for one year, & in the lease reserved "power to resume, in whole or in part, the lands hereby let for any purpose whatever, except that of letting to another agricultural tenant, on giving one month's notice of his intention so to do to the tenant." The landlord gave the tenant one month's notice of his intention to resume possession of the park, the purpose being to graze pedigree sheep belonging to himself :—*Held* : (1) the enumerated purposes in s. 18 (5) of the above Act did not form a genus; (2) the resumption contemplated was covered by the words "other purposes," & the notice was sufficient.—CRICHTON STUART (LORD) v. OGILVIE, [1914] S. C. 888; 51 Sc. L. R. 761; 2 S. L. T. 116.—SCOT.

**i. Farm let from year to year—Circumstances not amounting to warning.]**—A landlord & tenant could not agree to a renewal of the lease of a farm, & the landlord subsequently publicly advertised the farm in the newspapers, & granted a lease to a third party. In an action of removing brought by the landlord :—*Held* : no sufficient regular warning had been given to the tenant, & the tenant was entitled to possess the lands for another year by tacit relocation.—GORDON v. BRYDEN (1803), 13 F. C. 164.—SCOT.

**j. Grass parks let for pasture—Tenancy from year to year—No formal notice necessary.]**—Where grass parks are let for pasture from year to year, the

doctrine of tacit relocation does not take effect, & no legal formal warning to remove is necessary.

Deft. insisted on his rights to two parks, refusing peaceable possession to the new tenant, on the ground that he had received no legal warning & was entitled to the use of the pasture land for another year by tacit relocation :—*Held* : (1) unless he made a new bargain, he was not entitled to remain a single day after the expiry of his term; (2) if he did, he could be summarily removed, because he had no title of possession whatever.—MACHARG (PETITIONER) (1805), 13 F. C. 464.—SCOT.

**k. Contract for share farming—No provision as to duration—Reasonable notice.]**—Deft., the owner of a farm, entered into an agreement with pltf. to work it on shares as a dairy farm, deft. to find the land, stock & plant, & pltf. to find all labour, & rent to be paid jointly out of the proceeds & the remaining profits to be divided. There was no provision as to the duration of the contract. After pltf. had been in occupation for two months deft. terminated the contract, & gave pltf. nine days' notice to quit the land, & after the expiration of the nine days forcibly ejected him :—*Held* : (1) the contract was one which could only be terminated by reasonable notice; (2) pltf. was in occupation under a licence which was coupled with such an interest as rendered it irrevocable.—BELLINGER v. HUGHES (1911), 11 S. R. N. S. W. 419.—AUS.



stipulated for a "six months' notice," which was different from the "half-year's notice" mentioned in that sect., such a stipulation being valid by virtue of s. 54.—*WILKINSON v. CALVERT* (1878), 3 C. P. D. 360; 47 L. J. Q. B. 679; 38 L. T. 813; 42 J. P. 776; 26 W. R. 829.

*Annotations*:—*Apld.* *Barlow v. Teal* (1885), 15 Q. B. D. 501, C. A. *Mentd.* *Bruner v. Moore* (1903), 52 W. R. 295.

**24. Agricultural Holdings Act, 1883 — Agreement for "six months' notice."**—A tenancy under a written agreement from year to year "until six months' notice shall have been given . . . in the usual way to determine the tenancy" is not one "where a half-year's notice . . . is by law necessary" within s. 33 of the above Act, which does not apply so as to render a year's notice necessary for determination of the tenancy.—*BARLOW v. TEAL* (1885), 15 Q. B. D. 501; 54 L. J. Q. B. 564; 51 L. T. 63; 50 J. P. 100; 34 W. R. 54, C. A.

*Annotations*:—*Refd.* *Friend v. Shaw* (1887), 20 Q. B. D. 374. *Mentd.* *Bruner v. Moore* (1903), 52 W. R. 295; *Re Leeds Institute & Leeds City Council*, [1909] 1 Ch. 500; *Re Demerara Rubber Co.*, [1913] 1 Ch. 331.

**25. Common field lands — Tenancy from year to year—Six months' notice.**—A general parol demise at an annual rent, where the bulk of the farm is inclosed, & a small part in the open common fields, is only a lease from year to year, not for so long as the usual round of husbandry extends, & the usual half-year's notice to quit is sufficient.—*ROE d. BREE v. LEES* (1777), 2 Wm. Bl. 1171; 96 E. R. 691.

**26. — Custom of twelve months' notice—Evidence.**—In ejectment for common field lands by a landlord against his tenant, deft. alleged a custom to give a year's notice. Pltf. had given six months' notice:—*Held*: under a special custom twelve months' notice might be necessary, but there ought to be very strong evidence of the custom.—*ROE d. HENDERSON v. CHARNOCK* (1790), 1 Peake, 6.

**27. Two years' notice agreed on—Formal lease never executed.**—An agreement for a lease of a farm contained a stipulation that the tenancy should continue until after two years' notice to quit had been given. The tenant occupied the farm, paid rent for some years, but no lease was executed:—*Held*: it could not be implied that the stipulation as to the two years' notice to quit was one of the terms under which the tenant held.—*TOOKER v. SMITH* (1857), 1 H. & N. 732; 156 E. R. 1396.

#### SUB-SECT. 3.—TERMINATION WITH REFERENCE TO NOTICE OF CLAIMS FOR COMPENSATION.

See Part V., *post*.

#### PART. II. SECT. 3, SUB-SECT. 6.

**l. Whether notice to quit necessary—Lease of arable farm for year.**—*Qu.*: whether warning be necessary in the case of a one year's tack of an arable farm.—*M'NAIR v. BLANTYRE'S (LORD) TUTORS* (1833), 11 Sh. (Cl. of Sess.) 935.—*SCOT*.

**m. Notice to quit necessary—Though lease provides for no notice.**—*T.* was tenant of a farm under a lease from *L.*, expiring as to arable land at Martinmas, 1799, & as to the houses & grass at Whitsuntide, 1800. The tack obliged him to slit & remove "precisely at the expiry hereof, without any previous warning or process of removing for that effect." In Sept., 1799, *T.* had notice from *L.* in writing that the land was let to another tenant. In Oct., 1799, *T.* was charged on letters of horning on the tack to remove at Martinmas, 1799, and Whitsunday, 1800:—*Held*: *T.* entitled to a warning in terms of the Act of 1555 or a charge of forty days before

Whit-Sunday, 1799, in terms of the provision for such a case in the Act of Sederunt, 1756.—*LOCKHART v. TWADDLE* (1800), Hume, 564.—*SCOT*.

**30 i. Notice to quit unnecessary—Lessee permitted to continue in possession for one year.**—The tenant of an agricultural farm was allowed by the landlord to continue in possession for one year after the expiry of his lease:—*Held*: formal warning was not necessary for removing the tenant at the end of the year, & sufficient intimation had been given to the tenant & received & acted on by him, the landlord having advertised the farm with vacant possession from Martinmas, 1839, & the tenant having made an offer on that advertisement.—*BLAIN v. FERGUSON* (1840), 2 D. 546.—*SCOT*.

**30 ii. — Power reserved to landlord to resume possession at any time on payment of compensation.**—A farm lease reserved to the landlord "the right to sell or resume possession of any part or

#### SUB-SECT. 4.—BREACH OF COVENANT INVOLVING FORFEITURE OF LEASE.

See Nos. 33, 60, 61, 65, 319, 320, *post*.

#### SUB-SECT. 5.—EFFECT OF TERMINATION OF TENANCY.

See BANKRUPTCY & INSOLVENCY; DISTRESS; LANDLORD & TENANT.

#### SUB-SECT. 6.—OTHER CASES.

**28. Second notice to quit — No waiver of previous notice.**—A landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment, & before the last period mentioned in the notice was expired, the landlord, fearing that the witness by whom he was to prove the notice would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment:—*Held*: the second notice was no waiver of the first.—*DOE d. WILLIAMS v. HUMPHREYS* (1802), 2 East, 237; 102 E. R. 360.

**29. Determination by award of arbitrator.**—An action against the owner of land & a party holding by his permission, but claiming to hold as bailiff & not as tenant, was referred to an arbitrator, who was to say what was to be done by the parties with respect to the land. He awarded that the holding was as tenant, that the tenancy should cease on the delivery of the award, and that possession of the land should be delivered up to the owner in one month after:—*Held*: the award did not of itself change the property.—*THORPE v. EYRE* (1834), 1 Ad. & El. 926; 3 Nev. & M. K. B. 214; 110 E. R. 1462.

**30. Notice to quit unnecessary — Lessor managing for lessee.—Termination of service.**—A. owner of a farm, let it for seven years to B., & by a written agreement of the same date it was agreed that A. should manage the farm for B., B. allowing A. 12s. a week, " & allowing him & his family to reside & have the use of the dwelling house & furniture therein rent free," & this agreement was to be put an end to by three months' notice or three months' wages:—*Held*: no notice to quit was necessary, if the service was put an end to.—*DOE d. HUGHES & CORBETT v. DERRY* (1840), 9 C. & P. 491.

*Annotation* —*Mentd.* *Curling v. Mills* (1843), 7 Scott, N. R. 709.

parts of the lands hereby let at any time, . . . the tenant to receive a proportionate deduction from his rent & surface damage to crops as, failing agreement, same may be fixed by arbiters mutually chosen." It contained no provision with regard to notice to the tenant by the landlord of his intention to resume:—*Held*: the provisions in the lease for a deduction from the rent & compensation for damage caused by resumption impliedly excluded any right in the tenant to notice.—*KININ-MONTH v. BRITISH ALUMINIUM CO., LTD.*, [1915] S. C. 271; 52 Sc. L. R. 232. *SCOT*.

**n. Tenancy terminated by false notice — Tenant's right to damages.**—A covenant in a lease of a farm from deft. to pltf. provided that, upon receiving six months' notice from the lessor that he had sold the farm, & upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the lessee would

## Part III.—Covenants and Customs of the Country.

### SECT. 1.—IN GENERAL.

#### SUB-SECT. 1. COVENANTS AND IMPLIED COVENANTS IN GENERAL.

*See, generally, DEEDS & OTHER INSTRUMENTS.*

**31. Who entitled to benefits of covenants by tenant—Purchaser.**—Deft. purchased a farm (which was in occupation of an out-going tenant) upon a sale under order of ct., subject to such tenant right as the outgoing tenant should possess. The term of the tenant expired at Michaelmas, 1890. By the stipulations of his agreement the tenant was bound in the last year of tenancy to stock in the barns, etc., all corn, hay, etc., produced on the premises, the hay, etc., to be there consumed by cattle, & the dung, etc., to be left on the premises, for which purpose the tenant should have the use of such barns, etc., until Mar. 25, after the end of the tenancy; & also to leave all hay, etc., remaining unconsumed & be paid for it. Deft. paid the purchase price & took possession upon Oct. 13, 1890; but the conveyance was not executed, & the legal estate in the property remained vested in plffs. The rent due from the tenant at Michaelmas, 1890, was not paid, & at the instance of plffs., the receiver appointed by the ct. put in a distress for it, & seized certain hay, etc., produced during the last year of the term. Deft. moved the ct. that the receiver might be restrained from remaining in possession of the goods distrained:—*Held*: (1) deft. by purchase was in equity the beneficial owner of the property, & plffs. could not be permitted in equity to exercise any legal rights vested in them so as to prevent his full enjoyment of every benefit of ownership; (2) deft. was entitled to the benefit of the above stipulations in the agreement of the outgoing tenant, & the distress would in effect deprive deft. of this benefit; (3) plffs., though they had a right at law to distrain, must be regarded in equity as trustees for deft., & could not be allowed to distrain, & deft.'s application should be granted.—*Re POWERS, MANISTY v. ARCHDALE* (1890), 63 L. T. 626; 39 W. R. 185.

**32. Trustee in bankruptcy—Effect of disclaimer.**—The trustee in a bkpcy. may disclaim a lease of bkpt., even though the lease has been determined by effluxion of time or by forfeiture, between the appointment of the trustee & the execution of the disclaimer. And in such a case the effect of the disclaimer, when executed, is that neither the lessor nor the trustee can claim the benefit of any provisions contained in the lease which were to come into operation at the expiration or sooner determination of the term.—*Re MORRISH, Ex p. HART*

deliver up possession at the end of six months, the compensation being duly paid. Deft. served plff. with a notice that he had sold the farm, in consequence of which plff. desisted from putting in crops, & other work for which he had made preparation, & rented another farm. Upon ascertaining that the notice was untrue, plff. refused to give up possession, & sued deft. for false representation:—*Held*: plff. entitled to recover damages sustained by him in consequence of the notice.—*COWLING v. DICKSON* (1880), 5 A. R. 549.—**CAN.**

**o. Lease set aside as invalid—Tenant's right to damages.**—A tenant, under a lease with warrantice, having removed from his farm when all the leases in similar circumstances on the estate were set aside (one having been selected in which to try the question of their validity):—*Held*: although no decree of removal had been pronounced against

him (in consequence of the summons having been erroneously directed against his uncle), he was entitled to damages as for eviction.—*MENZIES v. QUEENSBERRY (EXECUTORS)* (1832), 11 Sh. (Ct. of Sess.) 18.—**SCOT.**

**p. Clause obliging to remove or to pay increased rent—Construction.**—Clause obliging to remove, or to pay an increased rent for seven years, is absolute & compulsory for removal.—*CROSS v. MUIRHEAD* (1813), Hume, 860.—**SCOT.**

**q. Removal fixed at period subsequent to death of lessee—Right of lessor's creditors to cultivate during period between death & term for removal.**—Where the covenant by the tenant for removal from a farm under a life-rent lease fixes the removal at a period subsequent to the death of the tenant, that does not *per se* entitle the representative of the tenant to cultivate the farm during the period between the death & the term for

removal, in the absence of anything else to give a title of possession after the death of the tenant.—*TWEEDDALE (MARQUIS) v. MURRAY* (1817), 6 Bell, Sc. App. 125.—**SCOT.**

*Annotations*:—*Refd.* Lybbe v. Hart (1885), 29 Ch. D. 8, C. A. *Mentd.* Ware v. Booth (1894), 10 T. L. R. 416; Sergeant v. Nash, Field, [1903] 2 K. B. 304, C. A.

**33. Who liable under covenants by tenant—Sub-lessee or assignee—Effect of forfeiture.**—A tenant held a farm under a lease containing a covenant against sub-letting & a clause giving the right to enter in case of bkpcy. or liquidation. The tenant covenanted not to dispose of any hay, straw, etc., from off the premises, but to consume same thereon, & on delivery up of the premises leave thereon all the hay, etc., grown thereon & not consumed, on being paid for same by valuation. The tenant died, & his son by agreement with the extrix. became tenant without the consent or knowledge of the landlord. The son became bkpt. Before the expiry of the term the lease was handed over by the extrix. to the landlord. The trustee in bkpcy. of the son claimed from the landlord the return of certain hay, straw, etc., which were on the farm when the son's petition was filed, & damages for their detention, & contended that the hay, straw, etc., were the property of the son, that the landlord had refused to recognise the son as tenant, & that the son was not bound by the lease. For the landlord it was contended that the son could not be in a better position than the tenant, & that the landlord was entitled to forfeiture upon his liquidation:—*Held*: (1) a sub-lessee or assignee, even when there was a covenant not to sub-let or assign, was bound by the lease; (2) the landlord by the same act recognised the son's tenancy & asserted the right of forfeiture; (3) when a lease was determined by forfeiture, the provisions in the lease could not be applied which were in favour of the tenant on expiry of the term by time.—*SILCOCK v. FARMER* (1882), 46 L. T. 404.

*Annotations*:—*Distd.* *Re Morrish, Ex p. Hart Dyke* (1882), 22 Ch. D. 410, C. A. *Refd.* Lybbe v. Hart (1885), 29 Ch. D. 8, C. A.

**34. Admissibility of evidence To explain technical terms—“Summerleazes” Meaning of.]**

—By an agreement plff., a tenant, had the use of milk of cows which were to be depastured on lands described as “summerleazes.” In an action against the landlords for putting their own cattle on the lands, evidence was tendered for defts. that in the locality it was the custom for a lessor to put his own cattle on “summerleazes”:—*Held*: such evidence, being in effect evidence of the meaning of the technical word “summerleazes,” was admissible to show what rights passed to plff. under the lease.—*TUDGAY v. SAMPSON* (1874), 30 L. T. 262.

### PART III. SECT. 1, SUB-SECT. 1.

**r. Should be precise.**—Clauses in agricultural leases should be precise. *ALEXANDER v. WALTERS* (1909), 10 W. L. R. 441.—**CAN.**

**33 i. Who liable under covenants by tenant—Tenant & assignee.**—A lease was granted to a tenant & assignees declaring that the assignees must be approved of by the landlord, or grant satisfactory security. The tenant assigned:—*Held*: it was the duty of the tenant to deliver, & not of the landlord to require, this security, & the tenant was liable in damages for misappropriation.—*GEMMEL v. LOW* (1823), 2 Sh. (Ct. of Sess.) 563.—**SCOT.**

## SUB-SECT. 2.—IMPLIED WARRANTIES.

**35. Lease of land or eatage thereof—Poisonous substance on land—No implied warranty as to suitability of land.]**—On a demise of land or the vesture of land (as the eatage of a field) for a specified term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken.

Where A. agreed in writing to take the eatage of 24 acres of land from B. for seven months at a rent of £40, & stocked the land with beasts, several of which died a few days afterwards from the effect of a poisonous substance which had accidentally been spread over the field without B.'s knowledge:—*Held*: A. not entitled to throw up the land, but continued liable for the whole rent.—*SUTTON v. TEMPLE* (1843), 12 M. & W. 52; 13 L. J. Ex. 17; 2 L. T. O. S. 150; 7 Jur. 1065; 152 E. R. 1108.

*Annotations*:—*Reid*. *Hart v. Windsor* (1843), 12 M. & W. 68; *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336; *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C. P. D. 507; *Cheater v. Cater*, [1918] 1 K. B. 247, C. A. *Mentd*. *Roadhead v. Mid. Ry. Co.* (1867), 8 B. & S. 371; *Fowler v. Lock* (1872), L. R. 7 C. P. 272.

**36. Land let for agricultural purposes—Noxious plants.]**—*Semble*: there is no implied warranty on the part of a lessor, who lets land for agricultural purposes, that no noxious plants, such as yew trees, are growing on the demised premises.—*ERSKINE v. ADEANE, BENNETT'S CLAIM* (1873), 8 Ch. App. 756; 42 L. J. Ch. 835; 29 L. T. 234; 38 J. P. 20; 21 W. R. 802, L.JJ.

*Annotations*:—*Distd*. *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5. *Mentd*. *Llanelli Ry. & Dock Co. v. L. & N. W. Ry. Co.* (1873), 8 Ch. App. 942; *Sauer v. Bilton* (1878), 7 Ch. D. 815; *Carter v. Salmon* (1880), 13 L. T. 490, C. A.; *Haseltine v. Simmons*, [1892] 2 Q. B. 547, C. A.; *Kennard v. Ashman* (1894), 10 T. L. R. 213; *Flight v. Provident Assoc. of London* (1895), 11 T. L. R. 391; *De Lassalle v. Guildford*, [1901] 2 K. B. 215, C. A.; *Lloyd v. Sturgeon Falls Pulp Co.* (1901), 85 L. T. 162; *Bailey v. British Equitable Assoc. Co.*, [1904] 1 Ch. 371, C. A.; *Bristol Tram., etc. Carriage Co. v. Fiat Motors*, [1910] 2 K. B. 831, C. A.

**Poisonous trees.]**—*See* Nos. 412—416, *post*.

## SUB-SECT. 3.—CUSTOMS OF THE COUNTRY IN GENERAL.

Reasonableness, proof & exclusion of customs in general, *see* CUSTOM & USAGES.

**37. Meaning of custom of country.]**—What is considered in farming as a good & husbandlike manner varies according to soil, climate & situation. The "custom of the country" with reference to good husbandry means the approved habits of husbandry in the neighbourhood under circumstances of like nature (LORD ELLENBOROUGH, C.J.).—*LEGH v. HEWITT* (1803), 4 East, 154; 102 E. R. 789.

*Annotations*:—*Reid*. *Westropp v. Elligott* (1884), 9 App. Cas. 815, H. L. *Mentd*. *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**38. Must have existed reasonable time—Not from time immemorial.]**—An agricultural custom need not have subsisted from time immemorial, but it must have subsisted for a reasonable length of

time & must be adequately proved. As regards proof, a custom must be collected, not from what the witnesses think the custom is, but from what was publicly done throughout the district (JESSEL, M.R.).—*TUCKER v. LINGER* (1882), 21 Ch. D. 18; 51 L. J. Ch. 713; 46 L. T. 894; 30 W. R. 578, C. A.; *affd.* (1883), 8 App. Cas. 508, H. L.

*Annotations*:—*Reid*. *Dashwood v. Magniac* [1891] 3 Ch. 306, C. A.; *Re* *Constable & Cranswick* (1899) 80 L. T. 164; *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1906] 1 A. C. 314, H. L.

**39. — — —.]**—In point of law an agricultural custom or custom of husbandry, whether relating to the cultivation of the land or regulating the rights & liabilities of landlord & tenant, in the absence of agreement, need not be an immemorial custom. Common usage in the neighbourhood is sufficient (CHITTY, J.).—*DASHWOOD v. MAGNIAC*, [1891] 3 Ch. 306, at p. 324; 60 L. J. Ch. 210; 64 L. T. 99; 7 T. L. R. 189.

*Annotations*:—*Mentd*. *Pardoe v. Pardoe* (1900), 82 L. T. 547; *Re* *Chaytor*, [1900] 2 Ch. 804; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A.; *Re* *Trevor-Batye's Settlement*, *Bull v. Trevor-Batye*, [1912] 2 Ch. 339; *Re* *Hall, Hall v. Hall*, [1916] 2 Ch. 488.

**40. Need not be general custom—Must be general in particular district.]**—With regard to an alleged custom for the tenant to recover compensation for half tillage, crops sown, etc., during the away-going year, it was objected that the custom was not a general custom, but prevailed only in a particular district. It appeared to prevail in the immediate neighbourhood of deft.'s estates, & was almost confined to those estates:—*Held*: it was sufficient for pltf. to show that the custom existed in the particular place.—*SENIOR v. ARMYTAGE* (1816), Holt, N. P. 197.

*Annotations*:—*Mentd*. *Dalby v. Hirst* (1819), 1 Brod. & P. 224; *Webb v. Plummer* (1819), 2 B. & Ald. 746; *Hutton v. Warren* (1836), 1 M. & W. 466; *Brown v. Burtinshaw* (1876), 7 Dow. & Ry. K. B. 603.

**41. — — — Application to particular estate insufficient.]**—The rule of law, as to importing into the terms of the tenancy "the custom of the country," does not admit of evidence of the usage of a particular estate or the property of a particular individual, however extensive it may be, it not being shown that the tenant was aware of it.

The law takes cognisance of the divisions of the country into countries or parishes, which are legal & public divisions, but not into estates, which are purely private; & there would be no legal presumption of notoriety arising from the fact of usage as to terms of letting on a particular estate (POLLOCK, C.B.).—*WOMERSLEY v. DALLY* (1857), 26 L. J. Ex. 219.

**42. Only applies to agricultural holdings.]**—The custom of the country applies only to farm & agricultural premises, not to a mere residence with garden & meadow attached, let furnished, & occupied for one year, though the tenant of such a property would be liable to an action for ploughing up the meadow. The landlord cannot recover damages from the tenant for dealing with the straw grown on the meadow so ploughed up as a distinct breach of good husbandry & the custom of the country, whatever may be the nature of the property.—*JOHNSTONE v. SYMONS* (1847), 9 L. T. O. S. 535; 11 J. P. 618.

## PART III. SECT. 1, SUB-SECT. 2.

**s. Lease of "clean" farm.]**—Action for damages for fraudulent representations, whereby pltf. were induced to lease a farm at a very high rental. The false representation was that the farm was a clean farm, whereas in fact it was full of weeds:—*Held*: the expression "clean farm" did not mean a farm absolutely free from weeds, but only

one on which there were not weeds in such quantities as to be materially injurious to the crops.—*JOHNSTONE v. HALL* (1894), 10 Man. L. R. 161.—*CAN.*

## PART III. SECT. 1, SUB-SECT. 3.

**t. Evidence of custom as to meaning of "interest."]**—A tenant bound himself to pay "interest" on sums expended on improvements on his farm at the rate exacted by Scottish Drainage & Im-

provement Co.:—*Held*: (1) the interest charged by the co. was alone payable, & not an annual rentcharge paid to them by the landlord, as that included a repayment to account of the capital borrowed; (2) proof of the usage of the country, to the effect that "interest" was understood to mean the whole sum payable to the co., was inadmissible.—*SINCLAIR v. M'BEATH* (1868), 7 Macph. (Cl. of Sess.) 273.—*SCOT.*



**Sect. 1.—In General: Sub-sects. 3 & 4. 2:**  
**Sub-sect. 1, A.**

**43. Application where written agreement.]**—No inquiry should be made as to the custom of the country where there is a written agreement on the subject.—*LIEBENROOD v. VINES* (1815), 1 Mer. 15; 35 E. R. 583.

**44. —.]**—A special agreement in order to control the custom [for the tenant to recover compensation for half tillage, crops sown, etc., during the away-going year] must be of such a nature that it operates upon, & prevents, in express terms, the application of the custom (*THOMPSON, C.B.*).

Although there is a written contract between landlord & tenant, the custom of the country will still be binding, if not inconsistent with the written contract (*BAYLEY, J.*).—*SENIOR v. ARMYTAGE* (1816), Holt, N. P. 197.

**Annotations:—***Distd.* Webb v. Plummer (1819), 2 B. & Ald. 746. *Folld.* Brown v. Burtinshaw (1826), 7 Dow. & Ry. K. B. 603. *Consd.* Hutton v. Warren (1836), 1 M. & W. 466. *Refd.* Dalby v. Hirst (1819), 1 Brod. & Bing. 224.

**45. —.]**—Where the benefit of a custom is claimed as incidental to a written agreement for letting a farm, the questions are, (1) whether the custom exists: (2) whether the written agreement by express words, or the inconsistency of its terms with it, excludes the custom.

In an action against a landlord by his former tenant, who had held under a written agreement, for money due at the end of the tenancy by the custom of the country, the witness called to prove the custom could not say whether it applied where the letting was in writing. The jury were directed that there was no sufficient evidence of the custom prevailing:—*Held*: the evidence was wrongly rejected, & a rule for a new trial was granted on the ground of misdirection.

The question is the existence of the custom. If it exists, it applies to all agreements, written or unwritten, which either do not exclude it by express words, or, by the nature of the stipulations contained in them, rebut the presumption of law that the parties intended to be bound by the custom also (*LORD DENMAN, C.J.*).—*WILKINS v. WOOD* (1848), 17 L. J. Q. B. 319; 11 L. T. O. S. 291; 12 Jur. 583.

**46. Evidence of custom as to date of payment of rent.]**—Upon a parol demise, rent to take place from the following Lady Day, evidence of the custom of the country is admissible to show that by "Lady Day" the parties meant old Lady Day.—*DOE d. HALL v. BENSON* (1821), 4 B. & Ald. 588; 106 E. R. 1051.

**Annotations:—***Folld.* Den d. Peters v. Hopkinson (1823), 3 Dow. & Ry. K. B. 507. *Refd.* Spartali v. Benecke (1850), 10 C. B. 212.

**47. — "Usual covenants."]**—Pltf. in replevin had taken & entered on a farm at a specified rent, & consented that an agreement should be prepared with the usual covenants, but no such agreement was prepared:—*Held*: (1) although the words "usual covenants" might be construed in the popular sense as "usual terms," they did not apply to the periods of payment of rent, but referred to agricultural covenants; (2) evidence could not be given, on the part of the landlord, of the usual terms or covenants in the same part of the country as to

payment of rent in order to show that it was payable quarterly, so as to justify a distress for rent; (3) the lease of a former tenant of the same farm was not admissible in evidence.—*HEYNES v. BROWN* (1853), 21 L. T. O. S. 24.

**48. Reasonableness — Question of law.]**—The reasonableness or unreasonableness of a custom of the country is a question of law for the ct.—*BRADBURN v. FOLEY* (1878), 3 C. P. D. 129; 47 L. J. Q. B. 331; 38 L. T. 421; 42 J. P. 344; 26 W. R. 423.

**Annotations:—***Mentd.* Mansel v. Norton (1883), 22 Ch. D. 769, C. A.; *Priestley v. Stone* (1888), 4 T. L. R. 730, C. A.; *Devonald v. Rosser*, [1906] 2 K. B. 728, C. A.

**49. Custom entitling tenant to sell flints ploughed up in course of husbandry—Reservation of mines, minerals, etc.]**—A farm was let under a written agreement reserving to the landlord "all mines & minerals, sand, quarries of stone, brick earth & gravel pits." A local custom (which it was suggested had grown up within the last thirty or forty years) allowed tenants of such farms let with a similar reservation to take away the flints that were turned up in the ordinary course of good husbandry; & to sell them for their own benefit. If the flints were not turned up & removed such farms could not be properly cultivated:—*Held*: the custom was reasonable & valid, & when read into the written agreement was not inconsistent with the reservation, even assuming (but without deciding) that the reservation of "mines & minerals" included such flints.—*TUCKER v. LINGER* (1883), 8 App. Cas. 508; 52 L. J. Ch. 941; 49 L. T. 373; 48 J. P. 4; 32 W. R. 40, II. L.

**Annotation:—***Consd.* Dashwood v. Magniac, [1891] 3 Ch. 306, C. A.

#### SUB-SECT. 4.—CUSTOMS OF THE COUNTRY AS APPLIED TO PARTICULAR MATTERS.

**Cultivation.]**—See Nos. 67—74.

**Cropping.]**—See Nos. 79—102, 178—185.

**Disposal of crops.]**—See Nos. 128—132, 199—209.

**Manure & Dung.]**—See Nos. 154—156, 212—216.

**Outgoing tenant's rights in general.]**—See No. 172.

**Waygoing crops.]**—See Nos. 199—209.

**Tillages.]**—See Nos. 178—185.

**Drainage.]**—See Nos. 225.

#### SECT. 2.—EFFECT DURING TENANCY.

##### SUB-SECT. 1.—CULTIVATION IN HUSBANDLIKE MANNER.

###### A. When Implied.

**50. Relation of landlord & tenant — Consideration.]**—The mere relation of landlord & tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner.—*POWLEY v. WALKER* (1793), 5 Term Rep. 373; 101 E. R.

**Annotations:—***Appld.* Wedd v. Porter, [1916] 2 K. B. 91, C. A. *Refd.* Callender v. Oelrichs (1838), 5 Bing. N. C. 58. *Mentd.* Brown v. Crump (1815), 6 Taunt. 300; *Beale v. Sanders* (1837), 3 Bing. N. C. 850.

#### PART III. SECT. 2, SUB-SECT. 1.—A.

**50 i. Relation of landlord & tenant.]**—In every agricultural lease the rules of good husbandry are an implied condition (*LORD ARDMILLAN*).—*McCULLOCH v. GRIERSON* (1862), 1 Macph. (Ct. of Sess.) 53.—**SCOT.**

**50 ii. — Purchaser from trustee in bankruptcy.]**—A party, who purchased

from the trustee of the sequestrated estate of a tenant farmer the privilege of sowing & reaping the crop of the farm for the year in which the bkcy. occurred:—*Held*: bound to cultivate & manage the farm in accordance with the rules of good husbandry, though there was no express stipulation to that effect in the agreement.—*FLEMING v. MACDONALD* (1860), 22 D. 1025; 32 Sc. Jur. 145.—**SCOT.**

**50 iii. — Second lease omitting express covenants contained in prior lease.]**—Pltf. leased land to deft.'s husband. The lease contained covenants by the lessee that he would cultivate in a good husbandlike & proper manner so as not to impoverish or injure the soil, & plough & crop same in a proper farmerlike manner. Afterwards a new lease was made substituting deft. as lessee, instead of her husband. This did not contain

**51. — Necessity of special agreement to release tenant from obligation.]**—A declaration that in consideration that deft. had become tenant to pltf. of a farm, deft. undertook to make a certain quantity of fallow & to spend £60 worth of manure every year thereon & to keep the buildings in repair:—*Held*: bad, those obligations not arising out of the bare relation of landlord & tenant.

Every tenant, where there is no particular agreement dispensing with that engagement, is bound to cultivate his farm in a husbandlike manner & to consume the produce on it; this is an engagement which arises out of the letting, & which the tenant cannot dispense with, unless by special agreement (GIBBS, C.J.).—BROWN v. CRUMP (1815), 1 Marsh. 567.

*Annotations*:—**Consd.** Callender v. Oelrichs (1838), 5 Bing. N. C. 58. **Foll.** Granger v. Collins (1840), 6 M. & W. 458. **Expld.** Kaye v. Dutton (1844), 2 Dow. & L. 291. **Distd.** Dietrichsen v. Giubilei (1845), 14 M. & W. 845. **Refd.** Rosecorla v. Thomas (1842), 6 Jur. 929.

**52. — No obligation where relation does not exist — Parson & successor.]**—An action lies by a landlord against a tenant for mismanagement of his farm, on the implied contract between landlord & tenant that the latter shall cultivate the land in a husbandlike manner. There is no such implied contract between a parson & his successor. The exors. of an incumbent are not liable in an action for dilapidation for neglect to cultivate the glebe land in a husbandlike manner.

Such an action is maintainable where the buildings, hedges, & fences are left in a state of decay, or where there has been a felling of timber otherwise than for repairs or fuel (PATTERSON, J.).—BIRD v. ROLPH (1833), 4 B. & Ad. 826; 1 Nev. & M. K. B. 415; 2 L. J. K. B. 99; 110 E. R. 667.

*Annotations*:—**Consd.** Huntley v. Russell (1849), 13 Q. B. 572; Ross v. Adcock (1868), L. R. 3 C. P. 655.

**53. Limits of obligation Measure of damages.]**—WILLIAMS v. LEWIS, No. 67, *post*.

any of the above-mentioned covenants, or anything specially applicable to leases of farms, provided for the same rental payable in the same way & at the same time, & contained a covenant to plough in each year of the term 4 inches deep, which was written into it. It did not contain express covenants to cultivate or crop:—*Held*: implied covenants to cultivate & crop in each year should be read into the second lease.—DUNSFORD v. 23 C. L. T. 290; 14 Man. L. R. 529.—CAN.

**50 iv. — Breach of obligation—Erection of buildings.]**—The tenant from year to year of a small parcel of land let to & treated & cultivated by him as an ordinary agricultural holding, & on which, at the time of the letting, there was only one cottage, erected or permitted to be erected certain dwelling-houses, the outer walls of which were of timber, & the foundations & partitions of brick, in which he permitted to reside the families of certain other tenants on the same estate, who had been evicted from their own holdings for non-payment of rent. These houses were erected in furtherance of the objects of an illegal conspiracy, & were kept up mainly for the purpose of deterring persons from taking the evicted farms. The holding in question was not suited for the erection of buildings, & the erection made a material change in the nature of the demised premises, & converted them, to a substantial extent, into a collection of dwelling-houses:—*Held*: (1) from such a letting it was to be implied that the tenant agreed with the landlord that he would preserve the premises as an agricultural holding during the demise; (2) the acts of the tenant were a breach of such agreement & should be restrained by injunction.—BROOKE v. MERNAGH

(1888), 23 L. R. Ir. 86; BROOKE v. KAVANAGH (1888), 23 L. R. Ir. 112. IR.

**50 v. — — — — —.]**—STEELE v. TIERNAN & CROLY (1889), 23 L. R. Ir. 583.—IR.

**53 i. Limits of obligation—Enforcement by order of court.]**—A landed proprietor presented a summary petition to the sheriff in the middle of Apr., setting forth that the tenant of his farm had made no preparation for laying down the crop, & praying the sheriff to remit to competent persons to examine the farm, & to authorise the proprietor to cultivate it according to the recommendations of their report. The sheriff remitted to two farmers to inspect the lands, & on their report authorised the proprietor to cultivate the farm according to their recommendation, reserving all questions as to the expense of laying down the crop, etc. The tenant having presented a note of suspension & interdict against the proprietor acting upon this warrant on the ground that it was *ultra vires* of the sheriff to grant it, the ct. refused the note.

The Judge Ordinary has power to interfere in such a case at common law, independent of the Act of Sederunt (*per Cur.*).—BROCK v. BUCHANAN (1851), 13 D. 1069.—SCOT.

#### PART III. SECT. 2, SUB-SECT. 1.—B.

**55 i. What amounts to bad husbandry—Failure to stop weeds growing.]**—The spread of noxious weeds from natural causes, or by the action of cattle depasturing or eating hay or straw coming from the fields where the weeds were, & the failure to stop the growth thereof, is no evidence of waste, but only of ill-husbandry.—PATTERSON v. CENTRAL

**54. — Enforcement of obligation by assignee of reversion.]**—WEDD v. PORTER, No. 68,

#### B. Express Covenants.

**55. What amounts to bad husbandry — Failure to manure arable land.]**—If a lessee lets arable land go without manure so that it grows thorns & other trees, this is not waste but bad husbandry.—ARUNDEL'S (COUNTESS) CASE (1424), Y. B. 2 Hen. 6, fo. 10 b.

**56. — — — Ploughing up—Pasture.]**—A lease contained a covenant to manage pasture in a husbandlike manner. There was no covenant not to convert pasture into arable:—*Held*: an interim injunction could be granted to restrain the tenant from committing waste by ploughing up pasture.—DRURY v. MOLINS (1801), 6 Ves. 328; 31 E. R. 1076.

*Annotation*:—**Refd.** Musgrave v. Horner (1874), 23 W. R. 125.

**57. — — — Rabbit warren & sheep walk excepted from covenant.]**—Covenant by a lessee that he will at all times during the term plough, sow, manure, & cultivate the demised premises (except the rabbit-warren & sheep-walk) in a due course of husbandry. If the lessee plough the rabbit-warren & sheep-walk, covenant lies against him.—ST. ALBANS (DUKE) v. ELLIS (1812), 16 East, 352; 104 E. R. 1122.

*Annotation*:—**Mentd.** Cannock v. Jones (1849), 3 Exch. 233.

**58. — — — Sowing arable land with mustard.]**—Deft., tenant from year to year of pltf., in revenge for a distress levied on the premises proceeded to cultivate the farm in an unhusbandlike manner, also threatening to plough up ancient meadow & old pasture land & to sow same with mustard seed & other pernicious seeds. Deft. actually did sow upwards of 50 acres of arable land with mustard seed. An injunction was granted.—PRATT v. BRETT (1817), 2 Madd. 62; 56 E. R. 258.

CANADA L. & S. Co. (1898), 29 O. R. 131.—CAN.

**55 ii. — Failure to clear land.]**—A lease of rectory land by the rector contained a covenant not to clear more than a certain portion of the land demised, that the clearing should be for agricultural purposes, in contiguous fields, not exceeding ten acres each, such fields to be enclosed in good lawful fences, " & shall be sufficiently chopped, underbrushed, logged, & burned, according to the due course of farming & good husbandry." The lessee, with the lessor's consent, cut & sold the timber off 180 acres, but for two years did nothing towards clearing this portion of the demised land:—*Held*: the delay was open to the objection of being contrary to "the due course of farming & good husbandry."—LUNDY v. TENCH (1869), 16 Gr. 597.—CAN.

**56 i. — — — Ploughing up—Pasture.]**—Covenant to cultivate, till, manure & employ land in a good husbandlike & proper manner. The lessee converted pasture into arable:—*Held*: a proper act of husbandry.—COOK v. EDWARDS (1885), 10 O. R. 341.—CAN.

**56 ii. — — — Cutting crop into chaff—Stacking oats unthatched.]**—Resp. purchased a farm from applt. One of the terms of the agreement provided "that the purchaser shall cut, harvest, stack, thresh & handle the crops in a good & husbandlike manner according to the approved methods of harvesting as carried on in the district of Drummond." Resp., instead of threshing the oat-crop, cut the greater part of it into chaff:—*Held*: there had been a breach of the above condition on the part of resp. in cutting the crop into chaff instead of threshing it, & it was immaterial whether



*Sect. 2.—Effect during tenancy: Sub-sect. 1, B.; sub-sect. 2, A.]*

**59. — Permitting goats to be on land.]—**A lease for years of lands was granted, & the lessee covenanted to manage the demised premises in a husbandlike manner. The lessee having permitted goats to be upon the land, the lessor filed his bill for an injunction, & obtained one on an interlocutory application. The lessee did not move to dissolve, & on the cause coming on for hearing, the ct. made an order that the bill be retained for twelve months, with liberty to the lessor to bring an action, & if it were not brought within that time, the bill to be dismissed with costs, not exceeding a stated sum, the injunction to be continued meanwhile.—*ROGERS v. PRICE* (1849), 13 L. T. O. S. 463; 13 Jur. 820.

**60. — Non-cultivation — Clause of forfeiture.]—**By a lease empowering the lessee to build, he covenanted to cultivate the part of the demised land on which no buildings should be erected in a husbandlike manner, & there was a clause of forfeiture for breach of covenant. The lessee built a vitriol factory on the land, with the knowledge of the lessor, but being obliged to discontinue the manufacture by an indictment, he pulled down the manufactory, & paid part of the proceeds of the building materials to the lessor, in pursuance of an agreement between them:—*Held*: the lessor had not in equity precluded himself from entering for non-cultivation of the land after the manufactory was pulled down, & an injunction to restrain an action of ejectment was dissolved.—*HILLS v. ROWLAND* (1853), 4 De G. M. & G. 430; 22 L. J. Ch. 961; 22 L. T. O. S. 139; 1 W. R. 422; 43 E. R. 575, LJJ.

**61. — Departure from four-course system — Mowing clover twice in year.]—**In an agreement for a farming lease pltf. agreed to farm lands in a good & husbandlike manner on the four-course system & not to break up pasture, & to consume all hay & straw, clover & green crops on the lands & spread the manure arising therefrom on the land. In a suit for specific performance of the agreement there was a conflict of evidence whether pltf. had committed such breaches of covenant as would have created a forfeiture of the lease if granted:—*Held*: there was not on the evidence such breach of covenant as would have worked a forfeiture of the lease.

With regard to the four-course system, any slight departure from it would not necessarily work a forfeiture. There is a considerable difference of

opinion as to the four-course system & what constitutes a breach of that system, particularly with regard to fallow, what would be a breach of the covenant that the land should lie fallow one year, whether a green crop is allowed, & what green crop is allowed. All that is left in doubt. As to mowing clover twice, I do not suppose that that would be such a breach of the covenant as would have been considered a proper ground for the forfeiture (*LORD CAMPBELL, C.*).—*RANKIN v. LAY* (1860), 2 De G. F. & J. 65; 29 L. J. Ch. 734; 2 L. T. 680; 24 J. P. 645; 6 Jur. N. S. 685; 8 W. R. 591; 45 E. R. 546, L. C.

*Annotation*:—*Mentd.* *Morley v. Clavering* (1860), 29 Beav. 81.

**62. — Conversion of moor land into place of amusement—Breach of earlier covenant to bring into cultivation.]—**A lease of a plot of moor land was granted to a lessee, who covenanted to bring same into cultivation within five years from the date of the lease, according to the most approved method of husbandry pursued in the neighbourhood of the premises, & to keep same in good farming & husbandlike condition. The former covenant was not performed by the lessee, & thirty years afterwards his assignee converted the land into a place of amusement, & constructed a running path thereon, & charged for admission thereto. The lessor filed a bill to have the covenants of the lease performed, & for an injunction to restrain deft., the holder of the lease, from using the land as a place of public amusement:—*Held*: the land not having been brought into cultivation under the first covenant, there could have been no breach of the second to keep it in cultivation. *Seemle*: if there had been a breach of the latter covenant it was not such a one as the ct. would enforce by mandatory injunction.—*MUSGRAVE v. HORNER* (1874), 31 L. T. 632; 23 W. R. 125.

**63. Pleading — Assignment of breach — Averment of waste—Evidence of acts not amounting to waste.]—**If the breach of a covenant be assigned thus: "That deft. has not used a farm in an husbandlike manner, but on the contrary, has committed waste," pltf. cannot give evidence of deft.'s using the farm in an unhusbandlike manner, if it does not amount to waste.—*HARRIS v. MANTLE* (1789), 3 Term Rep. 307; 100 E. R. 591.

*Annotations*:—*Consd.* *Amory v. Brodrick* (1822), 5 B. & Ald. 712. *Distd.* *Bute v. Thompson* (1841), 13 M. & W. 488. *Mentd.* *Gent v. Cutts* (1847), 8 L. T. O. S. 110. *Times Fire Ins. Co. v. Hawke* (1859), 33 L. T. O. S. 285.

the chaff realised more than the threshed product would have done.

*Seemle*: where oats are stacked & allowed to stand through the winter unthatched they are not treated in a good & husbandlike manner.—*KENNEDY v. JENKINS* (1909), 28 N. Z. L. R. 1073.—N.Z.

**61 i. — Departure from six-break shift.]—**By a lease for sixty-eight years of "outfield" lands, the tenant was bound to labour & well & sufficiently to manure the lands, but no specific mode of cultivation was prescribed. During sixty-seven years no objection was made to the tenant's mode of cropping, but during the last year of the lease an action was brought against him for damages for not having laboured the lands in a husbandlike manner. Three persons appointed by the sheriff to inspect the farm reported that in the last year of the lease 82 acres out of the 92 acres of the farm were in white crop, & that during the immediately preceding years two & occasionally three white crops had been taken successively from some fields, & assuming that the proper course of management was a six-break shift, they estimated the loss due to miscropping at £260:—*Held*: (1) in the case of a long lease it was not enough for the

tenant to leave the lands in the same situation in which he received them, but he must cultivate them according to the rules of good husbandry; (2) this had not been done, & the tenant was liable.—*THOMSON'S REPRESENTATIVES v. OLIPHANT* (1824), 3 Sh. & D. 275.—SCOT.

**61 ii. — Tenant following prescribed course of husbandry but failing to comply with specific rules in lease.]—**A lease contained a stipulation for the cultivation of the land let according to the rules of good husbandry, & that the lands should not be wasted or deteriorated. There were also certain specific rules laid down which, it was argued, were explanatory of these general terms:—*Held*: the tenant had in the cultivation of his farm followed the course which had been prescribed to him, & that, having done so, he could not be liable in damages for any deterioration thence arising.—*STARK v. EDMONSTONE* (1826), 5 Sh. & D. 45.—SCOT.

**61 iii. — Departure from rotation in district.]—**A tenant in an agricultural lease obliged himself to cultivate in a husbandlike manner & not to run out the lands, & also to leave one-fourth of the farm in pasturage at the end of the lease:—*Held*: he was bound

to crop according to the rotation in practice in the district, if suitable to his lands.—*CARRON CO. v. DONALDSON* (1858), 20 D. 681.—SCOT.

**61 iv. — Miscropping.]—**A lease provided that the farm should be worked "in a proper & husbandlike manner," & not peyorated or run out, & also, "without prejudice to the foresaid rules & regulations," an additional rent of £6 per acre so miscropped was stipulated. The landlord sued the tenant (1) for damages on account of deterioration of the farm "by a course of management the reverse of proper & husbandlike," & (2) for £360 as additional pactional rent for miscropping at the rate of £6 per acre. The ct. found that 24 acres too much were in white crop, & decerned for £141 as pactional rent, & for £100 as damages for the general deterioration of the farm, in addition to the pactional rent of £144 for miscropping.—*WEMYSS (EARL) v. RITCHIE* (1863), 2 Macph. (Ct. of Sess.) 137.—SCOT.

— *Liability for additional rent.]—*See pp. 21, 22, post.

**63 i. Pleading—Claim of damages for deviation.]—**It is competent in a summary petition by a landlord against his

**64. — Variance as to grantors & terms of lease.]—**A count in a declaration averred that deft. was tenant to three plffs., & had agreed to farm the lands in a husbandlike manner, & it appeared that the demise was only by two, & that the agreement, on which the action was brought, was to keep the land constantly in grass:—*Held*: there was a fatal variance.—*SAUNDERSON v. GRIFFITHS* (1828), 5 B. & C. 909; 8 Dow. & Ry. K. B. 643; 4 L. J. O. S. K. B. 318; 108 E. R. 338.

*Annotations*:—*Mentd.* *Bobbett v. Pinkett* (1876), 1 Ex. D. 368; *Durant v. Roberts & Keighley*, Maxsted, [1900] 1 Q. B. 629, C. A.; *Keighley, Maxsted v. Durant*, [1901] A. C. 240, H. L.

**65. — Particulars of breach—Non-cultivation—Overcropping.]—**Ejectment by a landlord against his tenant to recover possession of the premises demised upon a forfeiture by breach of a covenant to cultivate the lands according to the most approved system of husbandry. Deft. obtained particulars of the breaches which plff. relied upon. The particulars of the breaches were for selling hay off the land, removing manure, & for non-cultivation:—*Held*: evidence of over-cropping & bad cultivation was inadmissible under these particulars.

Non-cultivation, in the particulars, means letting land go to waste. In those parts of the country which I am familiar with, I know that farmers often take land & let it run to waste; that is quite a different thing from over-cropping (*BOSANQUET, J.*).

Non-cultivation means omitting to cultivate. If breaking up grass land had been called non-cultivation, deft. would have been misled by the particulars (*MAULE, J.*).—*DOE d. WINNALL v. BROAD* (1841), 2 Man. & G. 523; *Drinkwater*, 113; 2 Scott, N. R. 685; 10 L. J. C. P. 80; 133 E. R. 855.

**66. — Certainty of declaration following words of covenant.]—***MARTYN v. CLUE*, No. 78, *post*.

#### SUB-SECT. 2.—CULTIVATION ACCORDING TO CUSTOM OF THE COUNTRY.

##### A. When Implied.

**67. No express agreement Breach of duty—Measure of damages.]—**The duty of a tenant of agricultural land, as declared by the common law & unaffected by express agreement, is to cultivate the land in a good & husbandlike manner according to the custom of the country. He is not further bound to deliver up the land at the end of the tenancy in a clean & proper condition, properly tilled & manured, nor is he necessarily bound or entitled to leave the land in the same condition as when he took it. In case of a breach of his duty the measure of damages is the injury to the reversion occasioned by the breach.—*WILLIAMS v. LEWIS*, [1915] 3 K. B. 493; 85 L. J. K. B. 40; 113 L. T. 1161; 32 T. L. R. 42.

**68. Subject to Agricultural Holdings Act, 1908—Enforcement by assignee of reversion.]—**A tenant from year to year of a farm & building, at a rent, who has not entered into any other express

tenant before the sheriff, for the purpose of having him interdicted from pursuing a course of management inconsistent with good husbandry & the stipulations of his lease, to conclude for damages in so far as injury should be suffered by his actual deviation.—*FRASER v. McDONALD & JACKSON* (1834), 12 Sh. (Cl. of Sess.) 684.—*SCOT*.

**63 ii. — Miscropping—Averment of deterioration—Violation of lease.]—**In an action of damages by a landlord against a tenant for miscropping a field in violation of his lease, he averred on record actual deterioration of the farm. The defence was that the lease did not apply to the field in question & that the field had been cropped according to the rules of good husbandry:—*Held*: pursuer was not bound to put in issue deteriora-

tion, but only violation of the lease.—*MACKENZIE v. MONRO* (1860), 23 D. 144.—*SCOT*.

#### PART III. SECT. 2, SUB-SECT. 2.—A.

**a. Covenant to cultivate “in husbandlike & proper manner.”]—**A covenant in a lease to cultivate the demised land “in a husbandlike & proper manner” means to cultivate according to the course of farm cultivation & management in that part of the country where the land is situate.—*COULTER v. McCARTER* (1911), 17 W. L. R. 720; 4 Sask. L. R. 178.—*CAN*.

**b. Covenant to “farm” in husbandlike manner.]—**A covenant to farm in a husbandlike manner means according to good husbandry in that part of the

agreement with his landlord than as to the amount of the rent, is under an obligation implied by law to use & cultivate the land in a husbandlike manner, according to the custom of the country (subject to the above Act), & to keep the buildings wind & water-tight, & the assignee of the reversion can at common law enforce this implied obligation against the tenant.

Where a tenant of a farm & buildings, under a lease containing express covenants by him, continued in occupation after the expiration of the term, the landlord & tenant agreeing that the terms of the old lease should not apply, but not agreeing upon the terms of the new tenancy except that there should be a yearly tenancy at a fixed rent, & the landlord assigned the reversion during the continuance of the tenancy:—*Held*: the assignee of the reversion entitled to sue the tenant for breaches of the above-mentioned implied obligations which occurred after the assignment of the reversion.—*WEDD v. PORTER*, [1916] 2 K. B. 91; 85 L. J. K. B. 1298; 115 L. T. 243, C. A.

*Annotations*:—*Consd.* *Blanc v. Francis*, [1917] 1 K. B. 252, C. A. *Refd.* *Barnes v. City of London Real Property Co.*, [1918] 2 Ch. 18.

**69. Not applicable to tenants in common.]—**Although the ct. has jurisdiction, after a decree in a partition suit, to grant an injunction restraining a tenant in common in possession from committing destructive waste, it will not interfere to restrain a tenant in common in possession merely from farming contrary to the custom of the country as between landlord & tenant, that relation existing between him & the other tenants in common.—*BAILEY v. HOBSON* (1869), 5 Ch. App. 180; 39 L. J. Ch. 270; 22 L. T. 594; 18 W. R. 124, C. A.

**70. Pleading—Averring precise custom.]—**Plff., in an action against his tenant for mismanagement of a farm, set forth a precise custom as to the mode of cultivation, & alleged that deft. had not cultivated according thereto, which custom deft. traversed. The jury found that the custom was not as plff. had alleged, but deft. had not cultivated his farm according to the course of good husbandry in the neighbourhood:—*Held*: plff. bound by the precise custom, as he had stated it, & having failed to prove it, could not recover.—*ANGERSTEIN v. HANDSON* (1835), 1 Cr. M. & R. 789; 1 Gale, 8; 5 Tyr. 383; 4 L. J. Ex. 118; 149 E. R. 1299.

**71. — Denial of custom alleged.]—**The declaration, in an action by a landlord against his tenant, charged the latter with breach of duty in not cultivating land in a good & husbandlike manner & according to the custom of the country, in that he (amongst other things), contrary to the custom of the country, carried away hay without returning a proportionate quantity of manure. Deft., as to so much of the declaration as charged him with carrying away the hay contrary to the custom of the country, pleaded that no such custom existed that alleged:—*Held*: good on special demurrer.

country.—*SAVAGE v. O’CONNOR* (1855), 7 Ir. Jur. 161.—*IR*.

**c. How enforced.]—**In a suit by a landlord against a tenant seeking *inter alia* to restrain deft. from tilling the demised premises in an injurious or unhusbandlike manner:—*Held*: (1) the ct. would not investigate the proper mode of cultivation of a farm; (2) the implied term of an agricultural contract, namely, to cultivate in a proper manner according to the custom of the country, was not more specific than a general covenant to keep in repair.

I do not think it is the proper subject of a suit in equity. . . . Plff. can have an adequate remedy in a ct. of law (*CHATTERTON, V.-C.*).—*DUNN v. BRYAN* (1872), 7 L. R. Eq. 113.—*IR*.



*Sect. 2.—Effect during tenancy: Sub-sect. 2, A. & B.;*

*HARTLEY v. BURKITT* (1838), 4 Bing. N. C. 687; 1 Arn. 258; 6 Scott, 497; 2 Jur. 642; 132 E. R. 953.

72. — *Denial of tenancy.*]—A declaration in case stated that defts. were tenants to pltf. of a farm, & by reason thereof it was their duty as such tenants to manage & cultivate the farm in a good & husbandlike manner, according to the custom of the country, & assigned breaches in over-cropping, etc. Plea that defts. were not, nor was either of them, tenants to pltf. of the messuage, etc., in manner & form as in the declaration alleged:—*Held*: this plea only put in issue the fact of the tenancy, & not the holding subject to a duty to cultivate according to the custom of the country, & defts. could not object on this record that a lease, under which the land had been originally taken, was not produced by pltf., in order to show that it did not exclude the custom.—*HALLIFAX v. CHAMBERS* (1839), 4 M. & W. 662; 7 Dowl. 342; 1 Horn & H. 417; 8 L. J. Ex. 117; 150 E. R. 1586.

73. — *Not guilty—Evidence.*]—Where, to a declaration on an agreement for not cultivating according to the custom of the country, deft. only pleaded “not guilty,” proof that the tenancy was from year to year:—*Held*: sufficient evidence of the agreement.—*WEBB v. CLARKE* (1855), 4 W. R. 125.

74. — *Evidence.*]—In an action against a tenant upon promises that he would occupy the farm in a good & husbandlike manner according to the custom of the country, an allegation that he had treated the estate contrary to good husbandry & the custom of the country is proved by showing he had treated it contrary to the prevalent course of good husbandry in that neighbourhood, as by tilling half the farm at once, when no other farmer there tilled more than a third, though many tilled only a fourth. It is not necessary to prove any precise definite custom or usage in respect to the quantity tilled.—*LEGH v. HEWITT* (1803), 4 East, 154; 102 E. R. 789.

*Annotations*:—*Mentd.* Westropp v. Elligott (1884), 9 App. Cas. 815, H. L.; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

#### *B. Express Covenants.*

75. *Whether breach—Question for jury.*]—A. held a farm as tenant from year to year, upon a written agreement by which it was stipulated that he should cultivate the farm “in the same way & manner, or as near thereto as circumstances would admit of, as P. (the outgoing tenant) had used & cultivated same during his occupation thereof, & in all events according to the rule of good husbandry used & accustomed in the neighbourhood.” In an action against A., alleging for breach the cutting & carrying away of ash-poles, such user not being as near to the way & manner in which P. used & cultivated the farm as circumstances admitted, & being contrary to the rules of good husbandry used & accustomed in the neighbourhood, it appeared that the poles in question consisted of shoots growing from old stools, which were seasonable & fit for cutting about every seventeen or eighteen years; that, by invariable custom, they belonged to the landlord, in the absence of a special agreement to the contrary; that, whilst P. held the farm, these poles had never been in a fit state for cutting; that two tenants who had preceded P. in the occupation of the farm had cut & sold them as crops; & that A. had, whilst he occupied, paid the rates for the whole farm, including the wood or spinny in which the poles grew. The judge having omitted to leave to the jury upon what terms P. had held the farm, the ct.

granted a new trial.—*HOOD (VISCOUNT) v. KENDALL* (1855), 17 C. B. 260; 19 J. P. 823; 4 W. R. 123; 139 E. R. 1070.

76. — — —.]—Under a deed between pltf. & deft., pltf. agreed to give up a farm held by him of deft., & until such delivery up to cultivate according to the custom of the country, & deft. agreed, if pltf. cultivated the farm according to his covenant, to pay for the crops & manure at a valuation. In an action by pltf. for the amount of the valuation, it was objected that pltf. had not performed his covenants:—*Held*: the covenant to cultivate meant only so far as was universally obligatory by the custom of the country, & the question for the jury was whether substantially pltf. cultivated according to the custom, taking fairly into consideration that he was an outgoing tenant & was to be paid only according to the value of what he put into the ground.—*NEWSON v. SMYTHIES* (1859), 1 F. & F. 477.

77. — *Conversion of arable land into market garden—Erection of glass-houses.*]—Deft. held a farm from pltf. under a twenty-one years’ lease, which contained a covenant by the lessee to cultivate the farm in a good, proper, & husbandlike manner, according to the best rules of husbandry practised in the neighbourhood. Deft. claimed the right to erect glass-houses on arable land, part of the demised premises, & to cultivate tomatoes, mushrooms, grapes, & the like for the London market, a mode of cultivation which was being practised on other farms in the neighbourhood. Pltf. sought to restrain him from so doing:—*Held*: (1) this mode of cultivation was not prohibited by the express provisions of the lease; (2) whether it did or did not amount technically to waste, it was “meliorating” waste, in respect of which an injunction ought not to be granted, & the action was dismissed with costs.

The other provisions of the lease (*e.g.* a covenant not to convert pasture into arable & a covenant as to land left in fallow) would prevent the tenant covering the whole farm with glass-houses (*KEKEWICH, J.*).—*MEUX v. COBLEY*, [1892] 2 Ch. 253; 61 L. J. Ch. 449; 66 L. T. 86; 8 T. L. R. 173.

*Annotations*:—*Consd.* *Re Morse & Dixon* (1917), 87 L. J. K. B. 1, C. A. *Mentd.* *L. R. Comrs. v. Ransom* (1918), 119 L. T. 369.

78. *Pleading—Averment of breach—Sufficiency.*]—A declaration in covenant, by a lessor against the assignee of the lessee, set forth a covenant by the lessee, for himself, his heirs, exors., administrators & assigns, that he & they should cultivate the land in a good husbandlike manner & according to the custom of the country. The count then averred entry of the lessee & assignment by him to deft., who entered, & was possessed until the expiration of the term. Breach, that deft., after the assignment, used & cultivated the land in a bad & unhusbandlike manner, & not according to the custom of the country:—*Held*: (1) the declaration was good; (2) breach of a covenant to cultivate according to the custom of the country was sufficiently averred by stating that deft. did not so cultivate, without specifying instances.—*MARTYN v. CLUE* (1852), 18 Q. B. 661; 22 L. J. Q. B. 147; 118 E. R. 249.

#### **SUB-SECT. 3.—BREAKING UP OR MOWING MEADOW AND PASTURE, ETC.**

##### *A. Waste.*

79. *What is ancient pasture—Leased land not ploughed for thirty years but ploughed before*

#### **PART III. SECT. 2, SUB-SECT. 3.—A.**

79 i. *What is ancient pasture—Leased land not ploughed for thirty years.*]—

Under a settlement of 1838 P. was tenant for life of lands, with remainder to pltf. in tail male, with power to P. during his life to grant leases for three

lives, or any term of years not exceeding thirty-one years in possession, provided that none of the lessees should be authorised to commit waste, or exempted

**lease.]**—An injunction to restrain a lessee from ploughing pasture lands, which had remained unploughed during the continuance of the lease for thirty years, but were ploughed within six years before its commencement, refused. Though the lease has continued thirty years, during all which time the pastures have been unploughed, yet that will not make them ancient pastures within the rule of the ct.; for as to the lessee himself who took these pastures subject to the liberty of ploughing, they remain still so, notwithstanding this forbearance; otherwise if they had been so long out of lease.—*GORING v. GORING* (1676), 3 Swan. 661; 36 E. R. 1013.

*Annotation:*—*Apld.* *Rush v. Lucas*, [1910] 1 Ch. 437.

**80. — Settled land.]**—Altering ancient pasture or meadow into arable land is waste; ancient pasture here does not mean pasture from time immemorial, but only that which the settlor has kept as pasture. *Semble*: the course of dealing with the land adopted by the settlor affords the governing rule as to rights of a tenant for life (*CHITTY, J.*).—*DASHWOOD v. MAGNIAC*, [1891] 3 Ch. 306, at p. 328; 60 L. J. Ch. 210; 64 L. T. 99; 7 T. L. R. 189.

*Annotations:*—*Mentd.* *Re Chaytor*, [1900] 2 Ch. 801; *Pardoe v. Pardoe* (1900), 82 L. T. 547; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A.; *Re Trevor-Batye's Settlement*, *Bull v. Trevor-Batye*, [1912] 2 Ch. 339; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488.

**81. Good lands not ploughed for forty years — Injunction—Against jointress.]**—A jointress restrained from ploughing up ancient pasture grounds, jointure lands being good lands & not ploughed within forty years.—*PACKER v. NEWELL (LADY)* (1609), *Toth.* 144; 21 E. R. 149.

**82. Pasture land used as meadow for many years—Writ of estrepement.]**—Writ of estrepement was granted with regard to ancient meadow, but refused with regard to pasture land in the form of ridge & furrow, though it had been mowed & used for meadow for many years.—*TRESHAM v. LAMB* (1610), *Brownl.* 46; 123 E. R. 806.

**83. Ancient pasture—Injunction.]**—A decree for staying of ploughing up ancient pasture ground.—*HOWARD (LORD) v. RIDLER* (1621), *Toth.* 143; 21 E. R. 149.

**84. S. P. TRESHAM v. GERRARD** (1627), *Toth.* 144; 21 E. R. 149.

**85. S. P. BROOKE v. DENTON** (1633), *Toth.* 143; 21 E. R. 149.

**86. — — —.]**—A tenant will be restrained at the instance of the owner of the inheritance from ploughing up ancient pasture; such ploughing is as much waste as the ploughing of meadow.—*ATKINS v. TEMPLE* (1626), 1 Rep. Ch. 13; *Toth.* 143; 21 E. R. 493.

**87. — — — Against tenant for life.]**—Tenants for their lives were restrained from ploughing up ancient meadow & pasture ground.—*COLE v. PEYSON* (1637), 1 Rep. Ch. 106; 21 E. R. 521.

**88. — — — Ground formerly ploughed & fit for tillage.]**—The ploughing up of ancient pasture will be restrained in equity, notwithstanding that the nature of the ground was for tillage, & that it

had formerly been ploughed.—*FERMIER v. MAUND* (1638), 1 Rep. Ch. 116; 21 E. R. 524.

**89. Land full of bushes & furze—Injunction — Against tenant for life.]**—An injunction decreed against a tenant for life, at the suit of the owner of the inheritance, to restrain him from ploughing or burn-beating pasture ground which was full of bushes & furze for more than two years.—*TREGONWELL v. LAWRENCE* (1674), 2 Rep. Ch. 94; 21 E. R. 626.

**90. Jointure lands—Injunction—Against tenant unimpeachable for waste.]**—An injunction against ploughing may be granted against a tenant for life though dispunishable for waste at law, but not where the jointure deed contains an express clause of without impeachment of waste.—*TRACY v. TRACY* (1681), 1 Vern. 23; 23 E. R. 278.

*Annotation:*—*Mentd.* *Garth v. Cotton* (1750), 1 Ves. Sen. 516.

**91. Down land — Injunction—Against ploughing, breaking or burning.]**—The Ct. of Ch. will award a perpetual injunction to restrain waste, by ploughing, burning, breaking, or sowing of downland.—*WORSLEY v. STUART* (1711), 4 Bro. Parl. Cas. 377; 2 E. R. 255.

**92. Meadow—Making trench for drainage.]**—Deft. made a trench to carry off water from a meadow, the meadow being thereby improved, & not injured:—*Held*: not waste.—*ALTMAN'S CASE* (1577), 3 Dyer, 361 b; 73 E. R. 810.

**93. — — —.]**—A lessee cannot turn meadow into arable or stubble wood so as to make it pasture, but he may better a thing in the same kind, as by digging a meadow, to make a drain or sewer to carry away water.—*DARCY (LORD) v. ASKWITH* (1618), *Hob.* 234; 80 E. R. 380.

*Annotations:*—*Apld.* *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624. *Refd.* *Elwes v. Maw* (1802), 3 East, 38; *Simmons v. Norton* (1831), 7 Bing. 640; *Phillips v. Smith* (1845), 14 M. & W. 589. *Mentd.* *Jones v. Chappell* (1875), L. R. 20 Eq. 539.

**94. — — — Conversion into garden ground — Damages.]**—In an action of waste on Stat. Gloucester against a tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the ct. will give deft. leave to enter up judgment for himself.—*HARROW SCHOOL (GOVERNORS) v. ALDERTON* (1800), 2 Bos. & P. 86; 126 E. R. 1170.

*Annotations:*—*Apld.* *Barry v. Barry* (1820), 1 Jac. & W. 651; *Doe d. Grubb v. Burlington* (1833), 5 B. & Ad. 507. *Expld.* *Rochdale Canal Co. v. King* (1851), 2 Sim. N. S. 78; *Doherty v. Allman* (1878), 3 App. Cas. 709, H. L. *Refd.* *Pindar v. Wadsworth* (1802), 2 East, 154; *Meux v. Cobley*, [1892] 2 Ch. 253.

**95. — — — Conversion into arable — Justification — Evidence.]**—Ploughing up an old meadow & converting it to arable is waste, & the tenant cannot give evidence, under the general issue of no waste done, that the meadow was ploughed according to the custom of the country, & to ameliorate the land, as the reason for altering the character of the land must be pleaded by way of justification.—*SIMMONS v. NORTON* (1831), 7 Bing. 640; 5 Moo. & P. 645; 9 L. J. O. S. C. P. 185; 131 E. R. 247.

*Annotations:*—*Consd.* *St. Albans v. Skipwith* (1845), 8 Beav. 354. *Distd.* *Huntley v. Russell* (1849), 13 Q. B. 572. *Refd.* *Green v. Jenkins* (1860), 1 De G. F. & J. 454, L.J.J.

from impeachment for committing waste. By a lease of 1871 P. demised to deft., for thirty-one years, part of the settled lands. The lease contained an agreement that, in case any part of the lands demised should be broken up or tilled by the lessee, his exors., administrators, or assigns, he or they should, at least two years before the expiration or sooner determination of the term, lay down in a proper & husbandlike manner the lands so broken up or tilled with grass seeds, & should deliver up the lands properly laid down in grass. There was

evidence that, at the date of the settlement of 1838, the land was not "ancient pasture." Pltf. proved that from 1838 to 1871 the land had never been broken up, & had been in grass. Deft. proved that a few years after the lease he had ploughed up a small portion of the land for the purpose of draining it, & had relaid it afterwards in grass. In an action for an injunction:—*Held*: (1) the whole of the lands demised were subject to the provisions of the lease, & it was open to deft. to show that the acts complained of were meliorative waste, & if so, the

ct. would not restrain him by injunction; (2) the lands demised were not really "ancient pasture."—*PAIMER v. M'COR-*  
c (1890), 25 L. R. 110, 120.—*IR.*

**d. Ploughing excessive quantity of land—Pasture or stock farm.]**—Action of damages against a tenant for ploughing during the last year of his lease more of his farm than he was entitled to have under corn crop. The farm was a pasture or stock farm. Verdict for defender.—*TWEEDDALE (MARQUIS) v.*  
; (1821), 2 Murr. 563.—*SCOT.*



**Sect. 2.—** *during tenancy: Sub-sect. 3, A. & B.]*

**96. —** —.] — **JOHNSON v. GOLDSWAIN**, No. 138, —.

**97. —** —.] — It cannot be decided, as a general proposition without any exception, that the conversion of ancient meadow into arable is to be treated as waste.—**ST. ALBANS (DUKE) v. SKIPWITH** (1845), 8 Beav. 354; 14 L. J. Ch. 247; 5 L. J. O. S. 123; 9 Jur. 265; 50 E. R. 139.

**Annotation:—Mentd.** **ROSS v. ADCOCK** (1868), L. R. 3 C. P.

**98. —** —.] — **DASHWOOD v. MAGNIAC**, No. 80, ante.

**99. — Breaking up after injunction—Committal.]—**Injunction against ploughing up meadow land & committing other waste therein, until deft. should fully answer the bill, or the ct. make another order to the contrary. An answer was put in & an action brought by pltf. for injury sustained by the waste complained of. Deft. was committed to prison for breaking up such land a second time.—**ERPE v. SMITH** (1838), Coop. Pr. Cas. 113; 47 E. R. 425.

**100. Glebe land—Parson not lessee or tenant for life.]—**In respect to waste, a parson or vicar is not to be considered as merely lessee for years, or as tenant for life under a will or settlement. The ct. will not restrain an incumbent from ploughing up meadow infested with moss & weeds for the purpose of laying it down again in grass when properly cleaned.

The glebe land of a living which was ancient meadow & pasture, having much moss & weeds mixed with the grass, was about to be ploughed up by the incumbent with the view of cleaning it & laying it down again in grass:—**Held**: he ought not to be restrained by the ct. from ploughing up same. **Qu.**: whether a patron is in any case entitled to an injunction to restrain the incumbent from ploughing up ancient meadows.—**ST. ALBANS (DUKE) v. SKIPWITH** (1845), 8 Beav. 354; 14 L. J. Ch. 247; 5 L. T. O. S. 123; 9 Jur. 265; 50 E. R. 139.

**Annotation:—Mentd.** **ROSS v. ADCOCK** (1868), L. R. 3 C. P. 655.

**101. Strawberry beds—Ploughing up.]—**It is waste for an outgoing tenant of a garden ground to plough up strawberry beds in full bearing, although when he entered he paid for them on a valuation to the person who occupied the premises before him, & although it may have been usual for strawberry beds to be appraised & paid for as between outgoing & incoming tenants.—**WATIERELL v. HOWELLS** (1808), 1 Camp. 227.

**102. Pleading—Land which was pasture—Uncertainty.]—**A declaration in waste that deft. ploughed up land which was pasture *et sic facit vastum*:—**Held**: bad, for uncertainty, even after verdict.—**GUNNING v. GUNNING** (1678), 2 Show. 8; 89 E. R. 759.

#### *B. Express Covenants.*

**103. Not to mow meadow—Usual covenant.]—**In a lease of a farm a covenant not to mow meadow land more than once a year is not an unusual covenant, so as to excuse an intended assignee from accepting the title.—**HYDE v. WARDEN** (1877), 3 Ex. D. 72; 47 L. J. Q. B. 121; 37 L. T. 567; 26 W. R. 201, C. A.

**Annotations:—Mentd.** **EVANS v. DAVIS** (1878), 10 Ch. D. 747; **Willmott v. Barber** (1880), 15 Ch. D. 96; **Burford**

**v. Unwin** (1885), Cab. & El. 494; **Reeve v. Berridge** (1888), 20 Q. B. D. 523, C. A.; **Barrow v. Isaacs**, [1891] 1 Q. B. 417, C. A.; **Bishop v. Taylor & Harris** (1891), 60 L. J. Q. B. 556; *Re White & Smith's Contract*, [1896] 1 Ch. 637; **Eastern Telegraph Co. v. Dent**, [1899] 1 Q. B. 835; **Dougherty v. Oates** (1900), 45 Sol. Jo. 119; **Molyneux v. Hawtrey**, [1903] 2 K. B. 487, C. A.; **Harman v. Ainslie**, [1904] 1 K. B. 698, C. A.; **Lewis v. Baker**, [1905] 1 Ch. 46.

**104. Construction—Lands not “lately” ploughed.]—**Action for breach of covenant in ploughing lands not “lately” ploughed:—**Held**: the meaning of “lately” depended on circumstances, & fourteen or even twenty years might be “lately.” On a sale of lands, lately in the tenure & occupation of S., lands in his tenure twenty years before would pass.—**GENNER v. LUCKING** (1614), 2 Bulst. 258; 80 E. R. 1105.

**105. — “Lane’s Meadows”—Words describing locality not nature of land.]—**In covenant on a lease demising meadow pasture, & arable lands, & describing two closes by the name of “Lane’s Meadows,” in which the lessee covenants to pay £5 for every acre of meadow he shall plough, if the breach be assigned in ploughing up two meadows called “Lane’s Meadows,” deft. may plead that the lands called “Lane’s Meadows” were time out of mind arable, & traverse them being meadow, for the words “Lane’s Meadow” in the lease being descriptive of the local situation, & not of the nature of the land, they do not estop from trying the fact.—**SKIPWORTH v. GREEN** (1724), 8 Mod. Rep. 311; 11 Mod. Rep. 388; 1 Stra. 610; 88 E. R. 222.

**Annotation:—Mentd.** **Palmer v. Ekins** (1728), 2 Stra. 817.

**106. — Meaning of pasture lands.]—**By an agreement, made in 1895, the predecessor in title of pltf. let a farm to deft. from year to year, subject to twelve months’ notice in writing from either party, & the tenant agreed not to commit any waste or spoil, or plough or break up any of the pasture lands, & further to farm the land upon the most approved system of husbandry practised in the neighbourhood. The farm contained 215 acres, of which the most part was pasture, but there were about 53 acres of arable land. Included in the latter was one field of 22 acres, which had been regularly tilled by the tenant for thirteen seasons before 1894, but in 1895 the tenant laid it down in grass because the crops had deteriorated in quality & quantity. In 1901 he broke up 9 acres of this field, but in 1902 he relaid it in grass. In Apr., 1909, the landlord gave the tenant notice to determine the tenancy. The tenant required the landlord to pay him, when he went out, for the grass land laid down, & on the landlord’s refusal, the tenant threatened to plough up this land again. In an action by the landlord for an injunction to restrain the tenant from so doing:—**Held**: (1) upon the true construction of the agreement, the tenant had not broken any of the covenants, as the “pasture lands” in the agreement referred solely to those parts of the farm which were meadow land at the date of the agreement; (2) ploughing the field would not have been waste or spoil on the tenant’s part; (3) an act which admittedly would not be a breach of covenant, while the tenant was not under notice, was not converted into a breach as soon as notice to quit was served; (4) the fact that the tenant’s conduct was dictated solely by a desire to force the landlord to compensate him did not affect the construction of the contract, or disentitle the tenant to costs of the action.—**RUSH v. LUCAS**, [1910] 1 Ch. 437; 79 L. J. Ch. 172; 101 L. T. 851; 54 Sol. Jo. 200.

#### **PART III. SECT. 2, SUB-SECT. 3.—B.**

**e. Covenant to summer-fallow — Breach.]—Held**: on the evidence, pltf.’s claim for damages for breach by deft. of the provisions of the lease as to summer-fallowing 250 acres in each of the years

1907, 1908 & 1909 failed.—**LETT v. GIVEN** (1911), 19 W. L. R. 713; 1 W. W. R. 388.—**CAN.**

**106 i. Construction—“Pasturing purposes.”]—**Deft. agreed to rent a farm from pltf. “for pasturing purposes” by

a memorandum containing no other stipulation as to the use of the place. Instead of using the entire farm for grazing purposes deft. raised a crop of hay on part of the land, which he cut & stored in his barn & endeavoured to sell:—**Held**: deft. rightly enjoined from



## PART III.—COVENANTS AND CUSTOMS OF THE COUNTRY.

**107. Not to plough up ancient meadow or pasture—Sum payable on breach—Liquidated damages.]**—In a lease for years of land, the lessee covenanted not to plough pasture land, & if he did, to pay after the rate of 20s. per annum for every acre ploughed:—*Held*: (1) the ct. would not grant an injunction against the tenant's ploughing, for the parties themselves had agreed the damage, & set a price for ploughing; (2) the ct. would not relieve the lessee against the penalty, if he ploughed.—*WOODWARD v. GYLES* (1690), 2 Vern. 119; 23 E. R. 686.

**108. ———.]**—Where a lessee covenants not to plough up any ancient meadow or pasture ground, & if he does, to pay an additional yearly rent of £5 an acre, the increased rent is not to be considered as a penalty, but as a liquidated satisfaction, fixed & agreed upon by the parties, & upon an action brought for recovering it, an equity ct. ought not to interpose or give any relief.—*ROLFE v. PETERSON* (1772), 2 Bro. Parl. Cas. 436; 1 E. R. 1048.

*Annotations*:—*Distd.* *Hardy v. Martin* (1783), 1 Cox, Eq. Cas. 26. *Consd.* *Astley v. Weldon* (1801), 2 Bos. & P. 346. *Apld.* *Jones v. Green* (1829), 3 Y. & J. 298. *Refd.* *Elphinstone v. Monkland Iron & Coal Co.* (1886), 11 App. Cas. 332, H. L.

**109. ———.]**—In covenant by a lessor against the lessee upon a lease reserving an increased rent for every acre of certain lands converted into tillage, the jury by their verdict having given damages for actual injury sustained instead of the increased rent:—*Held*: (1) the ct. would not refuse pltf. a new trial, on the ground that the verdict was consistent with justice; (2) the judge having expressly directed the jury to find damages to the amount of the increased rent, the new trial should be granted without payment of costs.

There certainly is nothing unreasonable in a landlord stipulating that particular lands shall not be converted into tillage at all, & that in case that be done, a large sum shall be paid by way of stipulated damages (*ABBOTT, C.J.*).—*FARRANT v. OLMUS* (1820), 3 B. & Ald. 692; 106 E. R. 814.

*Annotation*:—*Distd.* *Fuller v. Fenwick* (1846), 3 C. B. 705.

**110. ——— Satisfaction—Waiver.]**—Covenant on an indenture of lease whereby the tenant covenanted to pay the rent of £50 half yearly, & over the above the reserved rent, the further yearly rent of £5 for every acre of the demised premises which deft. should convert into tillage, over & above one-third part thereof. Breach assigned for over tillage, whereby deft. became liable to pay £75 additional rent. Pleas, (1) after the committing of the supposed breaches of covenant, pltf., with the full knowledge of the supposed breaches of covenant, accepted & received from deft. £25 as & for all the rent due, in respect of the premises, up to & inclusive, etc., (covering the time alleged in the breach), without

& removing any part of the hay, but his raising a crop of hay on the farm was not a breach of the contract to use it for "pasturing purposes."—*BRADLEY v. McCURR* (1908), 18 O. L. R. 503.—*CAN.*

**107 i. Not to plough up ancient meadow or pasture—Sum payable on breach—How long payable.]**—A lease contained covenants by the lessee to pay an increased rent of £20 for every acre which he should plough up over & above one-third part of the demised lands, & also that, in case he should plough one-third or greater or less part, he should lay same with clover or grass seeds. The lessee ploughed more than one-third, paid the increased rent for it, & then laid it down in pasture:—*Held*: the increased rent ceased to accrue from the time that the ploughed land had been restored to pasture.—*DOMVILLE v. FORDE* (1873), 7 I. R. C. L. 531.—*IR.*

**107 ii. ——— For "each acre deficient."]**—A landlord granted a lease on the condition, *inter alia*, that the tenant at removal should leave 60 acres in five years' old sown grass, but in case he should think it more to his advantage not to have the land in grass during these years, then he was to "pay to the landlord the sum of £5 sterling of additional rent for each acre deficient," at the terms & in the manner stipulated as to the principal rent. The tenant, after laying down the proper quantity during the last year, ploughed part of it:—*Held*: he was liable only in £5 for each acre so ploughed during that year, & not for each of the five years.—*SUTTIE v. SOMNER* (1828), 6 Sh. (Ct. of Sess.) 1122.—*SCOT.*

**i. Not to break up more than fixed proportion of land—Lessee breaking up more.]**—A tenant held a farm under a

demanding or requiring the payment of such penalty or additional rent, & thereby then & there waived, gave up, & dispensed with his right to receive or recover any *nomine pænæ* or penalty, or such additional rent; (2) after the committing of the breaches of covenant, pltf., with a full knowledge, etc., waived, gave up, & dispensed with all claim or right on his part to receive, recover or be paid any such penalty, *nomine pænæ* or additional rent:—*Held*: both pleas were insufficient, the further yearly rent of £5 being not a penalty, but liquidated damages.—*DENTON v. RICHMOND* (1833), 1 Cr. & M. 734; 3 Tyr. 630; 2 L. J. Ex. 269; 149 E. R. 595.

**111. ———.]**—In a lease of land, the lessee, in addition to a certain reserved rent, covenanted to pay a penal rent for pasture land broken up or "used or converted to any other use than for meadow or pasture land." To a breach alleging non-payment of the reserved rent, deft. pleaded, "as to so much of the declaration as related to the sum of £150, parcel of the alleged arrears of rent in the declaration firstly mentioned," that, after same became due, & before commencement of the action, pltf. distrained certain goods, & sold them for a sum greater than the amount of the arrears of rent, & thereby satisfied & discharged the last-mentioned arrears:—*Held*: no answer.—*ALDRIDGE v. HOWARD* (1842), 4 Man. & G. 921; 5 Scott, N. R. 623; 134 E. R. 378.

**112. ——— Threatened breach—Injunction.]**—A tenant threatening a breach of a covenant not to plough an ancient meadow, on the breach of which he would have to pay an increase of rent, the ct. granted an injunction.—*WEBB v. CLARK* (1782), 1 Fonbl. Treatise of Equity, 154.

**113. ——— Land described as meadow—Evidence.]**—Where there is a reservation of £5 per acre during the last twenty years of a term for every acre of meadow thereby demised, which the tenant should plough, dig, ear, break up, or convert into tillage during the last twenty years of the term, & so after that rate for any greater or less quantity than an acre, or less term than a year, the rent is due in the last twenty years if the land is then ploughed, whether it was first ploughed within the last twenty years or before, & the rent continues payable during the twenty years though the land be again laid down to permanent grass. Land sown to clovers with corn is not thereby restored to a state of permanent pasture, but is still in tillage.

If a lease describe demised land as meadow land, no other evidence is necessary to prove it was meadow land at commencement of the term.—*BIRCH v. STEPHENSON* (1811), 3 Taunt. 469; 128 E. R. 186.

**114. ——— Land broken for building purposes.]**—An injunction was granted to restrain the tenant of a farm from breaking up meadow, contrary to covenant, for the purpose of building, the lease contain-

ing nineteen years' lease, the conditions of which implied a six-shift rotation of cropping & obliged him to cultivate according to the rules of good husbandry. It was in particular stipulated that not more than one-sixth of the land under a course of tillage should be broken up from lea in any one year. During several years preceding the last year of his lease the tenant had with the landlord's knowledge broken up from lea less land than he was entitled to break up, but for the crop of the last year of his tenancy he proposed to break up from lea land amounting to two-sixths in all of the amount of arable land:—*Held*: the landlord was entitled in respect of the provisions of the lease to interdict the tenant from breaking up more than one-sixth of arable land.—*STAIR (COUNTESS) v. WILLISON* (1883), 20 Sc. L. R. 315.—*SCOT.*

**Sect. 2.—Effect during tenancy: Sub-sect. 3, B.; sub-sect. 4]**

ing covenants not to convert meadow land, etc., showing the purpose intended to be tillage as a farm. *Qu.*: whether, in the absence of the covenants, the ct. would grant an injunction upon the ground of waste.—*GREY DE WILTON (LORD) v. SAXON* (1801), 6 Fes. 106; 31 E. R. 961.

**115. — Lands used as racecourse.]—**A lessee covenanted to pay, in addition to a certain reserved rent, a penal rent for pasture land broken up or "used or converted to any other use than for meadow or pasture land":—*Qu.*: whether using the land as a racecourse & ground for training horses was a breach of the covenant; at all events, the question was one for a jury and not determinable by the ct. on demurrer.—*ALDRIDGE v. HOWARD* (1842), 4 Man. & G. 921; 5 Scott, N. R. 623; 134 E. R. 378.

**116. — Exception for specified purposes—No licence to commit waste.]—**A tenant for life punishable for waste had power to lease for twenty-one years certain ancient pasture land. The leasing power provided that "none of the lessees should be by any clause or words therein contained authorised to commit waste, or exempted from punishment for waste." The tenant for life demised the premises for twenty-one years by a lease which recited the power & contained a covenant by the lessee not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system," which had already been introduced by the tenant for life in a manner amounting to waste:—*Held*: (1) the exception in the covenant did not amount to a licence or authority to the lessee to commit waste by carrying out the allotment system; (2) if any implication could be made, so as to construe that exception as implying a permission to the lessee to do anything, it could not be inferred that it permitted him to do more than to carry out the allotment system during the life of the tenant for life so far as she had power to permit it, & not otherwise.—*DOE d. HOPKINSON v. FERRAND* (1851), 20 L. J. C. P. 202; 17 L. T. O. S. 183; 15 Jur. 1061.

**117. — Eviction before breach.]—**In an action by a landlord against the tenant on a farming lease for breaches of covenants not to plough meadow land, or pasture orchards, or lop trees, it is no answer to plead that, before any of the breaches, deft. was evicted by authority of pltf. from part of the demised premises.—*NEWTON v. ALLEN* (1841), 1 Q. B. 518; 1 Gal. & Dav. 44; 10 L. J. Q. B. 179; 6 Jur. 99; 113 E. R. 1231.

*Annotation*:—*Consd. Morrison v. Chadwick* (1849), 7 C. B. 266.

**118. Lease of pasture farm—Injunction wrongly obtained — Damages against landlord.]—**The tenants of a pasture farm upon which they maintained a flock of sheep proposed to plough up part of the pasture land & plant corn. The landlord

obtained an interim injunction restraining them from so doing, with the result that the tenants were compelled to maintain the farm as a pasture farm. They kept their sheep on the land, & in consequence of a drought the sheep became depreciated in value. The interim injunction obtained by the landlord was dissolved at the hearing of the action, & in arbn. proceedings the tenants claimed as damages the net profit they would have made if they had ploughed the land & planted corn, & also the amount by which the sheep had deteriorated in value. It was contended for the landlord that the damages arising under the second head were too remote & could not be recovered:—*Held*: the tenants were entitled to damages under both heads of their claim.—*Re PEMBERTON & COOPER & COOPER* (1912), 107 L. T. 716.

**SUB-SECT. 4.—CROPPING.**

**119. Covenant to permit landlord to sow clover among tenant's barley—Sowing barley without giving landlord notice—No breach.]—**Covenant "to permit pltf. in the last year of the term to sow clover among deft.'s barley." Breach that deft. sowed, etc., without giving pltf. notice. Plea that deft. did not prevent it:—*Held*: a good plea, as omission to give notice was not active prevention, which was the sole question involved, and as pltf. was the party for whose benefit the covenant was intended, he ought to have used due diligence.—*HUGHES v. RICHMAN* (1774), 1 Cowp. 125; 98 E. R. 1002.

**120. Covenant to crop in specified manner—Construction.]—**A covenant in a farming lease not to sow with more than two grain crops during four years:—*Held*: to apply to any four years of the term however taken, not to each successive four years from the commencement.—*FLEMING v. SNOOK* (1842), 5 Beav. 250; 49 E. R. 574.

**121. — Meaning of "crops"—Rejection of evidence.]—**In an action arising out of a farming lease, in which the word "crops" occurred, it was proposed to call witnesses to prove that a particular covenant, with reference to not taking more than so many crops, meant white crops, not crops generally. The evidence having been rejected:—*Held*: (1) the word "crops" was used in the lease in its ordinary & popular sense, & as including any crops; (2) the lease showed that the word "crops" was meant to include turnips as well as wheat crops; (3) the evidence was properly rejected.—*NORTH v. WILLIAMS* (1848), 12 L. T. O. S. 222.

**122. — Tenant in possession under agreement for lease—Yearly tenancy—Covenants applicable to tenancy binding tenant.]—**When a party enters into possession of a farm & pays rent under an agreement for a lease containing divers covenants to cultivate, etc., he is bound by all the covenants

**PART III. SECT. 2, SUB-SECT. 4.**

**120 i. Covenant to crop in specified manner—Breach—Landlord's acquiescence—Whether representatives estopped.]—**The damage incurred by non-implementation of the stipulations of a lease in regard to cropping cannot be insisted in for a long period *retro* by the landlord's representatives, he not having objected to the deviations when they happened.—*MURRAY'S TRUSTEES v. GORDON* (1806), 13 F. C. 538.—*SCOT*.

**120 ii. — Whether purchaser estopped.]—**A. purchased an estate with entry at Whit-Sunday, 1837; at the same time a nineteen years' lease of one of the tenants expired, but he was allowed by the new proprietor to con-

tinue in possession of his farm for two years thereafter by tacit relocation. On the termination of the last year of possession, A. presented a petition to the sheriff, craving him, in respect of the tack, to appoint inspectors to report on an alleged miscropping of the farm, contrary to the terms of the lease:—*Held*: A. entitled to damages for miscropping, & his claim was not barred by the acquiescence of the former proprietor in former deviations on the part of the tenant from the lease.—*HALL v. MCGILL* (1847), 9 D. 1557.—*SCOT*.

**120 iii. — Measure of damages.]—**A farm lease contained covenants by the lessee that he would plough the land in each year 4 inches deep & crop same during the term in a proper farmerlike

manner. Afterwards a new lease was made substituting deft. as lessee instead of her husband. The new lease contained the same covenant to plough 4 inches deep in each year written into it, but, by mistake, no express covenants to cultivate or crop. The cultivated portion of the farm was 117 acres, but deft. only ploughed & cultivated 4 acres out of the 117, & weeds grew up all over the rest:—*Held*: deft. was liable for the estimated value of one-third of the crop that would probably have been produced on the 117 acres, if it had been cropped in that year, & for deterioration in value of the land on account of deft. having allowed it to grow up with weeds.—*DUNSFORD v. WEBSTER* (1903), 23 C. L. T. 290; 14 Man. L. R. 520.—*CAN*.



in the agreement applicable to a tenancy from year to year.

Where an agreement stipulated for the lease to contain a condition of re-entry if the tenant should grow two successive crops of white corn without fallow:—*Held*: he might be ejected without notice, if he committed breach of this covenant.—*DOE v. THOMSON* (1840), 12 Ad. & El. 476; 4 Per. & Dav. 177; 113 E. R. 892.

*Annotation*:—*Appld.* *Thomas v. Packer* (1857), 1 H. & N. 669.

**123. — Pleading breach—Sufficiency of replication.**—Pltf. covenanted in a lease not to take more than two crops of grain in succession, & that he would plant with potatoes, or sow with peas or beans twice well hoed. Deft. pleaded, as a breach of this covenant, that pltf. took more than two crops of grain successively, & did not nor would plant with potatoes, nor sow with peas which were twice well hoed. The replication traversed that pltf. took more than two crops of grain successively, & alleged that pltf. planted part of the land, consisting of, etc., with potatoes & sowed another part, consisting of, etc., with peas & the residue, consisting of, etc., with beans which were twice well hoed:—*Held*: as the plea showed no breach of the latter

part of the covenant, the replication was a sufficient answer to the material matter alleged in the plea.—*HAMMOND v. COLLS* (1845), 1 C. B. 916; 14 L. J. C. P. 288; 5 L. T. O. S. 515; 135 E. R. 803.

**124. — Damages or penal rent on breach.**—By an indenture, a farm & land were demised to a tenant at a yearly rent, & also under & subject to certain yearly payments, in case the tenant should not crop, manure, & manage the farm in manner therein specified & covenanted, & also in case the tenant, in the last three years of the term, should sow more than 70 acres of clover in one year, the additional rent of £10 an acre for every acre above 70 acres, for the residue of the term:—*Held*: (1) the additional rents were in the nature of liquidated damages, not of penalties; (2) on a bill filed by the landlord for a discovery of breaches of the covenants in aid of an action at law, a plea that the discovery might subject the tenant to penalties was overruled.—*JONES v. GREEN* (1829), 3 Y. & J. 298; 148 E. R. 1193, Ex. Ch.

*Annotation*:—*Mentd.* *Denton v. Richmond* (1833), 3 Tyr. 630.

**125. — Assessment of damages.**—*Qu.*: whether upon breach of covenant “to make yearly

**125 i. — Damages or penal rent on breach—Assessment of damages.**—A tenant bound himself to follow a particular mode of culture for every year of the tack, from which, if he deviated, he was to pay £5 of additional yearly rent for each acre cultivated differently, & “which additional rent shall not be considered as penal, but as pactional.” The landlord subsequently sent the tenant a scheme of cropping in some respects different. The tenant having deviated from both this & the stipulated mode, the landlord sued for additional rent. The tenant pleaded that the additional rent could not be transferred to the new scheme, as that prescribed in the lease had been abandoned, & at any rate, that the additional rent was, in reality, a penalty, & therefore, subject to an equitable modification:—*Held*: (1) the additional missive furnished by the landlord to the tenant merely changed the rotation of cropping, but left all the other stipulations & penalties of the former tack unchanged, & applicable to the new rotation; (2) the tenant was liable.—*MORRISON v. BLAIR* (1823), 2 Sh. (Ct. of Sess.) 241.—*SCOT*.

**125 ii. —**—It was provided by a lease that a tenant should not take two white crops, or plough up for crop any part of the farm which had not been three years in grass, & if he deviated from this rotation he should pay £10 of additional rent for each acre so cropped for the last three years of the lease. In the penult year of his lease he cropped a field which had not been three years in grass, & also cropped the same field in the last year of the lease:—*Held*: the tenant was liable in the additional rent for both years.—*LAWSON v. OGILVY* (1834), 7 Wils. & S. 397; 10 Sh. (Ct. of Sess.) 531; 7 F. C. 403.—*SCOT*.

**g. Departure from prescribed mode of cropping—Additional rent on breach.**—A tack stipulated that the tenant was at liberty to deviate from the mode of cropping & management laid down in the tack upon his paying £2 per acre more of additional rent to the landlord. He departed from the mode of cropping. The Ct. of Session decided that he was liable to pay the additional rent, but the House of Lords remitted the case to ascertain & determine specially what was the number of acres the tenant became bound to cultivate in the manner specified in the tack, & what was the number of acres cultivated contrary to the conditions thereof.—*STRATTON v. GRAHAM* (1789), 3 Pat. App. 110.—*SCOT*.

**h. —**—A tack contained a

clause prescribing “the course of labouring during the currency of the tack & that under a penalty of £3 for each acre laboured otherwise than as above, to which the damages are hereby estimated, without power to any judge to modify them on any pretence whatever”:—*Held*: the tenant, not having adhered to the mode of management pointed out by the lease, must make payment of the penalty stipulated by the tack.—*HENDERSON v. MAXWELL* (1802), 13 F. C. 49.—*SCOT*.

**i. —**—A tenant being bound by his tack either to cultivate his farm in a certain manner, or to pay an additional rent, will not be excused for changing the routine, even though it should become expedient by circumstances not imputable to himself, without first obtaining the consent of the landlord.—*FRASER v. EWART* (1813), 17 F. C. 223.—*SCOT*.

**j. — Covenant not optional.**—An interdict was brought by the landlord against the tenant to prohibit him from ploughing & cropping the farm in violation of the mode of cropping laid down in the lease. The lease provided that the tenant was to keep the fourth part of the farm yearly either in hay or pasture, or to pay an additional rent over & above the year's rent, & the tenant contended that this gave him an option to deviate on paying the additional rent:—*Held*: the clause was prohibitive & not alternative in its nature, & the tenant had no option to deviate on paying the additional rent.—*CRAIGIE v. MACKENZIE* (1815), 6 Pat. App. 117.—*SCOT*.

**k. —**—A tenant having entered into possession of a farm, on a missive of lease for nineteen years, prescribing a certain course of cultivation for the first sixteen years, & another during the last three years, under the penalty of paying an additional rent for these last years, & not having complied with the rules so prescribed:—*Held*: (1) he was liable in the penal rent; (2) it was not a valid defence that he had adopted the same course as the other tenants on the estate, & as was prescribed by their leases, or that he had done so with the knowledge of the landlord.—*MILLER v. GWYDIR* (1826), 2 Wils. & S. 52.—*SCOT*.

**l. — Application to pasture land.**—A farm consisted of two portions, one being arable land permanently under rotation, the other pasture, the fields of which were only occasionally broken up. In an action for additional penal rent under an agricultural lease in

respect of miscropping:—*Held*: clauses prescribing the mode of cropping the “land under cultivation,” & fixing a penal rent for miscropping, did not apply to the pasture land, & the landlord had no claim for damage in respect of the cropping of the pasture land except at common law.—*THREIPLAND v. MUNRO* (1861), 23 D. 1252.—*SCOT*.

**m. — Lease inoperative.**—A landlord presented a petition of sequestration for rent, alleging that his tenant had incurred a penalty in the lease of additional pactional rent, in respect that he had contravened the third year rotation:—*Held*: the contravention took place when the lease was not operative, & there being no action under the lease, petition dismissed.—*WILLIAMS v. WHITE & YOUNG* (1866), 2 Sc. L. R. 80.—*SCOT*.

**n. — How far applicable.**—A lease referred to regulations of older date, in which a seven shift rotation of crops was prescribed, & in which there was a clause of pactional rent for miscropping. The lease prescribed a six shift rotation, & the tenant several years before the expiry of the lease changed it to a five shift:—*Held*: on a proof, that the landlord had acquiesced in the change; but question whether, apart from acquiescence, the clause as to pactional rent, being in the regulations when a seven shift was provided for, applied to the lease in which a six shift was the rotation.—*TAYLOR v. DUFF* (1869), 7 M. 351.—*SCOT*.

**o. —**—A tenant engaged to cultivate farm lands according to the most approved rules of good husbandry. It was stipulated that should the tenant infringe the stipulations as to cropping, an additional rent of £5 per acre miscropped should become payable:—*Held*: (1) the tenant not liable in the penalties in the lease for miscropping in consequence of his not having left a certain field in grass at the renunciation of his lease, in respect that there had been no miscropping; (2) the landlord would have reserved to him his right to sue for damages for breach of agreement.—*COLVIN v. DUNBAR* (1870), 8 Sc. L. R. 149.—*SCOT*.

**p. — Acquiescence by landlord—Tenant's liability to purchaser.**—A tenant of a farm, held under a lease of nineteen years, which prescribed a five shift course of cropping, except by permission of the landlord, soon after his entry commenced a system of improvement by which he increased the arable land from 400 acres to 800, & in consequence departed from the prescribed

## Sect. 2.—Effect during tenancy: Sub-sects. 4 5.

one-fourth part of the arable lands a good fallow, or otherwise pay £20 per acre per annum for every acre which should be used contrary to the covenant over & above the rent reserved by the indenture, to be paid forthwith, or to be recovered by pltf. as ascertained or liquidated damages," an arbitrator or jury is bound to assess the damages at £20 per acre, or only at the amount of damages actually caused by breach of the covenant.—*FULLER v. FENWICK* (1846), 3 C. B. 705; 1 New Pract. Cas. 592; 16 L. J. C. P. 79; 8 L. T. O. S. 162; 10 Jur. 1057; 136 E. R. 282.

Annotation:—*Consd. Mills v. Bowyer's Soc., Bowyer's Soc. v. Mills* (1856), 3 K. & J. 66.

126. ———.]—A. demised premises to B. for a term of years, yielding & paying to A. the yearly rent of £100, & also yielding & paying to A. on the days of payment of the yearly rent, over & above same rent, a further yearly rent or sum according to the rate of £20 the acre in respect of grazing land which should be converted into tillage by B. during the term, & also yielding & paying to A. on the days of payment of the yearly rent first named, over & above same rent, according to the rate of £20 the acre for any closes which B. should underlet, or from which he should take a third crop of corn without seeding down, & also yielding & paying to A. on the days of payment of the first-mentioned rent, over & above same rent, the further yearly rent or sum of £20 the acre for land which should be mowed for hay, etc., without being manured once at least in every three years, the several eventual & contingent rents, if any such should become due, to be additional to the first-mentioned rent, & to be paid & payable half-yearly by equal portions, the first payment to be made on the day of payment of the first-mentioned rent which should first or next

course of cropping. His system of management was known to, & approved of by, his landlord. The farm was sold in three portions:—*Held*: the tenant was not liable in damages for mis-cropping to a purchaser, as (1) the latter had visited the farm before purchase, & might have seen that it was not arranged on a five shift course, & (2) the alleged contravention was a necessary consequence of the previous alteration in cropping which had taken place before the date of the sale, under a system of management approved of by the then landlord.—*CARNEGIE v. GUTHRIE* (1866), 5 M. 253.—SCOT.

q. ——— *Whether estoppel.*]—An agricultural lease for nineteen years prescribed a six & seven shift rotation respectively for different portions of the subject, under pactional additional rent for each acre miscropped. The tenant deviated from the stipulated rotation very soon after his entry & continued to do so in the knowledge of the landlord's factor, who did not remonstrate. The rents were paid & receipts given without reservation until the last year of the lease. In an action to recover pactional rent for the last year:—*Held*: the fact of the landlord's acquiescence in the tenant's violation of the conditions of the lease barred the claim.—*LAMB v. MITCHELL'S TRUSTEES* (1883), 10 R. (Ct. of Sess.) 640.—SCOT.

r. ———.]—A lease provided that in each year not more than one half of the farm should be in white crop, & that the other half should be in grass, fallow or green crop. The landlord permitted fruit culture for a number of years, but early in the last year of the lease he objected that the provisions of the lease must be observed & the fruit ground brought back into the prescribed rotation by Martinmas

term. The landlord claimed pactional rent for miscropping:—*Held*: (1) strawberries & raspberries were neither grass, fallow, nor green crop, as fruit involved a quite different kind of cultivation, which was not permitted by the lease; (2) in the circumstances the landlord's acquiescence could not avail defender.—*CALLANDER v. SMITH* (1900), 8 S. L. T. 109.—SCOT.

s. *Farm let to joint tenants — Obligations imposed.*]—A farm was let to two joint tenants for one year, one of the joint tenants having been sole tenant for seven years previously:—*Held*: the joint tenants were bound to adhere to the rotation of crops in operation on the farm, & were bound to have the whole young grass hained for a hay crop, & not merely the same acreage of young grass as they had received hained at their entry.—*McCULLOCH v. GRIERSON* (1862), 1 M. 53.—SCOT.

t. *Letting land in con-acre.*]—The letting of land in con-acre, i.e., the sub-letting by a tenant for the season of small portions of the land ready ploughed & prepared for a crop, is but a mode of farming it.—*CLOSE v. BRADY* (1839), Jo. & Car. 186.—IR.

u. *Tenant's right in each & every year to burn or till eight acres—Not more than four crops to be taken off any part to be broken up.*]—By indenture between A. & B. it was agreed that A., his heirs, etc., should not, during the continuance of the demise, "turn up, burn, or convert into any kind of tillage," any of the demised premises known by the name of "The Lawn"; & by a further covenant it was agreed that "A. should be at liberty, in each & every year, during the continuance of the demise, to burn or till eight acres of any other part save 'The Lawn,' & that

happen after such eventual or contingent rent should have been incurred, & to continue payable thenceforth during all the residue of the term thereby created. B. in one year took a third crop of corn without seeding down:—*Held*: B. liable to the penal rent of £20 per acre during the residue of the term, though the branch of the covenant imposing such penalty did not contain the terms "further yearly rent" which were contained in the other branches of such covenant.—*BOWERS v. NIXON* (1848), 12 Q. B. 558, n.; 18 L. J. Q. B. 35; 13 Jur. 334; 116 E. R. 978, Ex. Ch.

Annotation:—*Mentd. Gregory v. R.* (1850), 15 Jur. 74.

127. ——— *Stipulation destroyed by severance of reversion.*]—A contract of tenancy stipulated that the tenant should keep a certain proportion of the farms in grass, & pay so much per acre for any excess of arable over grass. Defts. purchased from the landlords a part, entirely arable, of the farm:—*Held*: the stipulation was destroyed by the severance of the reversion.—*WOMERSLEY v. DALLY* (1857), 26 L. J. Ex. 219.

## SUB-SECT. 5.—DISPOSAL OF HAY, STRAW, FODDER, AND ROOTS.

## A. Custom.

128. *Tenant's general right of removal—Rules of husbandry.*]—A tenant may, by the general rules of husbandry, carry away straw or hay from the premises.

In an action by a landlord against his tenant for carrying away hay, etc., off the farm:—*Held*: in absence of evidence that it was contrary to the custom of the country, the tenant could not thus be charged.—*GOUGH v. HOWARD* (1801), Peake, Add. Cas. 197.

he should be at liberty to take four crops thereof, & then lay down same in a husbandlike manner, & that he should not take more than four crops off any part to be broken up, under penalty; but it was thereby understood that the eight acres so to be broken up were always to be exclusive of the herd's garden":—*Held*: A. was at liberty to till eight new acres in each year, & take four crops thereout, & he was not prohibited from having more than eight acres in tillage in any one year.—*KELLY v. CULLINAN* (1840), 3 I. L. R. 68.—IR.

## PART III. SECT. 2, SUB-SECT. 5.—A.

128 i. *Tenant's general right of removal.*]—Application for interdict against a tenant removing from his farm or selling the straw & fodder raised & grown on it. The ground of the application was that the tenant was bound to consume the straw & fodder grown & raised on the farm in conformity with the rules of good husbandry & not to sell it, which he threatened to do. The defence was that there was no steading & offices on the farm whereby the grain might be manufactured & the fodder consumed. Petition refused.—*MITCHELL v. ADAM* (1866), 1 Sc. L. R. 247.—SCOT.

128 ii. ——— *From one farm to another.*]—A tenant, having two farms in the immediate vicinity of each other belonging to different proprietors, is not entitled to consume the green crop or fodder of the one upon the other. Neither is he entitled to carry his grain from the farm, where there is no thrashing machine, to be thrashed by the thrashing mill upon the other, upon finding caution to return the fodder to the farm upon which it grew.—*SCOTT v. DURHAM* (1813), 17 F. C. 305.—SCOT.

128 iii. ———.]—F. obtained a lease of a small farm belonging to G., which



## PART III.—COVENANTS AND CUSTOMS OF THE COUNTRY.

**129. Removal contrary to custom—By yearly tenant—Under notice to quit.]—**Injunction to restrain a tenant from year to year under notice to quit, as in the case of a lessee for a longer term, from doing damage, & from removing the crops, manure, etc., except according to the custom of the country.—*ONSLOW v.* — (1809), 16 Ves. 173; 33 E. R. 949.

*Annotation:—*Refd. *Wedd v. Porter*, [1916] 2 K. B. 91, C. A.

**130. Under agreement to farm in husbandlike manner.]—**A tenant from year to year agreed to cultivate his farm in a husbandlike manner. He removed from the farm certain hay & straw. On proof that it was contrary to the custom of the country for a tenant from year to year to remove any of these articles, an injunction was granted to restrain him.—*WALTON v. JOHNSON* (1848), 15 Sim. 352; 12 Jur. 299; 60 E. R. 654.

**131. Custom that incoming should pay outgoing tenant for straw—Agreement to consume hay & straw on premises—Custom not excluded.]—**By the terms of a farm lease for seven years, expiring at Michaelmas, the tenant agreed to cultivate the land according to the custom of the country, & “during the term to consume with stock on the farm all the hay, straw & clover grown thereon, which manure shall be raised on the farm,” & the landlord agreed to let the tenant occupy part of the homestead until Midsummer Day after expiration of the term, if necessary, “to end the cropping of the tenant grown on the premises”:—*Held*: the lease did not exclude the custom of the country, by which the tenant, having paid for straw on his incoming, was entitled to be paid for straw on his quitting, & an action was maintainable against the succeeding tenant for the straw left by the outgoing tenant on the farm at expiration of the term.—*MUNCEY v. DENNIS* (1856), 1 H. & N. 216; 26 L. J. Ex. 66; 20 J. P. 792; 156 E. R. 1182.

**132. Custom prohibiting selling off produce—Not applicable to tenancy in common.]—**Deft., a tenant in common, was in possession of a farm without the consent of plff., one of the other two tenants in common, & under no agreement for a lease with either of them, but he paid his share of mtge. interest. After a decree for sale in a partition suit deft. proposed to sell the hay & turnips from off the land, contrary to the custom of the country as between landlord & tenant:—*Held*: the selling of the hay & turnips was what deft. had a perfect right to do & was not such a destruction of the property as the ct. would restrain.—*BAILEY v. HOBSON* (1869), 5 Ch. App. 180; 39 L. J. Ch. 270; 22 L. T. 594; 18 W. R. 124, C. A.

### *B. Under Contract.*

**133. To consume hay on premises or bring on manure for hay removed—Sale of hay on quitting—Refusal by incoming tenant to permit removal of hay until manure brought on.]—**A tenant was bound either to consume the hay on the demised premises, or for every load of hay removed to bring

two loads of manure. On quitting possession of the premises, he sold part of a rick of hay then left standing to a purchaser, without mentioning his liability to bring manure. The incoming tenant refused to allow the purchaser to take away the hay until the manure was brought on. After an interval of a month, during which the hay had been considerably damaged, the former consented to its removal, but the purchaser refused to accept or pay for same:—*Held*: (1) although the bringing on the manure was not a condition precedent to the carrying off the hay as between the landlord & tenant, still, after the tenant had quitted possession of the premises, the succeeding tenant had a right to refuse to permit the hay to be removed till after the manure was brought on; (2) as the vendor had not enabled the purchaser to remove the hay in the first instance, he was not entitled to recover the price.—*SMITH v. CHANCE* (1819), 2 B. & Ald. 753; 106 E. R. 540.

*Annotation—*Consd. *Westropp v. Elligott* (1884), 9 App. Cas. 815, H.

**134. — Assignment of breach—Pleading.]—**B., defts.' testator, covenanted that he would not, during the lease which extended generally till Sept. 29, 1820, sell or convey away from the premises any of the straw which, during the leased term, should grow upon the premises (except wheat-straw & rye-straw), & for every load of hay, wheat-straw, & rye-straw, which should be sold or removed off from the premises during the thereby leased term, he, B., would bring back a cartload of dung, & plff. covenanted that it should be lawful for B. to have the use of the barns, etc., for receiving his crops of corn & hay which should grow upon the premises in the last year before the end of the term thereby granted, & for certain other purposes, until May 1 next after the expiration of the term, without paying any rent for same. The fourth breach assigned was that B., during the leased term, to wit, on Sept. 30, 1820, & on divers other days between that day & May 1, 1821, did remove off from the premises large quantities of hay, wheat-straw, & rye-straw without bringing back a cartload of dung for each load of hay & straw. Plea to so much of that breach as related to removing hay, etc., during the leased term, that B. did bring back a load of dung for each load of hay, etc., removed, & demurrer to the residue of that breach. Joinder in demurrer. Defts. also pleaded to all the breaches, except the fourth, & to so much of that as related to removing hay, etc., during the leased term, a release of all causes of action, except such as plff. had in respect of B. not bringing back to the premises manure for the hay, etc., removed after Sept. 29, 1820. Demurrer & joinder:—*Held*: (1) the plea to the fourth breach answered the whole of that breach, & the demurrer to the residue was bad; (2) the leased term continued for certain purposes until May 1, 1821, so that the release did not extend to all acts of removal done during the leased term, & the plea of release did not answer so much of the

adjoined another extensive farm held by him from C. G. presented a petition to the sheriff, alleging that F. had carried off the crop & fodder raised on his farm to the other one, & praying to ordain him to bring them back. F. contended that it was part of his agreement with G. that the two farms should be managed jointly, & by means of the steading on the larger, there not being a sufficient one on the smaller farm. The Lord Ordinary found the agreement proved, & that, although no tenant was entitled to carry off his crop to another farm, by which means the landlord might not only be deprived of his hypothec, but the right of having the fodder consumed upon the farm might be disappointed, yet this rule could only

apply where there were means, by a proper farm-steading, of manufacturing the grain, & by proper offices of consuming the fodder upon the farms, & remitted *simpliciter* to the sheriff. To this judgment the ct. adhered.—*GORDON v. FALCONER* (1822), 1 Sh. (Ct. of Sess.) 386.—SCOT.

### PART III. SECT. 2, SUB-SECT. 5.—B.

*a. To consume hay on premises—Defence that whole covenant not set out in declaration—How pleaded.]—**SHIER v. SHIER* (1872), 22 C. P. 147.—CAN.

*b. All hay, straw & corn stalks to be fed to cows on farm.]—*A lease of a dairy farm & cows provided: “All the hay,

straw, & corn stalks raised on the farm to be fed to the cows on the farm”:—*Held*: while the property in hay produced on the farm might be legally in the tenant, yet his contract was so to use it that it should be fed to the cattle & consumed on the premises, & he was not to have the beneficial use of it, & could not by his contract take it off the farm.—*SNETSINGER v. LEITCH* (1900), 21 C. L. T. 157; 32 O. R. 440.—CAN.

*c. To spend “fodder” on premises.]—*Only straw is “fodder,” & a tenant, though bound & restricted by a covenant in his lease to spend fodder on the premises, may sell or dispose of his crops of rye, grass, or clover.—*ANON.* (1831), Bluet. (I. of M.) 78.—I. OF M.



**Sect. 2.—Effect during tenancy: Sub-sect. 5, B.]**

fourth breach as it affected to answer, & being bad in part was bad *in toto*.—*ST. GERMAINS (EARL) v. WILLAN* (1809), 2 B. & C. 216; 3 Dow. & Ry. K. B. 441; 107 E. R. 363.

**135. ————.]**—A covenant in a farming lease that the tenant should, during the demise, consume on the premises, for improvement of same, all hay, straw, etc., which should grow or be made upon the premises, but in case he should take or sell off any part thereof, which he was at liberty to do, then that he should, for every ton of hay or straw taken or sold off, bring back a certain quantity of manure within a certain space of time, is a covenant in the alternative. Where in an action for breach of such covenant, the declaration set forth only so much of the covenant as related to consuming the crops on the premises, & assigned for a breach the selling off & carrying away certain crops, without converting same into manure, & deft. pleaded *non est factum* & a traverse of the breach:—*Held*: the declaration was defective, & deft. was entitled to recover on his plea of *non est factum*, & an amendment of the record was properly refused.—*RICHARDS v. BLUCK* (1848), 6 C. B. 437; 6 Dow. & L. 325; 18 L. J. C. P. 15; 12 L. T. O. S. 126; 12 Jur. 963; 136 E. R. 1319.

**136. ——— Construction—Damages.]**—A farming agreement contained the following clause:—"No hay or straw to be sold off the land without consent of the landlord or his agent, except the value of the straw so sold off be returned in manure on the land." A breach of the agreement having been committed, the landlord claimed as damages the selling price of the straw. The tenant contended that he was liable only for the value of the straw if spent in manure. A verdict & judgment having been given for the landlord:—*Held*: (1) if the tenant sold the hay or straw, he was only bound to spend upon the land as much manure as the straw would have produced (*POLLOCK, C.B., & PARKE, B.*); (2) the tenant was bound to return in manure the price or market value of the straw (*ALDERSON & PLATT, B.B.*); (3) the ct. being equally divided, a rule to reduce the damages should be refused.

Whether the word used be "price" or "value," it is the same thing (*PLATT, B.*).—*LOWNDES v. FOUNTAIN* (1855), 11 Exch. 487; 25 L. J. Ex. 49; 26 L. T. O. S. 151; 20 J. P. 24; 4 W. R. 152; 156 E. R. 923.

**137. Tenant advertising hay for sale—Tenant about to leave.]**—An agreement for the tenancy of a farm provided the tenant should consume on the farm all hay, straw, etc., produced on the farm, except that he should be at liberty to remove hay & straw if for every ton of hay or straw so removed he brought & consumed on the farm three tons of manure. About seven months before expiration of the tenancy, the tenant advertised some hay, clover, & straw for sale:—*Held*: an injunction would not be granted to prevent the sale, as it did not appear there was yet a breach of the agreement or a contemplated breach.—*WARWICK v. WILLIAMS* (1894), 38 Sol. Jo. 742.

**138. To consume hay, straw, etc., on premises during last three years of term—Threat to remove—Breach.]**—Pltf. was landlord of the farms held by defts. under a lease, by which they were bound to spend on the premises all hay, straw, & haum arising in the three last years. The supplemental bill charged that defts. threatened to carry away the straw & dung in the last year & to plough up an excessive quantity of the land, & prayed an injunction to restrain them from so doing:—*Held*: (1) as to the carrying off straw & manure, it was not a case of irremediable injury, which was the only ground of the summary interposition of equity cts., but merely a breach of contract; (2) the ploughing up

ancient meadow was, upon the face of it, irreparable waste, but in this case the question was as to the proper quantity of land to be cropped, & only fit for a jury to decide.—*JOHNSON v. GOLDSWAIN* (1796), 3 Anst. 749; 145 E. R. 1027.

**139. Not to sell off or remove produce—Removal in last year of tenancy.]**—A tenant, continuing possession by agreement on the terms of a lease, was bound at his removal to "leave upon the land all the dung & manure of the preceding year," the value to be paid by the succeeding tenant, & at no time to "sell or give away any of the hay or straw of the farm, which shall always be spent on the ground." The tenant on going out threatened to sell the straw:—*Held*: the tenant, under this contract, was not entitled to take away or sell the straw of the last or way-going crop, & the lessor was entitled to have & maintain letters of suspension & interdict. *Semble*: the tenant was not entitled to have value for such straw.—*ROXBURGHE (DUKE) v. ROBERTON* (1820), 2 Bli. 156; 4 E. R. 286.

**140. ——— Effect of Agricultural Holdings Act, 1908, s. 26—Date of sale.]**—The above sect., giving the tenant power to dispose of the produce of his holding, does not apply to the year before the expiration of the tenancy, & where a tenancy agreement prohibits the tenant from selling produce off his holding, he cannot by virtue of anything contained in the sect. sell off during the last year of his tenancy the produce of any previous year.

In a dispute between a landlord & his tenant as to the date upon which the latter sold produce of his holding to a third party:—*Held*: the material date was the actual date when the contract for sale was made, & not the date when, as between the contracting parties, the contract for sale became enforceable within Sale of Goods Act, 1893 (c. 71), s. 4.—*MEGGESON v. GROVES*, [1917] 1 Ch. 158; 86 L. J. Ch. 145; 115 L. T. 683; 61 Sol. Jo. 115.

**141. ——— Penalty or liquidated damages—Power of re-entry on breach.]**—A lease contained a covenant that the tenant should not carry any hay, etc., off the premises on pain to forfeit as & for liquidated damages the sum of £5 per ton sold or carried off, & a clause followed which enumerated all the covenants except the above & provided that upon breach of any of the covenants the lessor might re-enter:—*Held*: (1) the true construction was that he should not remove any of the hay without paying £5 per load; (2) the penalty of £5 did not prevent the clause of re-entry from applying to the above covenant, the words of the proviso being large enough to comprehend it.—*DOE d. ANTROBUS v. JEPSON* (1832), 3 B. & Ad. 402; 1 L. J. K. B. 154; 110 E. R. 144.

**142. ——— Penalty recoverable as rent.]**—A. demised to B. a farm at a certain rent, with a condition that, if any hay were cut & sold off the premises, the tenant should pay a penalty of 2s. 6d. for every yard, to be recovered by distress as for rent:—*Held*: (1) the sum payable was a penal sum by way of punishment for not spending the produce on the land, to be recovered by distress as if it was rent in arrear, but not being itself rent.—*POLLITT (POLLETT) v. FORREST* (1848), 11 Q. B. 962; 17 L. J. Q. B. 291; 11 L. T. O. S. 414; 12 Jur. 560; 116 E. R. 732, Ex. Ch.

*Annotations*:—*Consd.* *Evans v. Robins* (1863), 11 L. T. 211, Ex. Ch. *Refd.* *Grey v. Friar* (1850), 14 Jur. 1105; *Phillips v. Jones* (1850), 19 L. J. Q. B. 374, Ex. Ch. *Mentd.* *Freeman v. Edwards* (1848), 2 Exch. 732.

**143. ———.]**—Where a lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term, but to consume same upon the premises, & provided that an additional rent of £3 per ton should be payable by way of penalty for every ton of hay or straw so sold, & it appeared there was a

substantial difference between the manurial value of hay & that of straw :—*Held* : the sum so made payable was a penalty & not liquidated damages.—*WILLSON v. LOVE*, [1896] 1 Q. B. 626 ; 65 L. J. Q. B. 474 ; 74 L. T. 580 ; 44 W. R. 450, C. A.

*Annotations* :—*Expld.* *Re White & Arthur* (1901), 84 L. T. 594. *Consd.* *Bradley v. Walsh* (1903), 88 L. T. 737. *Distd.* *Diostal v. Stevenson*, [1906] 2 K. B. 345. *Consd.* *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A. C. 79, H. L.

**144. Increased rent on breach—Right to sell on payment of increased rent.]**—Covenant in a farming lease that the lessee would not sell or carry away from the demised premises any hay, straw or manure which should be grown or produced thereon, without the consent of the lessor first had & obtained, under the increased rent of £10 for every ton so sold or carried away, & so in proportion for any greater or less quantity, but that the lessee would eat & consume the hay & straw by his cattle. Breach that the lessee, without the consent of the lessor, did sell a large quantity of hay & straw grown & produced on the demised premises, to wit, etc. :—*Held* : the covenant was one covenant, which gave the lessee the right to sell the hay, etc., on payment of the increased rent, & the breach was not well assigned.—*LEGH (LEIGH) v. LILLIE* (1860), 6 H. & N. 165 ; 30 L. J. Ex. 25 ; 25 J. P. 118 ; 9 W. R. 55 ; 158 E. R. 69.

**145. — — — Removal of hay unfit for food.]**—Deft. was tenant to pltf. of a farm under a written agreement to pay an additional rent of £10 for every ton, or any less quantity, of "hay, straw, or other dry fodder" of the growth of the premises which should be sold off or taken away, or removed therefrom. At the trial of an action against him to recover damages for an alleged breach of this covenant it was proved that deft. had sold & removed a quantity, something less than a ton, of hay, which he alleged was very bad & utterly unfit to be eaten by cattle. The jury found that the hay so sold was "not fit food for cattle," & thereupon a verdict was entered for pltf. :—*Held* : the verdict was rightly entered for pltf., for what deft. removed was hay, & came clearly within the covenant, although it was hay of very inferior quality & unfit for food.—*FIELDEN v. TATTERSALL* (1863), 1 New Rep. 332 ; 7 L. T. 718.

**146. — — — Sale after determination of tenancy.]**—Deft. had become tenant to pltf. on the terms & stipulations that the rent should be payable half-yearly, that deft. "should not sell any straw, etc., or manure, grown or produced upon the farm, without the written licence" of pltf. under certain penalties, & "that the penalties should be considered as additional rent, & should be recoverable by distress or otherwise as rent." Averments, "in consideration thereof" deft. promised pltf. to pay all such penalties as he might be liable to pay pltf. according to the stipulations, & deft., without licence, sold straw grown on the premises during his tenancy. Breach, non-payment of penalties in respect thereof. Plea, the straw was sold after determination of the tenancy. On special demurrer to the plea :—*Held* : (1) pltf. entitled to judgment, as the promise to observe the terms, one of which was payment of penalties, was supported by the bygone consideration of having become tenant on those terms, & the stipulation must be construed to be not at any time to sell straw grown during the tenancy (*LORD CAMPBELL, C.J., & PATTESON, J.*) ; (2) the stipulation should be construed to be not during the tenancy to sell straw, etc., grown during the tenancy (*ERLE, J.*).—*MASSEY v. GOODALL* (1851), 17 Q. B. 310 ; 20 L. J. Q. B. 526 ; 17 L. T. O. S. 181 ; 15 Jur. 991 ; 117 E. R. 1298.

**147. — — — Covenant running with land.]**—An agreement under seal, whereby a farm was let to

S. from year to year, provided that the tenant should consume on the premises all hay & fodder, spread upon the land, all manure & compost produced on the farm, not sell off any hay or fodder, & at the end of the tenancy leave all manure & compost. The farm was sold & conveyed to C., who brought an action to restrain S. from acting in contravention of the above-mentioned provision :—*Held* : (1) C., as assignee of the reversion, could enforce any covenant in the lease which ran with the reversion ; (2) the covenant as to hay & manure did so run.—*CHAPMAN v. SMITH*, [1907] 2 Ch. 97 ; 76 L. J. Ch. 394 ; 96 L. T. 662 ; 51 Sol. Jo. 428.

**148. Not to sell off or remove in last year of tenancy—Not confined to produce grown during last year.]**—A covenant in a farming lease that the lessee "shall not nor will, during the last year of the term, sell or remove from the farm & lands any of the hay, straw & fodder which shall arise & grow on the farm & lands," restricts the tenant from selling or removing any of the hay, straw or fodder, the produce of the farm, which shall happen to be thereon during the last year of the term, & is not confined to such hay, straw, & fodder as has arisen & grown thereon during such last year.—*GALE v. BATES* (1864), 3 H. & C. 84 ; 4 New Rep. 66 ; 33 L. J. Ex. 235 ; 10 L. T. 304 ; 10 Jur. N. S. 734 ; 12 W. R. 715 ; 159 E. R. 457.

**149. To leave unconsumed all hay, etc., at end of tenancy—Injunction to restrain removal.]**—Deft. was exor. of his father, who held a farm of pltf., as tenant from year to year, subject to an agreement dated Nov. 30, 1857, requiring a certain course of husbandry, & also requiring the tenant to consume, or at the end of the tenancy leave unconsumed, on the premises all hay, straw, & fodder made thereon. The father having died on Nov. 2, 1865, the son succeeded him in the tenancy, but whether under the custom of the country merely, or upon terms of the agreement of Nov. 30, 1857, was a disputed point. In consequence of a notice to quit given to deft. by pltf., deft.'s tenancy was made to expire on Feb. 2, 1873. Some time in 1872, subsequent to the notice determining his tenancy, deft. removed to some adjoining land, the property of a third party, a large quantity of hay for the purpose (the bill alleged) of defeating pltf.'s rights to it which were to arise on Feb. 2, 1873, & generally to embarrass pltf. in his trial of those rights. Deft. had also exceeded the terms of the agreement in respect of the quantities of land permitted to be on tillage generally, & in wheat tillage in particular. Pltf. prayed an injunction to restrain deft. from breaking up more land, & from sowing more with wheat than was already broken up & sown, & also from disposing of the removed hay, & from removing other hay or any straw or fodder grown on the estate :—*Held* : the ct. would, for the purpose of the injunction, assume a continuation of the tenancy on the terms of the agreement of Nov. 1857, & the injunction prayed would be granted upon pltf. giving the usual undertaking as to damages, & with the reservation generally of liberty to apply.—*CROSSE v. DUCKERS* (1873), 27 L. T. 816 ; 21 W. R. 287.

**150. For valuation of hay, etc., left on land—Whether variable by parol.]**—Where an agreement in writing, relating to an interest in land, contained also stipulations for the mode in which the straw & manure upon the premises was to be valued, & the landlord set up an agreement by parol to vary the mode of valuation :—*Held* : the agreement was entire, & the mode of valuation could not be validly altered by a subsequent parol agreement between the parties.

There may possibly be (*sed qu.*) an abandonment of the entire agreement by parol, but, at all events, there can be no such partial abandonment.—



*Sect. 2.—Effect during tenancy: Sub-sect. 5, B.*

HARVEY v. GRABHAM (1836), 5 Ad. & El. 61; 2 Har. & W. 146; 6 Nev. & M. K. B. 754; 5 L. J. K. B. 235; 111 E. R. 1089.

*Annotations:—Consd.* Thames Haven Dock & Ry. Co. v. Brymer (1850), 5 Exch. 696, Ex. Ch. *Refd.* Sanderson v. Graves (1875), L. R. 10 Exch. 234. *Mentd.* Meehelen v. Wallace (1837), 7 Ad. & El. 49.

**151. — Construction — Meaning of “fair valuation” & “consuming price.”**—In an action by an outgoing tenant against his landlord for the value of hay & straw, left on the premises, it appeared that pltf. held subject to the terms of a draft lease, by which it was agreed (*inter alia*) that all the hay & straw not used for fodder arising from the last year's crop should be left on determination of the tenancy, the tenant being paid at a fair valuation. It appeared in evidence that the words “fair valuation” had been substituted in the draft for the words “consuming price.” An umpire who had valued the hay & straw, neither at a market price nor at a consuming price, but at a fair valuation between outgoing & incoming tenant, was the only witness as to the value. The amount at a “consuming price” had been paid into ct., & a verdict was given for pltf. for the amount of the “fair valuation.” Deft. contended that, according to the terms of the agreement, a “fair valuation” meant a “consuming price.”—*Held*: without considering the effect of the alteration in the draft, pltf. was entitled to keep his verdict, it being a matter of evidence what was a “fair valuation,” & the only evidence on the subject being that of the umpire. *Qu.*: whether the ct. could take into consideration the alteration in the terms of the draft lease.—CUMBERLAND v. BOWES (1854), 15 C. B. 348; 24 L. T. O. S. 169; 3 W. R. 138; 3 C. L. R. 149; 139 E. R. 458; *sub nom.* CUMBERLAND v. GLAMIS (LADY), 24 L. J. C. P. 46; 1 Jur. N. S. 236.

*Annotation:—Jenkins v. Betham* (1854), 3 C. L. R. 373.

**152. For valuation of hay, etc., sold—By outgoing to incoming tenant—Recovery from incoming tenant.**—An agreement between an outgoing & an incoming tenant was that the latter should buy the hay, etc., of the former upon the farm, & that the former should allow to the latter the expense of repairing the gates & fences of the farm, & that the value of the hay, etc., & of the repairs, should be settled by third parties. A statement was drawn up by referees, showing the valuation of the hay, & a deduction for the repairs, & a balance due to the outgoing tenant. In the declaration to recover this balance, counts were framed upon a special agreement, & upon a general *indebitatus assumpsit*:—*Held*: pltf. failed to prove the special agreement as it was insufficiently set out in the count, but he could recover upon the *indebitatus assumpsit* for goods sold & delivered.—LEEDS v. BURROWS (1810), 12 East, 1; 104 E. R. 1.

*Annotations:—Appld.* Sheldon v. Cox (1824), 5 Dow. & Ry. K. B. 277. *Expld.* Clayton v. Burtenshaw (1826), 7 Dow. & Ry. K. B. 800. *Distd.* Jebb v. M'Kiernan (1829), Mood. & M. 340. *Consd.* Collins v. Collins (1858), 26 Beav. 306. *Expld.* *Re* Hopper (1867), 8 B. & S. 100. *Refd.* Boss v. Holsham (1866), 15 L. T. 481.

**153. — By outgoing tenant to landlord—Recovery from incoming tenant.**—Pltf. entered upon the occupation of a farm under a written agreement, by which he agreed, amongst other things, “to pay £5 sterling for every load of fodder, straw, haum, dung, or turnips which should be sold or carried off the premises, & the same sum for every load of hay or wheat straw sold or carried off the premises, for which there should not be two loads of good dung or other manure (at the option of the landlord) to be spent on the premises,” & also “to purchase all the hay, sanfoin, & tares now

in the yard, also all the dung & manure now on the premises, also all the straw from the crops now stacked or about to be stacked in the yard, paying a fair price for same, to be ascertained by valuers on both sides.” The landlord engaged, on the tenant's quitting the farm, to purchase all hay, sanfoin, & tares in the yard, the produce of the farm, also all straw from the crops of the previous harvest that might be on the premises, paying a fair price for same, to be ascertained by valuers on both sides. Pltf. claimed from deft., the incoming tenant, the value of the straw. A valuation had been begun, but failed on this point, the valuers not agreeing upon a basis of valuation or upon an umpire:—*Held*: (1) as the agreement provided only that the outgoing tenant should be paid for the straw on the premises, & not for the dung, the established rule was that he was entitled to be paid for the straw only at a fodder price, viz., one half the market price; (2) the incoming tenant having consumed the straw, pltf. was entitled in the circumstances to maintain an action for it as upon a *quantum meruit*.—CLARKE v. WESTROPE (1856), 18 C. B. 765; 25 L. J. C. P. 287; 20 J. P. 728; 139 E. R. 1572.

*Annotations:—Consd.* *Re* Constable & Cranswick (1899), 80 L. T. 164. *Folld.* Kellett v. New Mills U. D. C. (1900), Hudson's Bldg. Contracts, 4th ed., vol. 2, p. 298.

#### 6.—MANURE AND DUNG.

**154. Dung —Prima facie to be used on premises.**—Dung by the common course of husbandry in all places ought to be used on the premises.—GOUGH v. HOWARD (1801), Peake, Add. Cas. 197.

**155. — Removed by tenant—Account.**—Demurrer allowed to a bill by a landlord for a specific performance of covenants, contained in a lease which had expired, to repair hedges & mansion-house, & also for an account of loppings & dung, cut or removed, by the tenant; common covenants in husbandry not being of such a specific nature as to be the subject of equitable jurisdiction.—RAYNER v. STONE (1762), 2 Eden, 128; 28 E. R. 845.

*Annotation:—Consd.* Phipps v. Jackson (1887), 56 L. J. Ch. 550.

**156. — Injunction.**—Interim injunction, till answer & further order, granted to restrain a tenant from carrying away dung, soil, & compost, or crops sown from seeds sown since Lady Day, the termination of his tenancy, & from ploughing up meadow.—PULTENEY v. SHELTON (1799), 5 Ves. 260, n.; 31 E. R. 576; subsequent proceedings (1799), 5 Ves. 147; 31 E. R. 516.

*Annotations:—Distd.* Lathropp v. Marsh (1800), 5 Ves. 259. *Refd.* Jones v. Green (1829), 3 Y. & J. 298.

**157. Assignment of manure by tenant—Bad husbandry.**—When a tenant has assigned his lease & manure to an incoming tenant, & has made a second assignment of stock & manure to trustees for creditors, & the second assignees take possession first, the second assignees have the right to the manure, for it was assignable by the tenant, though he might thereby subject himself to an action by the landlord for bad husbandry.—BURBAGO v. KING (1813), 2 Chit. 246.

**158. To muck & manure—How satisfied.**—A covenant by a lessee that he will sufficiently muck & manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of expiration of the term, is satisfied by the tenant laying on two sets of muck within the three last years of the term.—POWNALL v. MOORES (1822), 5 B. & Ald. 416; 106 E. R. 1243.

**159. To use soil, compost & manure on premises—Meaning of “soil.”**—Upon a covenant to use on demised premises all dung, straw, soil, compost, ashes & manure made thereon, a breach was assigned in not using on the premises all dung, straw, soil, compost, ashes & manure made thereon, but on the contrary, thereof, taking away straw, soil, ashes, & manure. Plea, deft. did not take away the straw, compost, ashes, & manure. A verdict being found for pltf. upon the supposed insufficiency of the plea, without the production of evidence, the ct. refused to enter a nonsuit, or direct a new trial, but entered a verdict for deft. upon the breach, with an assessment of damages as to the soil, or generally as to the premises in the breach not covered by the plea.

Soil must mean compost (LORD TENTERDEN, C.J.).

My impression is soil is not compost (BAYLEY, J.).—MARRACH v. ELLIS (1827), 1 Man. & Ry. K. B. 511.

**160. To spread & leave manure—Stranger leaving cattle on land & removing dung.**—A tenant executed a bond to his landlord, conditioned that it should be void if he should spread all the manure then collected in the midden-stead or on any other part of the farm on the land, & should not sell, cart, or convey away any manure from the farm. The tenant's stock upon the farm having been sold by auction, two cows bought by W. were permitted by the tenant to stay upon the premises for some weeks. W. brought all their food daily from his own farm, & took away the manure made by them:—*Held*: the condition of the bond was broken, as the manure so taken away was made upon the land, & ought to have been spread upon the land.—HINDLE v. POLLITT (1840), 6 M. & W. 529; 9 L. J. Ex. 288; 151 E. R. 521.

**161. To pay for manure on ingoing—Exclusion of custom.**—In an action by a landlord against an incoming tenant, the declaration stated that in consideration that pltf. would give up to deft. possession of the farm on which certain manure had been laid, & would permit him to have the benefit of the manure, deft. promised to pay pltf. for same, according to the custom of the country. Breach, non-payment. The custom of the country was for the tenant not only to pay for manure on going in, but to receive payment for it on going out. In support of this contract pltf. put in evidence a written agreement, which stated that the land had been manured with eight loads of manure per acre, & that the tenant agreed to leave the land, when given up by him, in same state, or to allow a valuation to be made:—*Held*: (1) the written agreement excluded the custom of the country as being inconsistent with it; (2) there was a variance between that agreement & the one stated in the declaration.—CLARKE v. ROYSTONE (1845), 13 M. & W. 752; 14 L. J. Ex. 143; 4 L. T. O. S. 376; 9 J. P. 488; 153 E. R. 315.

**Compensation for unexhausted manure & dung left at outgoing.**—See Nos. 212—218. *post*.

**of land by tenant's labourers—According to custom of country.**—A lease contained a stipulation that, for every acre, & so in proportion for a less quantity of the land which the lessee should suffer to be occupied by any other person without the landlord's consent, an additional rent should be paid. The tenant undertook to use, occupy, dress, & manure the land according to the custom of the country. The tenant, without the landlord's consent, suffered his labourers to use small portions of the land for the purpose of raising a potato crop. It was proved to be the custom of the country for farmers to pursue that course:—*Held*: the landlord entitled to the additional rent, this being an occupation of the land by other persons.—GREENSLADE v. TAPSCOTT (1834), 1 Cr. M. & R. 55; 4 Tyr. 566; 3 L. J. Ex. 328; 149 E. R. 991.

**163. Against assignment—Covenants usual in farming leases—Custom.**—A. granted to B. a lease containing a covenant against assignment. A. afterwards agreed to cancel the lease & to grant B. a more beneficial one, “as reward for the great improvement he had made in the estate, & encouragement for general industry.” A. died before executing the second lease, & B. filed a bill for specific performance against his representatives. A compromise was effected for granting a lease for a reduced term, “the lease to contain all covenants usual & ordinary in farming leases.” It was insisted by the tenant that under the compromise there should be no restriction against assignment:—*Held*: the master, in settling the lease, was to have regard to the original lease & to the custom as to farming leases, if any.—BELL v. BARCHARD (1852), 16 Beav. 8; 21 L. J. Ch. 411; 51 E. R. 678.

**164. Against subdivision—Breach—Actual transfer unnecessary.**—Where land was leased exclusively for agricultural purposes, with liberty to the lessee to erect the necessary buildings for residence, but not to subdivide in order to sell or lease stands for building:—*Held*: the lessor was entitled to treat the lease as null & void & eject the assignees thereof, on its being shown that they had advertised the land for sale in acre plots, & had issued plans showing a proposed subdivision into acre plots, the breach of condition being complete without actual transfer of the plots to purchasers.—SHORT v. TURFFONTAIN ESTATES, LTD., [1905] A. C. 584; 71 L. J. P. C. 148; 93 L. T. 57, P. C.

#### SUB-SECT. 8.—ADDITIONAL RENTS AND PENALTIES.

See Nos. 107—113, 124—127, 141—145, 162, *ante*; LANDLORD & TENANT.

#### SUB-SECT. 9.—ENTRY AND VIEW.

See LANDLORD & TENANT.

#### SUB-SECT. 7.—ASSIGNING, SUB-LETTING AND SUB-DIVIDING.

See, generally, LANDLORD & TENANT.

**162. Against occupation by third parties—User**

Questions arising at outgoing. See Nos. 219—224, *post*.

#### PART III. SECT. 2, SUB-SECT. 10.

**d. Tenant to possess by his own stock—Stock sold by creditors & repurchased by tenant's relations for eldest son.**—A tenant whose lease excluded assignees & sub-tenants, & by which it was de-

clared under pain of nullity that he should possess the farm with his own stocking, having become insolvent, his stocking was sold by his creditors, & repurchased by his relations for behoof of his eldest son, to whom also the father assigned the lease. The tenant

subsequent to his bankruptcy, had found caution for the rent of the next five years. In these circumstances, he was assoltized from a declarator of irritancy of the lease, brought by the landlord on the ground of his not possessing the farm with his own stocking.—STONE-



*Sect. 2.—Effect during tenancy: Sub-sects. 11, 12, 13, 14, 15, 16. Sect. 3: Sub-sect. 1.]*

#### **SUB-SECT. 11.—DRAINAGE.**

Questions arising at outgoing. *See* No. 225, *post*.

**165. To drain "in manner aforesaid"—Tenant to pay carriage of drain-pipes.]—**An agricultural lease contained a covenant on the part of the lessor, his heirs, etc., that he & they would "drain with proper drain-tiles, one rod apart, 10 acres of the lands now in rye-grass, at his & their cost, except the carriage of the drain-pipes, which is to be borne & paid by the lessee, & will drain the remainder of the lands hereby demised, in manner aforesaid, upon being paid a further yearly rent of £5 for every £100 so expended":—*Held*: (1) the words "in manner aforesaid" referred only to the mode of performing the work, viz., placing the drain-tiles one rod apart; (2) the tenant was not chargeable with the expense of carriage of the drain-pipes beyond the first 10 acres.—*BEER v. SANTER* (1861), 10 C. B. N. S. 435; 142 E. R. 521.

**166. Sale of farm—Tenant rights to be paid by purchaser—Recovery by vendors from purchaser of drainage expenses due to tenant.]—**Where A., B., & C., joint owners in fee of a farm, of which C. was in occupation as tenant, sold it to a purchaser, under an agreement containing a clause that "the tenant rights are to be ascertained by a valuation in the usual manner, & paid for on completion of the purchase," they are entitled to recover from the purchaser, as one of such "tenant rights," two-thirds of the sum expended by C., in drainage of the farm during his occupation, that being the amount which C. would have been entitled to receive from his co-owners, A. & B., on the expiration of his tenancy. Had the tenant not been an owner, the purchaser would have been bound to pay for the whole drainage; but on the other hand, if all the three owners had been occupiers of the farm as well, the purchaser would not be liable for the cost of the

drainage, which in such a case ought to be taken as done by the owners *qua* owners, & not *qua* occupiers. It is no answer to the claim of plffs. in such case that at the time of the sale the farm was represented to the purchaser to be thoroughly well drained; (1) because, if such an objection were good, it would vary by parol the written agreement; (2) it is not a good objection because it was a reason for recommending the land that it was already well drained, though the drainage had to be paid for. The purchaser should have inquired by whom it was drained.—*WARD v. MOSS* (1867), 16 L. T. 91.

#### **SUB-SECT. 12.—REPAIRS.**

*See* LANDLORD & TENANT.

#### **SUB-SECT. 13.—FENCES.**

*See* BOUNDARIES, FENCES, & PARTY WALLS.

#### **SUB-SECT. 14.—RENT.**

*See* LANDLORD & TENANT.

#### **SUB-SECT. 15.—FIXTURES.**

*See* Nos. 268—279, *post*.

#### **SUB-SECT. 16.—OTHER MATTERS.**

*See* cases, *infra*.

*FIELD v. MACARTHUR* (1800), 12 F. C. 451.—**SCOT.**

**e. — Covenant binding on heir.]—**A lease provided an irritancy in case of failure to pay rent, & took the tenant bound to possess by his own stock. The tenant died bkpt., & the crop was sold. The tenant's manager put on his own stock, & paid rent & burdens in the heir's name, but without any authority. About a year after, the bkpt.'s brother (a labourer, with no means & upwards of seventy years of age) served to him *cum beneficio inventarii*, inserting in the inventory the lease, & entered into an agreement with the manager, which was held to be a sub-lease to him:—*Held*: the heir was bound to possess by his own stock.—*FORBES v. URE* (1856), 18 D. 577.—**SCOT.**

**f. — Implied condition in lease of grass farm.]—**It is an implied condition in the lease of a grass farm that the tenant shall have upon the farm an amount of stock belonging to himself sufficient to give the landlord a substantial security for his rent.—*M'DOUGALL v. BUCHANAN* (1867), 40 Sc. Jur. 67; 6 Macph. (Ct. of Sess.) 180.—**SCOT.**

#### **PART III. SECT. 2, SUB-SECT. 11.**

**g. To perform draining—Tenant to pay interest on outlay & to perform carriages.]—**A landlord bound himself to perform draining, etc., by missives of lease, in 1813, & the tenant to pay interest on the outlay, & to perform carriages, the operations to be made at the sight of a person mutually chosen. The tenant, after entering into possession, attempted to repudiate the missives, but in 1817 he was decreed to implement them & he continued to pay

the full rent till 1822. In an action of damages against the landlord for non-implementation of the draining, etc.:—*Held*: the landlord not liable in damages before 1817, nor after 1817, unless the tenant could show that he had expressly required the landlord to implement the stipulation.—*REAY v. CHALMERS* (1834), 12 Sh. (Ct. of Sess.) 860.—**SCOT.**

**h. — Whether binding on succeeding heirs of entail.]—**An heir of entail bound himself, in the tenant's favour, to trench, drain & lime part of a farm. He died & was succeeded by his son, who did not represent him:—*Held*: the above obligation was not binding on succeeding heirs of entail who did not represent the grantor, but was a personal obligation forming no part of the lease which a succeeding heir was bound to recognise, & it could only transmit against the grantor's representatives.—*MACKENZIE v. MACKENZIE* (1849), 11 D. 596.—**SCOT.**

#### **PART III. SECT. 2, SUB-SECT. 16.**

**k. Tenant not to burn heather.]—**A lease provided for the conversion of uncultivated land into arable, & that no heather should be burned on the farm except on such part as should be pointed out when agreed on by the landlord & tenant. A considerable quantity of heather was burnt without the landlord's permission, & he craved an interdict:—*Held*: the tenant entitled to burn heather on those parts of the farm which he was converting into arable; but the burning done, though on uncultivated land, was not done in pursuance of an intention to convert into arable, nor on land in process of conversion, & to that extent the landlord was entitled to interdict.—*HAMILTON*

*v. CAMPBELL* (1869), 6 Sc. L. R. 427.—**SCOT.**

**l. Tenant not to burn ancient w.]—**A lease of several denominations of lands, in respect of which different rents were reserved, & part of which appeared to be ancient meadow, contained a covenant on the lessee's part not to burn the demised premises, or any part thereof, under a penalty of £10 per acre, to be recovered as the reserved rent, for every acre so burned. The assignee of the lease threatened to burn part of the premises, insisting upon his right so to do under the covenant, upon payment of the sum specified therein, as liquidated damages:—*Held*: he was not entitled so to do, & the ct. would interpose by injunction to restrain him from so doing.—*FRENCH v. MACALE* (1842), 2 Dr. & War. 269.—**IR.**

**m. Landlord to burn heather.]—**The tenant of a farm, under a lease which contained an obligation by the landlord to burn one year with another a certain quantity of heather per annum, possessed under the lease for nine years, during which period, although he repeatedly complained of the landlord's failure to burn sufficient heather, he paid the rent each half-year without deduction or reservation of any claim for damages, & took clean receipts therefor. In the tenth year he brought an action against the landlord for damages suffered in that & the preceding year, in consequence of the failure to burn sufficient heather:—*Held*: in the circumstances, the tenant could not be assumed by his actings to have waived his claim.

In 1895 a moorland farm was let verbally for nineteen years, & the

## SECT. 3.—EFFECT AT OUTGOING.

## SUB-SECT. 1.—IN GENERAL.

**167. Who liable for tenant's outgoing valuation.]**

—Defts.' testator, being in possession of an estate, of part of which he was the owner, & another part of which consisted of Crown lands leased to him for a term, expiring on Oct. 10, 1849, contracted with pltf. for the sale to him of the former part, & by agreement demised to him the Crown lands for one year from Sept. 29, 1848. Pltf. agreed he would abide by, perform, & keep the covenants & agreements contained in the Crown lease, & testator agreed that, in case he should be able to obtain a further lease from the Crown for fourteen years, he would grant to pltf. a lease for thirteen years, subject to the same covenants. By a memorandum subsequently signed by pltf., he agreed to take, with others, the Crown lands, "subject to the same rents, covenants, & obligations, in all respects" as were contained & provided for in the leases by which testator held, or should hold, same. Pltf., on taking possession, paid to the outgoing tenants, according to the custom of the country, the amount of the valuation for fallows, etc., as well of the other lands as of the Crown lands. By the terms of the Crown lease, the custom of the country as between landlord & outgoing tenant was excluded, so that testator could not recover against the Crown for fallows, etc. In May, 1849, pltf. requested defts. not to apply for a renewal of the Crown lease, & on Oct. 10, 1849, he gave up possession of the Crown lands. He then claimed from defts. as outgoing tenant to be paid for fallows, etc.:—*Held*: (1) the custom of the country was not excluded by the clause in which pltf. agreed to abide by, etc., the covenants, etc., contained in the Crown lease; (2) where such a custom existed, there was an implied contract on the part of the landlord that, if there were no incoming tenant, he would pay the outgoing tenant according to the custom. *FAVIELL v. GASKOIN* (1852), 7 Exch. 273; 21 L. J. Ex. 85; 18 L. T. O. S. 226; 15 J. P. 360; 155 E. R. 949.

*Annotations*:—*Expld.* *Codd v. Brown* (1867), 51 L. T. 536; *Mansel v. Norton* (1883), 31 W. R. 325, C. A. *Consd.* *Womersley v. Dally* (1887), 26 L. J. Ex. 219. *Refd.* *Bradburn v. Foley* (1878), 3 C. P. D. 129. *Mentd.* *Muncey v. Dennis* (1856), 1 H. & N. 216; *Ward v. Moss* (1867), 16 L. T. 91.

**168. — Lessor's estate or residuary devisee.]—**

An owner in fee demised a farm for a term of seven years. Before expiration of the seven years the

tenant entered into possession. In 1902, a lease was signed by the parties, in which the landlord undertook to burn, one year with another, one-twelfth part of the heather annually. The lease also bore that the farm was let "for the period of nineteen years from & after the term of Martinmas, 1895, which, notwithstanding the date hereof, is declared to be the term of entry hereunder":—*Held*: the obligation to burn one-twelfth part of the heather annually ran from Martinmas, 1895, & not from the date of the lease in 1902.—*RAMSEY v. HOWISON*, [1908] S. C. 697; 45 Sc. L. R. 539; 15 S. L. T. 983.—*SCOT*.

*n. Tenant to harvest crop & plough back—Failure of tenant to perform agreement.]—GRAVISTON v. JOHNSTON* (1905), 2 W. L. R. 81.—*CAN*.

*o. Tenant to reclaim waste lands.]—A tenant under an agricultural lease of nineteen years bound himself to reclaim certain waste lands during its currency. After partially implementing this obligation he refused to proceed with his reclamation further. In an action by the landlord to have him ordained so to do, he pleaded that the land was not adapted for reclamation, that to bring it into cultivation would involve his financial ruin, & that he was justified in*

abandoning the work in respect of changes in the condition of agriculture not foreseen by either of the parties when the lease was entered into:—*Held*: the defence irrelevant. Observations *per curiam* as to whether the landlord's remedy in such circumstances was specific implement or damages.—*DAVIDSON v. MACPHERSON* (1889), 30 Sc. L. R. 2.—*SCOT*.

*p. Landlord to supply tenant with horses & implements—Right of former to use on other land reserved.]—The lessor of land to be used as a market-garden agreed to supply a team of horses & farm implements for the use of the lessee, reserving the right of using the horses & implements on other land. There was a proviso that, if pltf. failed to fulfil his covenants, after giving two weeks' notice in writing, the lease should be void. After pltf. had been on the place for six months, deft. gave him notice to fulfil his covenants in two weeks, & after the expiry of the two weeks, put pltf. out of possession:—*Held*: (1) even if deft. wrongfully withheld the use of the horses & implements, the measure of damage would not be the loss of pltf.'s crop, but the cost of supplying the necessary force.—*SHEPHERD v. ROSS* (1914), W. L. R. 259; 4 D. L. R. 432.—*CAN*.*

lessor died, having devised his real estate to trustees for one thousand years to raise money in aid of his personal estate for payment of debts & legacies, & subject thereto to pltf. for life. The term of one thousand years was mtgd. to raise £20,000. On expiration of the seven years the tenant gave up the farm & no new tenant could be found:—*Held*: pltf., & not testator's estate, was liable to pay the outgoing tenant's valuation.—*MANSEL v. NORTON* (1883), 22 Ch. D. 769; 52 L. J. Ch. 357; 48 L. T. 654; 31 W. R. 325, C. A.

*Annotations*:—*Consd.* *Eccles v. Mills*, [1898] A. C. 360, P. C. *Consd. & Expld.* *Re Hughes*, *Ellis v. Hughes*, [1913] 2 Ch. 491. *Refd.* *Bath v. Bowles* (1905), 93 L. T. 801.

**169. — Lessor's executors or assigns—Covenant by lessor & assigns.]—Pltfs., exors. of A., sued defts., exors. of B., for the balance of compensation for certain crops, etc., pursuant to a covenant in a lease granted by B. to A. B. was tenant for life, & under the powers of Settled Land Acts granted the lease, & by its terms it was provided: "the lessor hereby for himself & his assigns covenants with the lessee that he, the lessor, or his assigns, or the succeeding tenants, will at expiration or sooner determination of the term take & pay for the growing crops & manure then upon the demised premises, etc. Provided also in the event of the lessor, or his assigns, at any time or times & from time to time desiring during the term to resume possession of any of the lands (but not the house, garden, building or yards) comprised in this demise for any purpose other than agriculture, it shall be lawful for him & them so to do, upon giving to the lessee his exors., administrators, or assigns, . . . three calendar months' notice in writing of such desire, & thereupon at expiration of such notice the lessor, or his assigns, shall . . . pay to the lessee, his exors., administrators, or assigns, for the growing crops," etc., "& for the unexhausted tillages & dressings, the like amount as he or they would be entitled to upon quitting pursuant to the covenant of the lessor in that behalf before contained." The lessor having died, the owners of the fee simple sold a certain portion of the demised property to a co., subject to the tenancy & to payment of compensation, etc., under the lease. Pltfs. paid rent in respect of this portion to the co., & notice having been given by the co. to pltfs. that they intended to resume possession, it was agreed that the co. should pay pltfs. £50 in respect of the unexhausted improvements. The co. being wound up, pltfs. could not**

*q. Landlord to embank river—Tenant's remedies on breach.]—A landlord leased a farm to a tenant, undertaking to embank a river & to make a sea dyke at his own expense. This he failed to do, & the river overflowed the land:—*Held*: (1) the tenant not entitled to quit the farm, as it was still capable of producing a good crop: (2) the tenant could recover damages for injury to crops, etc., but not for injury to his wife's health, as he came there knowing that the land was liable to floods.—*SCOTT v. TAIT* (1826), 4 Murr. 57.—*SCOT*.*

*r. Agreement reserving rent from crops—Expenses of threshing first charge on proceeds of crop before division.]—TOCHER v. THOMPSON* (1914), 27 W. L. R. 140.—*CAN*.

## PART III. SECT. 3, SUB-SECT. 1.

**167 i. Who liable for tenant's outgoing valuation—Purchaser.]—The ct. gave effect to a claim of an outgoing tenant against a singular successor of his landlord's, founded on a custom of the country in the district where the lands were situate, though there was nothing but the local practice to point out to the purchaser of the lands the existence of such a claim.—*BELL v. LAMONT*, (1814), 17 F. C. 645.—*SCOT*.**



**Sect. 3.—Effect at outgoing: Sub-sects. 1 & 2.]**

obtain this amount, & they then sued defts. on the covenant by B. in the lease:—*Held*: defts. were not liable, as the proviso did not imply any obligation on the part of the lessor to pay if the assigns did not, & as the proviso was that one person or another should pay, & the lessor was not the person who exercised the option.

*Semle*: (1) the co. were not the assigns of the lessor for the purposes of this case; (2) if it were established that the assigns were not going to fulfil the burden upon them, the ct. would not compel the tenant to give up his land.—*BATH v. BOWLES* (1905), 93 L. T. 801.

*See, also*, Nos. 228, 229, *post*.

**170. Who can claim—Assignee of outgoing tenant.]—***ELLIOTT v. JOHNSON*, No. 198, *post*.

*See, also*, Nos. 226, 227, *post*.

**171. Production of lease necessary.]—**On a contract between outgoing & incoming tenant for payment at a valuation upon the transfer of a farm "according to the lease which has expired," the lease must be put in evidence on the part of pltf.—*TANNER v. WASHBURN* (1858), 1 F. & F. 330.

**172. Landlord's right to set off—Arrears of rent**

**170 i. Who can claim—Landlord in occupation.]—**Where a landlord has himself been in the occupation of, & has prepared, land let to an incoming tenant, the latter is bound to reimburse the former, as he would have been bound to reimburse an outgoing tenant, for the lime, manure, seed & labour beneficially expended by him for the production of the crop which the incoming tenant reaps.—*MARSHALL v. WALKER* (1869), 7 M. 833.—*SCOT*.

**172 i. Landlord's right to set off—Illiquid claims against outgoing valuation.]—***Held*: a liquid claim for the price of stock transferred by valuation to a landlord in terms of a lease could not be compensated by illiquid & disputed claims at the landlord's instance.—*MACRAE v. GORDON* (1842), 4 D. 1310.—*SCOT*.

**172 ii. — Illiquid claim for damages against outgoing valuation under award.]—**In an action by an outgoing tenant for the price of the waygoing crop, which had been ascertained as provided in the lease, in a submission entered into between the parties at its termination, the landlord, who had taken over the crop, admitted the price was due, but set off an illiquid counterclaim for damages for miscropping & failure to upkeep buildings:—*Held*: the counterclaim was not a relevant defence to a claim for a sum found due to the tenant by decree arbitral.—*SUTHERLAND v. ARGUHAUT* (1895), 23 R. (Ct. of Sess.) 284.—*SCOT*.

**172 iii. — Arrears of rent against outgoing valuation—Bankruptcy of tenant.]—**The trustee on the sequestrated estate of a tenant of a farm on the estate sued for the value of grain & fodder on the farm at the close of the lease & taken by the landlord, who admitted the amount, but claimed the right to set off against it a balance of arrears of rent. The lease was for one year, with the declaration that it should continue thereafter from year to year until either party should bring it to an end by giving one year's notice, & it was provided that, in the event of the bkpcy. of the tenant, the lease should, in the option of the landlord, terminate at the ensuing Martinmas term, when possession should be given up & matters be settled on certain conditions. One of the conditions was: "The tenant shall give over to the landlord or incoming tenant, by valuation of arbiters to be mutually chosen, or their oversman, one half of the waygoing crop . . . the quantity to be fixed on the ground at any time between Lammas &

the period when the crops are fit to be cut. . . . The proprietor or incoming tenant shall also take by similar valuation the whole turnip crop & dung on the farm at the period of removal:—*Held*: the landlord's claim was not well founded.—*HART v. BAIRD* (1897), 5 S. L. T. 172.—*SCOT*.

**172 iv. — ]—**A lease for nineteen years from Whit-Sunday, 1893, contained a clause providing that the proprietor or incoming tenant should take from the outgoing tenant the sheep stock according to the customary mode of valuation. The tenant took advantage of a mutual break to terminate the lease at Whit-Sunday, 1898. His estates were sequestrated on May 3, 1898, & a trustee was appointed. Thereafter, the trustee & landlord entered into a submission whereby, on the narrative that under the lease the landlord was bound to take over the sheep stock, they nominated arbiters & an oversman to value the sheep stock, & it was valued accordingly:—*Held*: the trustee having invoked the lease by calling on the landlord to take over the stock, the landlord was entitled to set arrears of rent against the sum brought out by the arbiters.—*MCLAREN (JOHN CRAIG'S TRUSTEE) v. MALCOLM (LORD)* (1900), 2 F. (Ct. of Sess.) 541.—*SCOT*.

**172 v. — Interest on improvement expenditure against outgoing valuation.]—**In an action by an outgoing tenant against his landlord for sums ascertained to be due to pursuer under his lease by arbiters mutually chosen, defender pleaded he was entitled to set off against pursuer's claim a counter-claim for interest on improvement expenditure, etc., under the lease:—*Held*: as pursuer's right depended on his having implemented his obligations under the lease he was not entitled to decree *de plano*, & a proof allowed.—*LOVIE v. BAIRD'S TRUSTEES* (1895), 23 R. (Ct. of Sess.) 1.—*SCOT*.

**s. Landlord's right to deposit soil in grass park for dressing.]—**It is competent for the landlord of a grass park let for a year from Whit-Sunday to enter the park, at or about Candlemas thereafter, & deposit soil within it for the purpose of dressing it for the ensuing season, without leave of the tenant, who is not entitled to graze it at that period of the year.—*HAMILTON v. CUNINGHAME* (1830), 8 Sh. (Ct. of Sess.) 955.—*SCOT*.

**t. Mislabouring—Landlord's right to damages—Acquiescence.]—**A landlord is not entitled, at the termination of a

against outgoing valuation—Custom of country.]—

Debtor was tenant from year to year of a farm in Norfolk at £300 a year, payable half-yearly on Apr. 6 & Oct. 11, & at the date when he was adjudged bkpt. he was under notice to quit on the following Oct. 11. The trustee in bkpcy. did not disclaim the tenancy. Upon the expiration of the notice to quit a valuation of growing crops, tillages, etc., was made between the landlord & the trustee as outgoing tenant. Testimony was given that the custom was for the landlord to deduct from or set off against the sum due from him to the outgoing tenant on the valuation any rent in arrear. The balance of arrears of rent far exceeded the amount of the valuation:—*Held*: (1) the custom was proved; (2) the landlord was not bound to pay the amount of the valuation, but could set it off against the arrears of rent.—*Re WILSON, Ex p. HASTINGS* (1893), 62 L. J. Q. B. 628; 10 Morr. 219; 5 R. 455.

*Annotations*:—*Consd. Re Howell, Ex p. Mandelberg & Co.*, [1895] 1 Q. B. 844. *Reid. Rochester v. Le Fanu*, [1906] 2 Ch. 513.

**173. Breaches of covenant against moneys due for severed crops.]—**Where a tenant filed a liquidation petition & a trustee in bkpcy. was ap-

lease, to claim damages from the tenant for mislabouring, where during the currency of the lease he has made no objection, & where there have been no rules laid down in the lease as to cultivation.—*FRASER v. MAITLAND* (1824), 2 Shaw's App. 37.—*SCOT*.

**u. Agreement as to mode of fixing compensation for unexpired portion of term.]—**A party having let land for a certain period by a memorandum of agreement, containing a condition that the tenant should cede possession at any time before the expiry of that period, on being allowed such compensation for the term which might then be to run as should be "fixed by men to be mutually chosen for that purpose," & the landlord having resumed possession:—*Held*: there was a valid obligation to refer, & the tenant was not entitled to have the compensation due to him fixed in any other way.—*SMITH v. WHARTON (OR DUFF)* (1843), 5 D. 749.—*SCOT*.

**v. Agreement as to removal of hay of "last crop." ]—**Under an obligation by a tenant not to remove fodder, etc., produced on the lands held by him (hay, etc. "of the last crop" excepted) & a renunciation of the tenant's lease, accepted by the landlord fourteen years before its expiration by effluxion of time, the crop of the year, in which the renunciation was accepted, is to be treated as the "last crop," in construing the restriction upon the tenant.—*WEMYSS v. DRYSDALE* (1849), 6 Bell, Sc. App. 455.—*SCOT*.

**w. Agreement as to termination of tenancy—Growing season over before eviction.]—**The lease of land to be used as a market-garden provided that, if the tenant failed to fulfil his covenants, after giving two weeks' notice in writing, the lease should be void, & he covenanted to give up possession. After he had been on the place for six months the landlord gave him notice to fulfil his covenants in two weeks, & after the expiry of the two weeks, put the tenant out of possession:—*Held*: although the eviction of pltf. was not justified as the growing season was over when the eviction took place, pltf. had shown nothing to entitle him to punitive damages, & action dismissed.—*SHEPHERD v. ROSS* (1912), 21 W. L. R. 259; 4 D. L. R. 432.—*CAN*.

**x. Tenant deprived of farm entitled to tenant's profit.]—**A tenant deprived of his farm is entitled to a sum as tenant's profit.—*DALZIEL v. EXORS. OF QUEENSBERRY (DUKE)* (1826), 4 Murr. 18.—*SCOT*.

pointed :—*Held* : in respect of breaches of covenant committed by the tenant during his occupation, the only remedy of the landlord was to prove for damages in the liquidation, & the landlord had no right of set-off as against moneys due by him to the trustee for severed crops.—*Re MORRISH, Ex p. HART DYKE* (1882), 22 Ch. D. 410 ; 52 L. J. Ch. 570 ; 48 L. T. 303 ; 31 W. R. 278, C. A.

*Annotations* :—*Consd.* Lybbe v. Hart (1885), 29 Ch. D. 8, C. A. *Distd.* Ware v. Booth (1894), 10 T. L. R. 446. *Consd.* Serjeant v. Nash Field, [1903] 2 K. B. 304, C. A.

**174. Agreement as to mode of quitting.]**—A tenant, who has merely agreed to manage & quit the premises agreeable to the manner in which same had been managed & quitted by the former tenants, is not bound by the terms upon which they held. He is not liable as on a breach of covenant, if he quits the holding in the condition in which they quitted it, even although that condition was a breach of covenant by the former tenants to the landlord's knowledge.—*LIEBENROOD v. VINES* (1815), 1 Mer. 15, 719 (App.) ; 35 E. R. 583, 835.

**175. Agreement for new term no discharge of claim under original tenancy.]**—In an agreement for a lease of a farm, the tenant agreed to convert the arable land into pasture, & the landlord agreed to pay compensation at the end of the tenancy for certain unexhausted improvements under clauses which the ct. construed as including conversion. At the end of the term no claim was made by deft., the original tenant's assignee, but a new agreement for a further term was made, which did not mention the conversion of arable land into pasture :—*Held* : the conversion must be paid for by the landlord under the first agreement, & the new agreement was no discharge of the tenant's claim.—*LANE v. MOEDER* (1885), Cab. & El. 548.

**176. Construction of agreement — Ejusdem generis.]**—A lease contained a covenant by the tenant, a market gardener, to plant nine-tenths of the land demised with standard fruit trees, the landlords covenanting at the expiration of the tenancy to pay according to a valuation for all the standard fruit trees then growing on the premises, & for all bush fruit trees & other crops then growing on the premises. In addition to the fruit trees, the tenant had planted ten million bulbs, & on the expiration of the tenancy he claimed £8,000 in respect of the bulbs :—*Held* : bulbs were not "other crops then growing on the premises" within the covenant.—*Re PULLEN-BURRY & LANCING COLLEGE (PROVOST & FELLOWS)* (1915), 138 L. T. Jo. 456, C. A.

**Whether outgoing tenant can claim outgoing valuation while in breach of covenants in lease.]**—*See DEEDS & OTHER INSTRUMENTS.*

#### SUB-SECT. 2.—TILLAGES (INCLUDING FALLOWING).

**177. Covenant to leave land fallowed—Not discharged by surrender of lease.]**—A. leased land by

deed to M. for ten years, M. covenanting at the end of the term to leave 4 acres of the land fallowed & ploughed. There was also a proviso that, if M. mis-liked his bargain, upon a year's warning he might surrender his estate. Afterwards M. surrendered, but did not leave any land fallowed :—*Held* : the acceptance of the surrender did not dispense with the covenant, otherwise if the proviso had been for the last year of the ten, for then performance would have been impossible if surrender were accepted.—*AUSTIN v. MOYLE* (1806), Noy, 118 ; 74 E. R. 1083.

**178. Custom for payment of tillages by landlord—Good custom.]**—A custom for the tenant of a farm in a particular district to provide work & labour, tillage, sowing & all materials for same, in his away-going year, & for the landlord to make him a reasonable compensation for same, is valid in law, notwithstanding the farm is held under a written agreement, provided such agreement does not in express terms exclude the custom.—*SENIOR v. ARMYTAGE* (1816), Holt, N. P. 197.

*Annotations* :—*Expld.* Dalby v. Hirst (1819), 1 Brod. & Bing. 224 ; Webb v. Plummer (1819), 2 B. & Ald. 746. *Consd.* Hutton v. Warren (1836), 1 M. & W. 466. *Refd.* Brown v. Burtinshaw (1826), 7 Dow. & Ry. K. B. 603.

**179. ———.]**—A usage for the landlord to pay a sum in compensation to the offgoing tenant for labour & expense bestowed by him in tilling, fallowing, & manuring arable & meadow land, according to the course of good husbandry, the advantage of which labour & expense the tenant could not otherwise reap, is a reasonable usage. Such practice, being a mere usage of the neighbourhood, is not to be considered as a custom, strictly speaking, & need not be immemorial.

The declaration claimed compensation for work, etc., in manuring, tilling, & fallowing divers acres of land, in tilling & sowing other lands with wheat, & in sowing with seeds divers other acres :—*Held* : this was, in effect, an averment that the lands were arable.

The declaration also averred the manuring of 10 acres of meadow land :—*Held* : in substance, an averment that part of the land was meadow land.—*DALBY v. HIRST* (1819), 1 Brod. & Bing. 224 ; 3 Moore, C. P. 536 ; 129 E. R. 708.

*Annotation* :—*Refd.* Dashwood v. Magniac, [1891] 3 Ch. 306, C. A.

**180. ——— Not excluded by agreement as to dung—Applicable to tenancy from year to year—Holding over.]**—An outgoing tenant claimed an allowance from his landlord under the custom of the country for labour bestowed in tilling & sowing a certain portion of the land within the last year of his tenancy. The outgoing tenant had held the land for several years after the expiration of the lease without coming to any fresh agreement. The lease contained a covenant by the tenant to spend & consume on the demised premises three parts of the straw arising from them, & to leave the manure there at the end of the term to & for the use of the lessor, he paying the full price for same :—*Held* : (1) the tenant must be taken to have held

#### PART III. SECT. 3, SUB-SECT. 2.

**a. Covenant to harrow grass seeds—Whether outgoing tenant liable for failure of crop.]**—An outgoing tenant failed to fulfil an obligation in his lease to harrow grass seeds furnished by the incoming tenant & sown with the waygoing crop. There was a failure of grass crop :—*Held* : where no satisfactory reason appeared for failure of a crop, but there had been a failure to prepare for that crop in the way stipulated, the party who had neglected so to prepare for it must be held responsible.—*GRAHAM v. LINDSAY* (1861), 23 D. 440.—*SCOT.*

**b. Covenant to harrow & roll in grass seeds—Whether outgoing tenant bound to**

**remove stones.]**—An outgoing tenant was bound by lease to allow the landlord or incoming tenant, in the last year of his tenancy, to sow grass seeds among such parts of his waygoing corn crop immediately after green crop as the incoming tenant might desire, & to harrow & roll in same without remuneration. In the year of the waygoing crop the outgoing tenant, on the employment of the incoming tenant, who paid him for so doing, sowed grass seeds on certain portions of the farm, but failed to roll in the grass seeds, whereby their growth was injured :—*Held* : (1) the outgoing tenant was liable for the damage ; (2) the obligation to harrow & roll imposed no obligation on the outgoing tenant to remove whole stones from the land which would inter-

fere with the beneficial operation of the roller ; (3) by the practice of the district the outgoing tenant was not bound to remove the stones.—*MCINTYRE v. ANDERSON* (1872), 10 Sc. L. R. 59.—*SCOT.*

**178 i. Custom for payment of fallowing by landlord—Excluded by agreement.]**—By a lease, a portion of the land was to be reserved to the landlord for fallow & green crop, & for which the tenant was to receive merely 10s. per acre for ploughing :—*Held* : the rights of parties being thus settled by the contract, the tenant could claim no additional compensation for the fallow, as at common law.—*SHIREFF v. LOVAT (LORD)* (1864), 17 D. 177.—*SCOT.*



**Sect. 3.—Effect at outgoing: Sub-sects. 2 & 3.]**

under the terms of the expired lease as far as they were applicable to a tenancy from year to year; (2) the stipulation in it as to leaving the manure at the end of the term did not exclude parol evidence of the custom of the country allowing the outgoing tenant for the tillages & sowing claimed, & the custom was imported into the lease by implication.

**HUTTON v. WARREN** (1836), 1 M. & W. 466; 2 Gale, 71; Tyr. & Gr. 646; 5 L. J. Ex. 234; 150 E. R. 517.

**Annotations:—****Expld.** Johnston v. Usborne (1841), 11 Ad. & El. 549. **Consd.** Johnson v. Blenkinsopp (1841), 5 Jur. 570. **Expld.** Wilkins v. Wood (1848), 12 Jur. 583. **Consd.** Spartali v. Benecke (1850), 10 C. B. 212. **Distd.** Arden v. Sullivan (1850), 19 L. J. Q. B. 268; Gibson v. Small (1853), 4 H. L. Cas. 353, H. L. **Consd.** Brown v. Byrne (1854), 3 E. & B. 703. **Expld.** Vint v. Constable (1871), 25 L. T. 324. **Consd.** Re Constable & Cranswick (1899), 80 L. T. 164. **Appld.** Westacott v. Hahn, [1917] 1 K. B. 605. **Refd.** Syers v. Jonas (1848), 2 Exch. 111; Cuthbert v. Cumming (1855), 10 Exch. 809; Myers v. Sarl (1860), 3 E. & E. 306; Biddell v. Clemens Horst Co., [1911] 1 K. B. 934, C. A.; Produce Brokers Co. v. Olympia Oil & Cake Co., [1916] 1 A. C. 314, H. L.; Re Sutro & Heilbut, Symons, [1917] 2 K. B. 348, C. A.

**181. Who liable under custom—Landlord.]—**The outgoing tenant's remedy for tenant right according to the custom of the country is against the landlord, & not against the incoming tenant, unless by virtue of an agreement between the parties to that effect. The outgoing tenant is entitled to recover the amount of the tenant right from the landlord upon a *quantum meruit*, & the ascertainment of the amount by a valuation is not a condition precedent to his right to sue when it is not made such by the terms of the lease.—**SUCKSMITH v. WILSON** (1866), 4 F. & F. 1083.

**182. ——— Not incoming tenant—Unless by agreement.]—***Primâ facie* the landlord is bound to pay the outgoing tenant for tillages, & the mere fact of the incoming tenant entering upon the land does not render him liable so to do; but it is a question of fact whether the contract between the outgoing tenant & the landlord subsists, or a new contract has been entered into with the incoming tenant.—**CODD v. BROWN** (1867), 15 L. T. 536.

**Annotation:—****Refd.** Bradburn v. Foley (1878), 3 C. P. D. 129.

**183. ——— ——— ———.]—**Although the ordinary practice (to avoid circuitry) is for the incoming tenant to pay the outgoing tenant on a valuation, yet a custom of the country for the outgoing tenant to look to the incoming tenant only for payment for seeds, acts of husbandry, & tillages, to the exclusion of the landlord's liability, is unreasonable (as imposing on the outgoing tenant a debtor in whose selection he had no choice), uncertain as between a lessee & sub-lessee, & bad in point of law. The landlord is, by custom, liable to the outgoing tenant, & the incoming tenant is not liable to the outgoing tenant, where there is no contract, express or implied, between them. It being admitted that the outgoing tenant was entitled to be paid for seeds, acts of husbandry, tillages, etc.,

**182 i. Who liable under custom—Not incoming tenant—Unless by agreement.]—**In an action by a landlord against an incoming tenant for the expense of cultivating the summer fallow left upon the farm by the outgoing tenant in terms of his lease, & which had been paid by the landlord to him:—**Held:** (1) as the lease of the incoming tenant did not contain any obligation on him to pay for the fallow, & as the landlord had not established by sufficient written evidence that a separate obligation had been undertaken by him to that effect, he was not entitled to recover the sum sued for; (2) proof as to the practice of that part of the country was not competent evidence to support the landlord's claim.—**ALEXANDER v. GILLON** (1847), 9 D. 524.—**SCOT.**

**c. Manure & fallow received free of charge by incoming tenant—Outgoing tenant entitled to payment only for surplus left.]—**A tenant upon entering on his farm had received free of charge a certain amount of ground in fallow prepared with a certain quantity of manure. At the expiry of his lease he claimed the value of the fallow & manure left by him on the farm. The lease having gone a-missing in the hands of the landlord, & no stipulation as to the matter in dispute having been proved:—**Held:** the outgoing tenant was bound in equity to leave the same quantity of manure & fallow free of charge as he had received, & was entitled to payment only for the surplus.—**BROWN v. COLLEGE OF ST. ANDREWS** (1851), 13 D. 1355; 7 Sc. R. R. 682.—**SCOT.**

by either the landlord or incoming tenant, the ct. set aside a verdict found for the landlord in an action by the outgoing tenant (so found on the ground that, by the custom of the country, the incoming tenant, & not the landlord, was liable), & entered it for the outgoing tenant against the landlord.—**BRADBURN v. FOLEY** (1878), 3 C. P. D. 129; 47 L. J. Q. B. 331; 38 L. T. 421; 42 J. P. 344; 26 W. R. 423.

**Annotations:—****Expld.** Mansel v. Norton (1883), 22 Ch. D. 769, C. A. **Refd.** Priestley v. Stone (1888), 4 T. L. R. 730, C. A.; Devonald v. Rosser, [1906] 2 K. B. 728, C. A.

**184. Incoming tenant—Failure of landlord to pay in terms of lease.]—**A landlord & tenant entered into an agreement for renting a farm. The landlord covenanted that he or the incoming tenant should pay for the work & seeds of the off-going crop. By the custom of the country the incoming tenant was bound to pay for such labour & seeds, not the landlord. The off-going tenant brought an action on the custom, against the incoming tenant, for compensation:—**Held:** (1) the incoming tenant was not a party to the agreement that the landlord or he should pay compensation, & the custom prevailed against him; (2) as the landlord had not paid compensation, he was bound to pay a reasonable sum of money for the work & seeds, of which he had taken the benefit.—**LOUTH v. ENDERBY** (1824), 3 L. J. O. S. K. B. 23.

**185. Implied contract to pay—Receiver.]—**In an action for tillages or tenant-rights by an outgoing tenant, it was proved that pltf. held the farm under a lease containing an agreement for such tillages, granted by deft.'s brother, a receiver of the estate under the Ch. Ct., the legal estate being in trustees; that deft., upon the death of his brother in 1841, was appointed receiver, & continued to receive the rent from pltf. till 1843, in which year he gave notice to quit "the land & premises which you hold under me"; that upon pltf. quitting, he claimed a sum of money for his tenant-right, & deft. then offered £15, which was refused:—**Held:** sufficient evidence from which the jury might infer a contract by deft. to pay pltf. for his tillages or tenant-rights.—**MILLIS v. TURNER** (1848), 10 L. T. O. S. 323.

**186. Agreement for payment—Interest in land—Statute of Frauds.]—**An agreement, not in writing, with the owner of a farm, in consideration that he will let, or agree to let, same for a term of years, & will suffer the intended lessee to take possession, & have the benefit of growing crops, & of work, labour, & materials before expended in preparing the farm ready for tillage, to pay for such crops, work, labour, & materials, at a valuation, is a contract relating to an interest in land within Stat. Frauds, s. 4, & upon which no action can be maintained for the amount of the valuation.—**FALMOUTH (EARL) v. THOMAS** (1832), 1 Cr. & M. 89; 3 Tyr. 26; 2 L. J. Ex. 57; 149 E. R. 326.

**Annotations:—****Appld.** Harvey v. Graham (1836), 5 Ad. & El. 61. **Consd.** Re Laycock v. Pickles (1863), 4 B. & S. 497.

**d. Agreement for payment for labouring "fallow break."]**—An agricultural lease provided that during the last year thereof the tenant should "be paid for labouring & manuring the fallow break according to the valuation to be fixed by arbn., as well as for the value of the land left in bare fallow according to the average rent of the farm":—**Held:** "fallow break" did not include land from which the tenant had taken a waygoing green crop.

"Fallow" means land left without crop. To suppose that under the term "fallow" is included land left in green crop is to confound altogether the meaning of the word (LORD BENHOLME).—**THOMSON v. JAMIESON** (1874), 1 R. (Ct. of Sess.) 895.—**SCOT.**

**Refd.** Jones v. Flint (1839), 10 Ad. & El. 753; Martyn v. Clue (1852), 18 Q. B. 661; Harman v. Reeve (1856), 18 C. B. 587. **Mentd.** Hilton v. Grenville (1844), 2 L. T. O. S. 370; Evans (Joseph) v. Heathcote, [1918] 1 K. B. 418, C. A.

**187. In unsigned lease—Consistent with tenancy from year to year.]**—An agreement that an outgoing tenant shall be paid for tillages on expiration of his tenancy is not inconsistent with the terms of a tenancy from year to year.

**Pltf.**, a small farmer, had entered into an agreement with **deft.** for a lease for a term of three, five, or seven years, & a lease in pursuance of the agreement had been drawn up. It was never signed. Amongst other covenants, it contained one whereby **deft.** covenanted to pay for the tillages done by **pltf.** in the season previous to expiration of his tenancy. **Pltf.** entered into possession on Mar. 25, 1862, & quitted, in consequence of his landlord's notice, on Mar. 28, 1864. Previous to giving up possession he completed the tillages for the year's crops, & **deft.** having refused him payment for them, he brought an action:—**Held**: where a tenant entered on possession of premises in pursuance of an unsigned agreement for a lease, he became a yearly tenant upon such of the terms in the unsigned agreement as were not inconsistent with such a tenancy.—**BROCKLINGTON v. SAUNDERS** (1864), 13 W. R. 46.

**188. — Effect of earlier determination of lease.]**—A farm was taken for fourteen years, & the tenant had to pay a given sum for tillages & improvements done before he entered, & to receive the value of the tillages & improvements which he should leave on the farm, according to a valuation to be made at his quitting. The tenant in the first year of the tenancy said he would leave, & his landlord said he might; but no new bargain was made as to his tillages & improvements:—**Held**: he was not entitled to the value of the tillages & improvements which he left on so quitting.—**WHITTAKER v. BARKER** (1832), 1 Cr. & M. 113; 3 Tyr. 135; 149 E. R. 336.

**Annotation**:—**Consd.** England v. Shearburn (1881), 52 L. T. 22.

**189. — Effect of abandonment of lease.]**—A tenant of a farm from year to year, entitled to certain tenant rights, took a lease of the farm for seven years, under which he became entitled to larger tenant rights & allowances. In the middle of the term, being unable to pay the rent & continue the tenancy, he left the farm, & in effect, abandoned the position of tenant, & did not bring an ejectment against his landlord, who was in possession under a distress for rent, & who remained, at the tenant's request, in possession after the distress was satisfied. No new agreement was made as to the tenant rights & allowances:—**Held**: (1) in the absence of any new agreement, the tenant's rights arose only at expiration of the lease & on a substantial performance by the tenant of the covenants thereof, & as the tenant had in effect abandoned the tenancy, he was not entitled to any

tenant rights under the lease; (2) any tenant right he might have had previously while tenant from year to year was extinguished by his accepting the tenant rights under the lease.—**ENGLAND v. SHEARBURN** (1884), 52 L. T. 22; 49 J. P. 86.

**190. Assignment of stock, etc.—Right to payment for tillages included.]**—An outgoing tenant, administratrix of the late tenant, having (after having had the farm for above a year) assigned to an incoming tenant, in consideration of a debt due to him, all her goods & effects, & all stock, corn, grain, etc., on the farm, & all her estate & interest thereon & therein:—**Held**: the words "all her estate & interest" comprised the tenant right.—**CARY v. CARY** (1862), 10 W. R. 669.

**191. Agreement between incoming & outgoing tenant—Consent of landlord thereto—Landlord's rights not prejudiced.]**—**Pltf.** was tenant of a farm, with a right to the use of a certain part of the premises without payment until Mar. 25 next after the expiration of the term, "for threshing & spending the last year's crop," & by the custom of the country he was entitled, at the expiration of the term, to be paid by the landlord or the incoming tenant for certain tillages. He gave up the farm to **deft.** as incoming tenant, at Michaelmas, 1870, & before so doing valuers were mutually appointed to value the tillages as between them with the consent of the landlord, & the valuers duly made & signed their valuation. After **deft.** had entered into possession, but before Mar. 25, 1871, the landlord gave him notice that rent was due from **pltf.** & required him to pay the amount of the valuation, which was less than the rent due, to him, the landlord, & not to **pltf.**, & this **deft.** did on receiving an indemnity from the landlord, but without **pltf.**'s consent. **Pltf.** having sued **deft.** for the value of the tillages, was nonsuited:—**Held**: the nonsuit was right, for the contract to be implied between the incoming & outgoing tenant was subject to the right of the landlord to be paid the arrears of rent out of the valuation.

**Pltf.**, on quitting the farm at Michaelmas, 1870, gave up to **deft.**, & **deft.** exercised, the right which **pltf.** had under the lease of converting the straw on the farm (between Michaelmas, 1870, & Mar. 25, 1871) into manure with his cattle. In so converting it the cattle ate a certain portion of the straw, calculated to be one-third of the bulk, which the valuers valued as browse at £33:—**Held**: **pltf.** was entitled to recover this sum from **deft.**—**STAFFORD v. GARDNER** (1872), L. R. 7 C. P. 242; 25 L. T. 876; 36 J. P. 566; 20 W. R. 299.

**Annotations**:—**Expld.** Re Wilson, Ex p. Hastings (1893) 62 L. J. Q. B. 628. **Refd.** Bradburn v. Foley (1878), 3 C. P. D. 129.

#### SUB-SECT. 3.—WAY-GOING CROPS.

**192. Agreement that tenant should have crop—Right to enter to cultivate—No right to exclude land-**

**191 i. Agreement between incoming & outgoing tenant—Specified quantity of land to be left in grass—What land included.]**—By an agreement between an outgoing & an incoming tenant of a farm, the former bound himself to leave in grass certain parks consisting altogether of about 97 acres. In an action by the incoming tenant for damages arising from a deficiency in the quantity of grass, the defence was that the parks, though not containing 97 acres, had been left in grass & that at all events there were 97 acres of grass on the farm:—**Held**: the outgoing tenant, though not in perfect good faith, was entitled to take into account the whole grass on the farm, making, however, allowance for the inferiority in quality of any grass

not in the parks, but natural grass land not in use to be ploughed was not to be included.—**SIMPSON v. CREIGHTON** (1832), 2 Sh. & D. 405.—**SCOT.**

**e. Claim by outgoing tenant for fallow—Set off by incoming tenant for overcropping.]**—An outgoing tenant claimed a sum as the value of fallow ground left by him. Contesting this claim, the incoming tenant insisted for damages for overcropping. After several reports from agricultural experts, in one of which the claim for fallow was sanctioned on the ground that the tenant was entitled to take another crop instead of leaving in fallow, while the others negatived the averment of a special usage, the Lord Ordinary decreed for the

value of the fallow in favour of **pltf.**, who was the outgoing tenant, & the **et.** adhered.—**PURVES v. RUTHERFORD** (1822), 2 Sh. (Ct. of Sess.) 59.—**SCOT.**

#### PART III. SECT. 3, SUB-SECT. 3.

**f. Lease of grass enclosures—Entry at Whit-Sunday—Right to crop of corn sown last year of tenancy.]**—A tenant entering at Whit-Sunday to grass inclosures, under a tack for ten years, has no right to reap a crop of corn in the tenth year.—**GRAY v. GOLDIE** (1800), Hume, 804.—**SCOT.**

**g. Lease of land in grass—Right to way-going crop excluded.]**—A tenant of a piece of ground in natural pasture at entry, the term of removal from which



**Sect. 3.—Effect at oulgoing: Sub-sect. 3.]**

**lord.]**—By an agreement for letting a farm, it was stipulated that, in case the tenant should duly observe & perform the covenants therein contained, he should be entitled to a way-going crop, which way-going crop should be left to the landlord or the incoming tenant, at a valuation to be made by arbitrators or an umpire:—*Held*: at all events after expiration of the tenancy, this gave the tenant only a right to enter the field on which the crop was growing in order to cultivate it & improve the condition thereof, but not to exclude the landlord. *Qu.*: whether, under this clause, the performance of covenants by the tenant constituted a condition precedent to his right to the way-going crop.—**STRICKLAND v. MAXWELL** (1834), 2 Cr. & M. 539; 4 Tyr. 346; 3 L. J. Ex. 161; 149 E. R. 875.

**193. — Application to tenancy from year to year—Holding over—Exclusion of custom.]**—The custom of the country could have no place where the outgoing tenant held under a lease expressly making a different provision in respect of the way-going crop, or where he continued to hold over after expiration of such a lease without coming to any fresh agreement with his landlord, by which he must be taken to hold under the same terms.—**BORASTON v. GREEN** (1812), 16 East, 71; 104 E. R. 1016.

**Annotations:—Distd.** *Davis v. Connop* (1814), 1 Price, 53. **Consd.** *Knight v. Benett* (1826), 3 Bing. 364. **Refd.** *Evans v. Ogilvie* (1828), 2 Y. & J. 79; *Holding v. Pigott* (1831), 7 Bing. 465.

**194. — .]**—A tenant holding over after expiration of a lease for years may be taken to hold upon any of the terms of such former lease which are consistent with a yearly tenancy. Whether he does hold on any of such terms or not is a question for the jury on the facts proved. A covenant in a lease for years ending at Michaelmas, that the tenant shall & may retain & sow 40 acres of wheat on the arable land demised (consisting of 213 acres) at the seed-time next after the end of the term, & having the standing thereof till the harvest then next following, rent free, with use of premises for threshing, etc., till a day named, is a term which may be made incident to a tenancy from year to year.—**HYATT v. GRIFFITHS** (1851), 17 Q. B. 505; 18 L. T. O. S. 74; 117 E. R. 1375.

**Annotation:—Mentd.** *Wedd v. Porter*, [1916] 2 K. B. 91, C. A.

**195. — Subject to specified deductions—Landlord's right to customary deductions not excluded.]**—The following proviso was in a lease made between a landlord & tenants: "Provided, lastly, that on determination of his tenancy the tenant shall, in the event of his having duly performed the several stipulations & agreements herein contained & to be performed on his part, be entitled to have & take a following or way-going crop of corn not exceeding one-third of the arable land hereby demised, such crop to be taken from land summer-fallowed or from which turnips or rape have been eaten, or from land sown in the regular course with

seeds & depastured by sheep, & which way-going crop shall be taken at a valuation to be ascertained by two disinterested persons, one to be named by the oncoming, the other by the outgoing, tenant, or their umpire (in case they cannot agree), such umpire to be appointed by such valuers before proceeding upon such valuation, & the decision of such two arbitrators or of their umpire shall be final & binding on both parties. It is further agreed half of the value of such way-going crop shall be paid at Christmas next after the determination of this demise, the remaining half at Lady Day following, subject to such deductions as the same may be liable to under any of the covenants & agreements herein contained on the part of the tenant, which the landlord is hereby authorised to deduct, & also subject to such of the rents herein reserved as shall be due & owing, to payment of which it shall be primarily liable, & for which rents the landlord shall be entitled at any time to distrain the same way-going crop before or after severance as for rent in arrear." There were no provisions as to the mode of ascertaining the value of such crop. By the custom of the country, when applicable, deductions were to be made (1) in respect of the rateable proportion of the rent payable in respect of the land upon which the way-going crop had been grown, this being called "standage"; (2) in respect of the rateable proportion of rates & taxes payable in respect of this land; & (3) in respect of the expenses of reaping, threshing, stacking, & delivering the way-going crops. Disputes arose between the outgoing tenants & the landlord & incoming tenant as to what was meant by a way-going crop of corn, & as to what deductions should be made from its value. The umpire found that the outgoing tenant was entitled to the grain of the way-going crop & also to the straw at manurial value; & he stated his award in the form of a special case. The question before the ct. turned upon whether the rights of the way-going tenant were subject to the custom, & on his behalf it was contended that the application of the custom was displaced by the above provisions of the lease:—*Held*: the provisions in the lease were wholly independent of the custom, being stipulations for the landlord, giving him in certain cases a right of lien upon the amount of the valuation of the way-going crop, & having no connection with such deductions as were to be made by custom from the value of the crop.—**Re CONSTABLE & CRANSWICK** (1899), 80 L. T. 164; 43 Sol. Jo. 208.

**196. — & leave "turnip or fallow breaks" ploughed—Right to way-going black crop.]**—In a lease of a farm of 600 acres the tenant bound himself by a covenant never to have more than one half of the arable land in white crop during the same season, nor to take two white crops off same field without a green or black crop intervening, & to take only one black crop, i.e., beans, peas, potatoes, etc., between grass & grass, & further at the end of the lease to leave the turnip or fallow breaks once ploughed for the incoming tenant:—*Held*: the words "turnip or fallow breaks" meant the land which would, in the natural course of good

was stipulated to be Whit-Sunday, having, under a permission in his lease, brought it into cultivation during the currency:—*Held*: under the lease he had no right to a way-going crop.—**BLAIR v. LYALL** (1826), 4 Sh. (Ct. of Sess.) 365; 1 Sc. R. R. 767.—**SCOT.**

**h. Lease with entry at Whit-Sunday—Right to way-going crop.]**—A farm was held by deft. by a lease, having the entry at Whit-Sunday, 1802:—*Held*: deft. not entitled to the way-going crop, i.e., to reap the crop which was prepared & sown in the autumn or spring preceding Whit-Sunday, 1802.—

**SCOTT v. BRODIE** (1803), 13 F. C. 203; 4 Pat. App. 311, H. L.—**SCOT.**

**k. — .]**—At the expiration of a lease to which the entry was at Whit-Sunday, the tenant is entitled to a way-going crop.—**FULLARTON v. CRAUFURD** (1814), 17 F. C. 581.—**SCOT.**

**l. Agreement that at sale of estate tenant should receive full year's rent—Right to way-going crop where agreement silent.]**—A tenant entered into a lease of a farm at Whit Sunday, 1791, without any right to a grain crop at his entry. A clause in his lease provided that, if the

estate was sold, there was to be a liberty of break in the lease after seven years, if the purchaser wished to enter & take possession, upon which event the tenant was to receive a full year's rent on leaving the farm for defraying the expense of sowing out the lands that year in tillage with grass seed & clover, & in consideration of leaving the whole lands in grass & removing at Whit-Sunday. Nothing was said about a way-going grain crop:—*Held*: the tenant not entitled to a way-going crop.—**MACMICHAEL v. HUTCHESON** (1801), 4 Pat. App. 170, H. L.—**SCOT.**

husbandry, be ploughed & left fallow for the purpose of being planted with turnips, & the tenant was entitled, over & above the way-going cereal crop on the moiety of the lands, to have a way-going black crop in respect of 100 acres more.—*HUNTER v. MILLER* (1863), 9 L. T. 159, H. L.

**197. — Sale of crop & earlier entry given to incoming tenant—Ineffectual to discharge outgoing tenant's liability for rent.]—**A tenant of a farm, whose tenancy expired at Lady Day, 1801, was entitled to the way-going crop of the harvest, 1801, after his term expired, & paid rent up to Lady Day, 1800. In June, 1800, he agreed to let in the new tenant, sold to him the standing crops, & took a receipt for the value, & also for £20, "for the right of cropping the lands from June 18." The landlord distrained for the rent due till Lady Day, 1801. The new tenant paid this rent, & brought an action to recover it from the outgoing tenant, who had paid tithes & poor rate for 1801. Deft. having recovered a verdict:—*Held*: there must be a new trial, as by the terms of the written document of sale nothing was to be recouped by way of rent or otherwise, & the outgoing tenant must pay the rent for the time from Lady Day, 1800, to Lady Day, 1801.—*PETRIE v. DANIEL* (1804), 1 Smith, K. B.

**198. Assignment by tenant without consent—Right of assignee to sue—Holding over.]—**Deft., by deed, leased to E. some land for fourteen years. This lease contained a covenant by the lessee not to assign, & a covenant by the landlord to pay a valuation for the crops at expiration of the tenancy. After expiration of this tenancy, E. continued in possession for several years as tenant from year to year. Deft. gave E. notice to quit. E., before expiration of the tenancy, assigned to pltf.

**200 i. Custom that outgoing tenant should have crop—Good custom.]—**Found agreeable to a local usage in East Lothian, that a tenant of a farm there is entitled to dispose for his own use of a turnip crop, raised during the last year of his lease.—*HAMILTON v. REID'S TRUSTEES* (1824), 2 Sh. (Ct. of Sess.) 611. —*SCOT*.

**200 ii. — — —.]—**On the entry of a tenant to a farm the greater part of the arable land was in old pasture. The lease was for fifteen years from Whit-Sunday, 1846, & therefore expired at Whit-Sunday, & separation of the crop, 1861. In Mar. of that year the tenant, for the first time, took a crop off a field of old pasture. In an action by the landlord against the tenant for payment of this crop, & alternatively for damages for miscropping:—*Held*: (1) the crop belonged to the tenant, although he had already fifteen crops of grass off the field; (2) the statements were not relevant to support the conclusion for damages.—*HAIRD v. HARPER* (1865), 3 M. 543.—*SCOT*.

**200 iii. — — — Tenant from year to year.]—**In the county of Westmeath, the outgoing tenant is entitled, by the custom of the country, to seven-eighths of wheat, to two-thirds of oats, & all potatoes, but not to hay; & tenants from year to year are within the custom. *Semble*: the tenant is so entitled, whether he has paid up all rent to the time of quitting or not, or whether he has been ejected or has given up peaceable possession.

The outgoing tenant is not entitled to any portion of the crops sown after the expiration of a notice to quit.—*CUNNINGHAM v. UNIAKKE* (1842), Arm. M. & O. 393.—*IR*.

**m. — Excluded by stipulation in lease—Custom in Upper Canada.]—**Where there is a stipulation in a lease for a term certain that the lessee shall deliver up all the lands at the expiration of the lease, all question as to a customary right of the way-going crop is

excluded. *Semble*: there is no custom of the country as to the way-going crops in Upper Canada.—*BURROWES v. CAIRNS* (1846), 2 U. C. R. 288.—*CAN*.

**n. S. P. KAATZ v. WHITE** (1869), 10 C. P. 36.—*CAN*.

**o. Custom that tenant removing at Martinmas should have straw of way-going crop—Good custom.]—**A tenant removing at Martinmas has the right to dispose of the straw of his way-going crop, though the tack bind him to consume the straw on the farm during his lease.—*PHILP v. MORTON* (1816), Hume 865.—*SCOT*.

**q. Agreement by tenant to leave specified quantity of grass—How satisfied.]—**Where the landlord has the stipulated quantity of grass left on the whole lands let, he cannot object to the want of a relative proportion on the particular farms into which the land has been sub-let.—*KEITH v. LOGIE'S HEIRS* (1825), 4 Sh. (Ct. of Sess.) 267.—*SCOT*.

**r. Tenant not to sow fall grain in "all" fields cleared in first or last year of lease—Tenant not entitled to way-going crop.]—**Trover for a way-going crop, which pltf. contended he was entitled to under a covenant in his lease, "that he should not sow fall grain in all fields now cleared in the first or last year of the lease," on proving that he had not sown the grain in all the fields:—*Held*: the word "all" must be construed "any," & the lease did not militate against the common law rule, & pltf. precluded from claiming the way-going crop.—*GILMORE v. LOCKHART*, H. T. 6 Vict.—*CAN*.

**s. Whole fodder except hay & fodder of last crop to be consumed on farm—Right to way-going straw.]—**A way-going tenant, whose ish was from the horses & grass at Whit-Sunday, & from the arable land at the separation of the crop from the ground, & who was bound to consume on the farm the whole fodder except hay & the fodder of the last

without the knowledge or consent of deft. A valuation having been made, pltf. brought an action for the amount of the valuation:—*Held*: (1) pltf. could not recover, as there was nothing to establish a new relation of landlord and tenant between him & deft. (*MELLOR, J. & LUSH, J.*); (2) F. had no right to assign without deft.'s consent, and pltf. acquired no rights under the assignment (*SHEE, J.*).—*ELLIOTT (ELLIOT) v. JOHNSON* (1866), L. R. 2 Q. B. 120; 8 B. & S. 38; 36 L. J. Q. B. 44; 31 J. P. 212; 15 W. R. 253.

**199. Admissibility in evidence of custom as to way-going crop.]—**Trespass for cutting down & carrying away corn. Plea that A. B. was scised of the closes, & demised same to deft. for one year, with liberty, if the corn sown upon the closes was not carried away at the end of the term, for deft. to cut & carry away two-thirds of such wheat corn as should be sown on fallow, & half of that sown on brush. Pltf. traversed the demise with such liberty, & upon that issue was joined:—*Held*: deft. might, on this issue, give in evidence the usage of the country as to this method of taking farms.—*SNAPE v. MANLEY* (1764), 2 Y. & J. 82, n.; 148 E. R. 841.

**200. Custom that outgoing tenant should have crop—Good custom.]—**A custom that tenants, whether by parol or deed, shall have the way-going crop after expiration of their terms is good.—*WIGGLESWORTH v. DALLISON* (1779), 1 Doug. K. B. 201; 99 E. R. 132.

*Annotations*:—*Consd.* *Hughes v. Gordon* (1819), 1 Bli. 287; *Hutton v. Warren* (1836), 2 Gale, 71; *Vint v. Constable* (1871), 25 L. T. 324. *Refd.* *Webb v. Plummer* (1819), 2 B. & Ald. 746; *Knight v. Bennett* (1826), 3 Bing. 364; *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1916] 1 A. C. 314, H. L. *Mentd.* *St. Germain v. Willan* (1823), 2 B. & C. 216; *Josling v. Kingsford* (1863), 13 C. B. N. S. 447; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.; *Sutro v. Heilbut*, *Symons* (1917), 14 Asp. M. L. C. 34, C. A.

crop, & undertook sufficiently to cultivate, labour & manure the land:—*Held*: entitled to the value of the straw remaining on the farm at the way-going Whit-Sunday, not amounting to more than necessary for the purposes of the farm until the possession expired.—*ALLEN v. BERRY* (1829), 3 Wils. & S. 417.—*SCOT*.

**t. Basis of valuation—Valuation "to be made on such fair terms as parties can agree."]**—An obligation on the part of an incoming tenant to take an outgoing tenant's crop at a valuation, "to be made on such fair terms as the parties can agree," cannot be construed to mean that the valuation must be made according to the usage of the country in similar bargains.—*STILL'S TRUSTEES v. CHIVAS* (1829), 8 Sh. (Ct. of Sess.) 9.—*SCOT*.

**u. — Agreement for valuation by arbitration—Submission as to method of determination altered by landlord.]—**A tenant was bound by his lease to make over to the landlord or incoming tenant the whole corn & fodder of the last year's crop, as well as the turnips & potatoes on the farm, the last year of the lease, the value of the fodder, turnips & potatoes to be determined by arbiters. At the expiry of the lease the landlord insisted on a clause being inserted in the submission, to the effect that the fodder, turnips & potatoes should be valued at their value for consumption on the farm. To this the tenant objected as beyond the stipulation in the lease whereupon the landlord presented a note of suspension & interdict to prevent the tenant from removing the crop:—*Held*: the ct. could not interfere beforehand to determine the principle of valuation to be applied by the arbiters, & the tenant was entitled to have the submission expressed in terms of the lease.—*LINDSAY (TRUSTEE) v. BELL* (1862), 1 M. 39; 1 Sc. R. R. 101.—*SCOT*.

**v. — — —.]—**A tenant was bound by his lease to have ten acres under



*Sect. 3.—Effect at outgoing: Sub-sect. 3.]*

**201. — Not affected by stipulations confined to period of holding.]—**A tenant held a farm under a lease, containing a condition that the wheat land should be summer-fallowed & well manured for the crop, but no stipulation as to the terms of quitting. By the custom of the country, a tenant

who had sown his land with wheat after a crop of turnips at the wheat seedness next before expiration of his tenancy was entitled to cut & carry away one-half of the wheat so sown:—*Held*: (1) as the condition in the lease was confined to the period of holding the farm, & not to the time of quitting, there was nothing in it directly at variance with the

turnips during the last year of his lease, & for these he was to be paid by the proprietor or incoming tenant the value as fixed by arbn.:—*Held*: he was entitled to the full value of the turnips, viz., (1) their value to the tenant as feeding for the stock; (2) their value to the land through the dung made by the stock fed on them.—*SCOTT v. RITCHIE* (1869), 7 Sc. L. R. 135.—*SCOT*.

**w. — Parol agreement to deviate from prescribed rotation.]—**A lease prescribed a six shift rotation of crop, under which at the end of the lease three-sixths of the farm would have been in grass, one-sixth first year's grass, the other second & third year's grass. The lease provided that at the expiry of the lease the tenant should get payment from the landlord of the first & second years' grass. During the currency of the lease the landlord & tenant verbally agreed that the farm should be cultivated under a five shift rotation, under which, at the expiry of the lease, two-fifths of the farm were in grass, one-fifth first & second year's grass respectively:—*Held*: the parties, in agreeing to substitute a five shift for a six shift rotation, had agreed by implication that the provisions of the lease regarding payment for grass at the expiry of the lease should be superseded in favour of the rule applicable to a five shift rotation, & the tenant was not entitled to payment for the second year's grass.—*TAYLOR v. DUFF* (1869), 7 M. 351.—*SCOT*.

**x. — Agreement to pay for turnips "at valuation."]**—An incoming tenant was taken bound "to pay the outgoing tenant for turnips & dung at a valuation," & "to leave turnips & dung at the end of his lease to be paid for in like manner by the next succeeding tenant." At the expiry of his lease a dispute arose as to whether the turnips were to be valued at what they were worth for removal from the farm, or for what they were worth for consumption on the farm:—*Held*: they were to be valued at their market value, being what the outgoing tenant would have realised for them had he not been bound to leave them on the farm.—*CRABB (ERSKINE'S TRUSTEES) v. CROMBIE* (1870), 9 M. 54; 9 Sc. R. R. 179.—*SCOT*.

**y. Lease of orchard—Fruit of first year's crop not received by tenant—Right to way-going crop.]—**F. held a lease of a farm from B. (whose factor, etc., was T.) for nineteen years from Whitsuntide & Martinmas, 1797. Among the subjects let were orchards, & from these F. was to remove at Whitsuntide, 1816, but not from the arable lands until the ensuing Michaelmas. Nearly five years after a settlement with F. & his removal from the farm a claim was made upon him by T. for the value of the fruit for the year 1816. F. had not got the fruit of the orchard crop, 1797, & thus only had the number of crops (nineteen) stipulated for by the lease. Evidence was also produced that a person authorised by T. had been paid by F. for the crop of 1816. The ct. assailed F. with expenses.—*THOMSON v. FORRESTER* (1830), 4 Wils. & S. 136.—*SCOT*.

**z. Agreement that tenant should have "accommodation" for thrashing last crop.]—**It was agreed between landlord & an outgoing tenant that, after the removal of the latter, he should have the privilege of accommodation for thrashing the last crop up to the first day of May ensuing, on condition that the landlord or incoming tenant's servants

& horses should be allowed accommodation by him during the time that they were working the fallow break:—*Held*: the stipulated accommodation included only the use of the mill, & the tenant was not entitled to accommodation for horses for the purpose of conveying the crop to & from the mill.—*TWEEDDALE (MARQUIS) v. HUMIE* (1848), 10 D. 1053.—*SCOT*.

**a. Tenant allowed to leave land in fall crop.]—**A lease contained the words, "also to allow the tenants the right of leaving in fall crop the same quantity of land as is now in fall crop when they get possession," coupled with the fact that there was then a fall crop on part of the land, which had been sown by the preceding tenant & which he was entitled to reap:—*Held*: the tenants had the right to sow a crop during the tenancy, which they might reap afterwards.—*CAMPBELL v. BUCHANAN* (1858), 7 C. P. 179.—*CAN*.

**b. Obligation to sell on intimation—Verbal intimation sufficient.]—**An outgoing tenant was bound by his lease to sell the one half or the whole of the outgoing crop to the landlord or incoming tenant, on intimation being made to the outgoing tenant at least six months before expiry of the lease:—*Held*: such intimation need not be in writing, but might be made verbally & be proved by parol.—*DUKE v. FERGUSON* (1862), 24 D. 547.—*SCOT*.

**c. Agreement that tenant should have right to "corns"—Green crops not included—Landlord's right to fallow not excluded.]—**A lease entered into at a time when green crops were not grown in the district gave the tenant a right to the "corns" on the farm in the year of removal:—*Held*: this did not include green crop, & the tenant was not entitled, by growing green crop in his last year on ground which the lease contemplated should be fallow, to plead that the landlord could get no fallow, the whole land being under "corns."—*MILN v. DALHOUSIE (EARL)* (1869), 6 Sc. L. R. 689.—*SCOT*.

**d. Hay cut more than year after sowing—Whether landlord or outgoing tenant entitled.]—**Hay produced from grass seed, sown with white crop in spring, 1814, & cut in summer, 1815:—*Held*: to belong to the landlord, & not to the representatives of the deceased life-rent tenant, who died in June, 1815.—*TWEEDDALE v. SOMNER* (1816), 19 F. C. 213.—*SCOT*.

**e. Land prepared for hay by fallow or green crop—Right to reap.]—**Arable lands were leased to a tenant for the full & complete space of nineteen years, & crops from & after the tenant's entry thereto, "which is hereby declared to have been at Whit-Sunday last, 1808, as to the houses, yards, grass, & fallow ground, & to the other arable land now under crop at the separation of same from the ground":—*Held*: (1) land being uniformly prepared for hay by a fallow or a green crop during the preceding year, both of which were laborious & expensive operations, there was every reason for allowing the tenant to reap both as way-going crops; (2) the landlord entitled to be indemnified of the loss he sustained by not receiving possession of 20 acres of one-year-old grass at the Whit-Sunday of the tenant's removal, there not being two-year-old grass upon the farm.—*LYALL v. COOPER* (1832), 11 Sh. & D. 96.—*SCOT*.

**f. Incoming tenant's right to way-going crop—Life-rent tenant not entitled**

**to crop of year of entry.]—**Under a lease for a life-rent three, nineteen, or fifty-seven years thereafter with entry & removal at Whit-Sunday:—*Held*: as under the lease the life-rent tenant was not entitled to the crop of the year of entry, his successor in the lease was entitled to a way-going crop in the year of removal.—*HARVEY v. KING'S COLLEGE OF ABERDEEN* (1845), 8 D. 151; 4 Sc. R. R. 420.—*SCOT*.

**g. New lease granted during currency of old lease—Condition of farm in first year of new lease.]—**Where, during the currency of a lease, a new lease is entered into, the condition of the farm in the first year of the new lease affords no presumption as to the way-going crop to which the tenant is entitled at the end of the renewed lease.—*HUNTER v. MILLER* (1862), 24 D. 1011.—*SCOT*.

**h. Method of cultivation left to tenant's discretion—Right to alter method in last year.]—**A tenant in an agricultural lease, which permitted, but did not require, a six shift rotation, & which contained an obligation to observe the rules of good husbandry practised in the country, followed a four or a five shift rotation till the last year of the lease:—*Held*: he was entitled in the last year of the lease to adopt the six shift rotation, to the effect of taking a way-going crop, which, as regarded a portion of the lands, the mode of cultivation he had previously pursued would not have given him, this being within the fair construction of the lease, & it being made out, on the report of a man of skill, that the proposed way-going crop was not contrary to the rules of good husbandry as established in the district.—*HUNTER v. MILLER* (1863), 1 M. 29; 4 Macq. 560.—*SCOT*.

**k. Threshing way-going crop.]—**A party who had been ordained to remove from a farm within three weeks:—*Held*: allowed a reasonable period & accommodation to thresh out his grain & dispose of his cattle.—*FINLAYSON v. PEDIE* (1829), 7 Sh. (Ct. of Sess.) 617.—*SCOT*.

**l. — Right to use threshing-mill & barn.]—Held**: (1) the tenant of an agricultural farm under a lease expiring at Whit-Sunday as to houses & grass, & at the separation of the way-going crop as to the arable land, was not at common law entitled to retain a threshing-mill in the farm-stead after Whit-Sunday in order to thresh the way-going crop, nor to the use of a barn & stackyard for the purpose of storing same; (2) tenant entitled to contend that local custom had modified the strictness of the general rule of law, but proof of the custom failed.—*GATHERER v. CUMMING'S EXECUTORS* (1870), 8 M. 379; 8 Sc. R. R. 498.—*SCOT*.

**m. Outgoing tenant to sell crop to incoming tenant at valuation—Crop left on ground.]—**A lease of a farm bound the tenant "never to sell or remove off the lands any straw produced thereon, but to consume the whole thereon for their melioration." He was further bound to sell, if required, to the proprietor or the incoming tenant the last white crop, to be reaped under the lease, etc., at a valuation, but, if this were not insisted on, "then the tenant & his forefathers shall be entitled to dispose of same, inclusive of straw, as he pleases":—*Held*: he was entitled to the value of the straw at a valuation from an incoming tenant, who had elected to take the crop left on the ground.—*NIVISON v. HOWAT* (1883), 11 R. (Ct. of Sess.) 182.—*SCOT*.

custom, giving him a right to a proportion of the wheat sown by him after turnips, & the tenant was entitled to the benefit of the custom, leaving the landlord to his remedy for breach of covenant; (2) the incoming tenant had no right to seize a waggon of the offgoing tenant, who entered on the land so sown after turnips, after expiration of his tenancy, for the purpose of taking away a moiety of a crop of wheat.—*HOLDING v. PIGOTT* (1831), 7 Bing. 465; 5 Moo. & P. 427; 9 L. J. O. S. C. P. 125; 131 E. R. 180.

*Annotation* :—*Folld. Muncey v. Dennis* (1856), 1 H. & N. 216.

**202. — Excluded by termination at unusual date.]**—A tenant, whose tenancy is determined after Lady Day by an agreement which is silent as to way-going crops, is not entitled to such crops under a custom which gives to the tenant such crops upon a regular expiration of a Lady Day tenancy.—*THORPE v. EYRE* (1834), 1 Ad. & El. 926; 3 Nev. & M. K. B. 214; 110 E. R. 1462.

**203. — Of specified portion—Landlord's right to crop on excess.]**—Pltf. in trover for wheat was the offgoing, & deft. the incoming, tenant of a farm, of which pltf.'s tenancy had expired at the Lady Day before the taking of the wheat. By the custom of the country an offgoing tenant was entitled to crop one-third of the arable land of the farm with wheat, & to take, cut, & carry away that wheat after the tenancy had expired, this being called the odd mark. Pltf. had sowed 3 acres more than his proper odd mark by permission of the landlord, & after the wheat had been cut by pltf. deft. carried away the wheat in question :—*Held* : (1) a parol permission by the landlord to the outgoing tenant to sow more than his strict odd mark was good as against the landlord himself, & as against the incoming tenant; (2) pltf. was entitled to recover.—*GRIFFITHS v. TOMBS* (1833), 7 C. & P. 810.

**204. — — — — — Tenant's lien for seed.]**—When the tenancy of a farm expires, the tenant must give up possession of the whole of it to the landlord, crops & everything else, unless there be a custom of the country for the tenant to hold over any part, or to take any of the crops; & the proof of the custom lies on the tenant.

If the custom of the country be for an outgoing tenant, for what is called his odd mark, to crop one-third of the arable in wheat, & to reap that wheat after the tenancy has expired, & the tenant so crop more than the proper one-third, the landlord will be entitled to have all which was last sown, & which is above one-third, unless it be shown that the tenant has a lien upon it for the sowing & the seed.—*CALDECOTT v. SMYTHIES* (1837), 7 C. & P. 808.

**205. — Fences repaired by tenant—Right to possession till land cleared.]**—Where it appeared that, by the custom of the country as between outgoing & incoming farm tenants, the former was entitled to a way-going share of the crop of wheat sown by him in the last year of his tenancy; that he cut the whole of such crop, & kept the fences of the field in repair until the whole crop was cut & carried away :—*Held* : (1) in such circumstances the outgoing tenant had the possession in law of the field until the crop was carried away; (2) his vendee of his share of the crop had a good defence, under the plea of not possessed, to an action by the new tenant for breaking & entering the close in which the crop grew, for the purpose of carrying away his share.

The only question seems to be, whether the possession of the outgoing tenant, which it is admitted continues until the crop is reaped, does not continue also until it is carried away. If his possession continues until the crop is cut, it seems to follow that it must continue also until he has done all which he has a right to do (*POLLOCK, C.B.*).

—*GRIFFITHS v. PULESTON* (1844), 13 M. & W. 358; 14 L. J. Ex. 33; 153 E. R. 148.

*Annotation* :—*Reid. Re Powers, Manisty v. Archdale* (1890), 63 L. T. 626.

**206. Custom that outgoing tenant should store crop in barn—Good custom.]**—Lands were demised for one year, & so from year to year. In such a case a custom that a tenant may leave his way-going crop in the barn, etc., of the farm for a certain time after the lease is expired & he has quitted the premises is good; & as by tacit consent the contract between the parties continued beyond the time for which they originally contracted, all the rights belonging to the original contract must also be continued, & the landlord may distrain the corn so left for rent arrear after six months have expired from determination of the original term, notwithstanding Landlord & Tenant Act, 1709 (c. 18), ss. 6, 7.—*BEAVAN v. DELAHAY* (1788), 1 Hy. Bl. 5; 126 E. R. 3.

*Annotations* :—*Distd. Davis v. Connop* (1814), 1 Price, 53. *Apld. St. Germain v. Willan* (1823), 2 B. & C. 216. *Folld. Knight v. Benett* (1826), 3 Bing. 364. *Distd. Taylerson v. Peters* (1837), 7 Ad. & El. 110. *Apld. Griffiths v. Puleston* (1844), 13 M. & W. 358; *Re Powers, Manisty v. Archdale* (1890), 63 L. T. 626. *Reid. Boraston v. Green* (1812), 16 East, 71.

**207. — Injunction from carrying away crop—Distress by landlord.]**—By agreement, as well as by custom of the country, a tenant was to have the use of the barns & gate-rooms to thrash out his corn & fodder his cattle till the May-day after the expiration of his term; his term expired at Michaelmas, 1824; he was then restrained by injunction from carrying off the premises corn in the straw; in Jan., 1825, his landlord distrained a rick of corn on the premises :—*Held* : the distress was valid.—*KNIGHT v. BENETT* (1826), 3 Bing. 364; 11 Moore, C. P. 227; 4 L. J. O. S. C. P. 95; 130 E. R. 553.

*Annotation* :—*Consd. Re Powers, Manisty v. Archdale* (1890), 63 L. T. 626.

**208. Remedy of incoming tenant—Removal of crop by outgoing tenant—Holding over.]**—Trover does not lie by an incoming tenant to recover the value of the way-going crops taken by the offgoing tenant, who continued to hold the land as tenant from year to year after expiration of an old lease, which reserved to him the right after the end of the term at Lady Day "to fence in & preserve all such hard corn as should be sown on the premises the winter seedness preceding, so as the same exceeded not 29 acres, & was summer fallowed & well manured, etc., & at harvest to reap & carry away same," for neither is trover the proper action to try a question as to the right to the land, nor does the proper remedy for mismanagement of the land when the tenant did not summer fallow, etc., during the former term appertain to the incoming tenant, but to the landlord. The incoming tenant might maintain an action against the offgoing tenant for breach of the custom of husbandry in the place, in not leaving one-third of the way-going crop of wheat sown upon a clover brush; yet the custom of the country could have no place where the offgoing tenant held under a lease expressly making a different provision in respect of the way-going crop, or where he continued to hold over after expiration of such a lease without coming to any fresh agreement with his landlord, by which he must be taken to hold under the same terms.—*BORASTON v. GREEN* (1812), 16 East, 71; 104 E. R. 1016.

*Annotations* :—*Distd. Davis v. Connop* (1814), 1 Price, 53. *Apld. Knight v. Benett* (1826), 3 Bing. 364. *Reid. Evans v. Ogilvie* (1828), 2 Y. & J. 79; *Holding v. Pigott* (1831), 7 Bing. 465.

**209. — — — — — Admittedly without right.]**—Trover lies for corn cut by an outgoing tenant after expiration of his term, though sown by him before



**Sect. 3.—Effect at outgoing: Sub-sects. 3 & 4, A. B. & C.; sub-sect. 5.]**

that time, it being admitted that he had no right to a way-going crop.—*DAVIS v. CONNOP* (1814), 1 Price, 53; 145 E. R. 1328.

**210. Remedy of outgoing tenant—Damages.]—**In an action of trespass *quare clausum fregit*, it was proved that deft. had let his land to pltf. under terms reduced into writing. One stipulation was that pltf. should have a right to take two-thirds of the corn sown & left by him growing on the land at his leaving it at Lady Day, the custom of the country being that he should have the whole. It was also proved that deft. had refused to let pltf. cut the corn, but had turned his labourers off the land, & cut & carried all into his own barns. The value of the corn was proved to be about £285. Other trifling trespasses were charged in the declaration, to the whole of which deft. had pleaded the general issue. The jury found a verdict for pltf., with £315 damages:—*Held*: the excess was not so large as not to be covered by the circumstances of the trespass as proved, & it was certainly no ground for disturbing the verdict, the jury being entitled to take into consideration, independently of the trifling damages not attempted to be justified, & for which the judge had directed nominal damages to be found, the nature of the case, & were not bound to a minute calculation of value. *Semble*: it would have been otherwise if the damages had been very excessive. *Qu.*: as to the effect of the agreement, which was for one year only, as evidence of the terms on which pltf. continued to hold the land after expiration of the year, & as to the necessary directions to be given to the jury on such evidence.—*COX v. DUGDALE* (1823), 12 Price, 708; 147 E. R. 853.

**211. Arbitration—Arbitrators making award without notice to parties & without evidence—Custom.]—**A usage for arbitrations appointed to determine, as between outgoing & incoming tenants of a farm, the value of the way-going crop & the deductions for want of repairs of the farm buildings & fences, to make their award, on inspection of the crops & premises, without notice to the parties & without evidence, may be good; but no usage can justify the arbitrators in hearing one party & his witnesses only, in the absence of & without notice to the other party.—*OSWALD v. GREY (EARL)* (1855), 24 L. J. Q. B. 69.

**SUB-SECT. 4.—MANURE AND DUNG.**

Questions arising during tenancy. See Nos. 154—161, *ante*.

**210 i. Remedy of outgoing tenant—Trover.]—**By a lease from D. to pltf. it was provided that if D. sold the farm pltf. should give up possession upon receiving six months' notice before Apr. 1, & that he should have the privilege of harvesting & threshing the crops of the summer fallow, or the work done on the fallow should be paid for at a reasonable valuation. D. afterwards sold to deft., & pltf. received notice after he had prepared the summer fallow, but before he had sown it. He afterwards sowed it with fall wheat, & gave up possession on Apr. 1. Neither D. nor deft. elected to pay for the crop, & deft. converted it to his own use:—*Held*: pltf. had never parted with the property in the crop, & entitled to recover in trover against deft.—*HARRISON v. PINKNEY* (1881), 6 A. R. 225.—*CAN.*

**211 i. Arbitration—By two arbitrators & oversman in case of difference—One award.]—**A lease of a farm provided that the crop, etc., if taken by the incoming tenant, should be valued by two

men mutually chosen & by an oversman to be named by them, should they differ in opinion. The arbitrators, two farmers, differed on some points & appointed as oversman a third farmer, who issued his award, containing the agreed findings of the arbitrators & his own on the points on which they disagreed:—*Held*: no improper devolution by the oversman, as all that was desired, was the opinion of skilled persons, & that had been obtained.—*NIVISON v. HOWAT* (1883), 11 R. (Ct. of Sess.) 182.—*SCOT.*

**PART III. SECT. 3, SUB-SECT. 4.—A.**

**212 i. Dung left & accepted by landlord—Liability under custom.]—**Custom of a small estate not relevant to affect the rule of law that a landlord must pay for the dung left by an outgoing tenant when that matter is not regulated by the lease.—*ALLEN v. THOMSON* (1829), 7 Sh. (Ct. of Sess.) 784; 3 Sc. R. R. 311.—*SCOT.*

**n. Dung made since last wheat seed-**

**A. Where no Covenant.**

**212. Dung left & accepted by landlord—Liability under custom.]—**Where an outgoing tenant left manure for the benefit of the landlord, which was accepted & taken by him:—*Held*: the law, without an allegation or proof of a custom of the country, would imply an *assumpsit* on the part of the landlord to pay the tenant the value, & the tenant was not deprived of that right by reason of his having held over after expiration of the term.—*MARTIN v. COULMAN* (1834), 4 L. J. K. B. 37.

**213. Allowance for foldage by custom—Excluded by lease specifically providing for other outgoings.]—**By the custom of the country, the outgoing tenant was entitled to an allowance for foldage from the incoming tenant. Where a lease specified certain payments to be made by the incoming to the outgoing tenant, at the time of quitting the premises, among which there was not included any payment for foldage:—*Held*: (1) the terms of the lease excluded the custom; (2) the outgoing tenant was not entitled to any allowance in respect of foldage.—*WEBB v. PLUMMER* (1819), 2 B. & Ald. 746; 106 E. R. 537.

*Annotations*:—*Distd. Holding v. Pigott* (1831), 7 Bing. 465; *Hutton v. Warren* (1836), 2 Gale, 71; *Brown v. Byrne* (1854), 3 E. & B. 703; *Re Constable & Cranswick* (1899), 80 L. T. 161. *Refd. Spartali v. Benecke* (1850), 10 C. B. 212.

**214. Meaning of "foldage."]**—By an allowance for "foldage" I understand an allowance for the benefit to the land by the dung of sheep folded thereon (*BRUCE, J.*).—*Re CONSTABLE & CRANSWICK* (1899), 80 L. T. 164.

**215. Custom pleaded by incoming tenant—Effect of written agreement.]—**To an action for trespass & *de bonis asportatis* for carrying away manure, etc., deft. pleaded a custom, applicable to all farms within the parish not being exempted therefrom by special agreement or otherwise, for the incoming tenant to enter the premises & take the manure, etc. Pltf. traversed the custom. At the trial deft. gave proof of the custom, but a steward's book was produced, not signed by deft., stating the terms on which he held. The judge received the book in evidence, & directed the jury that the custom could not apply as the farm was held under an agreement, & that they should find a verdict for pltf.:—*Held*: a rule to enter a verdict for deft. should be granted, in effect because deft. by traversing the custom & by the form of the pleadings was precluded from setting up evidence of an agreement.—*EVANS v. OGILVIE* (1828), 2 Y. & J. 79; 148 E. R. 840.

**time—Tenant's right to under custom.]—**An out-going tenant, whose fish was from the houses & grass at Whit-Sunday, & from the arable land at the separation of the crop from the ground, & who was bound to consume on the farm the whole fodder except hay & the fodder of the last crop, & who undertook sufficiently to cultivate, labour & manure the land:—*Held*: entitled to the dung made since the previous wheat seedtime, it having been the tenant's unchallenged practice, & agreeable to the received rules of good husbandry in the district, to preserve the manure for the wheat crop.—*ALLEN v. BERRY* (1829), 4 Bli. N. S. 520; 3 Wils. & S. 417; 5 E. R. 185, H. L.—*SCOT.*

**o. Dung left by outgoing tenant—Trover by landlord.]—**Manure lying in heaps in a barn-yard is a chattel which may be taken away by the outgoing tenant, even after his tenancy has expired, & trover will lie for it, if held or taken away by the landlord.—*FOSHAY v. BARNES* (1869), 1 Han. 452.—*CAN.*

*B. Where Covenant to leave Dung but none as to Payment therefor.*

**216. Custom as to payment excluded.]**—The custom of the country is excluded where there is an express stipulation on the subject-matter to which it would otherwise apply, though such stipulation provides only for a part of the custom.

A tenant held under the terms of an expired lease, by which it was stipulated that the tenant on quitting the farm should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant. The lease contained no stipulation as to the tenant being entitled to payment for such manure. By the custom of the country, the tenant would have been bound not to sell or take away the manure in the fold, but to leave it to be expended on the land by the landlord or his succeeding tenant, & would have been entitled to be paid for same:—*Held*: (1) as an express stipulation had been made on the subject, the custom was excluded; (2) the tenant was not entitled to be paid for the manure.—*ROBERTS v. BARKER* (1833), 1 Cr. & M. 808; 3 Tyr. 945; 2 L. J. Ex. 268; 149 E. R. 625.

*Annotations*:—*Distd. & Expld.* Field v. Lelean (1861), 6 H. & N. 617, Ex. Ch. *Distd. Re* Constable & Cranswick (1899), 80 L. T. 164.

*C. Where Covenant to leave Dung and be paid therefor.*

**217. Outgoing tenant's rights & remedies—Removal by incoming tenant—Trespass.]**—Where

the outgoing tenant had covenanted with his landlord to leave the manure made by him on the farm & sell it to the incoming tenant at a valuation, to be made by certain persons:—*Held*: the effect of such covenant was to give the outgoing tenant a right of on-stand for his manure upon the farm, & possession of & property in it remained in him in the meantime, & if the incoming tenant removed & used it before such valuation, he was answerable to the outgoing tenant in trespass.—*BEATY v. GIBBONS* (1812), 16 East, 116; 104 E. R. 1032.

**218. — Recovery of value—Goods sold & delivered.]**—An outgoing tenant, who has sold all manure on the farm to a proposed tenant, cannot recover the value of manure which he is bound to leave on the farm on a declaration for goods sold & delivered.—*TYLER v. HOOK* (1855), 25 L. T. O. S. 69; 19 J. P. 326.

## SUB-SECT. 5.—LIVE STOCK.

*Leases of Animals. See ANIMALS.*

*Questions arising during tenancy. See p. 27, d, p. 28, c, f, ante.*

**219. Land & sheep leased together—Covenant to render back sheep at end of term.]**—W. was possessed of certain sheep, & by his will devised them to his daughter, & made his wife extrix. He dying, his wife married P., who leased the sheep with a

## PART III. SECT. 3, SUB-SECT. 4.—B.

**216 i. Custom as to payment excluded.]**—In a lease which expired at Whit-Sunday, as to the houses & grass, & at the separation of the crop from the ground as to the arable lands, & in which the tenant was obliged, "during the currency of this lease, to consume upon the ground of the lands the whole straw & fodder of every kind, except hay produced by the lands, & to lay the whole dung thereby produced on the grounds":—*Held*: the landlord entitled to claim, without paying for it, the whole dung produced from the penult crop, which had not been laid upon the farm.—*WEMYSS (EARL) v. WRIGHTS* (1801), 12 F. C. 538.—SCOT.

**216 ii. —.]**—A tenant bound himself by his lease "to eat the fodder on the ground during the lease & leave the fullzie thereon at removal," & at his entry received without consideration the dung left under the previous lease:—*Held*: bound to leave the whole dung & the fodder unconsumed without any consideration from the landlord.—*STIRLING v. YUILLE* (1827), 6 Sh. (Ct. of Sess.) 251; 2 Sc. R. R. 419.—SCOT.

**216 iii. —.]**—An outgoing tenant was bound by his lease "to use & consume the whole of the straw or fodder that shall be raised or grown on his farm in & upon same, & the whole dung, compost, or other manure made thereon, excepting hay, & the straw or fodder of the outgoing crop," which he might dispose of at pleasure:—*Held*: he was not entitled to payment for manure left on the farm unconsumed.—*GREIG & POSH v. MAC-KAY* (1869), 7 Macph. (Ct. of Sess.) 1109; 41 Sc. Jur. 619.—SCOT.

**p. Lessor's rights & remedies.]**—A lessee covenanted to use upon the demised premises all the straw & dung which should be made thereupon:—*Held*: the lessor was entitled to recover for manure removed from the premises which was there at the expiry of the term, but not for manure made thereafter, while the lessee was overholding.—*ELLIOTT v. ELLIOTT* (1890), 20 O. R. 134.—CAN.

## PART III. SECT. 3, SUB-SECT. 4.—C.

**217 i. Outgoing tenant's rights & remedies—Meaning of "winter dung."]**—A tenant was bound to "consume the

whole fodder growing upon the lands, etc., & to leave all the dung unconsumed in the last year of his possession, carefully gathered together, upon his getting payment of the winter dung, as its value shall be ascertained by two neutral men":—*Held*: (1) "winter dung" included all the dung made on the farm posterior to the crop preceding the tenant's removal; (2) the landlord was liable for the value of this & for what he had carried off pending the tenant's action.—*LYLE v. GRAHAM* (1824), 3 Sh. (Ct. of Sess.) 125.—SCOT.

**217 ii. Meaning of "price."]**—A tenant getting neither dung nor straw at his entry, & being taken bound to leave a year's dung as steelbow at his removal, on being allowed the "price" of the dung so left:—*Held*: entitled to its full value.—*HERRIOT v. HALKET* (1826), 4 Sh. (Ct. of Sess.) 452; 1 Sc. R. R. 793.—SCOT.

**217 iii. — Amount fixed by arbitration—How far binding.]**—By a document entitled "Proposed settlement" between a landlord and an outgoing tenant, the value of dung on the farm was stated to be 5s. per cubic yard, but this note was added: "The fallow, dung, & labour to be left open till the incoming tenant is consulted." The incoming tenant refusing to take the dung at this price, the matter was referred to arbn., & the landlord was also a party to the reference. The referee fixed the price at 4s. per cubic yard:—*Held*: the outgoing tenant must take the price fixed by the referee.—*TWEEDDALE (MARQUIS) v. HUME* (1848), 10 D. 1053.—SCOT.

**217 iv. — Lease cancelled on landlord selling—Tenant remaining in possession under buyer.]**—Pltf. leased from deft. a farm for a term of years, with the stipulation that the landlord might cancel the lease on giving six months' notice, but in such case he was to take at a valuation all the manure on the land in excess of the usual quantity left by outgoing tenants. The landlord, having sold the land, cancelled the lease, but the tenant continued in possession under the new proprietor at an increased rent:—*Held*: the tenant entitled to recover for the excess of manure on the land at the time of the cancelling of the lease.—*GRANT v. LOCHEAD* (1864), 2 L. C. L. J. 107.—CAN.

**217 v. — Right to retain straw for cattle.]**—A tenant, under lease with entry at Martinmas, was bound thereby to leave to the proprietor or incoming tenant at its expiry at Martinmas the dung that might be made after Jun. 15 immediately before the expiry "at a price to be paid by arbn." the lease requiring that all dung made previously should be applied to the lands. The lease also stipulated that no straw or dung of any kind that might be grown or made on the land should be sold or removed therefrom, but should be consumed for manure & applied to the land. In the district wherein the farm was the green crop was the only crop to which manure was applied. According to the custom which prevailed when the lease was entered into, the straw crop, with the exception of a small portion reserved for minor uses of the farm, was consumed in winter by cattle kept in courts (few cattle being kept in summer & those on pasture), & the manure so made was applied to the next year's crop. The tenant afterwards fed cattle in courts in summer, & to provide litter reserved half of the straw crop of the previous year, so that when he left the farm at Martinmas there was upon it a large amount of manure made after the immediately preceding June 15:—*Held*: the tenant had not accumulated the straw in violation of the lease & was entitled to receive payment for the manure made from it.—*M'DUFF v. BALFOUR* (1892), 19 R. (Ct. of Sess.) 440.—SCOT.

**q. Landlord's right to set up parol agreement.]**—A verbal bargain made nineteen years previously that, at removal, the tenant should leave, on payment at a certain rate, all the dung which might then remain & had not been consumed on the land, may be proved by witnesses.—*WILSON v. SWAN* (1804), Hume, 817.—SCOT.

## PART III. SECT. 3, SUB-SECT. 5.

**r. Agreement to "have full stock on the farm."]**—A tenant in an agricultural lease was bound "always to have a full stock on the farm." The tenant died, & his widow continued to reside on the farm along with her son, the substitute in the lease. The widow having died, the landlord applied for interdict against her exors., & also against her son "dis-



3.—*Effect at outgoing: Sub-sects. 5, 6 & 7. Parts IV. & V. Sects. 1, 2 & 3: Sub-sect. 1, A*

farm for eleven years, the lessee covenanting to render to P. at the end of the term a thousand sheep between two years shorn & four years shorn. Afterwards P. gave A., who married the daughter, the thousand cattle to have them after the term, & the term expired. P. (notwithstanding his gift) sold the cattle to X., who took them away with him. A. then seized them & sold them:—*Held*: the sale to X. was good, & the grant by P. to A. of the cattle during the term was utterly void, for P. during or after the term had not either a general or special property in the cattle, but only an action for breach of covenant against the lessee if he did not deliver a thousand sheep, as the lessee was not bound to deliver the same sheep but only such a number.—*WOOD & FOSTER'S CASE* (1586), 1 Leon. 42; 74 E. R. 39; *sub nom.* *WOOD v. ASH & FOSTER*, Owen, 139, Godb. 112.

*Annotations*:—*Refd.* Robinson v. Macdonnell (1816), 5 M. & S. 228; Westropp v. Elligott (1884), 9 App. Cas. 815, H. L.

220. ———.]—P. had granted a lease of land with a stock of sheep for twenty years rendering rent, & the lessee covenanted to render back at expiration of the lease one thousand sheep of the age of three or four years, & the lessor granted all his chattels & this stock of sheep to V. The sheep of the old stock were all spent, & others supplied, part by increase, part by purchase:—*Held*: (1) the increase of the stock of sheep went to the lessee, but if the lease were of the stock with lambs, calves & pigs, then the increase would belong to the lessor; (2) if the lease was of dead things, & anything was added to them for reparations or otherwise, the lessor should have this addition at the end of the term (*per CUR.*)—*WOOD & FOSTER'S CASE* (1586), 1 Leon. 42; 74 E. R. 39; *sub nom.* *WOOD v. ASH & FOSTER*, Owen, 139; Godb. 112.

*Annotations*:—*Refd.* Robinson v. Macdonnell (1816), 5 M. & S. 228; Westropp v. Elligott (1884), 9 App. Cas. 815, H. L.

221. ——— **Covenant to leave same number at end of term.**—A lease contained a covenant by the tenant to leave on the premises at the end of his tenancy the same quantity of live & dead stock as was there at the commencement. Specific performance of this covenant was refused.—*ELY (DEAN & CHAPTER) v. STEWARD* (1740), Barn. Ch. 170; 27 E. R. 600.

222. **Agreement to keep farm properly stocked.**]—An injunction will not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement, requiring him to keep on the

plenishing the farm . . . & from carrying into effect an intended sale of the whole stocking & farm implements":—*Held*: so broad an interdiction could not be granted, there being no proof of an intention to displenish the farm, & the son having consigned a year's rent.—*EDMOND v. ABEL* (1862), 24 D. 559.—*SCOT.*

s. *No express provision in lease to take over stock—Whether custom can be read into lease.*—A tenant, who had possessed a sheep farm under a formal lease embodying certain estate regulations, applied for a renewal of his lease by letter:—*Held*: the fact that the tenant had in the negotiations subsequent to the exchange of the missives repudiated any intention to be bound by the missives, did not prevent him from maintaining that the estate regulations as regarded taking over of sheep stock at the termination of the lease formed, on a true construction of the missives, part of the contract between him & the landlord.

If the tenant were able to prove a

universal & clear custom in regard to the stock to be taken over by the landlord at the termination of the lease, such custom might be read into missives containing no express provision on the subject as part of the lease (*LORD SHAW*).—*STEWART v. MACLAINE* (1899), 37 Sc. L. R. 623.—*SCOT.*

t. *Agreement to leave sheep stock at valuation—Basis of valuation.*—A lease of a farm provided that the tenant should, at the end of the lease, leave the sheep stock on the farm to the proprietor or incoming tenant at a valuation to be fixed by arbn.:—*Held*: (1) it was the duty of the arbiter to value the sheep upon the basis of their value to an occupant of the farm in view of the arbiter's estimate of the return to be realised by such occupant from them, in accordance with the course of prudent management, in lambs, wool & price when ultimately sold, & not upon the basis either (1) of market value only, or (2) of the cost & loss which would be involved in the re-stocking of the farm with a like stock if the then present

farm a proper & sufficient stock of sheep, horses, & cattle, as this would be in effect a judgment for specific performance.—*PHIPPS v. JACKSON* (1887), 56 L. J. Ch. 550; 35 W. R. 378; 3 T. L. R. 387.

223. **Landlord's covenant to take over sheep at valuation.**—A tenant, in a letter offering to take a lease of a farm for ten years from 1897, stipulated that at his "way-going at expiration of the lease" the landlord should take over the sheep at a valuation. The lease contained a clause that it should be forfeited for non-payment of rent, & the tenant having failed to pay five half-years' rent, the landlord put an end to the lease in Feb., 1902, & refused to take over the sheep:—*Held*: "way-going" must be taken to mean legal expiration of the lease, & the landlord on the tenant's default was not bound to take over the sheep.—*BREADALBANE (MARQUESS) v. STEWART*, [1904] A. C. 217, H. L.

224. **Covenant to fold sheep.**—A lease provided that the tenant should, during the term, fold his flock of sheep which he should keep on the demised premises, under a penalty if he omitted so to do:—*Held*: this amounted to a covenant to keep a flock of sheep upon the premises.—*WEBB v. PLUMMER* (1819), 2 B. & Ald. 746; 106 E. R. 537.

*Annotations*:—*Distd.* Holding v. Pigott (1831), 7 Bing. 465. *Consd.* Hutton v. Warren (1836), 1 M. & W. 466; Spartali v. Benecke (1850), 10 C. B. 212; Brown v. Byrne (1854), 3 E. & B. 703; *Itc* Constable & Cranswick (1899), 80 L. T. 164. *Mentd.* Wooler v. Knott (1876), 1 Ex. D. 124.

#### SUB-SECT. 6.—DRAINAGE.

Questions arising during tenancy. See Nos. 165, 166, *ante*.

225. **Custom for outgoing tenant to recover cost from landlord—Good custom.**—It is not an unreasonable custom that a tenant, who is bound to use & cultivate his farm according to the rules of good husbandry & the custom of the country, should be entitled on quitting the farm to charge his landlord with a certain portion of the expense of the necessary drainage of the farm done without his landlord's consent or knowledge.—*MOUSLEY v. LUDLAM* (1851), 21 L. J. Q. B. 64; *sub nom.* *LUDLAM v. MOUSLEY*, Saund. & M. 38; 18 L. T. O. S. 121; 15 Jur. 1107.

#### SUB-SECT. 7.—IMPROVEMENTS.

See cases *infra*.

sheep stock were removed; (2) the arbiter entitled to take into account both current market prices & the special qualities of the sheep, both in themselves & in their relation to the ground, which in his opinion would tend either to enhance or to diminish the return to be realised from them by an occupant of the farm.—*WILLIAMSON v. STEWART*, [1912] S. C. 235; 49 Sc. L. R. 170.—*SCOT.*

#### PART III. SECT. 3, SUB-SECT. 7.

u. *Agreement to pay for improvements—What are—New house replacing old one.*—A new house, if not inadequate to the size of the farm, though larger than the old one, which had become ruinous:—*Held*: a melioration, & to be paid for at the end of the lease by the landlord, who was bound by the lease to pay for meliorations.—*DUCAT v. ABOYNE (COUNTESS)* (1803), 13 F. C. 220.—*SCOT.*

v. ——— *Wooden chalet.*—M. under a lease for nineteen years became tenant of the arable & grazing farm o

## Part IV.—Distress and Execution.

See DISTRESS; EXECUTION.

## Part V.—Compensation.

## SECT. 1.—BY AGREEMENT.

**Outgoings in general.**]—See Nos. 167—171, 173—176.

**Tillages.**]—See Nos. 177, 185—191.

**Way-going crops.**]—See Nos. 192—198, 208—211.

**Live stock.**]—See Nos. 219—224.

**Manure & dung.**]—See Nos. 217, 218.

**Manure & dung.**]—See Nos. 212—216.

**Drainage.**]—See No. 225.

## SECT. 3.—BY STATUTE.

As to the Act now in force, see note, p. 5, *ante*.

## SUB-SECT. 1.—RIGHT TO COMPENSATION FOR IMPROVEMENTS.

## A. Who may claim Compensation.

**226. Trustee in bankruptcy—Disclaiming.**]—A trustee in bkpcy., who has disclaimed, cannot claim compensation for improvements under A. H. Act, 1883.—*SCHOFIELD v. HINCKS* (1888), 58 L. J. Q. B. 147; 60 L. T. 573; 37 W. R. 157; 5 T. L. R. 101.

## SECT. 2.—BY CUSTOM OF THE COUNTRY.

**Outgoings in general.**]—See No. 172.

**Tillages.**]—See Nos. 178—185.

**Way-going crops.**]—See Nos. 199—207.

C., any dwelling houses or offices built by him to be taken up on expiry of the term, at their then value, not exceeding £200. M. erected a stone cottage, certain offices & a wooden chalet. The landlord objected to pay for the latter:—*Held*: the wooden chalet was to be included in the valuation.—*MURRAY v. CAMPBELL* (1879), 6 R. (Ct. of Sess.) 1163.—**SCOT.**

w. — *Excludes local custom.*]—Provisions in articles of lease as to buildings:—*Held*: to supersede an alleged local custom as to remuneration by the tenant for meliorations thereon.—*GORDON v. THOMSON* (1831), 9 Sh. (Ct. of Sess.) 735; 4 Sc. R. R. 303.—**SCOT.**

x. — *Liability of landlord's executors under.*]—A. leased a farm to pltf., & it was agreed that pltf. should at the term of entry take off the houses on the farm from the outgoing tenant C., who held under a lease granted by B., the father of A., & pay the appreciated value thereof above the dead or lying inventory, & that A. should, at the term of the tenant's removal, pay him a sum not exceeding one year's rent as the value of the meliorations, including the value of the houses so paid for. A valuation was made as between pltf. & C. with the full knowledge of A.'s factor, who suggested & obtained various reductions in the amount payable. A. died during the currency of pltf.'s term:—*Held*: his exors. were liable to repay to pltf. one year's rent, the value of the meliorations exceeding that sum.—*RUNCIE v. YOUNG* (1857), 19 D. 965.—**SCOT.**

—In the lease of a farm, the incoming tenant bound himself to pay to the outgoing tenant any sums he might be entitled to for meliorations, & the landlord bound himself, his heirs & successors, in respect thereof, to take the buildings on the farm at the expiry of the lease, on a valuation not exceeding a certain sum. The landlord having died during the currency of the lease:—*Held*: the landlord's obligation transmitted against his general representatives, & the exors. were not entitled to a declaratory judgment, as against the tenant, that the personal estate was not liable.—*WALKER v. MASSON* (1857), 19 D. 1099.—**SCOT.**

z. — *Improvements destroyed by fire during tenancy.*]—A lease of a mill stipulated that, within two years, the tenant should spend not less than £800 in repairing, renewing & adding to the

machinery & thereafter maintain it in good repair, & on his leaving the whole machinery so renewed in good working order, the proprietor should be bound to pay him £400 at the end of the lease. The tenant, at the commencement of his lease, spent upwards of £800 on the machinery. During the currency of the lease the mill & machinery were destroyed by fire, the machinery being at that time in first rate working order, & worth more than £800:—*Held*: the tenant having fulfilled his obligations, his inability, in consequence of a *damnum fatale*, to hand over the machinery to the landlord, did not relieve the landlord from his obligation to pay the stipulated £400.—*SCOTT (DUKE OF HAMILTON TRUSTEES) v. FLEMING* (1870), 9 M. 329.—**SCOT.**

a. — *Cannot be set off against landlord's claim for repairs.*]—An agricultural tenant died in the fifth year of a nineteen years' lease. The landlord obtained a decree against the exors. (whom he refused to accept as tenants) for the expenses of repairing fences & buildings, which the tenant was bound to keep up. The exors. set off *pro tanto* against the landlord's claim the value of unexhausted increases & improvements, by which he was *lucratus* in consequence of the premature determination of the lease:—*Held*: the meliorations could not be pleaded in compensation against the landlord's claim.—*SCOTT v. HEPBURN* (1876), 3 R. (Ct. of Sess.) 816.—**SCOT.**

b. — *Who can enforce—Creditors of bankrupt tenant.*]—A landlord let a farm for twenty-one years, on condition *inter alia* of the tenant expending £1,100 in erecting a steading to be repaid at the end of the lease; the tenant laid out £600, & within three years, having become bkpt. & fled the country, decree of removal was pronounced for desertion, & it did not appear that the landlord was *lucratus*. In a question with the creditors of the tenant:—*Held*: the landlord was not liable to repay the £600.—*MORTON v. MONTGOMERIE* (1822), 1 Sh. (Ct. of Sess.) 344.—**SCOT.**

c. — *Trustee for benefit of creditors.*]—*DUFF v. FIFE (EARL)* (1852), 1 Stuart, 271.—**SCOT.**

d. — *Bankrupt tenant.*]—A lease was prematurely brought to a close by the sequestration of the tenant:—*Held*: he had no claim for compensation for improvements, by which the landlord was *lucratus*.—*WALKER v. MCKNIGHT* (1886), 13 R. (Ct. of Sess.) 599.—**SCOT.**

e. — *Parol agreement—Lease in writing.*]—An action for repairs done on a farm under an alleged verbal agreement that such improvements should be paid for by the landlord:—*Held*: not maintainable, there being no stipulation in the lease as to improvements, & the tenant could not qualify or add to the written instrument.—*LOSER v. KEZAR* (1856), 5 C. P. 234.—**CAN.**

f. *Landlord's right to set off arrears of rent.*]—A granted a lease in 1801 to B., on the expiration of which in 1823 B. became entitled to £95 as meliorations. The lease was then renewed for nineteen years by C., A.'s successor, & payment was postponed till Whit-Sunday, 1842. The sum of £95 was claimed by the following persons; (1) C. on the ground that there were due under the original lease arrears of rent by B. to the amount of £71, & that the renewed lease contained a covenant that those arrears should be postponed until the valuations became payable; (2) D., who claimed under a disposition in favour of his creditors made by B.; (3) E. as assignee of the renewed lease:—*Held*: D. entitled to the sum of £95.—*DUFF v. FIFE (EARL)* (1852), 1 Stuart, 271.—**SCOT.**

g. *Tenant cannot retain farm as security for improvements.*]—Defenders laid out large sums in permanent improvement of property, & built a new farm on stead at a cost of £400:—*Held*: as *bond fide* lessees they were not entitled to retain the farm until they had been reimbursed the above outlay.—*TURNER v. TURNER* (1811), Hume, 854.—**SCOT.**

h. *Farm sold under mortgage—Claim by party in possession.*]—A farm, over which there was a registered mtgo., was duly sold in execution of a judgment obtained on the mtge. by the mtgee. & was purchased by that person. Deft. who was in possession of the farm, on being sued for ejectment pleaded that he had made beneficial improvements to the property. Pltfs., when they bought, had no knowledge of deft.'s claims, & became mtgees. after the improvements had been effected:—*Held*: deft. not entitled to claim compensation for improvements.—*S. A. ASSOCN. v. VAN STADEN* (1892), 9 S. C. 95; 2 C. T. R. 41.—**S. AF.**

## PART V. SECT. 3, SUB-SECT. 1.—A.

j. *Tenant abandoning lease on landlord's failure to fence.*]—A tenant under



**Sect. 3.—By statute: Sub-sect. 1.**

&amp;

**227. Tenant for less than from year to year.]—**A tenancy from year to year or longer is within A. H. Act, 1883, notwithstanding that it does not possess every incident of an ordinary tenancy from year to year.

A tenant is not entitled to compensation under the Act if his tenancy is less than a tenancy from year to year (A. L. SMITH, L.J.).—**KING v. EVERS-FIELD**, [1897] 2 Q. B. 475; 66 L. J. Q. B. 809; 77 L. T. 195; 61 J. P. 740; 46 W. R. 51; 13 T. L. R. 571; 41 Sol. Jo. 712, C. A.

*Annotation: Re*ld. **Lewis v. Baker** (1906), 75 L. J. K. B. 848, C. A.

**B. Who is Liable for Compensation.**

**228. Executors of landlord.]—***Sem*ble: the exors. of a landlord do not come within the definition of "landlord" in A. H. Act, 1883, except so far as they are parties to proceedings for compensation.—**GOUGH v. GOUGH**, [1891] 2 Q. B. 665; 60 L. J. Q. B. 726; 65 L. T. 110; 39 W. R. 593; 7 T. L. R. 608, C. A.

**229. Purchaser taking subject to existing tenancies.]—**A contract was made in June, 1909, for sale of real estate, the conditions of sale providing that the leases or agreements under which existing tenancies were held could be inspected before the sale, & stating that the purchaser would be deemed to have notice of & take subject to all the terms of the existing tenancies, whether arising during the continuance or after expiration thereof. Before completion the purchaser discovered that a tenant of part of the property, to whom before completion notice to quit had been given by the vendor with the purchaser's concurrence, had, with the written consent of his landlord, planted fruit bushes on his holding, in respect of which, on expiration of his notice to quit (which would be after the date fixed for completion), he would have a claim for £50 for unexhausted improvements under A. H. Act, 1908, ss. 1, 2, or, alternatively, under the terms of his tenancy. Neither the tenant's lease, nor the agreement under which compensation was claimed, nor the landlord's consent, was disclosed or abstracted by the vendor before the sale, nor did the purchaser make any inquiry in respect thereof. The purchaser claimed that this sum was payable by the vendor, & completed without prejudice to that question:—*Held*: as the purchaser expressly took subject to all the terms of the existing tenancies, &

compensation was a term of the tenancy, & as the purchaser must be presumed to have knowledge of the stat., he had constructive notice of the claim & was liable to pay the sum due for compensation.—**Re DERBY (EARL) & FERGUSON'S CONTRACT**, [1912] 1 Ch. 479; 81 L. J. Ch. 567; 105 L. T. 943; 56 Sol. Jo. 71.

**C. In respect of what Holdings.**

**230. Agricultural Holdings (Scotland) Act, 1883 (c. 62)—Barn, barn-yard & cot-houses—Unconnected with agricultural land.]—**The terms of s. 35 of the above Act give rise to serious doubts whether the bare possession of a barn, barn-yard, & cot-houses unconnected with any land, pastoral or agricultural, is possession of a "holding" recognised by the Act (LORD WATSON).—**BLACK v. CLAY**, [1894] A. C. 368; 71 L. T. 446; 6 R. 362, H. L.

*Annotation:—*Re*ld.* **Morley v. Carter**, [1898] 1 Q. B. 8.

**231. Allotments & Cottage Gardens Compensation for Crops Act, 1887 (c. 26)—Land not cultivated as garden.]—***Held*: a piece of land less than two acres in extent, occupied by a seedsman for purposes of his business, & having in it vegetables, fruit & trees, & flowering plants which he sold, was not "cultivated as a garden," & was not an "allotment" within s. 4 of the above Act.—**COOPER v. PEARSE**, [1896] 1 Q. B. 562; 65 L. J. M. C. 95; 74 L. T. 495; 60 J. P. 282; 44 W. R. 494; 40 Sol. Jo. 376.

**232. Agricultural Holdings Act, 1908—Farm let with inn under one agreement—Separate business.]—**Where under a single agreement of tenancy at an entire rent a farm is let together with an inn, upon which a business entirely separate from the farm is carried on, the subject of the letting is not a "holding" within s. 48 of the above Act, in respect of which the tenant is entitled, on the expiration of his tenancy, to claim compensation for improvements under the Act.—**Re LANCASTER & MACNAMARA**, [1918] 2 K. B. 472; 87 L. J. K. B. 1250; 119 L. T. 440; 62 Sol. Jo. 681, C. A.

**D. In respect of what Improvements.**

**233. Market Gardeners' Compensation Act, 1895—Tenancy current at commencement of—Improvements executed before January 1, 1896.]—***Held*: Market Gardeners' Compensation (Scotland) Act, 1897 (c. 22), s. 4 (which corresponded with s. 4 of the English Act of 1895), was not retrospective, & did not entitle tenants under leases current at the commencement of the Act to compensation in re-

an agricultural lease for nineteen years left the farm at the end of the third year, in consequence of the landlord's failure to implement an obligation to put the fences into good tenantable repair:—*Held*: the breach of the obligation did not entitle the tenant to terminate the contract of lease, & his abandonment of the farm did not constitute a "determination of the tenancy" within A. H. (Scotland) Act, 1883 (c. 62), s. 42.—**TODD v. BOWRE** (1902), 4 F. (Ct. of Sess.) 435; 39 Sc. L. R. 307; 9 S. L. T. 365.—SCOT.

**PART V. SECT. 3, SUB-SECT. 1.—C.**

**230 i. Agricultural Holdings (Scotland) Act, 1883 (c. 62)—Hotel & land let together.]—***Held*: the above Act did not apply to a hotel & 30 acres of land let together as one subject.—**MACKINTOSH v. LOVAT (LORD)** (1886), 14 R. (Ct. of Sess.) 282; 24 Sc. L. R. 202.—SCOT.

**230 ii. —House, garden & land.]—**A tenant occupied a dwelling-house, garden & land, for which he paid a rent of £23 a year. The whole subjects embraced an area of three quarters of an acre, & the value of the land apart from

the house was estimated at 15s. per annum:—*Held*: the above Act did not apply to such a holding, in respect that the land was occupied as a mere accessory to the house, & the holding was not in the sense of s. 35 of the Act.—**TAYLOR v. MORAY (EARL)** (1892), 19 R. (Ct. of Sess.) 399; 29 Sc. L. R. 336.—SCOT.

**232 i. Agricultural Holdings (Scotland) Act, 1908 (c. 64)—Smithy, house & land.]—**A landlord let to a tenant on yearly lease, as one subject & for payment of one rent, a smithy & a dwelling-house, both built & maintained by the proprietor, along with 5½ acres of land, near but not actually contiguous to either the house or smithy:—*Held*: the subjects in question did not comprise a "holding" in the sense of s. 35 (1), of the above Act.—**STORMONTH DARLING v. YOUNG**, [1915] S. C. 44; 52 Sc. L. R. 35; 2 S. L. T. 86.—SCOT.

**232 ii. —Land with weaving mill.]—***Held*: subjects consisting of a carding, spinning & weaving mill, & a house & steading with 9 acres of agricultural land & 3 roods of pasture, let to one tenant at a *cumulo* rent of £19 5s.

(of which £10 5s. effeired to the mill & £9 to the rest of the subjects), did not constitute a holding within the above Act.—**YOOL v. SHEPHERD**, [1914] S. C. 689.—SCOT.

**232 iii. —Land used for fruit growing.]—***Held*: land, on which were planted raspberry bushes, the fruit from which was sold mainly to jam-makers & sometimes outright to fruit dealers, was not a "holding" within the above Act.—**GREWAR v. MONCUR'S CURATOR BONIS**, [1916] S. C. 764; 2 S. L. T. 20; *sub nom.* **YEAMAN v. GREWAR** (1916), 53 Sc. L. R. 596.—SCOT.

**232 iv. —Cottage with rood of potato land & share in common grazing.]—***Held*: the subjects consisting of a small thatched cottage in a village in Argyllshire, with a plot of garden ground & a byre, & one rood of potato land situated at a short distance from the cottage, & a one-fifteenth share in a common grazing extending to 58 acres for the grazing of one cow, all let to one tenant at a *cumulo* rent of £4 4s. 6d., were a "holding" within the above Act.—**MALCOLM v. M'DOUGALL**, [1916] S. C. 283; 1 S. L. T. 33.—SCOT.

spect of market garden improvements executed before the commencement of the Act.—*SMITH v. CALLANDER*, [1901] A. C. 297; 70 L. J. P. C. 53; 84 L. T. 801, H. L.

*Annotations*:—*Consd.* *Mears v. Callender*, [1901] 2 Ch. 388; *Re Kedwell & Flint*, [1911] 1 K. B. 797, C. A. *Reid.* *West v. Gwynne* (1911), 80 L. J. Ch. 578, C. A.; *Re Morse & Dixon* (1917), 87 L. J. K. B. 1, C. A.

**234.** —.]—A landlord in 1887 demised a farm to deft. for a term expiring in 1901. The lease provided (clause 13) that in the last year the landlord might enter & sow certain seeds, & that the tenant should also leave gratis for the landlord "all the roots remaining unconsumed in the ground, & also all improvements made by the tenant, & all cultivations, dressings, & manures, in consideration of no claim being made by the landlord for similar matters on the tenant now entering"; (clause 14) that the tenant might, at his own cost, convert into an orchard so much of certain meadow lands as he thought proper; & (clause 21) that A. H. Act, 1883, should not apply to the contract of tenancy. Shortly after the tenancy commenced deft. turned part of the meadow land into an orchard, in which in 1901 were over one thousand two hundred trees (apple, pear, plum & cherry) in good bearing condition, & though not capable of removal, worth some hundreds of pounds, to an incoming tenant. Deft. also erected ten glass-houses. One had concrete sides, & its glass span roof substantially rested on the sides & could be removed without damaging the walls. In the case of the other houses the glass span-roofs were supported by & nailed to wide sills, which in turn were nailed to & supported by wooden piles driven into the ground. In these houses deft. grew grapes, peaches, nectarines, tomatoes, & strawberries, which he sold in Reading & Covent Garden, carrying on the trade of a market-gardener with his landlord's knowledge:—*Held*: (1) Market Gardeners' Compensation Act, 1895, s. 4, only applied to improvements made after Jan. 1, 1896, & did not assist deft.; (2) as the glass-houses were erected without the landlord's written consent required by A. H. Act, 1883, s. 3, deft. was precluded from obtaining compensation for them; (3) deft. was entitled to compensation for the trees.—*MEARS v. CALLANDER*, [1901] 2 Ch. 388; 70 L. J. Ch. 621; 84 L. T. 618; 65 J. P. 615; 49 W. R. 584; 17 T. L. R. 518.

*Annotation*:—*Reid.* *Morse v. Dixon* (1917), 117 L. T. 590, C. A.

### 235. Agreement for substituted com-

#### PART V. SECT. 3, SUB-SECT. 1.—D.

**237 i. Agricultural Holdings (Scotland) Act, 1908 (c. 64)—Tenancy current at commencement of—Improvements executed before January 1, 1908.**—The words "has then executed thereon" in s. 29 (2) of the above Act mean "has thereafter executed thereon."—*TAYLOR v. STEEL-MATLAND*, [1913] S. C. 562; 50 Sc. L. R. 395; 1 S. L. T. 224.—*SCOT.*

**237 ii. —Improvements tenant bound to execute under lease.**—A lease required the tenant to cultivate the lands according to the rules of good husbandry, & in particular to follow a specified rotation according to which a certain proportion would be in temporary pasture sown more than two years before, the area thus laid down being approximately equal to the area in similar pasture which the tenant received at the commencement of the lease. The tenant having claimed compensation for the temporary pasture at his way-going in respect that it was an improvement within the above Act:—*Held*: he was not entitled to compensation, as he was only fulfilling the contractual obligation which he had undertaken in the lease, & as he was only

leaving the farm as it was at the beginning of the lease.—*GALLOWAY (EARL) v. M'CLELLAND*, [1915] S. C. 1062; 52 Sc. L. R. 822; 2 S. L. T. 128.—*SCOT.*

**237 iii. —.]**—By the terms of his lease the tenant of a farm was taken bound to cultivate the lands on a five-shift rotation, which involved two years in succession under grass, with the declaration that "the tenant may, if he prefers it, allow any portion of the lands specified to be cultivated in a five-shift rotation to lie in grass for a longer period than two years, but on his breaking it up he shall be bound to adhere to the rotation above prescribed, with this exception, that he shall be entitled to take two white crops in succession after grass which has lain not less than three years":—*Held*: at the termination of his lease, the tenant, who had allowed certain fields to lie in temporary pasture for more than two years, was not entitled to compensation under the above Act for that temporary pasture as an improvement, as in laying down the temporary pasture he was only fulfilling a contractual obligation under the lease.—*FINDLAY v. MUNRO*, [1917]

*compensation.*—*Re SMITH & DEVONSHIRE (DUKE)*, No. 241, *post*.

**236. —Tenancy from year to year.**—By virtue of s. 61 of A. H. Act, 1883, of which Act Market Gardeners' Compensation Act, 1895, ss. 1, 3, 4, are to be read as part, a tenancy from year to year, under a contract of tenancy current at the commencement of the last-mentioned Act, must for the purposes of that Act be deemed to continue to be a tenancy under a contract of tenancy current at the commencement of the Act until the first day on which it could be determined by notice to quit given immediately after the commencement of the Act, & thereafter be deemed to be tenancy under a contract of tenancy beginning after the commencement of the Act. Therefore a tenant from year to year, under a contract of tenancy current on Jan. 1, 1896, of a holding which was at that date used to the knowledge of the landlord as a market garden, is not, in the absence of any agreement that the premises should be let or treated as a market garden, entitled to compensation for improvements executed by him or his predecessors after the earliest day on which, if notice had been given immediately after Jan. 1, 1896, the tenancy could have been determined.—*Re KEDWELL & FLINT & Co.*, [1911] 1 K. B. 797; 80 L. J. K. B. 707; 104 L. T. 151; 55 Sol. Jo. 311, C. A.

**237. Agricultural Holdings Act, 1908, s. 2—"Consent"—What is.**—The mere fact that fruit trees & fruit bushes are referred to in a lease of lands, with the manifest object of evading the common law obligation to allow same to remain thereon at the expiration or sooner determination of the lease, is in itself no evidence of any consent on the part of the landlord to the making of any improvement comprised in Sched. I. (1) of the above Act within s. 2 thereof.

Where a lease provided that if the tenant should plant the demised lands, or any part thereof, with fruit trees, bushes, or plants, & the tenant should desire to remove same at the expiration or sooner determination of the lease, he should be allowed until a specified date to remove same, provided, nevertheless, that if the lessors should desire to take & purchase such fruit trees, bushes, & plants, they should give notice to the tenant & pay the tenant the fair value thereof to an incoming tenant:—

*Held*: that clause did not amount to a consent of the nature dealt with by that sect.—*Re MORSE & DIXON* (1917), 87 L. J. K. B. 1; 117 L. T. 590, C. A.

S. C. 419; 54 Sc. L. R. 316; 1 S. L. T. 203.—*SCOT.*

**237 iv. —"Continuous good farming" not improvement.**—The proprietor of an estate let a farm by a lease, which provided, *inter alia*, that the tenant was to farm the whole land according to the rules of good husbandry. On the termination of the tenancy the tenant claimed compensation for unexhausted improvements, & *inter alia*, for the increased fertility of the farm due to "continuous good farming":—*Held*: the arbiter in granting an award for "continuous good farming" had acted *ultra vires*, it not being an improvement specified in the above Act.—*BRODIE-INNES v. BROWN* (1916), 54 Sc. L. R. 170; [1917] 1 S. L. T. 49.—*SCOT.*

**237 v. —"Benefit"—What is.**—A lease contained a provision, by which the tenant was bound to apply to the land a certain amount of farmyard manure per acre, & so far as he had not sufficient farmyard manure for the purpose, to make up the amount with artificial manure. On quitting his holding the tenant claimed compensation for the unexhausted value of artificial manure applied in terms of that provision. The landlord maintained that the tenant



Sect. 3.—By statute: Sub-sect. 1, E. & F.]*E. Effect of Agreement.*

**238. Agricultural Holdings Act, 1883—Exclusion of procedure under—Subject-matter partly within & partly outside Act.]**—A tenant of agricultural land & his landlord agreed that the land should be given up before expiration of the term, & that the tenant should receive compensation in respect of feeding stuffs, which was an improvement comprised in Sched. I. of the above Act, & of three other matters not mentioned in the Act. The amount to be paid was to be ascertained by two valuers appointed by the landlord & the tenant respectively. In an action by the tenant to recover the amount agreed on by the valuers:—*Held*: (1) such an agreement between landlord & tenant was not prohibited by the above Act; (2) the claim not being for compensation under the Act, the procedure under the Act did not apply to it; (3) *pltf.* was entitled to recover in the action.—*NEWBY v. ECKERSLEY*, [1899] 1 Q. B. 465; 68 L. J. Q. B. 261; 80 L. T. 314; 47 W. R. 245; 15 T. L. R. 151; 43 Sol. Jo. 205, C. A.

*Annotation*:—*Consd. Re Pearson & I'Anson*, [1899] 2 Q. B. 618.

**239. — Attempted exclusion of statutory compensation.]**—A landlord in 1887 demised a farm to *deft.* for a term expiring in 1901. The lease provided (clause 14) that the tenant might, at his own cost, convert into an orchard so much of certain meadow land as he thought proper, & (clause 21) that the above Act should not apply to the contract of tenancy. Shortly after the tenancy commenced *deft.* turned part of the meadow land into an orchard, in which in 1901 were over one thousand two hundred trees (apple, pear, plum, & cherry) in good bearing condition, & though not capable of removal, worth some hundreds of pounds to an incoming tenant:—*Held*: (1) as the orchard was planted with the landlord's consent in writing, which was held to be given by the lease, *deft.* was entitled to compensation for the trees under ss. 1 & 3 of the above Act, there being nothing in clause 13

of the lease (*see* No. 234, *ante*) to exclude him from compensation; (2) if clause 13 must be construed as excluding *deft.* from statutory compensation, the attempted exclusion was inoperative by reason of s. 55 of the Act, & *deft.* was entitled to compensation for the trees.—*MEARS v. CALLENDER*, [1901] 2 Ch. 388; 70 L. J. Ch. 621; 84 L. T. 618; 65 J. P. 615; 49 W. R. 584; 17 T. L. R. 518.

*Annotation*:—*Morse v. Dixon* (1917), 117 L. T. 590, C. A.

**240. Market Gardeners' Compensation Act, 1895—Exclusion of procedure under.]**—A landlord agreed that he would allow the tenant of a farm, who was desirous of cultivating the farm as a market garden, a market garden valuation on his quitting the farm. The tenant expended large sums in cultivating the farm as a market garden & afterwards received notice to quit, but he did not give notice to claim compensation within the time prescribed by A. H. Act, 1883, s. 7. He claimed compensation in respect of improvements, for the whole of which he could have claimed under the above Act & Market Gardeners' Compensation Act, 1895, ss. 3, 4, if he had given the requisite notice:—*Held*: the tenant could claim compensation under the agreement notwithstanding s. 57 of the former Act, which prohibited a tenant from claiming compensation, otherwise than in the manner authorised by the Act, for improvements he could have claimed under the Act, as that sect. applied only to tenants claiming under the Act, but not to a tenant claiming compensation under an agreement outside the Act.—*Re PEARSON & I'ANSON*, [1899] 2 Q. B. 618; 68 L. J. Q. B. 878; 81 L. T. 289; 63 J. P. 677; 48 W. R. 154; 15 T. L. R. 452.

**241. Agreement for substituted compensation.]**—Fixed sums were specified in two leases of market gardens as compensation for the exercise by the landlord of a power reserved to him by the lease of resuming possession of any part of the land, on giving notice to the tenant. The tenant was on quitting the holding to leave all fruit trees. One lease provided that no allowance was to be paid to the tenant other than the compensation specified

was not entitled to claim compensation for manure applied in terms of the lease, in respect that he had received a "benefit" in the sense of s. 1 (2) (a) of the above Act in consideration for that improvement, viz., the benefit of having to pay less rent than he would otherwise have had to pay:—*Held*: such an implied benefit was not a benefit within the above sect.—*M'QUATER v. FER-GUSSON*, [1911] S. C. 640; 48 Sc. L. R. 560; 1 S. L. T. 295.—*SCOT*.

**237 vi. — — — — —.]**—A tenant under a lease, entered into before the above Act, claimed compensation under that Act for an improvement in respect of temporary pasture laid down by him in carrying out the system of cultivation imposed on him by the lease. The landlord maintained that, if compensation fell to be awarded, the arbiter must set against it the temporary pasture handed over to the tenant free of charge on his entry as being, in terms of s. 1 (2) (a) of the Act, a "benefit" which the landlord had given or allowed to the tenant in consideration of his executing the improvement. There was no reference in the lease to the temporary pasture received by the tenant on his entry:—*Semble*: this temporary pasture must be taken into account as being a "benefit" under the above sub-sect.—*GALLOWAY (EARL) v. M'CELLAND*, [1915] S. C. 1062; 52 Sc. L. R. 822; 2 S. L. T. 128.—*SCOT*.

**237 vii. — — — — —.]**—A tenant entered a farm in 1882 & continued his occupation thereof under a new lease granted in 1901. The lease provided a

five-course rotation for the worked land, but contained this clause: "Declaring, however, that the tenant may, if he prefers it, allow any portion of the lands specified to be cultivated in a five-shift rotation to lie in grass for a longer period than two years, but on his breaking it up he shall be bound to adhere to the rotation above prescribed with this exception, that he shall be entitled to take two white crops in succession after grass which has lain not less than three years." At his outgoing the tenant left a large amount of temporary pasture, & claimed compensation therefor under the above Act. *Semble*: (1) the right given to take two white crops in succession off land, which had been three years in grass, was not a benefit allowed by the landlord to the tenant under s. 1 (2) (a), of the Act; (2) a benefit consisting in temporary pasture received at the commencement of the lease would fall to be estimated as at the beginning of the last lease, not as at the tenant's first entry to the lands, *e.g.*, in this case in 1901 & not in 1882.—*FINDLAY v. MUNRO*, [1917] S. C. 419; 54 Sc. L. R. 316; 1 S. L. T. 203.—*SCOT*.

**237 viii. — "Dissent"—What is.]**—Under a lease, dated May, 1892, of a farm of 150 acres let, "primarily as an agricultural subject," the tenant was "entitled to use all or so much of the land" as he might think proper for the purposes of a market garden, but subject to conditions, including a condition as to rotation of crop, which permitted only two years' continuous cultivation of market garden produce. The tenant

annually kept 50 acres, but not always the same 50 acres, under cultivation as a market garden. In 1902 he proceeded to erect a forcing-house for the production of early rhubarb, the process being that the rhubarb stools were forced in the house & then transplanted to the fields where they remained for from three to five years. While the forcing-house was being erected the landlord's factor wrote to the tenant inquiring as to his intentions, & advising him that the conditions of the lease would be "strictly enforced." The house was completed, & rhubarb was cultivated until the expiry of the lease in 1911, when the tenant claimed compensation for improvements on his holding under the above Act in respect of the forcing-house erected by him & of rhubarb stools left in the ground:—*Held*: (1) the fact that the ground cultivated had varied from time to time did not prevent the 50 acres under cultivation at the expiry of the lease from being a market garden within s. 29 of the Act, for the purpose of a claim for compensation for improvements; (2) the factor's letter was a "notice of dissent" within s. 29 (2), in so far as the improvements claimed for were in contravention of the lease; (3) the tenant was entitled to compensation for the rhubarb, but only if & in so far as the cultivation had not been in contravention of the terms of the lease, & for the forcing-house, but only if & in so far as it constituted an improvement in connection with such a cultivation.—*TAYLOR v. STEEL-MAITLAND*, [1913] S. C. 562; 50 Sc. L. R. 395; 1 S. L. T. 224.—*SCOT*.

therein. By the other lease the compensation specified was expressed to be "in lieu of" compensation to which the tenant might be entitled under A. H. Act, 1883:—*Held*: the tenant was entitled under Market Gardeners' Compensation Act, 1895 (which was to be read and construed as part of A. H. Act, 1883), to compensation for trees planted in 1896 in addition to the compensation specified in the leases.—*Re SMITH & DEVONSHIRE (DUKE)* (1906), 22 T. L. R. 619, C. A.

**242. Agricultural Holdings Act, 1900—Attempted exclusion of statutory time for claim.]**—Resp., a tenant farmer of applt., gave notice in the terms of his lease of his intention to terminate his tenancy at Nov. 28, 1908. Upon Nov. 9, 1908, he sent to applt. notice of his claim for compensation for improvements, in the terms of A. H. (Scotland) Acts, 1883 (c. 62) to 1900 (c. 50), & upon Nov. 26, sent an amended claim. An arbiter was appointed, but applt. applied for an interdict to prevent the arbiter from acting, on the ground that resp. had lost his right to compensation by virtue of the following provision embodied in the lease: "Provided always that no claim for compensation under the Acts, or under these conditions, shall be made by the tenant later than one month before the determination of the tenancy":—*Held*: the clause in the agreement was void, for it attempted to deprive resp. of the right to compensation under A. H. Act, 1900, under which he was entitled to make his claim up to the last day of the tenancy.—*CATHCART v. CHALMERS*, [1911] A. C. 246; 80 L. J. P. C. 143; 104 L. T. 355, H. L.

**243. Agricultural Holdings (Scotland) Act, 1908 (c. 64)—Attempted exclusion of statutory arbitra-**

**tion.]**—Applt. was tenant of a farm under a lease containing the following clause: "Applt. binds himself at the expiry of his lease to leave the sheep stock on the farm to the proprietors or incoming tenant according to the valuation of men mutually chosen with power to name an oversman":—*Held*: the valuation of the sheep stock was referred to "arbn." in Scottish law & fell within s. 11 (1) of the above Act, which sect. superseded the provisions of the lease.—*STEWART v. WILLIAMSON*, [1910] A. C. 455; 80 L. J. P. C. 29; 102 L. T. 551, H. L.

*F. Counterclaim by Landlord.*

**244. Breach of agreement to consume crops on land—Stacked crops destroyed by fire.]**—By an agreement for letting a farm the tenants agreed to stack upon the premises all crops of hay & straw arising from the farm, & to consume on the farm all hay, straw, chaff, & green crops arising therefrom, & to carry out & spread upon the farm in regular succession all dung & manure arising therefrom. During the continuance of the tenancy a quantity of hay & straw stacked on the farm was destroyed by an accidental fire:—*Held*: upon termination of the tenancy, the landlord was not entitled, in answer to a claim by the tenants under A. H. Acts, 1883-1890, in respect of unexhausted improvements, to claim compensation for the loss of the manurial value of hay & straw so destroyed as a breach of the agreement, as the contract only related to such crops as were in existence & capable of being stacked upon the farm & consumed thereon.

*HULL & MEUX (LADY)*, [1905] 1 K. B. 588; 74 L. J. K. B. 252; 92 L. T. 74; 53 W. R. 389; 21 T. L. R. 220; 49 Sol. Jo. 222, C. A.

**PART V. SECT. 3, SUB-SECT. 1.—E.**

**242 i. Agricultural Holdings (Scotland) Act, 1900 (c. 50)—Exclusion of statutory compensation.]**—It was provided in the lease of a farm that with regard to certain specified improvements the tenant should receive, in lieu of the compensation provided by stat., compensation according to a schedule annexed to the lease, the amount falling agreement to be ascertained by two arbiters, one to be chosen by each party, or by an oversman to be named by the arbiters before entering on the reference, in case of their differing in opinion. On the termination of the lease the tenant served on the landlord a notice of claim for compensation, setting forth five separate heads of improvements, all of these being improvements, for which a tenant was entitled to receive compensation under the above Act, while heads 1 to 3 belonged to the class of specified improvements, for which compensation was to be given according to the schedule annexed to the lease. The tenant having named an arbiter, & the landlord having refused to name another, the Board of Agriculture, upon an application from the tenant, nominated a second to act on behalf of the landlord. In an action of suspension & interdict brought by the landlord against the tenant & arbiters:—*Held*: with respect to improvements under heads 1 to 3 statutory arbn. was incompetent, having been excluded by the agreement in the lease.—*HAMILTON (GILVY) v. ELLIOT* (1904), 42 Sc. L. R. 41.—*SCOT.*

**243 i. Agricultural Holdings (Scotland) Act, 1908 (c. 64)—Agreement for substituted compensation.]**—A lease dated in 1900 provided that with reference to A. H. (Scotland) Act, 1883, the compensation payable to the tenant on the determination of his tenancy should not exceed the rates & proportions specified in a schedule annexed to the lease, & that the compensation therein provided should be held as substituted for that

under the Act. The schedule annexed to the lease provided, on the basis of a fraction of the "cost" of the manure varying with the year of application, for certain specified artificial manures under three heads, & proceeded— "IV. Other artificial manures. Exhausted by first crop—no compensation. V. Feeding stuffs. For linseed, cotton, & rape cakes, or for other purchased substances of equal manurial value consumed on the farm by cattle & sheep & pigs during the last year of the lease, one-third of the value thereof. If consumed on permanent pasture, three-sixths of the value thereof if applied in last year, two-sixths if in second last year, & one-sixth if in third last year. Exhausted in four years." In a note appended to the schedule it was, *inter alia*, provided: "From the amount to be paid in compensation for the unexhausted manurial value of feeding stuffs the arbiters shall deduct any sum which in their opinion has been or shall be paid to the tenant on account of any increased award, by reason of the manurial value of the feeding stuffs consumed, put upon the dung left by the tenant":—*Held*: (1) the schedule falling to be read as a whole, head IV. was not void under A. H. (Scotland) Act, 1908, s. 5, but validly precluded the tenant from claiming compensation for artificial manures, other than those specified, which had grown a crop; (2) "value" in head V. meant, not actual cost price, nor then present cash value, nor residual manurial value, but original manurial value—i.e., the value of the manurial constituents of the feeding stuffs, such as nitrogen, potash, etc., before the feeding stuffs were consumed; (3) the tenant was validly precluded from claiming compensation for feeding stuffs of the character specified in head V., which were consumed on the holding (exclusive of the permanent pasture) prior to the last year of the lease; (4) the tenant was entitled to compensation in respect of the consumption on the holding of feeding stuffs, the manurial residuum of

which entered the farm-yard manure left unapplied to the land by the tenant at outgoing, but subject always to deduction of such sum as might be found deductible under the provisions of the note appended to the schedule.—*BROWN v. MITCHELL*, [1910] S. C. 369; 47 Sc. L. R. 216; 1 S. L. T. 65.—*SCOT.*

**243 ii. —Attempted exclusion of statutory notice of claim.]**—In a claim by tenants of a holding for compensation under the above Act in respect of drainage improvements, it appeared that no notice in compliance with s. 3 (1) of the Act had been given by the tenants to the landlord, but the tenants maintained that there had been an agreement under s. 3 (4) to dispense with notice. It was proved that, before the improvements were executed, the tenants had interviews with the landlord's factor, at which, although the question of compensation or notice was never specifically raised, the factor was informed of the nature of the proposed work; & that the tiles were supplied to the tenants under orders given by the landlord's factor & were paid for by the landlord, while the cartage & the laying of the drains were done by the tenants at their own expense, & that this was the custom on the estate:—*Held*: in these circumstances an agreement to dispense with the notice required by s. 3 (1) of the Act could not be inferred.—*BARBOUR v. M'DOULL*, [1914] S. C. 844.—*SCOT.*

**243 iii. —Exclusion of statutory compensation.]**—A lease between the landlord & the tenant of a farm provided that the value of certain unexhausted improvements, which the tenant at his entry to the farm had received without payment, should form a deduction from any sum that might be found due to him as compensation on his way-going:—*Held*: the stipulation did not contravene s. 5 of the above Act.—*BUCHANAN v. TAYLOR*, [1916] S. C. 129; Sc. L. R. 86; 2 S. L. T. 455.—*SCOT.*



*Sect. 3.—By statute: Sub-sect. 1, G. & H. (a) & (b).]*

*G. Notice of Claim.*

**245. Agricultural Holdings Act, 1883—Compensation calculated under Agricultural Holdings Act, 1875.]—Held:** (1) a notice by a tenant in occupation of a tenancy, current at the commencement of the above Act, of a claim for compensation for improvements executed after the commencement of the Act, was good, if given under the above Act, though the compensation was to be based upon the principles of A. H. Act, 1875; (2) the compensation for such improvements was to be calculated on the basis of A. H. Act, 1875, & not of A. H. Act, 1883.—*SMITH v. ACOCK* (1885), 53 L. T. 230; 49 J. P. 789.

**246. — “Determination of tenancy”—Holding under custom of country.]—**Where a tenant of a farm was entitled, under the custom of the country, to hold over a portion of the land for four months after the expiration of his notice to quit the farm:—*Held:* the “determination of the tenancy” within s. 7 of the above Act took place when the tenant’s holding under the custom of the country ended, & a notice of his claim for compensation, given two months before that time, was good.—*Re PAUL, Ex p. PORTARLINGTON (EARL)* (1889), 24 Q. B. D. 247; 59 L. J. Q. B. 30; 61 L. T. 835.

*Annotation:—Expld. Morley v. Carter*, [1898] 1 Q. B. 8.

**247. Different parts of holding expiring at different times.]—**Applt., owner of a farm in Scotland, obtained a decree ordering resp., the tenant, to remove (following the stipulations in the lease) from the houses, grass & fallow land, at the term of Whit-Sunday, 1892, from the arable land at the separation of the crop of same year from the ground, & from the barns & barn-yard & two cot-houses at Whit-Sunday, 1893. Resp. quitted possession of the houses (with the exception of the barns, barn-yard, & two cot-houses), & also of the grass & fallow lands, at the term of Whit-Sunday, 1892. He thereafter, on June 6, 1892, gave applt. notice of a claim for improvements:—*Held:* there were three terms of removal in regard to different portions of the subject-matter of the lease, & a notice four months before the “separation of the crop” (or its equivalent term Martinmas) after Whit-Sunday, 1892, was sufficient within A. H. (Scotland) Act, 1883 (c. 62), s. 7, which differed only from s. 7 of the English Act of 1883 in that the notice required was four months instead of two.—*BLACK v. CLAY*, [1894] A. C. 368; 71 L. T. 446; 6 R. 362, H. L.

*Annotation:—Refd. Morley v. Carter*, [1898] 1 Q. B. 8.

**PART V. SECT. 3, SUB-SECT. 1.—G.**

**246 i. Agricultural Holdings (Scotland) Act, 1883 (c. 62)—“Determination of tenancy.”]**—Tenants under an agricultural lease for nineteen years from Whit-Sunday, 1866, entered into possession on May 26, 1866, & remained until May 26, 1885:—*Held:* the term “Whit-Sunday” meant May 26, or old term, & not May 15, or legal term, & notice given four months before May 26, 1885, was good.—*HUNTER v. FRASER* (1886), 13 R. (Ct. of Sess.) 883.—*SCOT.*

**246 ii. — — —.]—**A tenant by agreement with the landlord renounced his lease & undertook to remove from the arable lands & grass at Martinmas, 1885, & from the houses at Whit-Sunday, 1886:—*Held:* (1) the tenancy did not “determine” till Whit-Sunday, 1886, being the date when all right of possession under the lease ceased, & a notice of claim under the above Act given four months prior thereto was good; (2) though the renunciation contained no reference to a claim for compensation

for unexhausted improvements, the claim was not excluded.—*STRANG v. STUART* (1887), 14 R. (Ct. of Sess.) 637; 24 Sc. L. R. 447.—*SCOT.*

**246 iii. — — —.]—**A farm was let for a term of years “with entry at Martinmas, 1885,” subject to the condition that the tenant should only get possession of the threshing mill “after the landlord shall have done with using same in threshing our last year’s crop.” The conditions of lease provided that no turnips growing on the farm should be sold, but that the whole should be consumed & made down into dung & regularly applied to the lands. It was further provided that the tenant should have right to the barn, threshing mill, & barnyard, till the “term of Whit-Sunday, after the termination of the lease, for the purpose of stacking & threshing his way-going crop”:—*Held:* “the determination of the tenancy” was at Martinmas, although the tenant was entitled under the lease to remain in occupation of the land under turnips, & a limited use of

the barn & a barnyard & threshing-mill after that date, & notice of a claim for compensation fell to be given by the tenant four months before Martinmas.—*WALDIE v. MUNGALL* (1896), 23 R. (Ct. of Sess.) 792; 33 Sc. L. R. 601; 4 S. L. T. 42.—*SCOT.*

**246 iv. — Form of notice.]—**The notice required by s. 7 of the above Act should contain specific information as to the various items, e.g., the quantity, nature, quality, & date of application of manure, claimed as improvements within the Act, such as will enable the landlord to judge whether he will entertain it or not.—*SINCLAIR v. BROWN* (1892), 19 R. (Ct. of Sess.) 780; 29 Sc. L. R. 652.—*SCOT.*

**PART V. SECT. 3, SUB-SECT. 1.—H. (b).**

**253 i. Appointment of referee—Jurisdiction of sheriff—Agricultural Holdings (Scotland) Act, 1889 (c. 20), s. 2 (3).]**—A sheriff, who has refused to appoint a

**248. — — —.]—**A tenant of a farm on a yearly tenancy was by the terms of his lease to hold the land from Feb. 2, & the buildings from May 1. In June, 1896, he gave notice to the landlord of his intention to deliver up the land on Feb. 2, 1897, on which date he duly delivered up possession of the land. On Feb. 26, 1897, he gave notice to the landlord under the above Act claiming compensation for unexhausted improvements, & on May 1, 1897, he gave up possession of the buildings:—*Held:* the tenancy determined within s. 7 of the Act on Feb. 2, & not on May 1, & the notice of claim was too late.—*MORLEY v. CARTER*, [1898] 1 Q. B. 8; 66 L. J. Q. B. 843; 77 L. T. 337; 46 W. R. 77; 14 T. L. R. 7; 42 Sol. Jo. 14.

**249. Agricultural Holdings Act, 1900—“Determination of tenancy”—Effect of agreement.]—***CATHCART v. CHALMERS*, No. 242, *ante*.

**250. Given to agent.]—**Notice to the landlord’s agent of a claim for compensation is *prima facie* sufficient notice to the landlord under A. H. Act, 1883, s. 7.—*INGHAM v. FRENTON* (1893), 10 T. L. R. 113.

*H. Arbitration.*

*(a) Necessity for.*

**251. Agricultural Holdings Act, 1883—Counterclaim in action for rent.]—**A claim for compensation by a tenant under ss. 8, 9, 57 of the above Act, if disputed, must be referred to arbn. only, & cannot form the subject-matter of a counterclaim in an action for rent brought by the landlord in the High Ct.—*GASLIGHT & COKE Co. v. HOLLOWAY* (1885), 52 L. T. 434; 49 J. P. 344.

*Annotation:—Consd. Schofield v. Hincks* (1888), 58 L. J. Q. B. 147.

**252. — — —.]—**A tenant of a farm became bkpt., & the trustee in bkpcy. having removed & sold a quantity of hay in breach of an agreement, & disclaimed the lease, the landlord sued the trustee for the removal of the hay, & the trustee counterclaimed for unexhausted improvements:—*Held:* the counterclaim could not be sustained, as, by s. 8 of the above Act, arbn. was rendered compulsory in case of dispute between landlord & tenant.—*SCHOFIELD v. HINCKS* (1888), 58 L. J. Q. B. 147; 60 L. T. 573; 37 W. R. 157; 5 T. L. R. 101.

*(b) Practice and Procedure.*

*See, now, C. C. R., O. 40, & as to the Act now in force, see note, p. 5, ante.*

**253. Appointment of referee—Jurisdiction of registrar—Agricultural Holdings Act, 1883.]—**In a reference under the above Act for compensation for improvements, the registrar of the ct. has no

jurisdiction under s. 11 of the above Act or C. C. R., 1889, O. 40, r. 7, to appoint a referee for one of the parties without the consent of such party, & it is not sufficient that such party has not expressed his dissent, but actual consent must be given & is a condition precedent to the jurisdiction of the registrar. If no such consent has been given, the power to appoint a referee for one party upon application of the other is exercisable by the judge alone under s. 11 of the Act, notwithstanding the above rule, & an award which states that one of the referees was appointed by the registrar, without also stating that the consent of the parties was given, is bad on the face of it.—*Re GRIFFITHS & MORRIS*, [1895] 1 Q. B. 866; 64 L. J. Q. B. 386; 72 L. T. 290; 59 J. P. 134; 43 W. R. 652; 11 T. L. R. 235; 15 R. 301.

**254. Award—Particulars not specified in.]—S.**, a landlord, granted a lease to L., & stipulated that A. H. Act, 1883, should not apply except as regarded oilcake & lime expended on the farm. L., on expiration of the lease, claimed compensation for improvements, & S. counterclaimed for breaches of the lease. The parties appointed referees, & afterwards an umpire, whose award did not specify the particulars as required by s. 19 of the Act:—*Held*: the reference was only a common law reference, & was none the less so because it included matters within the stat., & the award was final & binding on the parties.—*SHRUBB v. LEE* (1888), 59 L. T. 376; 53 J. P. 54.

**255. — Dealing with matters outside Agricultural Holdings Act, 1883—Prohibition.]—Deft.** was pltf.'s tenant of a farm under a lease, which provided for certain allowances & compensation being made, at expiration of the tenancy, to the outgoing tenant, as to various matters which were not the subjects of allowance or compensation under A. H. Act, 1883, & it also provided that ss. 7 to 28, both inclusive, of that Act relating to procedure should apply as well to any claim of the outgoing tenant for allowance or compensation to be made under the lease as to any claim under the Act. Subsequent to expiration of the tenancy an award was made in an arbn. held under the Act, which showed on the face of it the matters in respect of which the sums thereby awarded were given, & also that it dealt as well with matters which were properly the subject of allowance & compensation under the Act as with matters outside the Act. On an application by the tenant, the ct. judge made an order under s. 24 of the Act for enforcement of the award. The landlord moved for a writ of prohibition against the ct. judge enforcing the award or proceeding further with the matter:—*Held*: as the award on the face of it disclosed a want of jurisdiction so far as it dealt with matters which were not the subjects of allowance & compensation under the Act, the landlord was entitled to a writ of prohibition against enforcement of the award under s. 24 in respect of those matters, notwithstanding the agreement contained in the lease & the fact that the landlord had by his conduct acquiesced in the exercise of jurisdiction by the ct. judge.—*FARQUHARSON v. MORGAN*, [1894] 1 Q. B. 552; 63 L. J. Q. B. 474; 70 L. T. 152; 58 J. P. 495; 42 W. R. 306; 10 T. L. R. 240; 9 R. 202, C. A.

*Annotations*:—**Consd. & Distd.** *Clarke v. Knowles*, [1918] 1 K. B. 128. *Refd.* *Lee v. Cohen* (1894), 71 L. T. 824, C. A.; *Alderson v. Palliser*, [1901] 2 K. B. 833, C. A.; *Re Cundall*

referee on the ground that more than fourteen days have been allowed to elapse since the application, is not barred from making such an appointment upon a new application duly proceeded with.—*SINCLAIR v. BROWN* (1892), 19 R. (Ct. of Sess.) 780; 29 Sc. L. R. 653.—**SCOT.**

**k. Appointment of arbitrator—Agreement in writing—Agricultural Holdings (Scotland) Act, 1900 (c. 50).]**—*Held*: a

clause in an agricultural lease, referring to two arbiters certain questions of compensation under the lease, applied only to claims under the lease, & was not an agreement in writing within Sched. II., Part II. (1) authorising the Board of Agriculture to appoint under Sched. II., Part II. (4) an arbiter to act along with another arbiter appointed by one of the parties to the lease, in pursuance of an arbn. under the Act.—**HAMILTON**

& *Vavasour* (1906), 95 L. T. 483, C. A. **Mentd.** *R. v. Tristram*, [1902] 1 K. B. 816, C. A.

**256. Set aside for misconduct of arbitrator—Rejection of evidence.]—**Rejection of evidence by an arbitrator may constitute misconduct on his part entitling the party aggrieved to have the award set aside.—*WILLIAMS v. WALLIS & COX*, [1914] 2 K. B. 478; 83 L. J. K. B. 1296; 110 L. T. 999; 78 J. P. 337; 58 Sol. Jo. 536; 12 L. G. R. 726.

**257. Costs—As between solicitor & client—Agricultural Holdings Act, 1883, s. 20.]—Held**: the referees, in a reference under the above Act, had no jurisdiction under s. 20, or otherwise, to order a party to pay costs as between solr. & client.—*Re GRIFFITHS & MORRIS*, [1895] 1 Q. B. 866; 64 L. J. Q. B. 386; 72 L. T. 290; 59 J. P. 134; 43 W. R. 652; 11 T. L. R. 235; 15 R. 301.

**258. — Against arbitrator—Made party on application to set aside award—County Court (Agricultural Holdings) Rules, 1909, O. 40, r. 4 (1).]**—If an arbitrator acting under A. H. Act, 1908, on being served with notice of motion to set aside his award appears & takes part in the proceedings, he thereby makes himself one of the active parties, & he may be ordered to pay costs. Further, if he has been guilty of such collusion as would entitle one of the parties to bring an action against him, & his award is set aside on the ground of misconduct of that kind, costs may & ought to be given against him, whether he appears in the proceedings in the ct. or not.

A ct. judge set aside an award made under the above Act, on the ground of technical misconduct on the part of the arbitrator, & ordered the arbitrator to pay appct.'s costs. The arbitrator had been subpoenaed by both parties to the arbn., & he appeared in the ct., but took no active part in the proceedings, nor did he endeavour to uphold his award. No suggestion was made of dishonesty or want of *bona fides* on his part:—*Held*: in those circumstances the ct. judge was not entitled to order the arbitrator to pay the costs. C. C. (Agricultural Holdings) R., 1909, O. 40, r. 4 (1), which provides, *inter alia*, that on an application under the above Act for an order setting aside an award on the ground of the arbitrator's misconduct the arbitrator shall be made a party, is not *ultra vires*.—*LONDON v. KEEN*, [1916] 1 K. B. 994; 85 L. J. K. B. 1237; 114 L. T. 847; 60 Sol. Jo. 619.

**259. — Against party setting up excessive claim—Although partly successful.]—**A claim by a landlord against the tenant of a farm for dilapidations was referred to arbn. under A. H. Act, 1908. The arbitrator stated a special case for the opinion of the ct. upon the question of the tenant's liability under the lease, & this question was ultimately decided in the landlord's favour. The arbitrator by his award awarded the landlord as compensation one-tenth of the amount claimed, & directed that each party should bear his own costs of the litigation as to liability, & that the remainder of the costs of the arbn. should be borne by the landlord:—*Held*: the arbitrator was acting in the exercise of his discretion &, in the absence of proof of misconduct or want of jurisdiction, the award could not be set aside.—*GRAY v. ASHBURTON (LORD)*, [1917] A. C. 26; 86 L. J. K. B. 224; 115 L. T. 729; 81 J. P. 17; 61 Sol. Jo. 129, H. L. *Annotation*:—**Mentd.** *Ellesmere v. I. R. Comrs.* (1918), 34 T. L. R. 560.

*OGILVY v. ELIOT* (1904), 7 F. (Ct. of Sess.) 1115; 12 S. L. T. 397.—**SCOT.**

**257 l. Costs—Of case stated to sheriff—Agricultural Holdings (Scotland) Act, 1908 (c. 64), Sched. II. (14).]**—The expenses of a case stated for the opinion of the sheriff by an arbiter under the above Act fall to be dealt with by the sheriff, & not by the arbiter.—*M'QUATER v. FERGUSSON*, [1911] S. C. 640; 48 Sc. L. R. 560; 1 S. L. T. 295.—**SCOT.**



*Sect. 3.—By statute : Sub-sect. 1, H. (b) ; sub-sects. 3 & 4. Part VI.]*

**260. Appeal—Question of law.]**—An appeal lies to a Divisional Ct. under Cty. Cts. Act, 1888 (c. 43), s. 120, from the decision upon any question of law of a ct. judge in hearing an application to set aside an award under A. H. Act, 1908.—*WILLIAMS v. WALLIS & COX*, [1914] 2 K. B. 478 ; 83 L. J. K. B. 1296 ; 110 L. T. 999 ; 78 J. P. 337 ; 58 Sol. Jo. 536 ; 12 L. G. R. 726.

**261. Enforcement of award—By landlord—Agricultural Holdings Act, 1883.]**—In an arbn. under ss. 6, 7, 24 of the above Act, where a greater amount was awarded to the landlord in respect of waste & breaches of covenant than was awarded to the tenant as compensation for improvements :—*Held* : the landlord could not recover the balance under the procedure given by the Act.—*Re HOLMES & FORMBY*, [1895] 1 Q. B. 174 ; 64 L. J. Q. B. 391 ; 71 L. T. 842 ; 43 W. R. 205 ; 11 T. L. R. 91 ; 39 Sol. Jo. 100 ; 15 R. 114, D. C.

*Annotation :—Distd. Re Lloyd & Tooth*, [1899] 1 Q. B. 559, C. A.

*See, now, A. H. Act, 1908, s. 6 (3).*

**262.** .]—An outgoing tenant of a farm gave due notice of intention to claim from the lessor compensation for improvements under ss. 6, 9, 22 of the above Act, & the lessor gave due notice of intention to counterclaim against the tenant for breaches of covenant. After expiration of the time for giving notices of claim prescribed by the Act, both parties gave notices of further claims, some of which were in respect of matters not within the Act. Referees & an umpire having been appointed in pursuance of the Act, before the reference proceeded, an agreement in writing was made between the parties, by which all matters in difference as stated in the claims & counterclaims were referred to the referees & umpire already appointed under the Act, & it was agreed that all the matters should be dealt with in one award only of the referees or umpire. The referees disagreeing the umpire made an award, by which he found that a certain amount was due from the lessor to the tenant, & a larger amount was due from the tenant to the lessor, & awarded that the tenant should pay the balance to the lessor. The amount not being paid :—*Held* : leave might be given to the lessor to enforce the award in the same manner as a judgment or order to the same effect under Arbn. Act, 1889 (c. 49), s. 12.—*Re LLOYD & TOOTH*, [1899] 1 Q. B. 559 ; 68 L. J. Q. B. 376 ; 80 L. T. 394, C. A.

**263. — By tenant—Jurisdiction of county court judge—Prohibition.]**—*FARQUHARSON v. MORGAN*, No. 255, *ante*.

**264. — — — — — .]**—An agreement for letting a farm provided for adjustment of the rights of the parties, on termination of the tenancy, by arbitrators, each party choosing one, whose joint decision should be binding on both parties. Under this agreement the parties respectively appointed arbitrators. The landlord refused to permit the arbitrator appointed by him to concur in the appointment of an umpire. Upon an application by the tenant, the Board of Agriculture appointed an umpire, who made an award in favour of the tenant. Upon an application by the tenant under A. H. Act, 1883, s. 24, the ct. judge made an order that the sum awarded should be recoverable from the land-

lord. The landlord formally objected to the Board of Agriculture before the appointment by the Board of an umpire, & also before the ct. judge at the hearing of the case :—*Held* : (1) the arbn. never was one to which A. H. Acts applied, & the ct. judge had no power to make an order under s. 24 of the above Act ; (2) a writ of prohibition must be granted to restrain the ct. judge & the tenant from proceeding in the matter of the order of the judge.—*Re CUNDALL & VAVASOUR* (1906), 95 L. T. 483 ; 22 T. L. R. 802, C.A.

#### SUB-SECT. 2.—COMPENSATION FOR DISTURBANCE.

**265. Agricultural Holdings Act, 1908—Increased rent demanded—Onus of proof.]**—A landlord, who gives the satisfactory tenant of an agricultural holding notice to quit for the sole reason that he can obtain an increase of rent from another prospective tenant of equal standing, has good & sufficient cause for giving the notice to quit, & a reason not inconsistent with good estate management within A. H. Act, 1908, s. 11 (a).

From 1895 to 1911 B. was a good & satisfactory tenant of a market garden ; he improved the heart of the land by continuous high cultivation, effected certain improvements at his own cost, for which he would not receive full compensation, & had thereby increased the letting value of the holding. The landlords gave B. notice to quit for the sole reason that he refused to pay a further increased rent demanded of him. Such further increased rent was not proved to have been demanded by reason of an increased value of the holding resulting from the improvements executed by B. The landlords relet the holding to a new tenant at the further increased rental demanded from, & refused by, B. :—*Held* : B. not entitled to compensation for unreasonable disturbance either under clause (a) or clause (b) of s. 11.

Where an increase of rent is demanded from the tenant of an agricultural holding, & such demand results in the tenant quitting the holding, the *onus* in the first place is on the tenant to prove that such increase was demanded by reason of an increase in the value of the holding due to improvements executed by the tenant (*FARWELL, L.J.*).—*Re BONNETT & FOWLER*, [1913] 2 K. B. 537 ; 82 L. J. K. B. 713 ; 108 L. T. 497 ; 77 J. P. 281, C. A.

**266. — Claim may be made verbally.]**—In the case of the termination of the tenancy of an agricultural holding by the landlord, a claim for compensation by the tenant against his landlord for unreasonable disturbance under s. 11 (d) of the above Act, is not required to be in writing, but may be made verbally.—*SYLVESTER (SYLVESTER) v. BROWN* (1916), 85 L. J. K. B. 1173 ; 114 L. T. 930, C. A.

#### SUB-SECT. 3.—COMPENSATION FOR DAMAGE BY GAME.

*See GAME.*

#### SUB-SECT. 4.—MARKET GARDENS.

**267. Agricultural Holdings Act, 1908—"In use or cultivation as market garden."]**—Although it is

#### PART V. SECT. 3, SUB-SECT. 2.

**265 i. Agricultural Holdings (Scotland) Act, 1908 (c. 64), s. 10—**"Loss or expense which tenant may unavoidably incur"—"Reasonable opportunity" for valuation.]—In a claim under the above

sect. by an outgoing tenant for compensation :—*Held* : (1) "reasonable opportunity" was a question of circumstances, the sect. not imposing any duty on the tenants to give intimation to the landlord of such opportunity ; (2) "loss or expense" directly attributable to . . .

quitting the holding which the tenant may unavoidably incur," covered loss assessed by an arbiter as due to break-up prices at a forced sale.—*BARBOUR v. M'DOULL* (1914), 51 Sc. L. R. 720 ; 2 S. L. T. 72.—*SCOT*.

not necessary, in order to bring a case within A. H. Act, 1908, s. 42 (2), that it should be proved that a market garden had been in existence for a course of years, yet the sub-sect. clearly contemplates that there shall be some set of circumstances known to the landlord existing at the statutory date which lead to the conclusion that the holding was "at that date in use or cultivation as a market garden." Where a lease of lands that had been used & cultivated as a general farm was executed, leaving it optional to the tenant as to whether he would use same as a market garden or as an ordinary farm, but the landlord had knowledge when granting the

lease that the tenant intended to use the lands as a market garden—an intention which he might carry out or not as he pleased—and the tenant had simply ploughed the greater part of the lands before the statutory date, intending to plant thereon fruit trees & fruit bushes, which he did subsequently & cultivated the lands as a market garden:—*Held*: there was a perfectly colourless & neutral act from which no inference could be drawn, excepting that the lands were being cultivated for some purpose, & the above sub-sect. had no application.—*Re MORSE & DIXON* (1917), 87 L. J. K. B. 1; 117 L. T. 590, C. A. See, also, Nos. 176, 233, 234, 235, 236, 240, 241.

## Part VI.—Fixtures.

As to the Act in force, see note on p. 5, ante.

See, generally, LANDLORD & TENANT.

**268. Agricultural fixtures—Distinguished from trade fixtures—Buildings.]**—A tenant in agriculture, who erected at his own expense & for the mere necessary & convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, & fold yard wall, which buildings were of brick & mortar, & tiled, & let into the ground, cannot remove same, though during his term, & though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, & those made for the purposes of agriculture & better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former,

### PART VI.

**268 i. Agricultural fixtures.]**—A tenant who, at his own cost, makes additions to the houses on his farm, is not entitled to dilapidate them, or carry off the materials at his removal.—*MURRAY v. BISSET* (1805), Hume, 818.—SCOT.

**268 ii. — Landlord's rights on termination of lease.]**—It is optional to a landlord, at the termination of a lease, either to order removal of houses voluntarily built on the farm by the tenant for his own use, or to prevent their being removed, without offering any indemnification; but the tenant is not bound to put them in good condition.—*OLIPHANT (OF ROSSIE) v. THOMSON* (1822), 20 F. C. 542.—SCOT.

**l. Fences.]**—A tenant, who has voluntarily erected fences upon his farm, must, at his removal, either clear them away & leave the ground free from incumbrance, or put them in a state of repair.—*ANDREW v. MORRISON* (1811), 16 F. C. 152.—SCOT.

**m. —.]**—Wire fencing, wooden palings, & wooden folds, voluntarily erected by the tenant of a sheep farm at his own expense, for the purpose of trying experiments in rearing sheep, & not in substitution of previously existing fences, or necessary for the proper management of the farm, can be removed by the tenant.—*BUCCLEUCH (DUKE) v. STEVENSON, ETC.* (TOD'S TRUSTEES) (1871), 9 Macph. (Ct. of Sess.) 1014; 43 Sc. Jur. 552.—SCOT.

**n. — Windmill & shed.]**—*Held*: a fence, windmill & shed were fixtures & not having been removed before termination of the tenancy, belonged to the landlord.—*SASKATCHEWAN v. GOMBAR* (1909), 11 W. L. R. 520.—CAN.

**o. Stable fittings.]**—A tenant was bound by his lease to leave the fences, houses, etc., "in sufficient order, & good tenantable, habitable, & useful condition." An action was brought against him for payment of the sum alleged to be

necessary to put the houses & fences into good repair. The Lord Ordinary—after an inspection—pronounced judgment for the necessary amount. On appeal it was contended that the inspector's report was objectionable in so far as it did not allow anything for supplying trevies, racks, & mangers, which had been put up by the original tenant in a cottage, not originally used as a stable, but fitted up by him as such, & which he had taken away on removal agreeable to a common practice of the neighbourhood. The Ct. adhered to the Lord Ordinary's interlocutor.

*Semble*: if the trevies had been permanent fixtures, the case might have been different.—*SCOTT v. KWART* (1824), 3 Sh. (Ct. of Sess.) 344.—SCOT.

**p. Threshing machine.]**—A landlord bound himself, as there were no offices on the farm, to pay to the tenant £600, "for the purpose of building & erecting a farmstead, threshing-mill, & offices; & the tenant bound himself "to build the mains, offices, & thrashing-mill upon the farm, sufficient for the farm," & he further obliged himself to uphold & keep in repair, & leave in good order & condition at his removal, the mains, offices, & threshing-mill which he was to build. The tenant accordingly built the offices at an expense exceeding by several hundred pounds the sum paid him by the landlord, & he fitted up the threshing mill with machinery. At the expiry of the lease:—*Held*: the tenant had no right to carry away from the farm the machinery of the threshing-mill & its relative appendages, or any part thereof.—*CAMPBELL v. HOWDEN* (1825), 3 Sh. (Ct. of Sess.) 569.—SCOT.

**q. — & steam-boiler.]**—A tenant, while in possession under his lease, set up for agricultural purposes a threshing machine & steam-boiler. The threshing machine was fastened to four bolts fixed in the ground, but was capable of being detached from them by unscrewing four nuts at the end of the bolts, & removing the shaft of the machine, which passed

that is, where the superincumbent building is erected as a mere accessory to a personal chattel, as an engine, but where it is accessory to the realty, it can in no case be removed.—*ELWES v. MAW* (1802), 3 East, 38; 102 E. R. 510.

*Annotations*:—*Consd.* *Buckland v. Butterfield* (1820), 2 Brod. & Bing. 54. *Distd.* *Winn v. Ingilby* (1822), 5 B. & Ald. 625. *Consd.* *Whitehead v. Bennett* (1858), 27 L. J. Ch. 474; *Wake v. Hall* (1883), 8 App. Cas. 195, H. L.; *Ward v. Dudley* (1887), 57 L. T. 20; *Mears v. Callender*, [1901] 2 Ch. 388. *Refd.* *Steward v. Lombe* (1820), 4 Moore, C. P. 281; *Farrant v. Thompson* (1822), 2 Dow. & Ry. K. B. 1; *Trappes v. Harter* (1833), 2 Cr. & M. 153; *Darby v. Harris* (1841), 10 L. J. Q. B. 294; *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443; *Wiltshire v. Cottrell* (1853), 1 E. & B. 674; *London & Westminster Loan & Discount Co. v. Drake* (1859), 5 Jur. N. S. 1407; *Powell v. Farmer* (1865), 18 C. B. N. S. 168; *Barff v. Probyn* (1895), 64 L. J. Q. B. 557; *Norton v. Dashwood* (1896), 65 L. J. Ch. 737; *Mowats v. Hudson* (1911), 105 L. T.

through the wall of the house, both of which could be done without injury to the freehold. The steam-boiler was set in brickwork, which rested on the floor in the corner of the outhouse, & touched both walls, but was capable of being removed by detaching the upper tier of the brickwork, without injury to itself or to the outhouse:—*Held*: the threshing machine & steam-boiler were not fixtures as between landlord & tenant, & the tenant was entitled to remove them, on the expiration of his tenancy, as removable chattels.—*SHINNER v. HARMAN* (1853), 3 I. C. L. R. 243.—IR.

**r. Shed.]**—Inside a kraal on a farm was a shed, the roof of which, consisting of corrugated iron sheets screwed on to rafters, rested in front on poles fixed in the ground & at the back on the stone wall of the kraal. The shed had been erected by a lessee in occupation of the farm at the time it was sold, & who removed the shed after the sale, but before transfer:—*Held*: the shed was a fixture forming part of the farm which the vendor was bound to deliver with the farm.—*CAIRNCROSS v. NORTJE*, [1904] 21 S. C. 127; 14 C. T. R. 205.—S. AF.

**s. Ornamental shrubs, turf, & gravel.]**—F. was yearly tenant of a cottage & garden ground. His occupancy had commenced when the cottage was built & the garden was rough & uncultivated. He planted ornamental shrubs & laid out terraces with turf & gravel walks, access to the terraces being got by wooden steps:—*Held*: F. not entitled to remove the shrubs & turf, but entitled to remove the wooden steps.

*Semble*: the gravel was *pars soli* & irremovable.—*BURNS v. FLEMING* (1850), 8 R. (Ct. of Sess.) 226.—SCOT.

**t. Water tank.]**—*Held*: the tenant of a farm could remove a water tank, not attached to the freehold.—*SASKATCHEWAN v. GOMBAR* (1909), 11 W. L. R. 520.—CAN.



400, C. A.; *Re Chesterfield's S. E.*, [1911] 1 Ch. 237. **Mentd.** *Lee v. Risdon* (1816), 7 Taunt. 188; *Place v. Fagg & Ashby* (1829), 4 Man. & Ry. K. B. 277; *Re Ogden*, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765; *Elliott v. Bishop* (1854), 10 Exch. 496; *Bishop v. Elliott* (1855), 11 Exch. 113; *Walmsley v. Milne* (1859), 7 C. B. N. S. 115; *Powell v. Boraston* (1865), 13 W. R. 465; *Cornish v. Stubbs* (1870), 39 L. J. C. P. 202; *Wake v. Hall* (1880), 7 Q. B. D. 295, C. A.; *Re De Falbe*, *Ward v. Taylor* (1901), 84 L. T. 273, C. A.

See, now, Landlord & Tenant Act, 1851 (c. 25), s. 3.

**269. Barn—Custom of the country.**—Deft. was sued in trover for ten loads of timber; he was tenant to pltf., & had erected a barn on his holding & placed it upon blocks & pattens of timber lying on the ground. Evidence was admitted of a custom of the country for barns to be erected in that manner in order to allow them to be taken away at the end of the tenancy:—**Held**: deft. entitled to take away the barn.—**CULLING v. TUFNAL** (1694), Bull. N. P. (5th ed.) 34.

**Annotations**:—**Consd.** *Elwes v. Maw* (1802), 3 East, 38. **Refd.** *Wiltshier v. Cottrell* (1853), 1 E. & B. 674.

**270. Dutch barns.**—A lessee at the end of the term removed two Dutch barns, which had been erected during the term. The landlord then sued him for breach of a covenant in the lease to leave all erections made on the premises:—**Held**: the tenant was entitled to make the removal, & the covenant did not forbid it.—**DEAN v. ALLALLEY** (1709), 3 Esp. 11.

**Annotations**:—**Consd.** *Elwes v. Maw* (1802), 3 East, 38. **Refd.** *Mears v. Callender* (1901), 70 L. J. Ch. 621.

**271. Wooden barn—Conversion by reversioner.**—A tenant is entitled, at expiration of his term, to remove a wooden barn which he has erected on a foundation of brick & stone, the foundation being let into the ground, but the barn resting upon it by weight alone. He may maintain trover for such a barn against a party converting it. If the reversioner, having refused, while off the premises, to allow such a tenant to take away the barn, afterwards, while a third party is in possession of the land, come on the land & prevent the tenant from entering to take the barn away, this is a conversion by the reversioner.—**WANSBROUGH v. MATON** (1836), 4 Ad. & El. 884; 6 Nev. & M. K. B. 367; 5 L. J. K. B. 150; 111 E. R. 1016.

**Annotations**:—**Refd.** *Re Gye & Hughes*, *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443; *Wiltshier v. Cottrell* (1853), 1 E. & B. 674. **Mentd.** *R. v. Guest* (1838), 7 Ad. & El. 951.

**272. Box border.**—A tenant (not a gardener by trade) cannot remove a border of box planted on the demised premises by himself & intended to be permanent, unless by special agreement with the landlord.

There is no authority for saying that an ordinary tenant may take up growing trees without a special agreement for that purpose (**PARKE, J.**).—**EMPSON v. SODEN** (1833), 4 B. & Ad. 655; 1 Nev. & M. K. B. 720; 110 E. R. 603.

**Annotation**:—**Mentd.** *Lancaster v. Eve* (1859), 5 C. B. N. S. 717.

**Trees.**—See Part IX., *post*.

**273. Rick saddles—Threshing machine—Granary—Vendor & purchaser—Reversioner.**—Pltf. purchased a farm from the devisees in trust of the father of deft., & the premises were conveyed by a deed, to which deft. was a party as one of the devisees. Pltf. demised the premises to M. immediately after the conveyance, & deft., who was in the occupation of the farm at the time of the conveyance under a lease from the devisees, removed some rick saddles, a threshing machine, & a granary from the premises after the demise to M. The deed conveyed the land & all fixtures, & the articles

in question had been put on the land by deft.'s father:—**Held**: (1) everything attached to the land having passed by the deed, deft. had no right to remove the articles as fixtures removable by an outgoing agricultural tenant; (2) the removal of the rick saddles, which were stone pillars mortared to a foundation of brick & mortar let into the earth, with stone caps mortared on the pillars, & of the threshing machine, which was fixed by bolts & screws to posts which were let into the ground, was an injury to pltf.'s reversionary estate for which deft. was liable in an action; (3) a granary laid on a wooden foundation supported by staddles, & which could be lifted from them by sufficient power without disturbing them, was a chattel, though it might pass under the word "fixtures" in a deed of conveyance, if there were other words in the deed denoting an intention of passing chattels, & it appeared, from the circumstances of the case, to be comprehended under that word, but the removal of it would not support a count for an injury in the reversionary estate of pltf., nor a count in trover, since M. was entitled to exclusive possession.—**WILTSHIER v. COTTRELL** (1853), 1 E. & B. 674; 22 L. J. Q. B. 177; 17 Jur. 758; 118 E. R. 589.

**Annotations**:—**Consd.** *Holland v. Hodgson* (1872), L. R. 7 C. P. 328, Ex. Ch. **Refd.** *Chidley v. West Ham Churchwardens* (1874), 32 L. T. 486; *Hobson v. Gorringe*, [1897] 1 Ch. 182, C. A. **Mentd.** *Elliott v. Bishop* (1854), 10 Exch. 496.

**274. Hay-cutter, etc.—Mortgagor & mortgagee—Goods affixed to freehold after date of mortgage.**—Things firmly annexed to the freehold by a mtgor. in possession after the date of the mtge., for the purpose of improving the inheritance, pass to the mtgee., & do not pass to the assignees of the mtgor. upon his bkpcy.; & that rule applies as well to trade as other fixtures, the mtgor. not being in possession as tenant to the mtgee.

In 1853 M. mtged. land in fee to O. M. After the date of the mtge. M. erected buildings upon the land, & fixed thereto by means of screws & bolts a steam engine (connected with a boiler), hay-cutter, corn-crusher & grinding-stones. The steam engine was what was called a portable engine, & used for the purpose of pumping water into some baths which he had built upon the premises, & also for working the other machines & the grinding-stones. All these things were used by M. for the purposes of trade. On Aug. 20, 1858, O. M., the mtgee., sold, under a power of sale in the mtge., the mtged. premises to deft. On Sept. 4 M. became bkpt. In an action by the assignees of M. to recover possession of the steam engine, hay-cutter, corn-crusher & grinding-stones:—**Held**: having been firmly annexed by the mtgor. to the freehold, & there being nothing to show an intention between the mtgor. & mtgee. that fixtures annexed subsequent to the date of the mtge. should not pass as the mtged. estate, they passed to the mtgee., & so to deft.—**WALMSLEY v. MILNE** (1859), 7 C. B. N. S. 115; 29 L. J. C. P. 97; 1 L. T. 62; 6 Jur. N. S. 125; 8 W. R. 138; 141 E. R. 759.

**Annotations**:—**Consd.** *R. v. Lee* (1866), L. R. 1 Q. B. 241; *Climie v. Wood* (1869), L. R. 4 Exch. 328, Ex. Ch.; *Holland v. Hodgson* (1872), L. R. 7 C. P. 328, Ex. Ch.; *Tyne Boiler Works Co. v. Longbenton Overseers & Tyne-mouth Union* (1886), Ryde's Rat. App. (1886-90), 241, C. A. **Refd.** *Re Walker*, *Ex p.* Acton (1861), 4 L. T. 261; *Climie v. Wood* (1868), L. R. 3 Exch. 257; *Longbottom v. Berry* (1869), L. R. 5 Q. B. 123; *Tottenham v. Swansea Zinc Ore Co.* (1885), 52 L. T. 738; *Gough v. Wood*, [1894] 1 Q. B. 713, C. A.; *Hobson v. Gorringe*, [1897] 1 Ch. 182, C. A.; *Reynolds v. Ashby*, [1904] A. C. 466, H. L.; *Cullwick v. Swindell* (1866), L. R. 3 Eq. 249.

**275. Gardeners & nurserymen—Greenhouses & hot-houses.**—Gardeners & nurserymen in the

**275 i. Gardeners & nurserymen—Greenhouses & hot-houses.**—Greenhouses, forcing pits, & hotbed frames, erected by nursery gardeners for the purposes of their trade, may, in so far as not consisting of brickwork, be removed by them at the expiration of their lease. **Qu.**: whether the brickwork might not

also have been removed.—**SYME v. HARVEY** (1861), 24 D. 202; 34 Sc. Jur. 98.—**SCOT.**

neighbourhood of the metropolis may remove trees in the necessary course of their trade, & it seems, may remove greenhouses & hot-houses (LORD KENYON, C.J.).—PENTON v. ROBERT (1801), 2 East, 88; 102 E. R. 302.

*Annotations*:—**Consd.** Buckland v. Butterfield (1820), 2 Brod. & Bing. 54. **Expld.** Graves v. Weld (1833), 2 Nev. & M. K. B. 725. **Consd.** Mears v. Callender, [1901] 2 Ch. 388. **Refd.** Elwes v. Maw (1802), 3 East, 38. **Mentd.** Hubbard v. Bagshaw (1831), 4 Sim. 326; *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443; *Heap v. Barton* (1852), 12 C. B. 274; *Leader v. Homewood* (1858), 5 C. B. N. S. 546; *Barff v. Probyn* (1895), 64 L. J. Q. B. 557; *Leschallas v. Woolf*, [1908] 1 Ch. 641.

**276.** .]—A landlord in 1887 demised a farm to deft. for a term expiring in 1901. The lease provided that the tenant should leave gratis for the landlord all improvements made by the tenant, in consideration of no claim being made by the landlord for similar matters on the tenant entering, & that the tenant might, at his own cost, convert into an orchard so much of certain meadow land as he thought proper, & that A. H. Act, 1883, should not apply. Shortly after the tenancy commenced deft. turned part of the meadow land into an orchard, in which in 1901 were over one thousand two hundred trees (apple, pear, plum, & cherry) in good bearing condition, & though not capable of removal, worth some hundreds of pounds to an incoming tenant. Deft. also erected ten glass-houses. One had concrete sides, & its glass span-roof substantially rested on the sides & could be removed without damaging the walls. In the case of the other houses the glass span-roofs were supported by & nailed to wide sills, which in turn were nailed to & supported by wooden piles driven into the ground. In these houses deft. grew grapes, peaches, nectarines, tomatoes, & strawberries, which he sold, carrying on the trade of a market gardener with his landlord's knowledge:—*Held*: (1) at common law deft. could not cut down or remove the orchard trees; (2) at common law deft. could lawfully remove the glass-houses, unless precluded by the lease; (3) the lease did not preclude him, as "improvements" did not include glass-houses; (4) the common law right of deft. to remove the glass-houses was left untouched by A. H. Act, 1883, s. 34 of which was lawfully excluded by the lease; (5) deft. was entitled to remove the glass-houses.—MEARS v. CALLENDER, [1901] 2 Ch. 388; 70 L. J. Ch. 621; 84 L. T. 618; 65 J. P. 615; 49 W. R. 584; 17 T. L. R. 518.

*Annotation*:—**Refd.** Morse v. Dixon (1917), 117 L. T. 590, C. A.

**277. — Boiler & pipes for greenhouse—Rights of mortgagee as against owner of fixtures.**]—Pltf. claimed damages against defts. for the removal of a boiler & pipes from certain greenhouses on grounds belonging to E., of which pltf. was mtgee. E., the mtgor., was a nurseryman, & tenant of the premises on a long lease. The boiler & pipes were the subject of a hire & purchase agreement, by which defts. agreed with E. that the boiler & pipes should become his property on the payment of the price by certain instalments, but that until complete payment they were to remain the property of defts. E.'s lessor joined in the agreement. The mtge. was made after the agreement, & without notice of it, but before the boiler & pipes were fixed upon the premises. The boiler & pipes were fixed in brickwork. E. made default in payment of the instalments, & the boiler & pipes were removed by defts. under the agreement while E.

was still in possession of the premises. The ground of pltf.'s claim was that the boiler & pipes had been affixed to the mtged. property without his consent, & had become part of the soil, & were irremovable against him:—*Held*: (1) pltf., by allowing E. to remain in possession, impliedly authorised him to carry on his business of nurseryman, which would properly include the hiring & bringing on to the premises of fixtures necessary to his business, upon the terms that the owner should be at liberty to remove them on determination of the hiring agreement; (2) having regard to this implied authority, to the fact that the fixtures were not the property of E., & that E. was in possession at the date of their removal, pltf.'s claim failed.—GOUGH v. WOOD & CO., [1894] 1 Q. B. 713; 63 L. J. Q. B. 564; 70 L. T. 297; 42 W. R. 469; 10 T. L. R. 318; 9 R. 509, C.A.

*Annotations*:—**Expld. & Distd.** Huddersfield Banking Co. v. Lister, [1895] 2 Ch. 273, C. A. **Distd.** Thomas v. Jennings (1896), 66 L. J. Q. B. 5. **Expld. & Distd.** Hobson v. Gorringe, [1897] 1 Ch. 182, C. A. **Distd.** Reynolds v. Ashby, [1903] 1 K. B. 87, C. A.; *Re Allen*, [1907] 1 Ch. 575. **Consd.** Ellis v. Glover & Hobson, [1908] 1 K. B. 388, C. A. **Refd.** Reynolds v. Ashby, [1904] A. C. 466, H. L. **Mentd.** *Re Morrison, Jones & Taylor, Cookes v. Morrison, Jones & Taylor*, [1914] 1 Ch. 50, C. A.

**278. Injunction to restrain removal.**]—Pltf. granted a lease to B. of a house with certain fixtures mentioned in it, & the lease contained a covenant by B. that he would spend upon the premises all hay & manure arising from them. Defts. having got from him a bill of sale of all his effects, entered upon the premises & advertised to be sold by auction not only all B.'s furniture, but the fixtures included in the lease, & all hay & manure upon the premises, & a dog-kennel & other out-buildings, & fences, gates, & many other things affixed to the freehold, & were proceeding to pull them down in order to sell them. Upon a bill being filed, & before defts.' appearance, an injunction to restrain defts. from selling or removing from the premises any of the fixtures or other things which then were, or lately had been, affixed to the freehold, & hay & manure which had been made on the premises, was applied for. An injunction was granted as to the fixtures & manure, as well as to restrain waste by pulling down the buildings, etc. *Qu.*: whether an injunction had ever been granted for breaking a covenant.—GEAST v. BELFAST (LORD) (1796), 3 Anst. 749, n.; 145 E. R. 1027.

**279. Sub-lease—Right of superior landlord—No implied guarantee by sub-lessor.**]—In an under-lease of a nursery ground reserving the last three days of the term, the sub-lessee covenanted to deliver up to the sub-lessor the premises & all landlord's fixtures. The sub-lessee was not aware that his immediate lessors held under a superior lease, by which they were bound to deliver up all trade fixtures at the end of the term, & he placed on the ground greenhouses & other trade fixtures, which shortly before the end of the term he sold, whereupon the reversioners under the superior lease obtained an injunction to restrain their removal. The sub-lessee sued his immediate lessors for loss of his trade fixtures, & the costs incurred in reference to the injunction:—*Held*: the action was not maintainable, as it could not be implied that the sub-lessors had guaranteed that pltf. might remove his trade fixtures without interference from the superior landlord.—PORTER v. DREW (1880), 5 O. P. D. 143; 49 L. J. Q. B. 482; 42 L. T. 151; 44 J. P. 267; 28 W. R. 672.

*Annotation*:—**Mentd.** Thomas v. Jennings (1896), 45 W. R. 93.



## Part VII.—Bankruptcy of Tenant.

See BANKRUPTCY & INSOLVENCY.

## Part VIII. Growing Crops and Crops, Emblements, and Gleaning.

### SECT. 1.—GROWING CROPS AND CROPS.

**280. Sale—Interest in land—Passing before severance—Statute of Frauds—Grass.]**—A. by parol agreed to sell B. a standing crop of grass for 20 guineas; B. was to mow it & make it into hay, but no time was fixed for the mowing, or for payment of the money, nor was possession of the close given. A. afterwards gave B. notice that he should not have the grass, & sold it to C. B. entered privily & cut part of the grass; A. then gave notice to him not to mow, & C., under the direction of A., mowed & carried off same:—*Held*: B. could not have trespass *quare clausum fregit*, nor *de bonis asportalis*, for it was a contract for an interest in or concerning land under Stat. Frauds, s. 4, & not being in writing & being executory, A. might well discharge it.—*CROSBY v. WADSWORTH* (1805), 6 East, 602; 2 Smith, K. B. 559; 102 E. R. 1419.

*Annotations*:—**Expld.** & **Distd.** *Parker v. Staniland* (1809), 11 East, 362. **Distd.** *Warwick v. Bruce* (1813), 2 M. & S. 205; *Evans v. Roberts* (1826), 5 B. & C. 829. **Expld.** *Strickland v. Maxwell* (1834), 2 Cr. & M. 539; *Carrington v. Roots* (1837), 2 M. & W. 248. **Consd.** *Washbourn v. Burrows* (1847), 1 Exch. 107. **Apld.** *Roads v. Trumpington Overseers* (1870), L. R. 6 Q. B. 56. **Distd.** *Hand v. Hall* (1877), 2 Ex. D. 318. **Expld.** *Coverdale v. Charlton* (1878), 26 W. R. 687, C. A. **Consd.** *Maddison v. Alderson* (1883), 8 App. Cas. 467, H. L. **Refd.** *Jones v. Flint* (1839), 10 Ad. & El. 753; *Leroux v. Brown* (1852), 12 C. B. 801. **Mentd.** *Mogg v. Yatton Overseers* (1880), 50 L. J. M. C. 17; *Morris v. Baron*, [1918] A. C. 1, H. L.

**281.** ———— **].**—A contract for the sale of an interest in land without a note in writing may operate as a licence so as to excuse the entry of the purchaser on the land, but it cannot be made available in any way as a contract.

Where a party had purchased, by a verbal contract, a growing crop of grass, with liberty to go on the close where it grew for the purpose of cutting & carrying it away:—*Held*: he could not maintain trespass against the seller for taking away his horse & cart from the close, which he had brought there for the purpose of carrying away the grass, for this was in substance an action charging debt, on the contract within Stat. Frauds, s. 4.—*CARRINGTON v. ROOTS* (1837), 2 M. & W. 248; *Murph. & H.* 14; 6 L. J. Ex. 95; 1 Jur. 85; 150 E. R. 748.

*Annotations*:—**Apld.** *Reade v. Lamb* (1851), 6 Exch. 130. **Consd.** *Leroux v. Brown* (1852), 12 C. B. 801. **Expld.** *Williams v. Wheeler* (1860), 8 C. B. N. S. 299. **Consd.** *Britain v. Rossiter* (1879), 11 Q. B. D. 123, C. A. **Refd.** *Williams v. Lake* (1859), 6 Jur. N. S. 45.

**282.** ———— **Crops.]**—A declaration stated that pltf. was possessed of a farm, upon which were certain growing crops, & on which pltf. had done certain work & labour, & expended certain materials in making the lands ready for tillage, of which work, labour, & materials he, pltf., had not derived the benefit; & that, in consideration that

pltf. would let the farm to deft. for fourteen years, deft. undertook to take the crops, & pay for them, & for the work, labour, & materials, according to a valuation. Averments that pltf. let the farm accordingly, & left the crops upon it, & that deft. took possession of the farm, & had the benefit of the work, labour, & materials, & that the valuation was made, but that deft. did not pay. Plea, that the crops, & the benefit of the work, labour & materials, were not excepted or reserved out of the letting or agreement to let, & that there was no agreement in writing in respect of those causes of action, or any memorandum or note thereof, signed by deft. or any person by him lawfully authorised:—*Held*: the contract was for an interest in land, & the right to the crops, & the benefit of the work & labour, were both of them an interest in land within Stat. Frauds, s. 4.

To an *indebitatus* count for crops bargained & sold, & under & by virtue of such bargain & sale, accepted & taken, & had & received & cut down by deft., deft. pleaded that the crops, at the time of the bargain & sale, were growing upon & affixed to certain lands, & that before the bargain & sale there was a treaty on foot between pltf. & deft., by which it was proposed that pltf. should let the lands to deft., & that deft. should take therewith the crops, & that deft. assented to the treaty, & that, in order to carry the treaty into effect, the supposed bargain & sale was verbally contracted between pltf. & deft., & that there was no agreement in writing or any memorandum or note thereof:—*Held*: the crops were, at the time of the bargain & sale, an interest in the land, & the case was within Stat. Frauds.

The same point was held on a similar plea to a count for work, labour, & materials.

In *indebitatus assumpsit* upon an account stated deft. pleaded that, before the taking of the account, there was a verbal agreement for the sale of certain crops growing upon pltf.'s land, & for work, labour & materials, done & used in preparing the land for tillage, & that there was a treaty for pltf.'s letting & deft.'s taking the land for fourteen years, to which deft. assented, & that the money to be paid for the crops, & the work, labour, & materials, was the money concerning which the account was stated, & that there was no agreement in writing or any note thereof. To this plea pltf. replied that, before the account was stated, deft. had mown the crops & taken them to his own use, & had & received the amount of the work & labour & materials. Deft. rejoined, traversing that he had cut down the crops, & received the amount of the work & labour, etc., before the stating of the account:—*Held*: the contract, as appearing on the pleadings, was within Stat. Frauds, & pltf. could not recover.—*FALMOUTH*

### PART VIII. SECT. 1.

**282 i. Sale—Interest in land—Passing before severance—Statute of Frauds—Crops.]**—Declaration for breaking & entering pltf.'s close & cutting & carrying away the grain. Plea, that pltf. held the land under an indenture of lease from

deft., on the negotiation for & execution of which it was verbally agreed between them that deft. should have the right to enter & harvest the crop then in the ground sowed by him, that when the lease was executed a reservation of such right in it was suggested, but omitted on pltf.'s assurance that it was unnecessary,

& that the entry, etc., in pursuance of such agreement, was the trespass complained of:—*Held*: the plea was good, for the independent verbal agreement was good as an agreement, though deft., by s. 4 of the above Act, might be prevented from suing on it.—*MCGINNESS v. KENNEDY* (1869), 29 U. C. R. 93.—CAN.

## PART VIII.—GROWING CROPS AND CROPS, EMBLEMENTS, AND GLEANING.

(EARL) *v. THOMAS* (1832), 1 Cr. & M. 89; 3 Tyr. 26; 2 L. J. Ex. 57; 149 E. R. 326.

*Annotations*:—*Apld.* *Harvey v. Grabham* (1836), 5 Ad. & El. 61. *Expld.* *Jones v. Flint* (1839), 10 Ad. & El. 753; *Martyn v. Clue* (1852), 18 Q. B. 661; *Re Laycock v. Pickles* (1863), 4 B. & S. 497. *Refd.* *Harman v. Reeve* (1856), 18 C. B. 587. *Mentd.* *Hilton v. Grenville* (1844), 2 L. T. O. S. 370; *Evans (Joseph) v. Heathcote*, [1918] 1 K. B. 418, C. A.

**283.** —————.]—A. agreed with B. to let him land rent free on condition that A. should have a moiety of the crops, & while the crop was on the ground it was appraised for both parties. A. declared in *indebitatus assumpsit* for a moiety of the value of the crop sold to B. without stating the special agreement:—*Held*: he might well do so, as the special agreement was executed by the appraisal, & the action arose out of something collateral to it. *Semble*: such an agreement need not be in writing under Stat. Frauds.—*POULTER v. KILLINGBECK* (1799), 1 Bos. & P. 397; 126 E. R. 973.

*Annotations*:—*Distd.* *Crosby v. Wadsworth* (1805), 6 East, 602. *Consd.* *Evans v. Roberts* (1826), 5 B. & C. 829. *Refd.* *Green v. Saddington* (1857), 7 E. & B. 503.

**284.** ————— Turnips.]—A sale of growing turnips, no time being stipulated for their removal, & the degree of their maturity not being positively found, is a sale of an interest in land within Stat. Frauds, s. 4, & must be in writing.—*EMMERSON v. HEELIS* (1809), 2 Taunt. 38; 127 E. R. 989.

*Annotations*:—*Distd.* *Balvey v. Parker* (1823), 2 B. & C. 37. *Dbtd.* *Evans v. Roberts* (1826), 5 B. & C. 829; *Jones v. Flint* (1839), 10 Ad. & El. 753. *Mentd.* *White v. Proctor* (1811), 4 Taunt. 209; *Keweys v. Proctor* (1820), 1 Jac. & W. 350; *Kenworthy v. Schofield* (1821), 2 B. & C. 915; *Glengal v. Barnard* (1836), 1 Keen. 769; *Laythorp v. Bryant* (1836), 2 Bing. N. C. 735; *Seaton & Edwards v. Booth* (1836), 1 Har. & W. 742; *Murphy v. Boese* (1875), L. R. 10 Exch. 126; *Sims v. Landray* (1894), 8 R. 582; *Bell v. Balls*, [1897] 1 Ch. 663; *Moore, Nettlefold v. Singer Manufacturing Co.* (1901), 20 T. L. R. 366; *Dewar v. Mintoft*, [1912] 2 K. B. 373.

**285.** ————— Underwood.]—In an action of trespass, the question was whether pltf., who had purchased by parol the underwood then standing, to be cut by him, had such a possession as would enable him to maintain trespass against defts. for cutting & carrying away:—*Held*: a contract for sale of growing underwood, to be cut by the purchaser, was a contract for sale of an interest in land under Stat. Frauds, s. 4, & pltf. had no possession sufficient to maintain the action.—*SCORELL v. BOXALL* (1827, ), 1 Y. & J. 396; 148 E. R. 724.

**284 i.** ————— Turnips.]—A contract for the sale of a growing crop of turnips for less than £10 does not require a note in writing, such a crop being personal chattels, & trover being maintainable for its severance & conversion.—*DUNNE v. FERGUSON* (1832), Hayes, 540.—IR.

**286 i.** ————— Trees.]—The sale of growing trees or underwood is the sale of an interest in land.—*RHODES v. BAKER* (1851), 1 I. C. L. R. 488.—IR.

**a.** ————— Future crops.]—Crops to be sown upon certain land may be the subject of sale, as any other after-acquired property, & the property in them will pass, when sown, if they are so described as to be capable of being identified when acquired.—*GRASS v. AUSTIN* (1882), 7 A. R. 511.—CAN.]

**b.** —————.]—An agreement for the sale of land on credit provided that the crops grown upon it should be & remain the property of the vendor, & should not be removed therefrom until the then current year's payment of principal money & interest should have

been made, without the authority of the vendor:—*Held*: under this agreement, when the crop came into existence, the legal title to it was in the vendee, & no property in it passed to the vendor, but at most he had an equitable right to enter & take the crop when it came into existence, or to call for the execution of a formal & legal mtge. upon it.—*SMITH v. UNION BANK*, 11 Man. L. R. 182.—CAN.

**c.** ————— By sheriff under fi. fa.]—M. having recovered judgment against K., a writ of fi. fa. was issued, & the sheriff seized crops on the ground & growing on the land of K., & sold them by auction to M.:—*Held*: the property in the growing crop passed to M. under the sale to him.—*RUSSELL v. MOORE* (1881), 15 I. L. T. Jo. 139.—IR.

**d.** Conveyance on sale of land—Passes growing crops.]—By deed of conveyance of all & singular that certain parcel of land, etc., together with the houses & easements, profits, privileges, hereditaments, etc., to the parcel of land belonging to or in anywise appertaining, & all the rents, issues & profits thereof, etc., growing crops in the ground at the

**286.** ————— Trees.]—A sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract or sale of land or any interest therein within Stat. Frauds, s. 4.

Deft. by word of mouth purchased certain growing trees for £26 of pltf. on the terms that he, deft., should remove them as soon as possible. Deft. cut down some of the trees & agreed to sell the tops & stumps to a third party. Pltf. countermanded the sale & prohibited deft. from cutting down the rest of the trees. Deft., however, cut down the remainder & carried the whole away:—*Held*: the case was within Stat. Frauds, s. 17, & before the sale was countermanded there was an acceptance & actual receipt of part of the goods sold within that sect.—*MARSHALL v. GREEN* (1875), 1 C. P. D. 35; 45 L. J. Q. B. 153; 33 L. T. 404; 24 W. R. 175.

*Annotations*:—*Distd.* *Lavery v. Pursell* (1888), 39 Ch. D. 508. In *Marshall v. Green* the intention of the parties unquestionably was to sell & buy as timber; the trees being standing trees to be cut by the purchaser, the ct. held that it was not within s. 4. Now the ct. appear to have considered that there was no interest in the land, & I am bound of course by the English law to say that a tree is not a chattel; but a line must be drawn somewhere, & I draw the line at this case because on the facts it is quite different or materially different from *Marshall v. Green* (CHIRRY J.). *Consd.* *Jones v. Tankerville*, [1909] 2 Ch. 440; *Kauri Timber Co. v. Taxes Comr.*, [1913] A. C. 771, P. C. The present is a broad case of the natural products of the soil in timber—a crop requiring long continual possession of land until maturity is reached; the judgment of Bret, J. in *Marshall v. Green* distinguished this broad case & properly accepts the note in Saunders' Reports which has been cited (LORD SHAW OF DUNFERMLINE). *Refd.* *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10.

**287.** ————— Stamp Acts—Hops.]—A written agreement for the sale of all hops which shall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, cannot be given in evidence unless stamped with an agreement stamp, such an agreement not being within the exception in 23 Geo. 3, c. 58, s. 4, respecting agreements for the sale of goods, wares & merchandises.—*WADDINGTON v. BRISTOW* (1801), 2 Bos. & P. 452; 126 E. R. 1379.

*Annotations*:—*Consd.* *Parker v. Staniland* (1809), 11 East, 362; *Evans v. Roberts* (1826), 5 B. & C. 829; *Marson v. Short* (1835), 2 Bing. N. C. 118. *Dbtd.* *Rodwell v. Phillips* (1842), 9 M. & W. 501. *Refd.* *Crosby v. Wadsworth* (1805), 6 East, 602; *Jones v. Flint* (1839), 10 Ad. & El. 753.

**288.** ————— Fruit & vegetables.]—An agreement for the sale of fruit growing on the trees is an agreement for the sale of an interest in land within Stamp Act, 1815 (c. 184), & requires a stamp.—*RODWELL v. PHILLIPS* (1842), 9 M. & W.

time of execution of the deed will pass to the grantee.—*WOOD v. LANG* (1856), 5 C. P. 204.—CAN.

**e.** —————.]—The growing crops on land are part of & go with the freehold when sold, & where a tenant in possession at the time of sale carried away the growing crops, compensation was granted to the purchaser out of the purchase-money, & the same order was made to extend to taxes due on the land & unpaid.—*STEWART v. HUNTER* (1868), 2 Ch. Ch. 335.—CAN.

**f.** ————— Hay harvested by lessee.]—The purchaser of a farm during the pendency of a lease has no right to the hay grown on the farm & harvested by the lessee, & in his possession at the time of the sale.—*BRODY v. RENDALL* (1878), 9 R. L. N. S. 512; S. C. R. 1878.—CAN.

**g.** Demise of aftergrass.]—A demise of the aftergrass is a demise of the grass after the hay is cut.

An agreement to take the aftergrass for six weeks is not a demise of the land for six weeks.—*HICKEY v. COSGRAVE*, 6 Ir. Jur. 251.—IR.



## AGRICULTURE.

*Sect.* *& Crops.]*

501; 1 Dowl. N. S. 885; 11 L. J. Ex. 217; 152 E. R. 212.

*Annotation*:—*Refd.* Washbourn v. Burrows (1847), 1 Exch. 107.

**289.** ——— **Passing after severance—Statute of Frauds—Timber.**—A., the owner of trees growing on his land, verbally agreed with B., while they were standing, to sell him the timber at so much per foot. B. afterwards offered to sell the butts of the trees to a third party, & said he would convert the tops into building stuff. A. afterwards, by letter, required B. to pay for the timber, which B. had bought of him. B. wrote a letter in answer, stating he had bought the timber, but he had bought it to be sound & good, & it was not so:—*Held*: (1) the contract was not a contract for the sale of land within Stat. Frauds, s. 4, but was a contract for the sale of goods, wares, & merchandises within s. 17; (2) as the purchaser did not in his letter recognise the absolute contract described in the vendor's letter, but stated one conditional as to quality, there was no note in writing of the bargain to satisfy Stat. Frauds; (3) there had been no part acceptance or actual receipt of the goods to satisfy the stat., as there was nothing to show that the purchaser had divested himself of his right to object to the quality of the goods, or that the seller had lost his lien for the price.—*SMITH v. SURMAN* (1829), 9 B. & C. 561; 4 Man. & Ry. K. B. 455; 7 L. J. O. S. K. B. 296; 109 E. R. 209.

*Annotations*:—*Expld.* Falmouth v. Thomas (1832), 1 Cr. & M. 89; Shelton v. Livins (1832), 2 Tyr. 420. *Distd.* R. v. Hockworthy (1837), 7 Ad. & El. 492. *Consd.* Wright v. Percival (1839), 8 L. J. Q. B. 258. *Expld.* Rodwell v. Phillips (1842), 9 M. & W. 501; Washbourn v. Burrows (1847), 1 Exch. 107. *Consd.* Morton v. Tibbett (1850), 15 Q. B. 428. *Expld.* Bailey v. Sweeting (1861), 30 L. J. C. P. 150. *Distd.* Wilkinson v. Evans (1866), L. R. 1 C. P. 407. *Consd.* Marshall v. Green (1875), 1 C. P. D. 35.

**290.** ——— *Defts.* were sued for the price of some growing trees, which they had purchased, cut down, & carried away, & a witness proved an admission by one of them that something was due, & a promise to pay. At the time of the bargain written memoranda had been made of the transaction, but these memoranda (one of them an item in a book of accounts), being neither stamped nor signed with the names of the parties, were not produced in evidence, & *pltf.* was nonsuited:—*Held*: the nonsuit was proper.—*TEAL v. AUTY & DIBB* (1820), 2 Brod. & Bing. 99; 4 Moore, C. P. 542; 129 E. R. 895.

*Annotations*:—*Refd.* Scorell v. Boxall (1827), 1 Y. & J. 396; Falmouth v. Thomas (1832), 1 Cr. & M. 89. *Mentd.* Chisman v. Count (1841), 2 Man. & G. 307; Lane v. Hill (1852), 18 L. T. O. S. 221.

**291.** ——— **Future crop.**—Where A. agreed to supply B. with a quantity of turnip-seed, & B. agreed to sow it on his own land & sell the crop of seed produced therefrom to A. at £1 1s. the Winchester bushel, & the seed so produced at the price agreed upon exceeded in value the sum of £10:—*Held*: this contract was within Stat. Frauds, s. 17, & void for want of a memorandum in writing. *Semble*: since Weights & Measures Act, 1824 (c. 74), an agreement to sell by the Winchester bushel, not containing any declaration of the proportion which that measure bore to the imperial bushel, was void.—*WATTS v. FRIEND* (1830), 10 B. & C. 446; L. & Welsb. 193; 5 Man. & Ry. K. B. 439; 8 L. J. O. S. K. B. 181; 109 E. R. 516.

*Annotation*:—*Distd.* Williams v. Burgess (1839), 10 Ad. & El. 499.

**292.** ——— **Grass.**—Where the owner of the soil sells what is growing on the land, whether natural produce or *fructus industriales*, on the terms that he is to sever them from the land, & deliver them to the purchaser, the latter acquires no

interest in the soil. *Semble*: growing crops are not an interest in land within 2 & 3 Vict. c. 37.—*WASHBOURN v. BURROWS* (1847) 1 Exch. 107; 5 Dow. & L. 105; 16 L. J. Ex. 266; 154 E. R. 45.

*Annotations*:—*Appld.* Derry v. Toll (1850), 5 Exch. 741. *Refd.* Clack v. Sainsbury (1851), 11 C. B. 695. *Mentd.* Robinson v. Little (1848), 9 Q. B. 602.

**293.** ——— **Crops.**—*Pltf.*, at Lady Day, 1821, gave up possession of a farm to *deft.*, having previously sown 40 acres of it with wheat. At a meeting in the previous month *pltf.* asked *deft.* if he would take the wheat at £200, saying, if he would not, he should not have the farm. *Deft.* said he would take the wheat, & being asked to whom the dead stock should be valued, replied, "To me." *Deft.* afterwards undertook to pay for the wheat & dead stock on a specified day, & paid £75 on account generally, & eventually had possession of the farm, the wheat & the dead stock. In *indebitatus assumpsit* for crops bargained & sold, & for goods sold & delivered:—*Held*: (1) the contract for the dead stock being distinct from the contract for the sale of the wheat, or the giving up of the farm, *pltf.* might recover for that amount; (2) (*dub.* LITTLEDALE, J.) *deft.* having received the wheat & made a payment on account of it, *pltf.* might recover for the rest of that amount.

It is said it appears that the parties bargained for an interest in land. It seems to me there was nothing more than a conditional agreement for the crops in the event of *deft.* leaving the land. . . . There was no evidence of any engagement that the offgoing tenant should assign his interest in the land to *deft.*, & that might cease at Lady Day when the possession was to be given up. He, therefore, had no interest in the land to part with, & the contract was not for the sale of any interest in the land (HOLROYD, J.).

A parol agreement for the sale of crops may be good between the outgoing & incoming tenant; but then there would be no sale of any interest in the land, for that would come from the landlord (LITTLEDALE, J.).—*MAYFIELD v. WADSLEY* (1824), 3 B. & C. 357; 5 Dow. & Ry. K. B. 224; 3 L. J. O. S. K. B. 31; 107 E. R. 766.

*Annotations*:—*Consd.* Evans v. Roberts (1826), 5 B. & C. 829. *Expld.* Falmouth v. Thomas (1832), 2 L. J. Ex. 57. *Refd.* Scorell v. Boxall (1827), 1 Y. & J. 396; Hallen v. Runder (1834), 1 Cr. M. & R. 266; Mechelen v. Wallace (1837), 7 Ad. & El. 49.

**294.** ——— **Potatoes.**—A contract by the owner of a close cropped with potatoes, made on Nov. 21, to sell to *deft.* the potatoes at so much a sack, *deft.* to get them out of the ground immediately, is not a contract for any interest in land within Stat. Frauds, s. 4, but the same as if the potatoes, which had done growing & were to be taken up immediately, had been sold in a warehouse from whence they were to be removed by *deft.*—*PARKER v. STANILAND* (1809), 11 East, 362; 103 E. R. 1043.

*Annotations*:—*Folld.* Warwick v. Bruce (1813), 2 M. & S. 205. *Consd.* Evans v. Roberts (1826), 5 B. & C. 829.

**295.** ——— *Deft.* on Oct. 12 agreed to sell to *pltf.* (an infant) all the potatoes then growing on 3 acres at so much per acre, to be dug up & carried away by *pltf.*, & *pltf.* paid £40 to *deft.* under the agreement, & dug a part & carried away a part of those dug, but was prevented by *deft.* from digging & carrying away the residue:—*Held*: (1) he was entitled to recover for this breach of the agreement; (2) such agreement (being by parol) was not within Stat. Frauds, s. 4.—*WARWICK v. BRUCE* (1813), 2 M. & S. 205; 105 E. R. 359.

*Annotations*:—*Consd.* Evans v. Roberts (1826), 5 B. & C. 829. *Refd.* R. v. Cambridge (1822), 1 B. & C. 23.

**296.** ———. —.]—A contract for the sale of a growing cover of potatoes, to be dug by the vendor & carried away by the vendee when at maturity, is not a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them within Stat. Frauds, s. 4.—**EVANS v. ROBERTS** (1826), 5 B. & C. 829; 8 Dow. & Ry. K. B. 611; 4 L. J. O. S. K. B. 313; 108 E. R. 309.

**Annotations:—***Consd.* Watts v. Friend (1830), 8 L. J. O. S. K. B. 181. *Expld.* Shelton v. Idivius (1832), 2 Tyr. 420. *Appl.* Hallen v. Runder (1834), 1 Cr. & M. & R. 266. *Consd.* Sainsbury v. Matthews (1838), 4 M. & W. 343; Jones v. Flint (1839), 10 Ad. & El. 753. *Refd.* Washbourn v. Burrows (1847), 1 Exch. 107; I. R. Comrs. v. Smyth, [1914] 3 K. B. 406.

**297.** .]—An agreement made in June to sell the produce of 100 lugs of land, planted with potatoes, at 2s. a sack, the buyer to have them, & pay for them at picking-up time, & to find diggers, is not “any interest in or concerning land,” required to be in writing by Stat. Frauds.—**SAINSBURY (STANSBURY) v. MATTHEWS** (1838), 4 M. & W. 343; 1 Horn & H. 459; 8 L. J. Ex. 1; 2 Jur. 946; 150 E. R. 1460.

**Annotations:—***Reid*. *Rodwell v. Phillips* (1842), 9 M. & W. 501; *Washbourne v. Burrows* (1847), 16 L. J. Ex. 266.  
**Mentd.** *Smith v. Knowelden* (1841), 2 Man. & G. 561.

298. ——— ——— ——— ——— ——— Corn & potatoes.]—  
Pltf. & deft. orally agreed (in Aug.) that deft. should give £45 for the crop of corn on pltf.'s land, & the profit of the stubble afterwards, & pltf. was to have liberty for his cattle to run with deft.'s, & deft. was also to have some potatoes growing on the land, & whatever lay grass was in the fields, & deft. was to harvest the corn, & dig up the potatoes, & pltf. was to pay the tithe :—*Held* : it did not appear to be the intention of the parties to contract for any interest in land, & the case was not within Stat. Frauds, s. 4, but a sale of goods & chattels, as to all but the lay grass, &, as to that, a contract for the agistment of deft.'s cattle.—*JONES v. FLINT* (1839), 10 Ad. & El. 753 ; 2 Per. & Dav. 594 ; 9 L. J. Q. B. 252 ; 113 E. R. 285.

**Annotations:—***Reid. Mogg v. Yutton Overseers* (1880), 50 L. J. M. C. 17; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Met. Ry. Co. v. Fowler*, [1892] 1 Q. B. 165, C. A.

*See, now, Sale of Goods Act, 1893 (c. 71), ss. 4 (1), 62 (1).*

299. **Sale of Farming Stock Act, 1816**  
(c. 50)—On whom binding—Purchaser.]—Pltf. demised a farm to R., who covenanted not to remove any hay, straw, fodder, manure, etc., but to use & employ it in a husbandlike manner upon the premises. R. sold a quantity of wheat to defts., who removed it together with the straw in defiance of pltf.'s remonstrances:—*Held*: the prohibition in the above Act was not confined to purchasers under an execution, but operated to prevent any purchaser of farming stock being on the land from carrying it off contrary to the lease. — **WILMOT (WILLMOT) v. ROSE** (1854), 3 E. & B. 563; 23 L. J. Q. B. 281; 23 L. T. O. S. 76; 18 J. P. 600; 18 Jur. 518; 2 W. R. 378; 2 C. L. R. 677; 118 E. R. 1253.

**Annotations :—Distd. & Expld.** Hawkins v. Walrond (1876), 1 C. P. D. 280. **Consd.** Lybbe v. Hart (1885), 29 Ch. D. 8, C. A.

**300. ———— Trustee in bankruptcy.] —**  
The enactment in s. 11 of the above Act that the assignee of any bkpt. shall not take or use any hay, straw, etc., on any farm of bkpt. in any other way than bkpt. ought to have done, is still in force, & applies to a trustee in bkpcy. or liquidation under Bkpcy. Act, 1869 (c. 71).

A lessee was bound by the covenants in his lease not to sell hay, straw, etc., grown on his farm without the permission of the landlord. The lessee became a liquidating debtor under Bkpcy. Act, 1869

(c. 71), s. 125, & the trustee in the liquidation disclaimed the lease:—*Held*: the trustee was bound by Sale of Farming Stock Act, 1816 (c. 50), s. 11, notwithstanding the disclaimer, & an injunction was granted to restrain him from selling the hay, straw, etc., grown on the farm.—*LYBBE v. HART* (1885), 29 Ch. D. 8; 54 L. J. Ch. 860; 52 L. T. 634; 1 T. L. R. 235, C. A.

**Annotations :—***Dbtd. Clogg v. Hands* (1890), 44 Ch. D. 503.  
**Mentd.** *Chapman v. Smith*, [1907] 2 Ch. 97.

**301. — By landlord under distress.]—Sale of Farming Stock Act, 1816 (c. 50), s. 11, does not apply to a sale by a landlord of a distress. A lease of a farm contained a covenant by the tenant not to remove hay, unthreshed corn, etc., from the demised premises, but to use them for the improvement of the land. The landlord, having distrained hay & unthreshed corn for rent in arrear, sold the distress under a condition that the purchaser should consume the matters sold on the premises, & consequently the best price was not obtained in accordance with 2 Wm. & M. c. 5:—*Held*: the landlord could not legally sell under such a condition.—*HAWKINS v. WALROND* (1876), 1 C. P. D. 280; 45 L. J. Q. B. 772; 35 L. T. 210; 40 J. P. 824; 24 W. R. 824.**

302. — What Included—Severance before time for completion.]—Pltf. agreed to buy an estate "including the hay, growing crops, etc." The time fixed for completion was June 24, but it was afterwards extended till Sept. 29, & in the meantime defts. had cut & sold the hay & crops:—*Held*: (1) pltf. was entitled only to those crops in existence at the time of completion; (2) he had no right to the proceeds of the sale of those cut & gathered before Sept. 29.—WEBSTER v. DONALDSON (1865), 34 Beav. 451; 11 Jur. N. S. 404; 13 W. R. 515; 55 E. R. 710.

303. — At valuation—Time essence of contract.]—C., tenant of a farm who was jointly with pltf. entitled to the farming stock & growing crops, agreed with defts., to whom he had arranged to transfer the farm, that certain growing crops on the farm should be taken by defts. at a valuation made by certain valuers on Apr. 1, 1844, & the amount secured by defts.' joint promissory note, but that such valuation should be examined & revised on Aug. 1 next ensuing, & that the parties should be bound by any alteration then made in it. The valuers on Apr. 1 estimated £41 to be due to pltf. for the crops after certain deductions, & defts. gave their promissory note for that amount. The valuers could not attend on Aug. 1, & the crops were in fact viewed on Aug. 2 only. The value was finally fixed on Aug. 12, & it was proved that the value had not altered between Aug. 1 & 2. According to the revised valuation, the sum due to pltf. was only £3 5s. In an action on the promissory note :—*Held* : the time fixed for the revision of the valuation was of the essence of the contract, & pltf. was entitled to the full amount of the note.—*MARSHALL v. POWELL* (1846), 9 Q. B. 779; 16 L. J. Q. B. 5; 8 L. T. O. S. 159; 11 Jur. 61; 1 New Pract. Cas. 590; 115 E. R. 1475.

**304. — Failure of specific crop—Vis major.]—**Deft. in Mar., 1872, agreed to sell to pltf. 200 tons of Regent potatoes grown on land belonging to deft., at a certain price, to be delivered in Sept. & Oct., 1872. Deft., at the time of the contract, had 68 acres ready for planting potatoes, part of which was already sown, & the rest was sown afterwards. This quantity of land was enough in ordinary years to produce more than 200 tons. From no fault of deft., but in consequence of a potato blight which occurred in Aug., the crop failed, & deft. was able to deliver only 80 tons. In an action for non-delivery of the remainder:—*Held*: the contract being for the sale of part of a specific crop, the case



**Sect. 1.—Growing Crops & Crops.]**

was within the principle of *Taylor v. Caldwell* (1863), 3 B. & S. 826, & delivery of the potatoes being prevented by *vis major*, deft. was excused from performance of the contract.—*HOWELL v. COUPLAND* (1876), 1 Q. B. D. 258; 46 L. J. Q. B. 147; 33 L. T. 832; 40 J. P. 276; 24 W. R. 470, C. A.

**Annotations:—***Distd.* *Ashmore v. Cox*, [1899] 1 Q. B. 436. *Consd.* *Nickoll v. Ashton*, [1901] 2 K. B. 126, C. A. *Reid.* *Clark v. Lindsay* (1903), 88 L. T. 198; *Krell v. Henry*, [1903] 2 K. B. 740, C. A.; *Re Hull & Meux*, [1905] 1 K. B. 588, C. A.; *Re Shipton, Anderson & Harrison*, [1915] 3 K. B. 676; *Horlock v. Beal*, [1916] 1 A. C. 486, H. L.

**305. Failure of crop not specific.]—**Defts., market gardeners, entered into a contract to supply plfts. with a quantity of gherkins. In reply to plfts. defts. wrote: "We could offer you in green probably about 50 hogsheads, & say 150 hogsheads large at the same price as last year." Defts. subsequently wrote: "We accept your offer . . . for 50 hogsheads crooked green at 30s. per hogshead; 150 hogsheads large green at 21s. per hogshead; 150 to 200 hogsheads second flower at 27s., as required; terms as usual." Owing to the weather, & through no fault or negligence of defts., the crop of gherkins was a failure. An action having been brought for damages for breach of contract:—*Held*: (1) the contract was for a specific quantity of a particular kind of goods, & did not refer to gherkins only grown on defts.' land; (2) defts. were liable for failure to deliver.—*HAYWARD BROTHERS, LTD. v. DANIEL & SON* (1904), 91 L. T. 319.

**306. Interest in land—Mortmain.]—**Growing crops are an interest in land within Charitable Uses Act, 1736 (c. 36).—*SYMONDS (SYMONS) v. MARINE SOCIETY* (1860), 2 Giff. 325; 29 L. J. Ch. 623; 2 L. T. 726; 25 J. P. 180; 6 Jur. N. S. 910; 8 W. R. 728; 66 E. R. 136.

*See, generally, CHARITIES.*

**Chattels—Bills of Sale Acts.]—***See* **BILLS OF SALE.**

**307. Assignment of future crops.]—**The tenant for years of a farm, being indebted to his landlord, assigned to him, by deed, all his household goods, live stock, hay, & corn, as well in stock as then growing upon the farm, utensils & implements of husbandry, & also all his tenant right & interest yet to come & unexpired in & to the farm & premises, to hold the goods, cattle, chattels, tenant right, effects, & things to the landlord, in trust to sell, & thereout to pay the debt, & pay over the surplus to the tenant, & the tenant granted to the landlord licence & authority at any time to enter upon the farm, & take, carry away, & sell the goods, etc., thereby assigned:—*Held*: under this assignment the tenant's interest in crops grown in future years of the term passed to the landlord.—*PERCH v. TUTIN* (1846), 15 M. & W. 110; 15 L. J. Ex. 280; 153 E. R. 782.

**Annotations:—***Folld.* *Allatt v. Carr & Scholfield* (1858), 6 W. R. 578. *Mentd.* *Flory v. Denny* (1852), 7 Exch. 581; *Congreve v. Evetts* (1854), 10 Exch. 298.

**308. —.]—**By a bill of sale, made in 1855, R., in consideration of £400 advanced by T., assigned to T. all the crops of corn, etc., growing on his farm at B., or upon any other farm which R. at any time during continuation of the security might thereafter occupy, also implements of husbandry, etc., tenant rights, & all rights which R. might be entitled to on quitting his present or any other taken farm, & all other personal property of R. The deed provided that, for the more effectually securing to T. payment of the money, R. irrevocably appointed T., her exors, etc., his lawful attorney or attorneys, in his or their name or names, to

make & perfect any assignment, transfer, or delivery of any goods or chattels, etc., or any other personal estate or property not legally passing by the effect of the assignment therein made, & to which R. should, before satisfaction of that security, become beneficially possessed of or entitled to; & it contained a power for T., her exors., etc., to break doors & take possession of any of the effects of R. of which he was then possessed, or should thereafter acquire, & to occupy & possess any of the lands of R. for the purpose of selling any growing crops. After execution of the deed, & while the debt was unpaid, R. took another farm. In 1857 crops growing on the farm at B., & also crops standing on the farm taken by R. after the bill of sale, & farming stock & other goods of R., some of which had been acquired since the bill of sale, were seized by the exor. of T. under the bill of sale:—*Held*: (1) the deed operated to authorise seizure of future property; (2) by seizure a good title was acquired to the crops standing on the new farm, as well as those upon the old farm.—*CARR v. ALLATT, ALLATT v. CARR* (1858), 27 L. J. Ex. 385; 6 W. R. 578.

**Annotations:—***Consd.* *Brown v. Bateman* (1867), L. R. 2 C. P. 272; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345, C. A. *Reid.* *Chidell v. Galsworthy* (1859), 6 C. B. N. S. 471.

**309. — Right of entry.]—**To a declaration in trespass for assault defts. pleaded a justification in defence of the possession of a dwelling-house. Pltf. newly assigned that the trespasses were committed not in a dwelling-house, but on a certain bridge & in certain yards & fields, parcel to a farm. The plea to the new assignment stated that W. was possessed of the dwelling-house, & also of the bridge, yards, & fields, which belonged & were adjacent to the dwelling-house, & then justified the trespasses in defence of the possession of the house, bridge, yards, & fields, & then averred that defts. removed pltf. from the bridge, yards, & fields, & took him by the nearest way to a public highway near to the dwelling-house, bridge, yards, & fields. The replication alleged the seisin of W. in the farm, the demise of it by him to J. as tenant from year to year, the entry of J., an assignment by J. to B. to secure a debt of the then & future growing crops on the farm, with a power to B., in default of payment, to take possession. It then alleged a default by J., that W., at the time of the default, was in possession of the farm, on which there then were growing crops which belonged to J. after the date of the assignment, that pltf., as servant of B., took possession, & continued in possession, of the growing crops for a reasonable time, & that before a reasonable time had elapsed defts. removed him, & dragged him from the dwelling-house, across the bridge, yards, & fields, to the highway:—*Held*: the replication was bad, as it did not show any right in B. to place a person on the premises to retain possession of the growing crops after J.'s tenancy had come to an end, & the landlord had regained possession, & if B.'s right so to do depended upon the mode of termination of the tenancy, or the nature or condition of the crops, the replication ought to have set forth the circumstances which abridged the *prima facie* rights of the owner of the farm to remove all other persons from it.—*HAYLING v. OKEY* (1853), 8 Exch. 531; 22 L. J. Ex. 139; 20 L. T. O. S. 293; 17 Jur. 325; 1 W. R. 182; 155 E. R. 1461, Ex. Ch.

**310. Trespass—Who can maintain.]—**Trespass *quare clausum fregit* can be brought by one who has "the crop & vesture" of land, by one who has *herbagium*, & by one who has right of pasture.—

**310 i. Trespass—Who can maintain.]—**Tenants will be restrained from proceeding at law, & a reference to the master

ordered to ascertain the damages which they have sustained in relation to their crops, etc., by reason of their having

been put out of possession, & kept there-out until the execution of restitution, & the purchaser will be ordered to pay

**WELDEN v. BRIDGEWATER** (1592), Moore, K. B. 302; Cro. Eliz. 421; 72 E. R. 594.

*Annotations* :—**Consd.** Cox v. Glue, Saint v. Mousley (1848), 5 C. B. 533. **Mentd.** Mallet v. Sackford (1607), Cro. Jac. 198.

**311. — At suit of purchaser.**—Herbage is the profit of the land, so if A. sells the corn which is sown, & another destroys it, A.'s vendee will have an action for breaking his close. If a man sells his land or corn & dies before the corn is cut, the exors. will have an action for breaking the close against any person destroying the corn.—**ANON.** (1510), Keil. 159; 72 E. R. 334.

**312. — Against sheriff.**—The vendee of a growing crop of grass who is in possession of the field, for the purpose of making it into hay, can maintain trespass against the sheriff if when cut the close be entered, & part of the grass carried away by a person who has purchased the grass of a bailiff of the sheriff, who had seized & sold it under a *fi. fa.* against the original vendor, where the person actually entering claims under the sale of the sheriff's bailiff & carries off the crop by his authority.—**TOMPKINSON v. RUSSELL** (1821), 9 Price, 287; 147 E. R. 95.

—**TROTTER v. ELLIS** (1829), 1 Sau. & Sc. 149, n.—**IR.**

**310 ii.** —.]—The owner of a lot of land encroached upon an adjoining lot belonging to the Crown, & took three successive crops off it without any permission from the Crown. Another person, who had taken possession of the same land also without licence about ten years before, & paid taxes & made clearings on it, warned off the owner of the other lot after he had taken the third crop, & then cropped the land himself.—**Held**: the owner of the adjoining lot had no property or possession to maintain trespass against him for that crop.—**KILLICHAN v. ROBERTSON** (1843), 6 O. S. 468.—**CAN.**

**310 iii.** —.]—A., living abroad, sent to an agent to purchase land for B., who was living in Canada, & to take the conveyance to A. This was done, & B. was put in possession of the land, & thenceforth used & cultivated it for his own benefit. At the time of purchase a crop of wheat was in the ground :—**Held**: B., & not A., should sue in trespass for cutting & carrying away the wheat. *Qu.*: whether the property in the wheat passed to A. or B.—**CAMPBELL v. CUSHMAN** (1847), 4 U. C. R. 9.—**CAN.**

**310 iv.** —.]—In trespass for taking hay & grain, it was proved that the land on which they grew belonged to pltf.'s father, who four years before the trial gave it up to pltf. on the condition that he should support his father & family, that the father continued to live on the land, but that pltf. took the management of the farm & sowed the grain & cut the grass :—**Held**: this constituted a tenancy, & gave pltf. the possession of the crops.—**FERGUSON v. SAVOY**, 4 All. 263.—**CAN.**

**310 v.** —.]—A. held a decree of a competent ct. of revenue for possession of certain land as against B., & obtained under that decree formal possession of that land. B., however, was allowed to remain in such necessary possession of the land as was requisite to enable him to remove a crop which was on the land. B. removed his crop, & thereafter sued in a civil ct. for a declaration that he was A.'s tenant of the land in question holding occupancy rights. A. did not defend the suit, & the civil ct. passed a declaratory decree in favour of pltf., & further proceeded to execute that declaratory decree by putting B. in possession. Subsequently B. sued A. for damages in respect of the alleged removal by A. of a second crop, which he asserted that he had sown upon the land :—**Held**: B. had no cause of

action.—**UDIT NARAIN SINGH v. SHIB RAI** (1898), 1. L. R. 20 All. 198.—**IND.**

**311 i.** — *At suit of purchaser.*—A person purchasing a crop of wheat at a sheriff's sale may bring trespass against a person converting or injuring it, though he may never have received possession of the field.—**HAYDON v. CRAWFORD** (1834), 3 O. S. 583.—**CAN.**

**311 ii.** — *At suit of tenant—Against purchaser.*—In a lease of a farm, containing a covenant by the lessor for quiet enjoyment, the lessee agreed that if the place were sold, & he should receive one month's notice prior to the expiration of any year, he would give up peaceable possession & allow any incoming tenant to plough the land after harvest. Before the expiration of the lease the place was sold to a purchaser. After the purchase, & before the lessee had harvested his crop, the purchaser entered on the land & ploughed it up, thereby causing injury to the lessee :—**Held**: (1) the purchaser was a trespasser & liable for damages; (2) no liability was imposed on the lessor under the covenant for quiet enjoyment.—**NEWELL v. MAGER** (1899), 30 O. R. 550.—**CAN.**

**314 i.** — *Tenant in common.*—Pltf. & deft., being each possessed of a farm, agreed to work them together & divide the profits arising from them at the end of the season. Before the harvest deft. was dispossessed of his farm by ejection, & pltf. thereupon gave him notice that he would not divide his crops with him. Deft., however, entered pltf.'s farm & took away his share of the crop.—**Held**: pltf. could not maintain trespass against him.—**DEMP v. MORRA** (1845), 2 U. C. R. 146.—**CAN.**

**314 ii.** —.]—H., by agreement with deft., planted 16½ acres of deft.'s land with Indian corn & other crops, the agreement being that H. was to do all the work, & deft. to receive for his share as much Indian corn as should represent the portion of the land sown with sugar corn & potatoes, & one-third of the Indian corn, & that H. was to have the remainder :—**Held**: (1) H. & deft. were tenants in common of the crop of Indian corn; (2) one tenant in common could not maintain trespass or trover against his co-tenant for merely reaping & harvesting the crop, but he might, if his co-tenant had consumed the crop, or dealt with it so that he could not retake it or pursue his remedies against the persons who had possession of it.—**BRADY v. ARNOLD** (1868), 19 C. P. 42.—**CAN.**

**h. Trover—When maintainable.**—Trover does not lie for growing crops,

**313. At suit of executor.**—Trespass lies at the suit of an exor. for cutting & carrying away growing corn in testator's lifetime.—**EMERSON v. AMELL** (ANNISON, EMERSON) (1672), 1 Freem. K. B. 22; 2 Keb. 874; 3 Salk. 160; 1 Ventr. 187; 89 E. R. 20.

**314. — Tenant in common.**—One tenant in common cannot maintain trespass against another tenant in common for cutting in due season & carrying away the whole produce of the common property, a crop of hay.—**JACOBS v. SEWARD** (1872), L. R. 5 H. L. 464; 41 L. J. C. P. 221; 27 L. T. 185; 36 J. P. 771, H. L.

*Annotation* :—**Refd.** Birkin v. Smith, [1909] 2 K. B. 112, C. A.

**315. Defence of realm—Requisition.**—By Defence of the Realm Regulations, reg. 2B, it was provided that it should be lawful for the Admty. or Army Council or Minister of Munitions to take possession of any food, forage & stores of any description & of any articles required for or in connection with the production thereof :—**Held**: (1) this regulation was not *ultra vires*, inasmuch as it was reasonably capable of being a regulation for the public safety & defence of the realm, & an exercise

but will if they be severed. *Qu.*: whether, if after the expiration of a notice to quit, the landlord gives leave to cut hay, there is a property in the hay thereby vested in the tenant, so as to enable him to maintain trover therefor.—**CUNNINGHAM v. UNIACKE** (1842), Arm. M. & O. 393.—**IR.**

**k.** —.]—The entry of a party on timber limits to cut hay, & his cutting & stacking it on the land, do not give him such property in the hay cut as to enable him to maintain trover for its removal against persons claiming by virtue of Crown timber licences then in force.—**MCDONALD v. BONFIELD** (1869), 20 C. P. 73.—**CAN.**

**l.** —.]—**GRAHAM v. HEENAN**, 20 C. P. 340.—**CAN.**

**m.** — *Joint tenants.*—A. & B. sowed wheat under a contract with C. to put in the crops on a farm, & to do all the necessary farm work thereon for the whole season, & for which they were to have one-half of the crops of that year. B. having absconded, his interest in the wheat while growing was sold under an execution obtained at the suit of D., who became the purchaser thereof. A. subsequently sold all his interest & that of B. in the wheat to C., who harvested it :—**Held**: as between A. & B. the contract was joint, & trover by D. for the one-quarter sold to him under the execution against B. was not maintainable.—**PARK v. HUMPHREY** (1864), 14 C. P. 209.—**CAN.**

**n. Share farming agreement—Division of crop under.**—**FINDLAY v. FALCONER** (1911), 17 W. L. R. 167.—**CAN.**

**o.** —.] — **MALFAIRE v. SCHULTZ** (1911), 18 W. L. R. 407.—**CAN.**

**p.** — *"Harvesting season."*—A share farming agreement provided that either party might terminate the agreement "at the end of any harvesting season by prompt notice in writing to the other party" :—**Held**: the words "the end of the harvesting season" meant the end of the harvesting operations on the particular farm for any season within the term agreed.—**TOOTH v. KITTO** (1913), 17 C. L. R. 421.—**AUS.**

**q. Removal of "hay"**—**Indian Act, R. S. C. (c. 43) s. 26.**—The word "hay" in the above Act does not necessarily mean hay from natural grass only, but what is commonly known as hay, namely, either from natural grass or grass sown & cultivated.—**R. v. GOOD** (1889), 17 O. R. 725.—**CAN.**



## AGRICULTURE.

### Sect. 1.—Growing Crops & Crops. Sect. 2.]

of the powers under the regulation for the purpose of procuring a substantial quantity of a necessary supply of food or forage for the use of troops was an exercise of powers, in that sense, in that it was for the safety & the defence of the realm ; (2) although under the regulation the Admlty., Army Council or Minister of Munitions had no power to take possession of growing crops, nevertheless they had a right to give notice that they would take possession of such crops when secured, & a requirement to take possession of fruit to be made into jam for the use of the Army, not as a growing crop, but when gathered, was valid.—*LIPTON, LTD. v. FORD*, [1917] 2 K. B. 647 ; 86 L. J. K. B. 1241 ; 116 L. T. 632 ; 33 T. L. R. 459 ; 15 L. G. R. 699.

*See, further, CONSTITUTIONAL LAW.*

*Bequests relating to.]—See WILLS.*

*Reputed ownership.]—See BANKRUPTCY & INSOLVENCY.*

*Right of mortgagee to.]—See MORTGAGE.*

*Distress of & execution on.]—See DISTRESS ; EXECUTION.*

### SECT. 2.—EMBLEMMENTS.

*See, now, LANDLORD & TENANT ACT, 1851 (c. 25).*

**316. Nature of right—What crops.]—**A tenant for a term, determinable upon a life, sowed the land in spring, first with barley, & soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable by being mixed with it, but the increase of the value did not compensate for the expense of cultivating the clover, & a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, & took two crops of the same clover after more than a year had elapsed from the sowing:—*Held*: the tenant was not entitled to emblements of either of these two crops ; because (1) emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed ; (2) even if pltf. were entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been

already taken by him at the time of cutting the barley.—*GRAVES v. WELD* (1833), 5 B. & Ad. 105 ; 2 Nev. & M. K. B. 725 ; 2 L. J. K. B. 176 ; 110 E. R. 731.

**317. — — — Hops.]—**Hops growing out of ancient roots are like emblements & shall go to the personal representatives of a tenant for life, & not to him in remainder.—*LATHAM v. ATWOOD* (1638), Cro. Car. 515 ; 79 E. R. 1045.

*Annotations :—Folld. Anon.* (1696), Freem. Ch. 210. *Consd. Graves v. Weld* (1833), 5 B. & Ald. 105.

**318. — — — —.]—Held**: hops which grew out of old roots, the person dying in July, viz., after reassurance, should go to the exor. & not to the heir, but otherwise of apples & nuts.—*ANON.* (1696), Freem. Ch. 210 ; 22 E. R. 1165.

**319. — — — None on forfeiture.]—**Where a lessor enters by virtue of a condition of re-entry for non-payment of rent, he is entitled to emblements.—*NICHOLAS v. SIMONDS* (1625), 2 Roll. Rep. 468 ; 81 E. R. 921.

**320. — — — —.]—**A lease having been granted on condition that if the lessee contracted a debt on which he should be sued to judgment which should be followed by execution, the lessor should re-enter as of his former estate, & the lessor having re-entered after a judgment & execution:—*Held*: he was entitled to the emblements.—*DAVIS v. EYTON* (1830), 7 Bing. 154 ; 4 Moo. & P. 820 ; 9 L. J. O. S. C. P. 44 ; 131 E. R. 60.

*Annotation :—Mentd. Bryan v. Child & Farmer* (1850), 5 Exch. 368.

**321. Who entitled to—Disseisee.]—**A disseisor or his feoffee sows corn & leaves it growing on the land ; the disseisee may seize it. This applies also after severance though it be carried off the land.—*ANON.* (1536), Jenk. 204 ; 145 E. R. 138.

**322. — — — —.]—**If the disseisor sow the land & afterwards sever the emblements, & the disseisee re-enters, then the property of them is in the disseisee, & he can take them. Although cut they remain on the land, & are of the nature of the soil.—*ANON.* (1561), Ben. & D. 30 (8) ; 123 E. R. 248.

**323. — — — Lessee of tenant for life.]—**If the lessee of a tenant for life be dismissed, & the lessor of the disseisor sow the land, & then the tenant for life dies, & he in remainder enters, yet he shall not have the emblements, but the lessee of the tenant for life.—*KREVETT v. POOL* (1596), Cro. Eliz. 463 ; 78 E. R. 701.

**324. — — — Executors.]—**A. was bound in an obligation that B. should enjoy a lease of Blackacre

### PART VIII. SECT. 2.

**316 i. Nature of right.]—**Growing crops sown by the person in possession, & intended to be reaped at maturity, are *fructus industriales*, & the ownership of them is not an interest in land within Stat. Frauds, s. 4.—*CAMERON v. GIBSON* (1889), 17 O. R. 233.—*CAN.*

**316 ii. — — — What crops.]—**A tenant under the ct., in Apr., 1857, sowed artificial grass on the lands, which he grazed from Oct., 1857, until May 1858, when he began to preserve the grass for meadow. This tenancy expired in May 1858:—*Held*: he was not entitled to emblements of the artificial grass.—*FLANAGAN v. SEAVER* (1858), 9 I. Ch. R. 230.—*IR.*

**321 i. Who entitled to—Tenant under court.]—**A tenant holding under the Ct. of Ch. for seven years pending a cause, having sowed the lands after he had notice of their having been sold under the decree:—*Held*: entitled to emblements, when dispossessed by injunction, to put the purchaser into possession, & he might recover them by action at law.—*SHORT v. ATKINSON* (1834), Hayes & Jo. 682.—*IR.*

**321 ii. — — — —.]—**The ct. deals with its tenants as tenants at will & therefore, as being entitled to emblements, & when a lease is suddenly terminated the ct. deals with them accordingly.—*O'CONNELL v. O'CALLAGHAN* (1841), Long. & T. 157.—*IR.*

**321 iii. — — — Tenant from year to year.]—***Qu.*: whether a tenant from year to year is entitled to emblements, independent of any custom.—*CUNNINGHAM v. UNIACKE* (1842), Arm. M. & O. 393.—*IR.*

**323 i. — — — Lessee of tenant for life.]—**During the lifetime of a widow & tenant for life, two of the farms belonging to the estate were leased for five years, dependent on her living so long, & the lessees covenanted to cultivate, till, manure & to spend, use, & employ in a proper husbandlike manner all the straw & manure, & not to remove or permit to be removed from the premises any straw of any kind, manure, wood or stone, & to stack carefully the straw & turn all the manure thereon into a pile (so it might heat & rot so as to kill & destroy fowl seeds), & thereafter & not before to spread same on the land:—*Held*: (1)

defts. not entitled to the straw & manure as emblements, as the widow was not in actual occupation or cultivation of the lands on which it was produced ; (2) the lessees would have been entitled to the straw & the manure, which had been piled into heaps, but for their covenants, which precluded them from making any claim.—*GARDNER v. PERRY*, 23 C. L. T. 295.—*CAN.*

**323 ii. — — — —.]—**When a lease of land, in which the lessor has a life estate only, has been put an end to by the death of the lessor during the term, the wheat then sown & in the ground are emblements belonging to the lessee.—*ATKINSON v. FARRELL* (1912), 27 O. L. R. 204 ; 4 O. W. N. 73 ; 8 D. L. R. 582.—*CAN.*

**324 i. — — — Executors.]—**The exor. of a deceased rector is entitled to the emblements of glebe lands.—*O'CONNOR v.* (1836), 2 Jones, 20.—*IR.*

**324 ii. — — — —.]—**An injunction to restrain the sale by an exor. of farming implements & furniture, which with the crops & live stock were left to a remainderman after the determination of a life interest therein, was granted, but was refused as regarded the crops & live

immediately after his death. The land being sown, A.'s exors. took the corn:—*Held*: obligation not forfeited, for by law the corn belonged to the exors.—**LAUNTON'S CASE** (1578), 4 Leon. 1; 74 E. R. 685.

**325.** ———.]—The remainderman for life shall have the emblements sown by the deviser in fee, in preference to the exor. of the tenant for life.—**ANON.** (1587), Cro. Eliz. 61; 78 E. R. 321.

**326.** ———.]—**ANON.**, No. 318, *ante*.

**327.** ———.]—Emblements shall go to the exor., & not to the heir or remainderman, it being for the benefit of the kingdom, which is interested in the produce of corn, & other grain, & will not suffer them to go to the heir (**LORD HARDWICKE, C.**).—**LAWTON v. LAWTON** (1743), 3 Atk. 13; 26 E. R. 811.

*Annotations*:—**Mentd.** **Dudley v. Warde** (1751), Amb. 113; **Elwes v. Maw** (1802), 3 East, 38; **Grymes v. Boweren** (1830), 6 Bing. 437; **Trappes v. Harter** (1833), 2 Cr. & M. 153; *Re Walsh, Ex p. King* (1840), 4 Jur. 510; **Egerton v. Brownlow** (1853), 4 H. L. Cas. 1, H. L.; **Elliott v. Bishop** (1854), 10 Exch. 496; **Bishop v. Elliott** (1855), 11 Exch. 113; **Walsley v. Milne** (1859), 7 C. B. N. S. 115; **Wake v. Hall** (1883), 8 App. Cas. 195, H. L.; **Ward v. Dudley** (1887), 57 L. T. 20; **Hill v. Bullock**, [1897] 2 Ch. 55; **Gough v. Wood** (1899), 42 W. R. 469, C. A.; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523, C. A.; *Re Hulce, Beattie v. Hulce*, [1905] 1 Ch. 406; *Re Whaley, Whaley v. Roehrich*, [1908] 1 Ch. 615.

**328.** — **Remainderman.**]—If land which was sowed be leased to one for life, the remainder to another for life, & the tenant for life dies before severance of the corn, he in the remainder shall have the corn.—**ANON.** (1608), Godb. 159; 78 E. R. 97.

**329.** ———.]—Corn is *fructus industrialis*, & he that sows it has a kind of property *ipso facto* in it divided from the land, & the exor. shall have it, & not the heirs. If A., seised of land, sow it with corn & then convey it away to B. for life, remainder to C. for life, & then B. die before the corn reaped, C. shall have it & not the exors. of B., for the reason of industry & charge in B. fails.—**GRANTHAM v. HAWLEY** (1615), Hob. 132; 80 E. R. 281.

*Annotations*:—**Apld.** **Petch v. Tutin** (1816), 15 L. J. Ex. 280. **Mentd.** **Robinson v. Macdonnell** (1816), 5 M. & S. 228; **Muskett v. Hill** (1839), 5 Bing. N. C. 694; **Lunn v. Thornton** (1845), 1 C. B. 379.

**330.** — **Remainderman for life.**]—**ANON.**, No. 328, *ante*.

**331.** — **Devisee.**]—Where the owner of land sows it with corn & dies before severance, having devised the land, the devisee takes the corn, & not the deviser's exor.—**SPENCER'S CASE** (1622), Win. 51; 124 E. R. 44.

**332.** ———.]—A testator devised his real estate to W. in fee, but chargeable with payment of a legacy, & he bequeathed to his exors. all his moneys, securities for money, household furniture, goods, chattels, personal estate & effects whatsoever & wheresoever, not specifically bequeathed, subject to payment of his debts. There was no specific bequest of emblements:—*Held*: in the absence of any words to rebut the ordinary presumption that

it is the will of a testator that he who takes the land shall take the crops which belong to it, the emblements passed to the devisee of the real estate.—**COOPER v. WOOLFITT** (1857), 2 H. & N. 122; 26 L. J. Ex. 310; 29 L. T. O. S. 212; 3 Jur. N. S. 870; 5 W. R. 790; 157 E. R. 51.

**333.** — **Not lessee at will.**]—If a lessee at will determines the tenancy he is not entitled to emblements.—**OLAND'S CASE** (1602), 5 Co. Rep. 116a; 77 E. R. 235; *sub nom.* **OLAND v. BURDWICK**, Moore, K. B. 394; Cro. Eliz. 460; Gouldsb. 189.

*Annotations*:—**Reid.** **Marsden v. Sambell** (1880), 43 L. T. 120. **Mentd.** **Wicks v. Jordan** (1614), 2 Bulst. 213; **Dunsdale v. Isles** (1673), 3 Keb. 166, 207; **R. v. Baden** (1694), Show. Parl. Cas. 72, H. L.; **Davis v. Eyton** (1830), 7 Bing. 151.

**334.** — **Joint tenants—Husband & wife.**]—If the husband & wife be joint tenants & the husband sows the land & dies, & the wife survives, she shall have the emblements (**COOK, C.J.**).—**GOODMAN & GORE'S CASE** (1612), Godb. 189; 78 E. R. 115.

**335.** ———.]—Husband & wife were joint tenants for their lives. The husband sowed the land & died before harvest:—*Semble*: the emblements went to the husband's exor.; the ct., however, proposed an equal division, which was agreed to.

Where strangers are joint-tenants, the survivor takes the emblements.—**ROWNEY'S CASE** (1694), 2 Vern. 322; 23 E. R. 808.

**336.** — **Female durante viduitate.**]—If a feme copyholder, *durante viduitate*, sows the land, & before severance takes baron, the lord of the manor shall have the crop, but not if it is in the hands of her lessee.—**OLAND'S CASE** (1602), 5 Co. Rep. 116a; 77 E. R. 235; *sub nom.* **OLAND v. BURDWICK**, Moore, K. B. 394; Cro. Eliz. 460; Gouldsb. 189.

*Annotations*:—**Consd.** **Davis v. Eyton** (1830), 4 Moo. & P. 820. **Reid.** **Wicks v. Jordan** (1614), 2 Bulst. 213. **Mentd.** **Dunsdale v. Isles** (1673), 3 Keb. 166, 207; **R. v. Baden** (1694), Show. Parl. Cas. 72, H. L.; **Marsden v. Sambell** (1880), 43 L. T. 120.

**337.** ———.]—If a widow, who is to enjoy copyholds *durante viduitate*, sows the land & afterwards takes a husband, she loses the corn, which belongs to her husband.—**WICKS v. JORDAN** (1614), 2 Bulst. 213; 80 E. R. 1076.

**338.** — **Widow.**]—Where lands held by a husband for life passed on his death to his widow as jointure, the emblements—namely hops—belonged to the estate of the husband; but otherwise as to dower, which is considered as excrescence or continuance of the estate of the husband.—**FISHER v. FORBES** (1734), cited 9 Vin. Abr. 573, pl. 82; 2 Eq. Cas. Abr. 392; 22 E. R. 334.

**339.** — **Parson.**]—A parson who resigns his living is not entitled to emblements.—**BULWER v. BULWER** (1819), 2 B. & Ald. 469; 106 E. R. 437.

*Annotation*:—**Consd.** **Davis v. Eyton** (1830), 7 Bing. 154.

**340.** — **Tenant pur autre vie.**]—A tenant *pur autre vie*, who upon the death of the life in his

stock.—*Re HALL (DECEASED)* (1892), 26 L. L. T. Jo. 493.—**IR.**

**a.** — **Heir-at-law.**]—On June 12 a writ of *fi. fa.* issued against the goods of C., then seised of certain freehold tenements. On Aug. 1 C. died. On Aug. 4 the writ was delivered to the sheriff. On Aug. 12 the sheriff levied & sold to plff. certain potatoes then growing on the freehold tenements:—*Held*: plff., claiming as heir-at-law of C., might maintain trover for the potatoes.—**TIERNY v. BYRNE** (1841), 2 Craw. & D.

**331 i.** — **Devisee.**]—Growing crops on the land of a testator may or may not be assets according to the contents of the will. In ordinary circumstances they go to the exor., & not to the heir, but

if the land on which the crops were growing was devised by the will, that would in general make the crops go with the land.—**FISHER v. TRUEMAN** (1853), 10 U. C. R. 617.—**CAN.**

**331 ii.** ———.]—A testator had sown a quantity of grain which was in the ground after his decease. The land on which it was, had been devised to the widow for life:—*Held*: she, not the exors., was entitled to the emblements.—**CUDNEY v. CUDNEY** (1874), 21 Gr. 153.—**CAN.**

**b.** — **Curate.**]—A. employed B. as his curate, & in lieu of salary agreed to allow him to have the use of the glebe-house & lands, worth about £80 a-year:—*Held*: this created a tenancy between A. & B., & upon A.'s death, B. entitled

to emblements.—**O'CONNOR v. TYNDALL** (1836), 2 Jo. Ex. Ir. 20.—**IR.**

**340 i.** — **Tenant pur autre vie.**]—In an action of ejectment:—*Held*: a tenant *pur autre vie* had no right to set up 14 & 15 Vict. c. 25, as he had no claim to emblements.—**STRADBROOKE v. MULCAHY** (1852), 2 L. C. L. R. 406, 410; 4 Ir. Jur. 390, 392.—**IR.**

**340 ii.** ———.]—A tenant, who held under a lease *pur autre vie*, had, prior to the termination thereof by the death of the last surviving *cestui que vie*, sowed a crop of wheat, & subsequent thereto, & after demand of possession by the landlord, sowed some oats & potatoes. He was afterwards evicted on a civil bill decree, in an ejectment founded upon the determination of the tenant's



**Sect. 2.—Emblements. Sects. 3 & 4. Part IX. Sect. 1.]**

lease refuses to deliver up possession & puts his landlord to an action of ejectment to recover the premises, does not thereby deprive himself of his right to those crops which he sows prior to determination of his tenancy.—**KELLY v. WEBBER** (1860), 3 L. T. 124.

**341. — Tenant sowing after judgment.]—**Where A., after judgment against him, sowed the land & afterwards brought a writ of error to reverse the judgment, which was affirmed:—**Held**: he was not entitled to hold the land until he had cut the corn.—**WICKS v. JORDAN** (1614), 2 Bulst. 213; 80 E. R. 1076.

**342. Right of entry to gather crop.]—**Trespass for assaulting & imprisoning pltf. Plea, that he was trespassing on defts.' close. Replication, that defts. had nothing in the close except under R.; that before the time when, etc., & before defts. had anything in the close, R. demised it from year to year to W.; that W. permitted pltf. to plant a crop of teazles on condition that W. should have one half of the crop, & pltf. the other, & that pltf. entered to cut his teazles, when defts. assaulted him:—**Held**: the replication was a sufficient answer to the plea, though it did not allege that W.'s interest in the land was continuing when pltf. entered to cut the teazles.

A tenant from year to year does not know in what year his lessor may determine the tenancy by half a year's notice to quit; in that respect, at least, he has an uncertain estate; the public interest requires that he who grows a crop shall have a right, where his landlord determines the tenancy, to claim it as emblements; otherwise every tenant from year to year whose holding commences at Michaelmas, & who plants his crop early in the spring, may, by a notice to quit given at Lady Day, be deprived of the fruit of his labours whenever the harvest is protracted beyond Michaelmas. Therefore, though the tenancy of W. might have been determined before the teazles were mature, yet he & pltf. had a right to enter for the purpose of gathering the teazles which pltf. had planted during the tenancy (**BEST, C.J.**).—**KINGSBURY v. COLLINS & ELMES** (1827), 4 Bing. 202; 12 Moore, C. P. 424; 5 L. J. O. S. C. P. 151; 130 E. R. 746.

**Annotation:—Reid.** *Graves v. Weld* (1833), 5 B. & Ad. 105.

**343. Contract to give up—Recovery of value.]—**The value of growing crops, to which the tenant is entitled by the common law or the custom of the country as emblements, & contracted by the tenant to be given up to his landlord or successor, may be recovered on a count for crops bargained & sold (**PARKE, B.**).—**HALL v. RUNDER** (1834), 1 Cr.

interest. The landlord, after getting into possession, cut & dug the respective crops. In an action of trover by the outgoing tenant against the landlord:—**Held**: (1) he was entitled to recover the value of the wheat, but not of the oats & potatoes; (2) the rights of the tenant, in respect of the crops, were not affected by the proceedings in the ejectment.—**KELLY v. WEBBER** (1860), 11 L. C. L. R. 57; 5 Ir. Jur. 358.—**IR.**

**c. — Purchaser.]—**A person having become purchaser of land under a sale in Ch., & having received possession on condition that he allowed the wheat & straw there to be removed, does not acquire any legal right to the straw as emblements under such purchase.—**ODELL v. CAYNE** (1855), 4 C. P. 452.—**CAN.**

**d. — —.]—**On July 14, 1876, B. obtained a decree against D. directing D. to pay the amount advanced upon a

mtge. of D.'s lands within six months from the date of decree, or, in default of payment, the lands to be sold with liberty to B. to bid at the sale. Default having been made, the lands were sold on June 21, 1877, & B. became the purchaser. At the time of the sale the lands were in the occupation of D.'s tenants under an agreement to give to D. a moiety of the crops:—**Held**: that, by the sale to B., D.'s right to the moiety of the crops in the hands of his tenants passed to B., & no residual right remained in D., the crops not having been actually carried away & appropriated by D.—**LAND MORTGAGE BANK OF INDIA v. VISHNU GOVIND PATANKAR** (1878), 1 L. R. 2 Bom. 670.—**IND.**

**e. — Tenant under parol arrangement.]—**A. entered into possession, & sowed a crop, upon an oral understanding that he should have the products thereof, but no special time for occupation was mentioned:—**Held**: a suffi-

**M. & R.** 266; 3 Tyr. 959; 3 L. J. Ex. 260; 149 E. R. 1080.

**Annotations:—Apprvd.** *Minshall v. Lloyd* (1837), 2 M. & W. 450. **Consd.** *Darby v. Harris* (1841), 1 Q. B. 895; *Re Gye & Hughes, Ex p. Reynal* (1841), 2 Mont. D. & De G. 443; *Kelly v. Webster* (1852), 12 C. B. 283. **Folld.** *Elliott v. Bishop* (1854), 3 C. L. R. 272. **Apld.** *Lee v. Gaskell* (1876), 1 Q. B. D. 700; *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5. **Folld.** *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523; *C. A. Reid. London & Westminster Loan & Discount Co. v. Drake* (1859), 6 C. B. N. S. 798. **Mentd.** *Mather v. Fraser* (1856), 4 W. R. 387; *Moor v. Roberts* (1858), 3 C. B. N. S. 830.

**344. Landlord & Tenant Act, 1851 (c. 25)—Death of landlord—Distress.]—**H. held as tenant from year to year of A., tenant for life, a cottage with about an acre of land, which was partly cultivated as a garden, & partly sown with corn & planted with potatoes. A. died in the middle of a year of H.'s tenancy, & M. thereupon became entitled to the reversion, & at the expiration of the then current year of H.'s tenancy, distrained for the proportion of the rent due since A.'s death:—**Held**: (1) the above Act applied to all tenancies in respect of which there might be a claim to emblements; (2) but for the Act, there might have been a substantial claim to emblements, & the premises were "a farm or lands" within s. 1; (3) that sect. gave a right to distrain for the rent, as well as to recover it by action.—**HAINES v. WELCH & MARRIOTT** (1868), L. R. 4 C. P. 91; 38 L. J. C. P. 118; 19 L. T. 422; 17 W. R. 163.

**SECT. 3.—CLEANING.**

**345. No right at common law.]—**No person has, at common law, a right to glean in the harvest field. Neither have the poor of a parish, legally settled as such, any such right.—**STEEL v. HOUGHTON** (1788), 1 Hy. Bl. 51; 126 E. R. 32.

**Annotations:—Folld.** *Neill v. Devonshire* (1882), 8 App. Cas. 135, H. L.; *Smith v. Andrews*, [1891] 2 Ch. 678; *Hanbury v. Jenkins*, [1901] 2 Ch. 401; *Simpson v. A.-G.*, [1901] A. C. 476, H. L.; *Simpson v. A.-G.* (1904), 20 T. L. R. 761, H. L.; *Folkestone Corpn. v. Brockman*, [1914] A. C. 338, H. L.

**346. —.]—**Trespass for breaking & entering closes, etc., taking corn, etc. Justification that the closes had been sown with wheat, barley, etc.; that the crop was reaped, & after it was carried off the land, deft., being a poor, necessitous, & indigent person, entered, etc., to glean & gather the straw containing ears of corn remaining & being dispersed & scattered abroad in the closes, etc., after the crop had been reaped & carried away, etc., being the

cient tenancy was created to entitle him to such crop.—**MULHERNE v. FORTUNE** (1859), 8 C. P. 434.—**CAN.**

**f. — Tenant of landlord purchasing former tenant's rights.]—**Where the former tenant of lands was entitled to the growing crops as emblements, & the landlord, after making a demise simply, without exceptions, purchased that former tenant's rights:—**Held**: he was estopped by the demise from saying that the crops did not belong to the new lessee.—**COPELEY v. ENRIGHT** (1857), 7 L. C. L. R. 393.—**IR.**

**g. — Evicted tenant.]—**Where the herd of an evicted tenant held as part of his wages & had sown with oats & potatoes three roods of the evicted farm, which contained fifty-eight acres:—**Held**: the evicted tenant entitled to avail himself of those crops as emblements.—**KENNA v. NUGENT** (1873), 6 L. R. C. L. 547; 7 L. R. C. L. 464.—**IR.**

**gleanings of the crop, for his necessary support, etc. Judgment for pltf.—**WORLLEDGE *v.* MANNING (1786), 1 Hy. Bl. 55; 126 E. R. 34.

**Annotation :—**Reid. Steel v. Houghton (1788), 1 Hy. Bl. 51.

**347. Reasonable exercise.]**—The right of gleaning or leasing (if any) must be exercised under proper

**circumstances & restrictions.—R. v. PRICE (1766), 4 Burr. 1925 ; 98 E. R. 1.**

**Annotation :—***Reid. Steel v. Houghton* (1788), 1 Hy. Bl. 51.

## SECT. 4.—MUSHROOMS.

*See* **CRIMINAL LAW & PROCEDURE.**

## Part IX.—Trees and Timber.

**SECT. 1.—DEFINITION AND CLASSIFICATION OF TREES, TIMBER, UNDERWOOD, ETC.**

**348. Tree.]—***Semble*: a “tree” ordinarily means a growing tree, so that words imputing theft of a tree do not impute a felony.—**MINORS v. LEEFORD** (1806), Cro. Jac. 114; 79 E. R. 98.

**What constitutes larceny of.]—See CRIMINAL LAW & PROCEDURE.**

**349.** —.]—"Trees" in an exception do not include orchard trees.—LONDON (BP.) *v.* N. (1522), Y. B. 14 Hen. 8, fo. 1, pl. 1.

**Annotations :—****Folld.** London v. Southwell (1618), Hob. 303. **Refd.** Ive's Case (1597), 5 Co. Rep. 11a; Smith v. Bole (1618), Cro. Jac. 458. **Mentd.** Case of Swans (1592), 7 Co. Rep. 15b; Lilford's Case (1614), 11 Co. Rep. 46b; Blades v. Higgs (1862), 12 C. B. N. S. 501.

**350. S. P. WYNDHAM v. WAY** (1812), 4 Taunt. 316; 128 E. R. 351.

**351. S. P. BULLEN v. DENNING (DENING) (1826),**  
5 B. & C. 842; 8 Dow. & Ry. K. B. 657; 4 L. J.  
O. S. K. B. 314; 108 E. R. 313.

*Annotations* :—**Mentd.** Blackett v. Royal Exchange Assce. (1832), 1 L. J. Ex. 101; Savill v. Bethell, [1902] 2 Ch. 523, C. A.

**352. Timber—What is — General rule.]—**The question of what timber is depends, first, on the general law, *i.e.*, the law of England, &, secondly, on the special custom of a locality.—**HONYWOOD v. HONYWOOD** (1874), L. R. 18 Eq. 306 ; 43 L. J. Ch. 652 ; 30 L. T. 671 ; 22 W. R. 749.

*Annotations* :—**Consd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. **Refd.** *Pardoe v. Pardoe* (1900), 82 L. T. 547.

**353. — Diameter & girth.]—**Timber means strictly trees of 6 in. in diameter, or 2 ft. in girth allowing for irregularities of shape.—WHITTY v. DILLON (LORD) (1860), 2 F. & F. 67.

**354. — At common law—Oak, ash, & elm—Twenty years old.]—By the general law, which may be varied by special custom, timber consists of oak, ash & elm of the age of twenty years & upwards, provided they are not so old as no longer to have a reasonable quantity of usable wood in them.—HONYWOOD v. HONYWOOD (1874), L. R. 18 Eq. 306 ; 43 L. J. Ch. 652 ; 30 L. T. 671 ; 22 W. R. 749.**

**Annotations:—**Consd. *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. Refd. *Pardoe v. Pardoe* (1900), 82 L. T. 547.

**355. S. P. PHILLIPPS v. SMITH (1845), 14 M. & W. 589; 15 L. J. Ex. 201; 10 J. P. 533; 153 E. R. 610.**

*Annotation:* -**Consd.** Dashwood v. Magniac, [1891] 3 Ch. 306,  
C. A.

**356.** — — — .]—Oaks, elms, etc., are or may become timber trees.—ANON. (1587), Cro. Eliz. 55 ; 78 E. R. 316.

**Annotation :—***Consd. Ford v. Racster* (1815), 4 M. & S. 130.

**357. ——— Pollard oak & ash.]—Pollard oaks**  
ashes that have grown for twenty years without  
lopping are timber.—WALTON v. TRYON (1751),  
Amb. 130; 1 Dick. 244; 2 Eag. & Y. 123; 2 Gwill.  
827; 27 E. R. 85.

**Annotations :—**Consd. *Ford v. Racster* (1815), 4 M. & S. 130 ;  
*Evans v. George & Rowe* (1825), 12 Price, 76, Ex. Ch. ;

**Lozon v. Pryse** (1840), 4 My. & Cr. 600. **Refd.** **Chichester v. Sheldon** (1823), Turn. & R. 245. **Mentd.** **Ersikine v. Ruffie** (1769), 3 Gwill. 961, Ex. Ch.; **Page v. Wilson** (1821), 2 Jac. & W. 513; **Willis v. Stove** (1827), 1 Y. & J. 262, Ex. Ch.

*See, also, No. 584, post.*

**358. — Trees timber by custom.]**—In a purchase where timber is agreed to be valued, the custom of the country makes those trees timber which in their nature are not so, as birch, beech, etc., & pollard trees, if the bodies are sound, are to be valued as timber.—**CHANDOS (DUKE) v. TALBOT** (1731), 2 P. Wms. 601 ; 24 E. R. 877.

**Annotations:—****Mentd.** Hall v. Terry (1738), West *Imp.* Hard. 500; Prowse v. Abingdon (1738), 1 Atk. 482; Nicholls v. Judson (1742), 2 Atk. 300; A.-G. v. Milner (1744), 3 Atk. 112; Basset v. Basset (1744), 3 Atk. 203; Chester v. Willes (1754), Amb. 246; Pearce v. Loman (1796), 3 Ves. 135; Astley v. Milles (1827), 1 Sim. 298; Honner v. Morton (1828), 3 Russ. 65; Horton v. Smith (1858), 27 L. J. Ch. 773; Remnant v. Hood (1859), 27 Beav. 74; Henty v. Wrey (1882), 21 Ch. D. 332, C. A.

**359.** Timber & timberlike trees in an assignment include both ordinary timber & that which by the custom of the country was considered timber & the thinnings.—*GORDON v. WOODFORD* (1859), 27 Beav. 603; 29 L. J. Ch. 222; 1 L. T. 260; 6 Jur. N. S. 59; 54 E. R. 239.

**360.** — — **Beech.**]—Beech may be timber by the custom of the country.—**PALMER'S CASE** (1811), Co. Litt. 53a, n. (10).

**361. S. P. WALTON v. TRYON (1751), Amb. 130 ;**  
**Dick. 244 ; 2 Eag. & Y. 123 ; 2 Gwill. 827 ; 27**  
**E. R. 85.**

*Annotations* :—**Consd.** *Evans v. George & Rowe* (1825), 12 Price, 76, Ex. Ch.; *Lozen v. Pryse* (1840), 4 My. & Cr. 600. **Refd.** *Page v. Wilson* (1821), 2 Jac. & W. 513; *Chichester v. Sheldon* (1823), Turn. & R. 245; *Willis v. Stone* (1827), 1 Y. & J. 262, Ex. Ch. **Mentd.** *Erskine v. Ruffle* (1769), 3 Gwill. 961, Ex. Ch.; *Ford v. Raester* (1815), 4 M. & S 130.

**362. S. P. *Re* HARRISON'S TRUSTS, HARRISON v. HARRISON (1884), 28 Ch. D. 220 ; 54 L. J. Ch. 617 ; 52 L. T. 204 ; 33 W. R. 240 ; 1 T. L. R. 167, C. A.**

**383.** ——— Use irrelevant.]—The question whether beech is timber depends not upon the use to which it is put, but upon the custom of the country (Gloucestershire).—*R. v. MINCHIN-HAMPTON (INHABITANTS)* (1762), 3 Burr. 1308 ; 97 E. R. 847.

**364.** ——— **Bedfordshire.**]—In Bedfordshire maiden beeches of twenty years' growth, & beech wood proceeding from stools originally maiden trees above twenty years' growth, were treated as timber.—**BIBYE v. HUXLEY** (1724), Bunb. 192 ; 1 Eag. & Y. 805 ; 2 Gwill. 657 ; 2 Wood, 237 ; 145 E. R. 644.

**Annotations:—***Consd. Evans v. George & Rowe* (1825), 12 Price, 76, Ex. Ch.; *Lozon v. Pryse* (1840), 4 My. & Cr. 600. **Mentd.** *Walton v. Tryon* (1751), Amb. 130.

**365. Buckinghamshire.]**—By the custom of Buckinghamshire, beech is timber.—**LAPTHORNE v. —** (1616), 1 Roll. Rep. 355; 81 E. R. 530.

**366.** — — — — — **Not Oxfordshire.]—**  
Beech trees are recognised as timber in Bucking-

## AGRICULTURE.

*Sect. 1. — Definition & classification of trees, timber, underwood, etc. Sect. 2: Sub-sect. 1.]*

hamshire but not in Oxfordshire.—**DASHWOOD v. MAGNIAC**, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811; 7 T. L. R. 629, C. A.

*Annotations:—***Refd.** *Pardoe v. Pardoe* (1900), 82 L. T. 547. **Mentd.** *Re Chaytor*, [1900] 2 Ch. 804; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A.; *Re Trevor Batye's Settlement*, *Bull v. Trevor Batye*, [1912] 2 Ch. 339; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488.

**367. — — — Gloucestershire.]**—In the parish of Whitcombe Magna, Gloucestershire, great beech trees growing from the root are timber.—**ABBOTT (ABBOT) v. HICKS** (1694), 1 Eag. & Y. 584; 2 Gwill. 838, n.; 1 Wood, 319.

*Annotations:—***Refd.** *Walton v. Tryon* (1751), Amb. 130. **Mentd.** *Ersine v. Ruffe* (1769), 3 Gwill. 961.

**368. S. P. R. v. MINCHIN-HAMPTON (INHABITANTS)** (1762), 3 Burr. 1308; 97 E. R. 847.

**369. — — — Hampshire.]**—In Hampshire beech trees are timber, but hedgerows, willows, maples & hazels are not.—**LAYFIELD v. COWPER** (1694), 1 Eag. & Y. 591; 1 Wood, 330.

*Annotations:—***Distd.** *Walton v. Tryon* (1751), Amb. 130. **Refd.** *Page v. Wilson* (1821), 2 Jac. & W. 513.

*See, also, No. 376, post.*

**370. — — — Evidence.]**—Where beech is admitted to be timber by the custom of the country, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties & privileges of timber at twenty years' growth. Upon an issue whether certain beech trees in the county of Bucks (which after being felled had been distrained for payment of a poor rate, to which it was contended they were liable) were or were not timber according to the custom of the country, the inquiry is confined to the nature of the wood & the period of growth, whether of twenty years; no evidence can be received to qualify its character of timber by showing that it was not deemed to be such in the county, unless the tree contained 10 ft. of solid wood.—**AUBREY v. FISHER** (1809), 10 East, 446; 103 E. R. 845.

*Annotations:—***Consd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. **Refd.** *R. v. Narberth North* (1839), 9 Ad. & El. 815.

**371. — — — Birch.]**—*Held*: in Yorkshire great birch trees of two hundred years' growth were timber & belonged to the inheritance & could not be taken by a tenant for life; same of windfalls being timber proper, & not decayed trunks.—**CUMBERLAND'S (COUNTESS) CASE** (1610), Moore, K. B. 812; 72 E. R. 922.

*Annotation:—***Refd.** *Channon v. Patch* (1826), 5 B. & C. 897.

**372. — — — Thorns.]**—White thorns may be timber by the custom of the country.—**PALMER'S CASE** (1611), Co. Litt. 53a, n. (10).

Waste in cutting thorns. *See, further, Nos. 875—880, post.*

**373. — — — ]**—Blackthorn may be timber in some places. Waste may be committed in cutting down blackthorn, the jury finding it to be timber.—**COOK v. COOK** (1638), Cro. Car. 531; 79 E. R. 1059.

**374. — — — ]**—Thorns in some counties are adjudged timber where trees are scant. A grove ordinarily is underwood.—**BARRET v. BARRET** (1628), Het. 34; 124 E. R. 321.

*Annotations:—***Refd.** *Phillipps v. Smith* (1845), 14 M. & W. 589. **Mentd.** *Simmons v. Norton* (1831), 7 Bing. 640; *Doe d. Grubb v. Burlington* (1833), 5 B. & Ad. 507; *Jones v. Chappell* (1875), L. R. 20 Eq. 539; *Tucker v. Linger* (1882), 21 Ch. D. 18, C. A.; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.; *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624.

**375. — — — Walnut.]**—Walnut trees, where of considerable value, are to be estimated as timber. Where trees are of value, & the parties cannot agree

on the valuation of them as timber, the ct. will send it to be tried whether by the custom of the country any & which of them are timber trees.—**CHANDOS (DUKE) v. TALBOT** (1731), 2 P. Wms. 601; 24 E. R. 877.

*Annotations:—***Mentd.** *Hall v. Terry* (1738), West temp. Hard. 500; *Prowse v. Abingdon* (1738), 1 Atk. 482; *Nicholls v. Judson* (1742), 2 Atk. 300; *A.-G. v. Milner* (1744), 3 Atk. 112; *Basset v. Basset* (1744), 3 Atk. 203; *Chester v. Willes* (1754), Amb. 246; *Pearce v. Loman* (1796), 3 Ves. 135; *Astley v. Mills* (1827), 1 Sim. 298; *Honner v. Morton* (1828), 3 Russ. 65; *Horton v. Smith* (1858), 27 L. J. Ch. 773; *Remnant v. Hood* (1859), 27 Beav. 74; *Henty v. Wrey* (1882), 21 Ch. D. 332, C. A.

**376. — — — Willows.]**—Willows are timber by the custom of Hampshire, & if they grow within the site of a house, it is waste to sell them.—**CUFFLY v. PINDAR** (1616), Hob. 219; 80 E. R. 366.

*Annotation:—***Refd.** *Phillipps v. Smith* (1845), 15 L. J. Ex. 201.

*See, also, No. 369, ante.*

**377. Timber estate.]**—**DASHWOOD v. MAGNIAC**, No. 615, *post*.

*See, also, Nos. 710—713, post.*

**378. Tithe cases as to what is timber.\*]**—Tithes are payable of birches of over twenty-one years' growth.—**FORSTER v. PEACOCK** (1581), Moore, K. B. 907; 72 E. R. 988.

\* *Note.*—These cases, though obsolete as to tithes, are retained as showing what is "timber."

**379. — — — ]**—Tithes are not payable of little oaks under twenty years' growth.—**WRAY v. CLENCI** (1587), Moore, K. B. 908; 72 E. R. 988.

**380. — — — ]**—Timber trees, such as oaks, elms etc., though felled before the age of twenty years, are not titheable; so if such trees of that age be cut & new germins grow.—**ANON.** (1587), Cro. Eliz. 55; 78 E. R. 316.

*Annotation:—***Consd.** *Forð v. Raester* (1815), 4 M. & S. 130.

**381. — — — ]**—Tithes are not payable of decaying trunks of trees or branches beyond twenty years' growth.—**RANNE v. PATISON** (1596), Moore, K. B. 908; 72 E. R. 988.

**382. — — — ]**—Tithes are not payable for beech trees over twenty years old being timber, nor for decayed oaks, although they are not timber by reason of rottenness & are used as firewood.—**HOLLIDAY v. LEE** (1598), Moore, K. B. 541; 72 E. R. 745.

**383. — — — ]**—Birch, etc., although above twenty years' growth, shall pay tithes; so of holly, alders & maple.—**ANON.** (1607), Cro. Jac. 199; 79 E. R. 174.

**384. — — — ]**—Wood usually cut for firewood is titheable though permitted to grow for twenty-five years. So pollards of fifty years' growth are titheable when felled.—**HAWES v. CORNWALL** (1666), 1 Lev. 189; 83 E. R. 362; *sub nom.* **CORNWALL (CORNELL) v. HAWS**, 2 Keb. 90; 1 Sid. 300.

*Annotations:—***Consd.** *Lozon v. Pryse* (1840), 4 My. & Cr. 600; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. **Refd.** *Walton v. Tryon* (1751), Amb. 130.

**385. — — — ]**—Gros bois is timber or that wood which is employed for the purpose of building.

Where a bill alleged that tithe was payable for oakwood springing or growing from the germins or stumps of trees formerly felled, though such wood was timber of the growth of eighty years, & the general result of the evidence was that the mode of growth thus alleged was the ordinary mode of raising timber in Pembrokeshire:—*Held*: tithe was payable for the oakwood as described.—**EVANS v. ROWE & GEORGE** (1825), M'Cle. & Yo. 577; 148 E. R. 542; *sub nom.* **EVANS v. GEORGE & ROWE**, 12 Price 76, Ex. Ch.

*Annotation:—***Consd.** *Lozon v. Pryse* (1840), 4 My. & Cr. 600.

**386. — — — ]**—Wood of the growth of twenty years or upwards, springing from roots or stools of



## PART IX.—TREES AND TIMBER.

trees formerly felled, is exempt from payment of tithes.—*LOZON v. PRYSE* (1840), 4 My. & Cr. 600 ; 10 L. J. Ch. 103 ; 5 Jur. 310 ; 41 E. R. 231

*Annotation* :—*Consd.* *Dashwood v. Magniac* [1891] 3 Ch. 306, C. A.

**387. Trees not timber—Alder poles.]—**Alder poles cut from a coppice in Berkshire, although above twenty years' growth, & usually measured by timber measure, are not timber.—*GOODALL v. PERKINS* (1694), 1 Eag. & Y. 606 ; 2 Gwill. 543 ; 1 Wood, 338.

*Annotations* :—*Mentd.* *Erskine v. Ruffle* (1769), 3 Gwill. 961 ; *Willis v. Stone* (1827), 1 Y. & J. 262, Ex. Ch.

**388. — Hornbeam, sallow & hazel—Ash & stub oak.]—Held** : hornbeam, sallow, hazel, ash & stub-oak in Essex were not timber & were titheable.—*TURNOR v. SMITH* (1680), 1 Eag. & Y. 526 ; 2 Gwill, 529.

*Annotation* :—*Consd.* *Lozon v. Pryse* (1840), 4 My. & Cr. 600.

**389. — —.]—**Hornbeams, hazels, willows or sallows at no time of their growth are timber.—*ANON.* (1581), *Godb.* 4 ; 78 E. R. 3.

*Annotation* :—*Consd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**390. Larch.]—**Larch trees are not timber nor subject to the same rules as timber trees.—*Re HARRISON'S TRUSTS, HARRISON v. HARRISON* (1884), 28 Ch. D. 220 ; 54 L. J. Ch. 617 ; 52 L. T. 204 ; 33 W. R. 240 ; 1 T. L. R. 167, C. A.

*Annotation* :—*Mentd.* *Re Terry, Terry v. Terry* (1918), 87 L. J. Ch. 577, C. A.

**391. Saplings.]—**Saplings are not either poles or underwood, neither are they timber in the proper sense of the term.—*WHITTY v. DILLON (LORD)* (1860), 2 F. & F. 67.

**392. Silva cædua.]—**The distinction between *silva cædua* & *silva non-cædua* is well known, & *silva cædua* as a rule is equivalent to coppice *quæ succisa rursus ex stirpibus aut radicibus renascitur* (*BOWEN, L.J.*).—*DASHWOOD v. MAGNIAC*, [1891] 3 Ch. 306 ; 60 L. J. Ch. 809 ; 65 L. T. 811 ; 7 T. L. R. 629, C. A.

*Annotations* :—*Mentd.* *Pardoe v. Pardoe* (1900), 82 L. T. 547 ; *Re Chaytor*, [1900] 2 Ch. 804 ; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A. ; *Re Trevor Batye's Settlement, Bull v. Trevor Batye*, [1912] 2 Ch. 339 ; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488.

**393. Underwood—Meaning of term.]—**The term underwood is generally applied to species of wood which grow expeditiously & send up many shoots from one stool, the root remaining perfect from which the shoots are cut, & producing new shoots & so yielding a succession of profits. Horse chestnuts, limes, plane trees & aspen, though not timber, are not underwood. Firs & larches planted with oaks for the purpose of sheltering the latter, & cut from time to time as the oaks grow larger & require more space, the primary object being to protect the oaks & not to derive a profit from them by sale, are not underwood. At all events, they are not saleable underwood within 43 Eliz. c. 2 (*BAYLEY, J.*).

The term signifies coppice as distinct from haut-bois. Wood which is not timber is not necessarily underwood ; thus beech, aspen, horse-chestnut, lime & walnut trees are not necessarily underwood in places where they are not timber by custom (*HOLROYD, J.*).—*R. v. FERRYBRIDGE (INHABITANTS)* (1823), 1 B. & C. 375 ; 1 Dow. & Ry. M. C. 301 ; 2 Dow. & Ry. K. B. 634 ; 107 E. R. 139.

*Annotations* :—*Consd.* *R. v. Narberth North* (1839), 1 Per. & Dav. 590 ; *Fitzhardinge v. Pritchett* (1867), L. R. 2 Q. B. 135. *Reid.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**394. —.]—**Small wood never likely to be used for timber may be called underwood (*LITTLEDALE, J.*).

The nature of the tree does not determine the question, which depends on the treatment of the woods in each case (*WILLIAMS, J.*).—*R. v. NARBERTH NORTH (INHABITANTS)* (1839), 9 Ad. & El. 815 ; 1 Per. & Dav. 590 ; 8 L. J. M. C. 46 ; 3 J. P. 419 ; 112 E. R. 1423.

*Annotation* :—*Reid.* *Fitzhardinge v. Pritchett* (1867), L. R. 2 Q. B. 135.

**395. Saleable underwoods.]—**The question whether woods are saleable underwoods & so rateable to the relief of the poor under Poor Relief Act, 1601 (c. 2), s. 1, depends on the mode & object of their cultivation, & if these be to produce a succession of profitable crops from the same stools & roots the woods so treated are saleable underwoods, & it is immaterial at what intervals the successive crops are cut, & of what species of tree—whether timber trees or others—the woods consist.—*FITZ-HARDINGE (LORD) v. PRITCHETT* (1867), L. R. 2 Q. B. 135 ; 8 B. & S. 216 ; 36 L. J. M. C. 49 ; 15 L. T. 502 ; 31 J. P. 100.

*Annotation* :—*Consd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

Other cases as to Poor Relief Act, 1601 (c. 2), s. 1 (now repealed by Rating Act, 1874 (c. 54) ), & the rating of trees, *see RATES & RATING.*

**396. — Contract to fell timber & burn underwood—Liability for act of contractor.]—**Resps. agreed with a contractor in July, 1890, to clear some forest land belonging to them by felling the timber & burning the underwood. The contractor undertook to "complete the felling by Nov. 30, 1890, & burn in a favourable time about Feb. next." The contractor was to take all responsibility, & make good all damage. He sublet the contract, & the sub-contractor completed the felling in Nov., but burnt the underwood on Dec. 23, when the fire spread to adjacent land of applt., & damaged his crops & fences :—*Held* : even assuming that the contractor had broken the terms of the contract by burning as early as Dec., resps. were liable.—*BLACK v. CHRISTCHURCH FINANCE CO.*, [1894] A. C. 48 ; 63 L. J. P. C. 32 ; 70 L. T. 77 ; 58 J. P. 332 ; 6 R. 394, P. C.

*Annotations* :—*Consd.* *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335, C. A. ; *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392, C. A.

### SECT. 2.—PROPERTY IN TREES AND LIABILITIES OF DIFFERENT CLASSES OF OWNERS.

#### SUB-SECT. 1.—ADJOINING OWNERS.

**397. Ownership of trees—General rule.]—**If A. plants a tree upon the extremest limits of his land, & the tree growing extends its roots into the land of B. next adjoining, A. & B. are tenants in common of this tree. If all the roots grow into the land of A. though the boughs overshadow the land of B., yet the branches follow the roots, & the property of the whole is in A.—*WATERMAN v. SOPER* (1698), 1 Ld. Raym. 737 ; 91 E. R. 1393.

*Annotation* :—*Dttd.* *Holder v. Coates* (1827), *Mood. & M.* 112.

**398. — —.]—**Trespass for carrying off boards, etc. Justification that there was a big tree which grew between the closes of pltf. & deft., & part of the roots of the tree extended into deft.'s close & the tree was nourished by the soil ; that pltf. cut down the tree & carried it into his close & sawed it into boards, & deft. entered & took some of the boards, & carried them off as he was entitled to do :—*Held* : on demurrer, though some of the roots of the tree were in deft.'s ground, still the body of the



**Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sect. 1.]**

main part of the tree was in pltf.'s ground, wherefore the remainder of the tree belonged to him, but if pltf. had planted a tree in deft.'s ground it would be otherwise.

Pltf. cannot limit the roots of the tree, how far they shall grow & go (MOUNTAGUE, C.J.).—MASTERS v. POLLIE (1620), 2 Roll. Rep. 141; 81 E. R. 712.

**Annotations:—**Consd. Holder v. Coates (1827), Mood. & M. 112. I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*, & I still think so (LITTLEDALE, J.).

**399.** —.].—If a tree grows in a hedge which divides the land of A. & B. & by its roots takes nourishment in the land of A. & also of B., they are tenants in common of the tree.—ANON. (1622), 2 Roll. Rep. 255; 81 E. R. 783.

**Annotation:—**Consd. Lemmon v. Webb, [1894] 3 Ch. 1, C. A.

**400.** —.].—If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted.—HOLDER v. COATES (1827), Mood. & M. 112.

**Annotations:—**Folld. Speed v. Money & Musson (1904), 48 Sol. Jo. 674. **Refd.** Lemmon v. Webb, [1894] 3 Ch. 1, C. A.

**401.** S. P. SPEED v. MONEY & MUSSON (1904), 48 Sol. Jo. 674.

**402. Evidence of ownership—Reputation.]**—To an action of trespass for cutting down & converting trees, which deft. justified as growing upon his soil & freehold, pltf. replied that the trees were his freehold, & not deft.'s:—**Held:** this was proved by showing that they grew on a certain woody belt, 15 ft. wide, which surrounded pltf.'s land, but was undivided by any fences from the several closes adjoining, of which it formed part, belonging to different owners, & that from time to time pltf. & his ancestors, at their pleasure, cut down, for their own use, the trees growing within the belt, & the several owners of the different closes including the belt never felled trees there, though they felled them in other parts of the same closes, & that when they made sale of their estates, the trees in the belt were never valued by their agents, because they were reputed & considered to belong to pltf. & his ancestors, in which the several owners acquiesced.—STANLEY v. WHITE (1811), 14 East, 104 E. R. 630.

**Annotations:—**Distd. Hollis v. Goldfinch (1823), 1 B. & C. 205. **Consd.** Doe d. Barrett v. Kemp (1831), 7 Bing. 332. **Expld.** Jones v. Williams (1837), 2 M. & W. 326; Bailey v. Stephens (1862), 12 C. B. N. S. 91. **Refd.** White v. Lisle (1819), 4 Madd. 214; Gale v. Burnell (1845), 7 Q. B. 850. **Mentd.** Dendy v. Simpson (1856), 18 C. B. 831; Simpson v. Dendy (1856), 2 Jur. N. S. 642, Ex. Ch.

**403. Overhanging trees—Right to cut—Notice.]**—If the branches of your trees grow over on my

land, I can cut them off, but I cannot justify cutting them off before they grow over my land because I have fear of their so doing (CROKE, J.).—NORRIS v. BAKER (1616), 1 Roll. Rep. 393; J. Bridg. 47; 81 E. R. 559; *sub nom.* MORRICE v. BAKER, 3 Bulst. 196.

**Annotations:—**Expld. Jones v. Williams (1843), 11 M. & W. 176, where LORD ABINGER, C.B. pointed out that there was no entry, the party cutting trees from his own land. **Apprvd.** Lemmon v. Webb, [1894] 3 Ch. 1, C. A. **Consd.** Lemmon v. Webb, [1895] A. C. 1, H. L.

**404.** —.].—Branches of trees in the land of A. overlapping the land of B. may be cut by B. **Semble:** if the security of life or property demand it, without notice (BEST, J.).—LONSDALE (EARL) v. NELSON (1823), 2 B. & C. 302; 3 Dow. & Ry. K. B. 556; 2 L. J. O. S. K. B. 28; 107 E. R. 396.

**Annotations:—**Consd. Jones v. Williams (1843), 11 M. & W. 176; Lemmon v. Webb, [1894] 3 Ch. 1, C. A. Best, J. clearly does not consider any notice necessary in the case of overhanging trees. He considers notice unnecessary in all cases of nuisances arising from omission, if there is an emergency (LOPES, L.J.); Lemmon v. Webb, [1895] A. C. 1, H. L. **Consd. & Distd.** Campbell Davys v. Lloyd, [1901] 2 Ch. 518, C. A. **Mentd.** Lyme Regis Corpn. v. Henley (1834), 1 Bing. N. C. 222; Gwynne v. Burnell (1840), 6 Bing. N. C. 453.

**405.** —.].—(1) If a tree planted on A.'s land grows over B.'s soil, no action lies for the encroachment unless damage is proved (LINDLEY, L.J.). (2) The encroachment of (a) boughs & (b) roots over & within B.'s land is not a trespass or occupation of that land which, by lapse of time, could become a right; it is a nuisance. (3) For any damage occasioned by this an action on the case would lie. (4) B. may abate the nuisance, if A. after notice neglects so to do, & may abate the nuisance without notice, if he could do so without trespassing on A.'s land (KAY, L.J.).—LEMMON v. WEBB, [1894] 3 Ch. 1; 63 L. J. Ch. 570; 70 L. T. 712; 58 J. P. 716; 10 T. L. R. 467, C. A.; *affd.* as to (2) (a) & (4), [1895] A. C. 1, H. L.

**Annotations:—**Folld. as to (3), Smith v. Giddy, [1904] 2 K. B. 488. **Consd.** Cheater v. Cater, [1918] 1 K. B. 247, C. A. **Mentd.** Reynolds v. Presteign U. D. C., [1896] 1 Q. B. 601; Campbell Davys v. Lloyd, [1901] 2 Ch. 518, C. A.

**406.** —.].—If a man's trees overhang his neighbour's land, his neighbour may cut off the overhanging branches back to the boundary without giving notice to the owner of his intention so to do. A man cannot acquire a right to let his trees overhang his neighbour's land, either by prescription or under Stat. Limitations.—LEMMON v. WEBB, [1895] A. C. 1; 64 L. J. Ch. 205; 71 L. T. 647; 59 J. P. 564; 11 T. L. R. 81; 11 R. 116, H. L.

**Annotations:—**Consd. Cheater v. Cater, [1918] 1 K. B. 247, C. A. **Refd.** Reynolds v. Presteign U. D. C., [1896] 1 Q. B. 601. **Mentd.** Campbell Davys v. Lloyd, [1901] 2 Ch. 518, C. A.; Smith v. Giddy, [1904] 2 K. B. 448.

**407. —. Action for damages.]**—An action lies for damage to crops caused by branches of trees,

**PART IX. SECT. 2, SUB-SECT. 1.**

**403 i. Overhanging trees—Right to cut.]**—A proprietor is not entitled, without obtaining authority so to do, to cut down trees & shrubs growing on his neighbour's land, on the line dividing their respective properties, on the ground that the trees & shrubs in question interfere with the cleaning of the boundary ditch, more especially where the weight of evidence shows that the ditch could have been cleaned without cutting the trees & shrubs.—BAIN v. MONTEITH (1892), Q. R. 2 S. C. 337.—CAN.

**403 ii. —.].**—Pltfs. sued for an injunction restraining defts. from obstructing them in cutting certain branches of a pipal tree overhanging

their property. The pipal tree grew in the inclosure of a temple, & the resistance was based on the ground that the tree was an object of veneration to Hindus, & that the lopping of its branches would be offensive to the religious feelings of the Hindu community:—**Held:** pltfs. were entitled to the injunction prayed for, & the fact that pltf.'s action might cause annoyance to a large number of Hindus was not a sufficient ground for cutting down the well-recognised common law rights of an owner of property.—BEHARI LAL v. GHISA LAL (1902), 1 L. L. R. 24 All. 499.—IND.

**407 i. —. Action for damages.]**—The branches of a tree growing on defts.' land extended over pltfs.' land &

brushed against pltfs.' house, & disturbed them in their sleep, & the leaves from the branches also blocked the downpipe from gutters on the roof of pltfs.' house:—**Held:** pltfs. had a good cause of action for damages in respect thereof. **Semble:** defts. would not be liable for any damage done by the roots of the trees extending into pltfs.' land.—ROSE v. EQUITY BOOT CO., LTD., & HANNAFIN (1913), 32 N. Z. L. R. 677.—N.Z.

**407 ii. —. Injunction.]**—As every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter, in case of breach of such an

belonging to & in the land of an adjoining owner, overhanging the land on which the crops are growing. In such case the person whose crops are injured by the overhanging branches of his neighbour's trees is not confined to his remedy by cutting off the branches which overhang his land, but may maintain an action for the damage.—*SMITH v. GIDDY*, [1904] 2 K. B. 448; 73 L. J. K. B. 894; 91 L. T. 296; 53 W. R. 207; 20 T. L. R. 596; 48 Sol. Jo. 589.

*Annotation*:—*Refd.* *Cheater v. Cater*, [1918] 1 K. B. 247, C. A.

**408. — Entry on neighbour's land to lop trees.**—If a man is unable to lop his tree unless it fall upon the land of another, there he may well justify the felling of it upon the other's land, because otherwise he could not lop it at all.—*DIKE & DUNSTON'S CASE* (1586), Godb. 52; 78 E. R. 32.

**409. — Right to take fallen fruit.**—If trees grow in the hedge & the fruit falls into another's ground, the owner may go in & take it (*DODDRIDGE, J.*).—*MILLEN v. FAWDRY* (1626), Lat. 119; W. Jo. 131; Benl. 171; 82 E. R. 304; *sub nom.* *MILLEN v. HAWERY* (1625), Lat. 13; *sub nom.* *MITTEN v. FAUDRYE* (1626), Poph. 161.

*Annotations*:—*Refd.* *Gundry v. Feltham* (1786), 1 Term Rep. 334; *Anthony v. Haney* (1832), 8 Bing. 186. *Mentd.* *King v. Rose* (1673), Freem. K. B. 347; *Mason v. Keeling* (1699), 1 Ld. Raym. 606; *Beckwith v. Shordike* (1767), 4 Burr. 2092; *Deane v. Clayton* (1817), 7 Taunt. 489.

**410. — Clippings—No right to enter.**—A. cut a hedge of thorns growing on his land; the cuttings against his will went on B.'s land. A. went immediately on B.'s land & took them:—*Held*: although the cuttings belonged to A., he could not go on to B.'s land to fetch them, & an action of trespass lay against him.

A. was liable, unless he had done all he could to prevent the fall of cuttings on B.'s land. As to boughs blown down by the wind, A. could have entered & taken them (*CHOKE, J.*).—*ANON.* (1466), Y. B. 6 Edw. 4, fo. 7, pl. 18.

*Annotations*:—*Apld.* *Millen v. Fawdry* (1626), Lat. 119. *Consd.* *Lambert & Olliot v. Bessey* (1680), T. Raym. 421, 467, as showing that "in all civil acts the law does not so much regard the intent of the actor, as the loss & damage of the party suffering."

**411. Tree growing against wall—Right to remove.**—Pltf. sued deft. in trespass for breaking & entering his close & cutting a tree. Deft. pleaded that it was wrongfully growing against his wall & he removed it as he lawfully might:—*Held*: a good defence, provided the jury found such cutting down was not in excess of what was necessary to remove the injury to deft.—*PICKERING v. RUDD* (1815), 1 Stark. 56; 4 Camp. 219.

*Annotations*:—*Consd.* *Lemmon v. Webb*, [1895] A. C. 1, II. L. *Refd.* *Wells v. Ody* (1836), 1 M. & W. 452; *Foulkes v. Scarfe* (1842), 4 Man. & G. 126; *Kenyon v. Hart* (1865), 6 B. & S. 249; *Harvey v. Walters* (1873), L. R. 8 C. P. 162; *Clifton v. Bury* (1887), 4 T. L. R. 8.

**412. Poisonous trees — Yews projecting beyond boundary.**—Defts. purchased a piece of ground some seventeen years before pltf.'s action for purposes of their cemetery & fenced it round with a dwarf wall 2 ft. high, with, at two places, open iron railings 2 ft. high on top of the wall. In the part of their ground opposite these railings, & about 4 ft. within same, defts. planted two yew trees,

which in the course of time grew through & beyond the railings, & projected on & over the adjoining meadow occupied by pltf., & which he had, for some two years before the action, hired for the purpose of pasturing his horse therein. The horse, having eaten a quantity of the leaves & branches projecting over pltf.'s meadow, was poisoned thereby:—*Held*: (1) defts. were liable to pltf. in damages for loss of his horse; (2) it was immaterial whether or not defts. knew yew trees were poisonous to cattle, as, in either case, they must be held responsible for the direct consequences of their own act in the original planting of the trees; (3) pltf. was not bound to examine all the boundaries of the field which he had hired, so as to see that no tree likely to be injurious to his horse was projecting over it.—*CROWHURST v. AMERSHAM BURIAL BOARD* (1878), 4 Ex. D. 5; 48 L. J. Q. B. 109; 39 L. T. 355; 27 W. R. 95.

*Annotations*:—*Consd.* *Ponting v. Noakes*, [1894] 2 Q. B. 281. *Foll.* *Smith v. Giddy*, [1904] 2 K. B. 448. *Refd.* *Lemmon v. Webb*, [1894] 3 Ch. 1, C. A.; *Cheater v. Cater*, [1918] 1 K. B. 247, C. A. *Mentd.* *West v. Bristol Tram. Co.* (1908), 99 L. T. 264, C. A.

**413. — Landlord & tenant.**—A landlord let a farm to a tenant, retaining in his own possession adjoining land, on which was a shrubbery containing yew trees so near the farm that the branches of the yew trees overhung the boundary & were within reach of the tenant's cattle & horses. The tenant's mare ate of the branches & died. The yew trees overhung the land substantially to the same extent & in the same condition both at the commencement of the tenancy & at the date when the mare ate of the branches:—*Held*: a lessee takes the property as he finds it, & as the tenant took the land with the branches of the yew trees at that time overhanging it so as to be within reach of horses, the landlord was not liable for the loss of the mare.—*CHEATER v. CATER*, [1918] 1 K. B. 247; 87 L. J. K. B. 449; 118 L. T. 203; 34 T. L. R. 123; 62 Sol. Jo. 141, C. A.

**414. — Yews not projecting beyond boundary.**—Declaration that deft. was possessed of yew trees upon land belonging to him & in his occupation, the clippings of which trees were, to his knowledge, poisonous to horses & cattle, whereupon it became his duty to take due care to prevent the clippings from being put or placed upon land other than his own or in his occupation, where the horses & cattle of his neighbours & others might be enabled to eat them. Breach, that deft. took so little care of the clippings that they were put & placed upon land other than his own or in his occupation, whereby pltf.'s horses were enabled to eat the clippings, & were poisoned & killed:—*Held*: the declaration was bad, as it disclosed no facts from which a duty could be inferred in deft. to take care of the clippings, & was consistent with the inference that the clippings had been carried from deft.'s land by a stranger, or through some cause over which deft. had no control.—*WILSON v. NEWBERRY* (1871), L. R. 7 Q. B. 31; 41 L. J. Q. B. 31; 25 L. T. 695; 36 J. P. 215; 20 W. R. 111.

*Annotations*:—*Distd.* *Firth v. Bowling Iron Co.* (1878), 3 C. P. D. 254. *Refd.* *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5; *Ponting v. Noakes*, [1894] 2 Q. B. 281.

**415. — Trespassing animal injured.**—Pltf.'s horse was poisoned by eating the leaves of a

obligation, it is open to the ct. to grant a mandatory injunction for the removal of the nuisance under Specific Relief Act (1 of 1877), s. 55.—*LAKSHMI NARAIN BANERJEE v. TARA PROSARNA BANERJEE* (1904), I. L. R. 31 Calc. 944.—*IND.*

**407 iii. — Apprehension of damage at future time—Right of action.**—Pltf. claimed removal of certain trees, planted

by deft. on his own land, on the ground that the trees had been planted so near his land that, when they grew up, they would injure his crops:—*Held*: until pltf.'s enjoyment of his own land was directly & immediately interfered with by the growth of deft.'s trees, he had no right to ask for their removal, & he had, therefore, no cause of action.—*RAM LALL v. DALGANJAN* (1883), I. L. R. 5 All. 369.—*IND.*

**h. Roots of trees undermining boundary wall.**—The roots of certain trees planted on deft.'s land, & close to a boundary wall belonging to pltf., grew & penetrated into pltf.'s land & under his wall, & so caused it to fall. Pltf. obtained an injunction restraining deft. from continuing to permit such injury, damages & costs.—*MIDDLETON v. HUMPHRIES* (1913), 47 I. L. T. 160.—*IR.*



*Sect. 2.—Properly in trees & liabilities of different classes of owners: Sub-sects. 1 & 2.]*

yew tree which grew upon defts.' land adjoining pltf.'s field in which the horse pastured. No part of the yew tree projected over pltf.'s land, but some branches could be reached by the horse stretching its neck over a ditch which belonged to defts., & which divided their land from pltf.'s field. No duty on the part of defts. to fence their land from pltf.'s cattle was proved. Pltf. having brought an action for the value of the horse:—*Held*: in absence of intention to injure pltf.'s horse by placing something in the nature of a trap for him, defts. were not liable for injury sustained by the horse through its own wrongful intrusion.—*PONTING v. NOAKES*, [1894] 2 Q. B. 281; 63 L. J. Q. B. 519; 70 L. T. 842; 58 J. P. 559; 42 W. R. 506; 10 T. L. R. 444; 38 Sol. Jo. 438; 10 R. 265.

*Annotations*:—*Folld.* Lowery v. Walker, [1909] 2 K. B. 433. *Refd.* Latham v. Johnson & Nephew, [1913] 1 K. B. 398, C. A.; *Cheater v. Cater* (1917), 87 L. J. K. B. 449, C. A.

**416. ——— Landlord & tenant.]**—A., tenant for life of an estate, in 1868 leased to B. a farm adjoining plantations, in which yew trees were growing & which the lessor reserved to himself. In Mar. & Sept., 1869, sheep belonging to B. died from having eaten of the yew that protruded through the fence surrounding the plantations & clippings of yew that had been thrown over the fence by A.'s gardener. A. died in Feb., 1870; B. continued to hold the farm as tenant of the trustees of the will by which the estate was settled. In Sept. & Oct., 1870, four steers belonging to B. got over a ditch, which happened to be nearly dried up, on to land in the hands of the trustees, & died from eating yew there. A bill for the administration of A.'s estate was filed in Feb., 1871, & B. brought in under the decree a claim against A.'s exors. for damages on account of the loss of his sheep & cattle so poisoned, the claim in respect of the steers being made in the suit by arrangement:—*Held*: (1) the claim for the losses which occurred in A.'s life, if ever sustainable, was one in respect of an injury to property coming within Real Property Limitation Act, 1833 (c. 42), s. 2, & was made too late; (2) as to the claim for the loss of the steers, there was no obligation thrown by the law upon a landlord as between himself & his tenants to keep up his fences, & the trustees were not liable. *Semble*: the claim for the losses which occurred in A.'s life could not in any case have been sustained, for there was no implied warranty on the part of the lessor that his land was free from noxious plants.—*ERSKINE v. ADEANE, BENNETT'S CLAIM* (1873), 8 Ch. App. 756; 42 L. J. Ch. 835; 29 L. T. 234; 38 J. P. 20; 21 W. R. 802, L.JJ.

*Annotations*:—*Expld.* Crowhurst v. Amersham Burial Board (1878), 4 Ex. D. 5. *Consd.* De Lassalle v. Guildford, [1901] 2 K. B. 215, C. A.; *Cheater v. Cater*, [1918] 1 K. B. 247, C. A. *Refd.* Lloyd v. Sturgeon Falls Pulp Co. (1901), 85 L. T. 162; Bristol Tram., etc., Carriage Co. v. Fiat Motors, [1910] 2 K. B. 831, C. A. *Mentd.* Llanelly Ry. & Dock Co. v. L. & N. W. Ry. Co. (1873), 8 Ch. App. 942, L.JJ.; *Saner v. Bilton* (1878), 7 Ch. D. 815; *Carter v. Salmon* (1880), 43 L. T. 490, C. A.; *Heseltine v. Simmons*, [1892] 2 Q. B. 547, C. A.; *Kennard v. Ashman* (1894), 10 T. L. R. 213; *Flight v. Provident Assocn. of London* (1895), 11 T. L. R. 391; *Baily v. British Equitable Assce.* [1901] 1 Ch. 376, C. A.

**417. Tree blown down by gale—No evidence of decay.]**—Pltf. was the owner of a house & garden adjoining a house & grounds leased to deft. Some poplars were growing in deft.'s grounds, & towards the end of the lease one was blown down & fell on pltf.'s ground. Three days after the termination

**417 i. Tree blown down by gale.]**—Adjoining R.'s house and lot was land owned by S., & on which were a number of cedar trees in a state of semi-decay. R. warned S. of the dangerous condition

of one of the trees that was within falling distance of his house, S. replying that R. was at liberty to cut the tree down if he wished to do so. The tree fell on R.'s house during a high

of deft.'s lease, but while her gardener & her furniture were still allowed to remain on the premises, the upper part of another of the poplars was broken off by an exceptional gale & fell on pltf.'s stable & did damage. In an action for damages in respect of the second of these occurrences, there being no evidence of any decay in the poplars:—*Held*: there was no evidence of negligence & deft. was not liable.—*BRUCE v. CAULFIELD* (1918), 34 T. L. R. 204, C. A.

**418. Burning heath & furze.]**—If a man sets fire to heath & furze on his own ground so near to the boundary that it causes the furze on his neighbour's land to be burnt, he is liable in an action for damages, though the act was that of his servants, & though the furze was being burnt at the proper season & the fire was carried across to pltf.'s land by a sudden wind.—*TURBERVILL (TUBERVIL) v. STAMP* (1697), Holt, K. B. 9; Carth. 425; Skin. 681; Comb. 459; 1 Com. 32; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; 90 E. R. 846.

*Annotations*:—*Consd.* Brucker v. Fromont (1796), 6 Term Rep. 659; *Canterbury v. A.-G.* (1843), 1 Ph. 306; *Filliter v. Phippard* (1847), 11 Q. B. 347; *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5. *Refd.* General Omnibus Co. v. Limpus (1862), 9 Jur. N. S. 333. *Mentd.* Burns v. Poulson (1873), 29 L. T. 329.

*See, also*, p. 117, a—h, *post*.

**Defective fences—Damage arising from.]—See** ANIMALS; BOUNDARIES, FENCES & PARTY WALLS.

SUB-SECT. 2.—COPYHOLDERS.

**419. Rights—General rule.]**—The property in trees remains in the lord, but in the absence of custom he cannot cut them, so they must remain uncut. The possession is in the copyholder, but the property is in the lord. If a stranger cuts down the trees, the copyholder can maintain trespass against him, & the lord can maintain trover for the trees. If the lord cuts down the trees, the copyholder can maintain trespass against the lord; & if the copyholder cuts down the trees, irrespective of forfeiture the lord can bring trover against the copyholder. The lord cannot compel the copyholder to plant another tree in place of one cut down (*JESSEL, M.R.*).—*EARDLEY v. GRANVILLE* (1876), 3 Ch. D. 826; 45 L. J. Ch. 669; 34 L. T. 609; 24 W. R. 528.

*Annotations*:—*Refd.* Webb v. Knight, Hedley v. Webb (1901), 70 L. J. Ch. 663; *Derry v. Sanders* (1918), 62 Sol. Jo. 549, D. C. *Mentd.* Tucker v. Linger (1882), 21 Ch. D. 18, C. A.; *Powell v. Vickerman* (1887), 3 T. L. R. 358; *Ruabon Brick & Terra Cotta Co. v. G. W. Ry. Co.*, [1893] 1 Ch. 427, C. A.; *G. W. Ry. Co. v. Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157; *Batten-Pooll v. Kennedy*, [1907] 1 Ch. 256.

**420. Rights of lord—Cannot cut without custom.]**—The lord cannot cut any trees upon a copyhold except under a custom.—*ASHMEAD (ASHMOND) v. RANGER* (1699), Holt, K. B. 162; 1 Com. 71; Fortes. Rep. 152; 1 Ld. Raym. 551; 12 Mod. Rep. 378; 2 Salk. 638; 92 E. R. 964; *affd.* in Ex. Ch.; *reversd.* in H. L. (1702), Lords' Journal, Apr. 27.

*Annotation*:—*Refd.* Odel v. King (1729), 1 Barn. K. B. 302.

**421. ———.]**—The lord of the manor has no right to enter on a copyhold of inheritance & cut timber for his own use, even though he leaves sufficient for botes & estovers, unless there is a custom in the manor.—*WHITECHURCH v. HOLWORTHY* (1815), 4 M. & S. 340; 19 Ves. 213; 105 E. R. 859.

wind & damaged it:—*Held*: there was no cause of action.—*REED v. SMITH*, 27 W. L. R. 190; 19 B. C. R. 139.—CAN.

**422. S. P. KENT (EARL) v. WALTERS** (1699), 12 Mod. Rep. 317; 88 E. R. 1347.

**423. — Compensation—Compulsory enfranchisement—Valuation.**—The lord of a manor has rights in respect of the timber on the copyhold properties, for which rights he was upon a commutation under Enfranchisement of Copyholds Act, 1841 (c. 35), & is upon an enfranchisement under Copyhold Acts, 1852 (c. 51) & 1853 (c. 94), entitled to compensation.

There was a custom in a manor entitling the lord to one-third part of the timber growing on the lands of the manor. On proceedings by the lord against the tenant for enfranchisement under Copyhold Acts:—*Held*: (1) by the general law apart from custom, the lord of the manor had rights in respect of the timber, for which he was on enfranchisement entitled to compensation; (2) it was the exclusive province of the copyhold comrs. to determine whether the custom was proved, & the ct. would not interfere with their decision; (3) the lord was entitled to compensation for his rights as to timber under the custom. — **REYNOLDS v. WOODHAM WALTER** (1872), L. R. 7 C. P. 639; 41 L. J. C. P. 281; 27 L. T. 374; 36 J. P. 806.

*See, further, COPYHOLDS.*

**424. Lord's remedy against copyholder.**—By the custom of a manor, the lord & tenant had a joint interest in all oak trees, the body of the tree up to the first main bough belonging to the lord & the tenant being entitled to the lop, top & bark of such oak trees & to oak timber by assignment. Deft., a tenant, claimed oak timber for firebote, which was refused, & then cut timber without consent of the lord:—*Held*: the lord not entitled to an injunction against the tenant. *Semble*: the lord could not bring trover against the tenant for the timber when cut, but he might have an action for the proceeds due to him.—**DENCH v. BAMPTON** (1799), 4 Ves. 700; 31 E. R. 362.

*Annotations*:—**Overd.** Parrott v. Palmer (1834), 3 My. & K. 632. The case of *Dench v. Bampton* before Lord Loughborough is clearly not law; & independently of its having been overruled a few years afterwards in the case of *Richards v. Noble* (1807), 3 Mer. 673, the principle on which Lord Loughborough proceeded has never been considered a sound one, namely, that the only remedy of the lord for waste done by the tenant in cutting timber without licence or custom is at law for the forfeiture (LORD BROUGHAM, C.). **Consd.** Blackmore v. White, [1899] 1 Q. B. 293. **Refd.** Doe d. Grubb v. Burlington (1833), 5 B. & Ad. 507.

**425. .**—A lord of a manor is entitled to an injunction & account of waste by a copyholder, & is not confined to his remedy by forfeiture, which would be inadequate in the case of a barren spot on which valuable timber trees grew.—**RICHARDS v. NOBLE** (1807), 3 Mer. 673; 36 E. R. 258.

*Annotations*:—**Consd.** Parrott v. Palmer (1834), 3 My. & K. 632; Blackmore v. White, [1899] 1 Q. B. 293.

**426. Account against tenant executor.**—The lord of a manor may bring a bill for an account of timber cut by deft.'s testator.—**WINCHESTER (BP.) v. KNIGHT** (1717), 1 P. Wms. 406; 24 E. R. 447.

—**Expld. & Distd.** Jesus College v. Bloom (1745), 1 Amb. 54. **Distd.** Pultney v. Warren (1801), 6 Ves. 73. **Consd.** Bourne v. Taylor (1808), 10 East, 189; Salisbury v. Gladstone (1861), 9 H. L. Cas. 692, H. L.; Portland v. Hill (1866), L. R. 2 Eq. 765; Phillips v. Homfray (1883), 24 Ch. D. 439, C. A.; Phillips v. Homfray, [1892] 1 Ch. 465, C. A. **Refd.** Lansdowne v. Lansdowne (1815), 1 Madd. 116; Powell v. Aitken (1858), 4 K. & J. 343; Salisbury v. Gladstone (1860), 6 H. & N. 123, Ex. Ch.; Peck v. Gurney (1873), L. R. 6 H. L. 377, H. L.

**427. — Right to timber cut by copyholder—Cutting by underlessee.**—If a copyholder for life cuts timber trees, the lord may take them; if the underlessee for years of a copyholder cuts timber, it is not a forfeiture of the copyhold estate.—**CAGE v. DOD** (1650), Sty. 233; 82 E. R. 672.

**428. Inclosure.**—The parish & manor of Hanley, & all the messuages, lands, & tenements mentioned in a special award, were from time immemorial within Cranbourne Chase, & so continued until the chase was disfranchised; & in the seventeenth year of Queen Elizabeth's reign, the lord of the manor, & the owner of certain woods & coppices, whose estate A. then had, granted several leases of the same messuages, lands, & tenements, then held by D. & P. respectively, for the term of one thousand years, with common of pasture as appurtenant thereto, for certain beasts over & upon the woods & coppices, to be used & enjoyed in the manner then accustomed by others having common of pasture over same for the like commonable cattle. The right of common then accustomed was from May 12 to Nov. 22, except only such part of the woods wherein the owner or occupier thereof, from time to time, at his free will & pleasure, cut down the wood & underwood, which parts so cut down the owner or occupier was accustomed to inclose with a fence to preserve the growth of the wood & underwood therein, & thereby excluded all beasts therefrom until the end of three successive years from the time of such cutting, when the deer of the chase were admitted into the woods & coppices, & all other beasts, until the end of four successive years from the time of such cutting, when the commonable cattle were admitted. The lessees, their tenants, etc., had used & enjoyed common of pasture in the woods & coppices. The question was, whether the owner of the woods was entitled to inclose the coppices & woods, so from time to time to be cut down, & exclude therefrom all the commonable cattle for seven successive years, for preservation of the wood & underwood:—*Held*: (1) the owner of the woods was not so entitled; (2) 22 Edw. 4, c. 7, did not apply to woods wherein rights of common existed; (3) 35 Hen. 8, c. 17, s. 8, only applied to woods in which immemorial rights of common existed, not to rights of common claimed by grant.—**DIBBEN v. ANGLESEA (MARQUIS), ANGLESEA (MARQUIS) v. DIBBEN** (1834), 10 Bing. 568; 2 Cr. & M. 722; 4 Tyr. 926; 4 L. J. Ex. 278; 149 E. R. 951.

*Annotations*:—**Dbtd.** Bourke v. Lloyd (1842), 10 M. & W. 550. **Mentd.** Eardley v. Steer (1835), 5 Tyr. 1071; Farley v. Briant (1835), 3 Ad. & El. 839; Clarke v. Owen (1836), 2 Har. & W. 324; Hunt v. Hunt (1837), Will. Woll. & Dav. 62; Duckworth v. Harrison (1838), 4 M. & W. 432; Empson v. Fairfax (1838), 8 Ad. & El. 296; Gisborne v. Hart (1839), 5 M. & W. 50; England v. Davison (1841), 9 Dowl. 1052.

**429. Copyholder's possessory interest.**—A copyholder has only possessory property in timber trees, & where his possession is gone his property is gone. If a timber tree is severed from the freehold by tempest or otherwise, the property would be in the lord.—**ANON.** (1704), 11 Mod. Rep. 68; 88 E. R. 892.

**430. S. P. ANON.** (1705), 11 Mod. Rep. 94; 88 E. R. 918.

**431. S. P. LEWIS v. BRANTHWAITE** (1831), 2 B. & Ad. 437; 9 L. J. O. S. K. B. 263; 109 E. R. 1205.

*Annotations*:—**Consd.** Keyse v. Powell (1853), 2 E. & B. 132; Bowser v. Maclean (1860), 2 De G. F. & J. 415; Eardley v. Granville (1876), 3 Ch. D. 826.

**432. Rights of tenant for life or years—Custom bad.**—A custom that every copyhold tenant may cut down trees at his pleasure is unreasonable & void.

In an action for trespass for cutting down elm trees, brought by the lord of a manor, deft. justified as copyholder for life, for that *infra manerium usitalum fuit a tempore*, etc., to cut down & carry away at his pleasure any elms growing upon the tenements, & showed that he was tenant for life, etc.:—*Held*: (1) the custom was unreasonable that a copyholder for life should cut down timber trees



. 2.—*Property in trees & liabilities of different classes of owners: Sub-sect. 2.]*

which by intendment had not their growth in his time, & by that means the succeeding copyholder should not have any for his use to repair his house; (2) as it was pleaded *quod quilibet tenens custodarius* of any customary tenement, etc., & deft. did not say *de quel* estate, it was too large & unreasonable for any one who had but for a month, or at will, that he might by that custom cut down trees; (3) pltf. entitled to judgment.—**POWEL v. PEACOCK** (1603), Cro. Jac. 30; 79 E. R. 23.

*Annotations:—Folld.* **Rockey v. Huggens** (1628), Cro. Car. 220. *Refd.* **Anon.** (1597), Noy, 2.

**433. S. P. LUTTRELL v. WOOD** (1599), 1 Brownl. 236; 123 E. R. 775.

*Annotation:—Refd.* **Northumberland v. Wheeler** (1610), 1 Bulst. 158.

**434. S. P. ANON.** (1597), Noy, 2; 74 E. R. 974.

**435. ———.**—A prescription for a copyholder for life to cut down timber trees without limit is against reason & void.—**NORTHUMBERLAND (EARL) v. WHEELER** (1610), 1 Bulst. 158; 80 E. R. 849.

**436. ———.**—A custom within a manor that every copyholder may cut trees at his pleasure is against common law.—**ANON.** (undated), cited Win. 1; 124 E. R. 1.

*Annotations:—Refd.* **Leifield v. Tysdale** (1614), Hob. 10. **Anon.** (1622), Win. 1.

**437. S. P. LEIFIELD v. TYSDALE** (1614), Hob. 10; 80 E. R. 161.

*Annotations:—Mentd.* **Startup v. Dodderidge** (1705), 2 Ld. Raym. 1158; **Champneys v. Buchan** (1857), 29 L. T. O. S. 47.

**438. ———.**—An alleged custom for copyholders for life to cut down & sell elms:—*Held*: bad, *sed aliter* in the case of copyholders of inheritance.—**ROCKEY v. HUGGENS** (1628), Cro. Car. 220; W. Jo. 245; 79 E. R. 793.

**439. ———. Tenant for lives only.]**—Where a copyhold estate is granted for three lives to a man & his heirs & he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut the timber growing on the estate.—**MARDINER v. ELLIOT** (1788), 2 Term Rep. 746; 100 E. R. 402.

**440. Copyholder for life with power to nominate successor.]**—A custom in a manor that a copyholder for life may name to the lord of the manor who should be his successor is good; a custom that such copyholder may cut down all the trees growing upon the customary land is good, but must be construed reasonably, notwithstanding he leave sufficient for housebote, for excess shall not be allowed. Such copyholder has power to make another estate for life & has as good privilege as tenant after possibility, & has a greater estate than a bare tenant for life who cannot be warranted by custom to do such an act.

Trees growing are parcel of the inheritance.

Where there is a lease for years excepting the wood, & the lessor afterwards grants the trees, & the lease determines, the lessor shall not have the trees again.—**ROWLES v. MASON** (1612), 2 Brownl. 85, 192; 123 E. R. 829, 892; *sub nom.* **ROLLES v. MASON** (1609), 1 Brownl. 132.

**441. Right of tenant of inheritance—Custom good.]**—A custom for copyholders of inheritance to have loppings of pollingers is good. A copyholder of inheritance has interest in the loppings & boughs as well as the lord in the timber.—**STEBBING v. GOSNAL** (1599), Cro. Eliz. 629; 78 E. R. 870.

**442. ———.**—A copyholder of inheritance may by custom cut down trees, but not a tenant for life.—**BROCK v. BEARE** (1610), 1 Bulst. 50; 80 E. R. 753.

**443. ———.**—There may be a custom for copyhold tenants to fell timber.—**BROCK v. SPENCER** (1611), Hob. 6; 80 E. R. 156.

**444. ———.**—A custom for copyhold tenants of inheritance to fell timber or other trees on their customary lands, & to retain same for their own use without licence from the lord, although such timber may not be felled for necessary repairs, is not unreasonable.—**BLEWETT v. JENKINS** (1862), 12 C. B. N. S. 16; 142 E. R. 1047.

*Annotation:—Mentd.* **Constable v. Nicholson** (1863), 14 C. B. N. S. 230.

**445. ———.**—Commission to set out sufficient timber & wood for all manner of botes & estovers & to be left standing & growing upon the premises both for present & future time, for the customary tenants of the manor of S. H., who were seized of copyholds of inheritance held of the manor, & who claimed by virtue of a custom.—**AYRAY v. BELLINGHAM** (1675), Cas. temp. Finch, 199; 23 E. R. 109.

**446. ———. Devisee for life of copyholder of inheritance.]**—Where a copyholder of inheritance, having power by custom to cut timber, surrendered to the use of his will, & devised to A. for life without impeachment of waste, with remainders over:—*Held*: though there was no instance in fact of a copyholder for life in the manor cutting timber, yet, the right being annexed to the fee & inheritance, the copyholder in fee in carving out his estate might make a tenant for life dispunishable for waste, & the lord could not enter upon the copyholder for life's estate, as for a forfeiture upon his cutting timber, for the injury, if any, was to the remainderman of the inheritance.—**DENN d. JODDRELL v. JOHNSON** (1808), 10 East, 266; 103 E. R. 776.

**447. Lopping off boughs—Custom.]**—The question being whether a copyholder might lop off boughs without a special custom:—*Held*: by the common law he might cut off the under boughs which could not cause any waste, but the amputation of the top boughs would cause the putrefaction of the whole tree, wherefore that was waste as well as the decapitation thereof.—**DAWBRIDGE v. COCKS** (1594), Cro. Eliz. 361; 78 E. R. 609.

*Annotation:—Refd.* **Ashmead v. Ranger** (1699), 1 Ld. Raym. 550.

**448. Estovers—Cutting for repairs, etc.]**—A tenant by copy of ct. roll cannot by the common law take trees for housebote, hedgebote, & cartbote, as a tenant for years may do who has an estate certain, but a copyholder has not the liberty except by special custom, & such customs are in certain manors & are good.—**MONTAGUE (LORD) v. SHEPARD** (1582), Cro. Eliz. 5; 78 E. R. 271.

*Annotation:—Overd.* **Ashmead v. Ranger** (1700), 12 Mod. Rep. 378. Cro. Eliz. 5 is not law as appears by the case of **Heydon v. Smith**, 13 Co. Rep. 67 (HOLT, C.J.).

**449. ———.**—The cutting down by a copyholder of trees for repairs, where there is a custom so to do, is no forfeiture, even though the trees are not employed in repairs until five years after cutting, & until after action brought, provided the trees are found necessary for repairs, & to have been cut for that purpose.

If trees are cut down for repairs, & are not otherwise employed, but are more than sufficient for repairs, it is no forfeiture, since a man cannot precisely know what would be sufficient (**FENNER, J.**).—**EAST v. HARDING** (1596), Moore, K. B. 392; Cro. Eliz. 292, 498; 78 E. R. 546, 749.

*Annotations:—Consd.* **Willis v. Stone** (1827), 1 Y. & J. 262, Ex. Ch. *Refd.* **Doc d. Grubb v. Burlington** (1833), 5 B. & Ad. 507. *Mentd.* **Eastcourt v. Weeks** (1698), 1 Salk. 186.

**450. ———.**—A lease of a manor, in which there was a custom that every copyhold tenant for

life had used to take all trees growing upon his copyhold lands to be employed for fuel in his copyhold house, & for bounds & fences, etc., upon the customary lands & tenements, was made for twenty-one years, with an exception of trees, woods, underwoods, etc. At a ct. held by the lessee, a house with land, upon which oak & ash trees were growing, was granted by the steward, by copy of ct. roll, to A. for life, according to the custom of the manor. A. lopped the trees upon his copyhold, & employed them for bounds & fences in & upon his copyhold lands, etc. :—*Held* : he might lawfully do so.—*SWAYNE'S CASE* (1608), 8 Co. Rep. 63a ; 77 E. R. 568 ; *sub nom.* *SWAINE v. BECKET*, Moore, K. B. 811 ; 1 Brownl. 231.

*Annotations* :—*Refd.* Rowles v. Mason (1612), 2 Brownl. 85, 192 ; Liford's Case (1611), 11 Co. Rep. 46b ; Secheverel v. Dale (1625), Poph. 193. *Mentd.* Sammer v. Force (1610), 2 Brownl. 208 ; Thorne v. Tyler (1611), March, 161 ; Barnardiston v. Soam (1674), 3 Keb. 419 ; Gosling v. Veley & Joslin (1850), 19 L. J. Q. B. 111, Ex. Ch.

**451.** —. ]—In trespass for cutting down a tree, deft. justified under the lord of the manor, & pltf. replied a grant by copy of ct. roll to him by the lord of the manor of a messuage & lands, & then averred a custom for every copyholder of the manor to cut the branches of pollingers, etc., to burn in the messuage, & further averred a custom for them to cut down timber trees for reparation of houses built upon the customary tenements, & then averred that the trees upon, etc., were not sufficient for the uses aforesaid, & that at the time of the cutting down the trees his house was in decay & in want of necessary repairs :—*Held* : (1) the first part of the custom that every copyholder should cut branches, etc., to burn in the messuage was absurd & repugnant ; (2) every copyholder might take upon his copyhold, as incident to his grant, housebote, hedgebote, & ploughbote ; (3) the lord could not take all the timber trees, but must leave sufficient for necessary reparations ; (4) the copyholder should have a general action of trespass against his lord, *quare clausum fregit et arborem succidit*, etc., & should recover for his special loss, to wit, the pannage & shadow of the trees, but he should not recover the value of the trees.—*HEYDON v. SMITH* (1610), 2 Brownl. 328 ; 13 Co. Rep. 67 ; Godb. 172 ; 77 E. R. 1176.

*Annotations* :—*Consd.* The Winkfield, [1902] P. 42, C. A. *Refd.* Rowles v. Mason (1612), 2 Brownl. 192. *Mentd.* Ashmead v. Ranger (1699), Fortes. Rep. 152.

**452.** —. —. ]—A copyholder by custom shall have timber trees to repair his house & shall maintain trespass against the lord if he cuts them.—*ASHMEAD (ASHMOND) v. RANGER* (1699), Holt, K. B. 162 ; 1 Com. 71 ; Fortes. Rep. 152 ; 1 Ld. Raym. 551 ; 12 Mod. Rep. 378 ; 2 Salk. 638 ; 92 E. R. 964 ; *affd.* in Ex. Ch. ; *reversd.* in H. L. (1702), Lords' Journal, Apr. 27.

*Annotation* :—*Refd.* Odel v. King (1729), 1 Barn. K. B. 302.

**453.** —. —. ]—*DEARDEN v. EVANS* No. 457, *post*.

**454.** —. —. ]—If a copyholder cuts trees for repairs & does not employ them, but lets them rot, that is a forfeiture.—*ANON.* (1597), 1 Roll. Abr. 508, tit. Copyholds, D., pl. 20.

**455.** —. —. ]—If a copyholder by custom may cut timber trees for repair, he may have the timber trees, the lop, top, & bark also, & may sell the top & bark towards defraying of his charge in repair.—*SANFORD v. STEVENS & SMITH* (1617), 3 Bulst. 281 ; 81 E. R. 238.

**456.** —. —. ]—*Purpose for which cut*—*Question for jury.*—Where a copyholder for life cut trees, though none were applied to the repair of the premises till several months after, & after ejectment brought as for a forfeiture, & most of them remained unapplied, but parts of the premises were

still out of repair :—*Held* : (1) it was a question for the jury whether they were cut *bonâ fide* for the purpose of repair, & were in a course of application for that purpose ; (2) there being no evidence that they were to be applied to any other purpose, a verdict for deft. must not be set aside.—*DOE d. FOLEY v. WILSON* (1809), 11 East, 56 ; 103 E. R. 925.

**457.** —. —. ]—*No right to sell.*—Although a copyholder may cut down trees for the purpose of repair, the lord may bring trover if he attempts to sell them.—*DEARDEN v. EVANS* (1839), 5 M. & W. 11 ; 2 Horn & H. 7 ; 8 L. J. Ex. 171 ; 3 Jur. 703 ; 151 E. R. 5.

**458.** —. —. ]—*Custom to take for burning.*—A custom for tenants of a manor to have branches of trees for burning is only good so far as appertaining to messuages, not to lands.—*CHICHESTER (Bp.) & STRODWICK'S CASE* (1613), Godb. 234 ; 78 E. R. 136.

*Annotation* :—*Consd.* A.-G. v. Reynolds, [1911] 2 K. B. 888.

**459.** —. —. ]—Copyholders for life in a certain manor were by custom entitled to lop trees upon their copyholds for fire & repairs. The lord leased the manor for years excepting the trees, & his lessee granted a copy for life :—*Held* : (1) such copyholder might lop because he was in by the custom, which after admission was paramount to the lease ; (2) the exception of the trees in the lease could not override the custom.—*SWAYNE'S CASE* (1608), 8 Co. Rep. 63a ; 77 E. R. 568 ; *sub nom.* *SWAINE v. BECKET*, Moore, K. B. 811 ; 1 Brownl. 231.

*Annotations* :—*Refd.* Rowles v. Mason (1612), 2 Brownl. 85, 192 ; Liford's Case (1611), 11 Co. Rep. 46b ; Secheverel v. Dale (1625), Poph. 193. *Mentd.* Sammer v. Force (1610), 2 Brownl. 208 ; Thorne v. Tyler (1611), March, 161 ; Barnardiston v. Soam (1674), 3 Keb. 419 ; Gosling v. Veley & Joslin (1850), 19 L. J. Q. B. 111, Ex. Ch.

Common of estovers, *see, further*, COMMONS & RIGHTS OF COMMON.

**460.** —. —. ]—*Right to housebote by delivery*—*Delivery*—*Cutting.*—Where the bailiff of a manor assigned to a tenant in Apr. pursuant to the terms of a lease a tree for housebote, the bailiff was discharged in July, & the tenant cut down the tree in Oct. :—*Held* : (1) a sufficient delivery ; (2) the tenant entitled to fell the tree in Oct.—*COURTENAY v. FISHER* (1826), 4 Bing. 3 ; 12 Moore, C. P. 39 ; 5 L. J. O. S. C. P. 4 ; 130 E. R. 668.

**461.** —. —. ]—*Trees severed by accident or wrongful act.*—Neither a copyholder of inheritance nor his lessee, where the custom is for him to cut timber for repairs, can employ trees felled with the wind for any such use ; thereby his special property ceases.—*AILNER'S CASE* (1664), 1 Keb. 691 ; 83 E. R. 1188.

*See, also*, No. 429, *ante*.

**462.** —. —. ]—*Trees on common.*—If the lord of the manor plant trees on a common, a commoner has no right to abate them.—*KIRBY v. SADGROVE* (1797), 1 Bos. & P. 13 ; 3 Anst. 892 ; 126 E. R. 751 ; *sub nom.* *SADGROVE v. KIRBY* (1795), 6 Term Rep. 483.

*Annotations* :—*Distd.* Arlett v. Ellis (1827), 7 B. & C. 346. *Consd.* Hope v. Osborne, [1913] 2 Ch. 349.

*See, further*, COMMONS & RIGHTS OF COMMON.

**463.** —. —. ]—*Underwood.*—The lord of a manor granted by copy to A. & his heirs the right to cut underwood over at least 4 or 5 acres annually. The manor was leased, & the lessee cut certain underwood. The copyholder brought an action for trespass against the lessee, who alleged that he had left sufficient for the copyholder to cut over 4 or 5 acres annually :—*Held* : (1) underwood could be granted by copy if the custom permitted ; (2) the copyholder could bring an action of trespass, although



**Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sects. 2, 3, 4 & 5**

the soil did not pass to him; (3) all the underwood passed to the copyholder & none remained to the lord.—*HOE v. TAYLOR* (1595), Moore, K. B. 355; Cro. Eliz. 413; 4 Co. Rep. 30b; Jenk. 274; 72 E. R. 655.

**Annotations:—***Refd.* Musgrave v. Gave (1742), Willes, 319; Wilson v. Mackreth (1766), 3 Burr. 1824. **Mentd.** Heydon & Smith's Case (1610), 13 Co. Rep. 67.

**464. — Grant of woods to copyholder—Merger.]—**A copyholder in fee in a manor, where by custom the lord had as a *profit à prendre* the cut of the woods & underwoods on the copyhold, obtained a grant of all the woods & underwoods growing & which afterwards should grow on the lands to him & his heirs:—*Held*: this did not merge in the copyhold.—*FAWLKNER v. FAULKNER* (1681), 1 Vern. 21; 23 E. R. 276.

**465. Special agreement—Evidence of usage & reputation.]—**By agreement between the lord & certain customary tenants within the manor, the tenants covenanted for themselves & their heirs or assigns not to cut down, sell or dispose of any wood standing or growing or thereafter to stand or grow without the lord's licence, & the lord covenanted to set out yearly upon request from the tenants sufficient for repair of their houses & other necessary uses in & about the tenements, & that the tenants might cut down, use & dispose of any wood planted by themselves & their heirs on the tenements for such purposes:—*Held*: (1) deft., tenant of one of the customary tenements comprised in the agreement, was not entitled without licence to cut down & sell wood planted on the tenement by a tenant since the agreement; (2) the lord might maintain trover against the tenant for wood so cut; (3) evidence that the tenants of deft.'s estate for thirty years & upwards had publicly, & without interruption from the lord & with his knowledge, cut & sold the planted wood in large quantities was admissible; (4) evidence of reputation that tenants of deft.'s estate had the right of cutting & selling planted wood was inadmissible.—*BLACKETT v. LOWES* (1814), 2 M. & S. 494; 105 E. R. 465.

**466. Relief from forfeiture for cutting.]—**A., having two copyholds in the manor of B., cut timber on one & employed it in repairing the other. There was no custom so to do. The lord of the manor obtained a verdict on ejectment for forfeiture. The timber was of small value:—*Held*: pltf. might be relieved against the forfeiture, on payment of costs of all the trials & paying the fees of re-admission, but no fine.—*NASH v. DERBY (EARL)* (1705), 2 Vern. 537; 23 E. R. 948.

**Annotation:—***Refd.* Bracebridge v. Buckley (1816), 2 Price, 200.

**467. Copyholder's remedies against lord.]—**A copyholder may maintain an action of trespass against the lord for cutting down trees on the land of the copyholder, if the copyholder has by custom the right to cut the boughs for firewood, & the right of housebote, ploughbote, & cartbote.—*HEYDON v. SMITH* (1610), 2 Brownl. 328; 13 Co. Rep. 67; Godb. 172; 77 E. R. 1476.

**Annotations:—***Consd.* The Winkfield, [1902] P. 42, C. A. **Mentd.** Rowles v. Mason (1612), 2 Brownl. 192; Ashmead v. Ranger (1699), Fortes. Rep. 152.

**468. —.]—**A copyholder may maintain trespass against his lord for cutting upon the copyhold trees to which the copyholder was entitled for repairs.—*ASHMEAD (ASHMOND) v. RANGER* (1699), Holt, K. B. 162; 1 Com. 71; Fortes. Rep. 152; 2 Salk. 638; 1 Ld. Raym. 551; 12 Mod. Rep. 378; 92 E. R. 964; *affd.* in Ex. Ch.; *revsd.* in H. L. (1702), Lords' Journal, Apr. 27.

**Annotation:—***Refd.* Odel v. King (1729), 1 Barn. K. B. 302.

**469. —.]—**Prescription by copyholder in fee to have the toppings of trees for firebote & hedgebote. The prescription was "to cut *ramos aliquarum arborum*":—*Held*: bad for uncertainty, for it might be taken "for some of any trees." The plea should have been "*omnium arborum*."

Such a copyholder may have an action against the lord if he cuts the trees, for by so doing he destroys the very thing for which the tenant prescribes. He that has common of estovers may bring case against the owner of the land for distraining the trees. The above prescription has been good for a copyholder by life.—*CROSSE v. ABBOT* (1605), Noy, 14; 74 E. R. 985.

**Annotation:—***Refd.* Ashmead v. Ranger (1699), Fortes. Rep. 152.

**470. —.]—**Case lies against the lord of a manor for cutting down the body of a tree when the tenant should have the loppings.—*CROGATE v. MORRIS* (1610), 1 Brownl. 197; 123 E. R. 751.

**471. —.]—**Where many copyholders prescribe to have loppings & toppings of pollards & "hashs" growing on the lord's waste, & the lord cuts them, any copyholder may bring case.—*WHITEHAND'S CASE* (undated), cited 2 Brownl. 149; 123 E. R. 866.

**472. Remedy of copyholder in remainder against copyholder for life.]—**E. C. being seised in fee of copyhold lands surrendered them to the use of J. C., pltf., on condition that deft. should enjoy them for life. After the death of E. C. deft. cut down several trees & an injunction issued to stay all future waste by him.—*CORNISH v. NEW* (1675), Cas. temp. Finch, 220; 23 E. R. 121.

**473. Remedies against stranger.]—**If trees upon a copyhold are cut by a stranger, the copyholder may maintain case & the lord also for the same trespass in respect of the injury done to his inheritance (*PEMBERTON, C.J.*).—*JEFFERSON v. JEFFERSON* (1683), 3 Lev. 130; 83 E. R. 614.

**Annotations:—***Consd.* Attersoll v. Stevens (1808), 1 Taunt. 183. *Refd.* Lewis v. Branthwaite (1831), 2 B. & Ad. 437.

**474. Trees cut by purchaser before surrender.]—**The purchaser of a small copyhold estate before surrender to him entered on the premises, cut down the timber, & did everything as owner. There was no custom giving the tenant power to cut down the timber. The vendor, who had covenanted to surrender on or before a certain date, gave notice in writing that he would surrender on the next ct. day. The vendor suing for specific performance, on behalf of the purchaser it was alleged that he was disordered in his senses & that the sale of the timber was an imposition on the purchaser:—*Held*: (1) the purchaser's cutting down of timber was a convincing proof of his folly because it was a direct forfeiture; (2) it was merely a matter at law & the suit must be dismissed.—*EDWARDS v. HEATHER* (1724), Cas. temp. KING, 3; 25 E. R. 190.

**475. Sale of copyhold land & timber—Specific performance.]—**Where a purchaser contracts for purchase of copyhold land & timber at one price, he is not allowed any abatement in respect of the timber, although he may not be able to cut it, & must specifically perform the contract.—*CROSSE v. LAWRENCE* (1852), 9 Hare, 462, 469; 21 L. J. Ch. 889, 892; 18 L. T. O. S. 314; 16 Jur. 142; 68 E. R. 591, 595.

**SUB-SECT. 3.—DEVISEES IN FEE WITH GIFT OVER.**

**476. Rights as regards timber.]—**An infant devisee in fee, subject to a gift over on his not attaining twenty-one without issue, was restrained from cutting timber generally on the grounds (1) of his



infancy; (2) he was only beneficially entitled to the rents & profits until twenty-one; (3) after that date, he was a trustee for other persons.—**ROBINSON v. LITTON** (1744), 3 Atk. 209; 6 Cru. Dig. 428, 429; 26 E. R. 922.

*Annotations*:—**Expld.** Garth v. Cotton (1750), 1 Ves. Sen. 546. **Consd. & Apld.** Stansfield v. Habergham (1804), 10 Ves. 273. **Expld.** A.-G. v. Marlborough (1818), 3 Madd. 498; Turner v. Wright (1860), 2 De G. F. & J. 234. **Mentd.** A.-G. v. Duplessis (1752), Park. 144.

**477.** —.].—*Semble*: where there is an executory devise over, even of a legal estate, the ct. will not permit the timber to be cut.—**STANSFIELD v. HABERGHAM** (1804), 10 Ves. 273; 32 E. R. 849.

*Annotation*:—**Dbtd.** Turner v. Wright (1860), 2 De G. F. & J.

**478.** —.].—A devisee in fee, subject to an executory devise over, is not impeachable for waste; but the ct. will restrain him from committing equitable waste by cutting down ornamental or immature timber.—**TURNER v. WRIGHT** (1860), 2 De G. F. & J. 234; 20 L. J. Ch. 598; 2 L. T. 649; 6 Jur. N. S. 809; 8 W. R. 675; 45 E. R. 612, L. C.

*Annotation*:—**Consd. & Foll.** *Re* Hanbury's S. E., [1913] 2 Ch. 357.

**479.** —.].—Real estate was devised to a person in fee, with a gift over in the event of his dying without leaving issue living at his death, & it was declared he should not cut timber except for necessary repairs on pain of forfeiting his estate, & if he did so the estate should go over. The devisee died without issue, having cut & sold timber:—*Held*: (1) this restriction was legal; (2) the clause of forfeiture was only an additional means of securing its observance, & did not take away the remedies arising from the restriction itself; (3) the value of the timber could be claimed against the estate of the devisee.—**BLAKE v. PETERS** (1863), 1 De G. J. & Sm. 345; 1 New Rep. 503; 32 L. J. Ch. 200; 9 L. T. 247; 9 Jur. N. S. 836; 11 W. R. 409; 46 E. R. 139, L. J. J.

*Annotation*:—**Refd.** *Re* Williames, Andrew v. Williames (1884), 52 L. T. 41.

**480. Tenant in fee subject to trust to devise.**].—A devise to A. & her heirs for ever "in the fullest confidence that after her decease she will devise the property to my family" being restrained to an estate for life by decree at the Rolls, the devisee was enjoined from cutting timber pending an appeal.—**WRIGHT v. ATKYNS** (1813), 1 Ves. & B. 313; 35 E. R. 122.

**481. Right to proceeds of timber cut by order of court—Infant tenant.**].—**DYER v. DYER**, No. 841, *post*.

#### SUB-SECT. 4.—DONEES OF POWERS OF SALE, ETC.

**482. Trustee—Cestui que trust—Tenant for life without impeachment of waste.**].—A trustee having a power to sell an estate, of which the *cestui que trust* was tenant for life without impeachment of waste, sold & conveyed the land only, received the money for it, & applied it to the purpose of the trust, & the *cestui que trust* by the same conveyance sold & conveyed the timber & received the money for it:—*Held*: the power was not well executed.—**COCKE-RELL v. CHOLMELEY** (1830), 10 B. & C. 564; 5 Man. & Ry. K. B. 509; 109 E. R. 560, Ex. Ch.; *sub nom.* **CHOLMELEY v. PAXTON**, 8 L. J. O. S. K. B. 197; S. C. in Ch. (1832), 1 Cl. & Fin. 60, H. L.

*Annotations*:—**Distd.** Doe d. Blewitt v. Phillips (1841), 1 Q. B. 84; Doe d. Strickland v. Woodward (1847), 1 Exch. 273. **Expld.** Kokewich v. Marker (1851), 3 Mac. & G. 311. **Apld.** Buckley v. Howell (1861), 29 Beav. 546. **Distd.** *Re* Rutland's S. E., Rutland v. Bristol, [1900] 2 Ch. 206.

**483. Power to lease—Exception—Invalid execution.**].—**DOE d. DOUGLAS v. LOCK**, No. 773, *post*.

#### SUB-SECT. 5.—ECCLESIASTICAL OWNERS.

**484. Bishop.**].—A prohibition was granted against a bishop to prevent him cutting & selling the trees of his bishopric.—**DURHAM'S (BP.) CASE** (1307), Regl. Plac. Parl. 335.

*Annotation*:—**Consd.** Jefferson v. Durham (1797), 1 Bos. & P. 105.

**485.** —.].—A person who had no interest sued for a prohibition to restrain a bishop & his tenant from committing waste by cutting timber in lands, parcel of the possessions of the bishopric:—*Held*: the Ct. of Common Pleas had no power to issue such a writ, at all events at the suit of such an uninterested person. *Semble*: even if the Ct. of King's Bench could grant such a writ at the suit of the Crown, they could not grant it at the suit of any one.—**JEFFERSON v. DURHAM (BP.)** (1797), 1 Bos. & P. 105; 126 E. R. 804.

*Annotations*:—**Expld.** Wither v. Winchester (1817), 3 Mer. 421. **Refd.** Herring v. St. Paul's (1819), 3 Swan. 489; Ross v. Adcock (1868), L. R. 3 C. P. 655.

**486. Dean & Chapter.**].—A dean & chapter have not the power of cutting timber on their lands except for repairs of their property, & cannot give any such right to a lessee. Even if they possessed such a right, & a lease of "woods, groves, hedgerows, & springs [describing them] & all the trees, woods, & underwoods growing, etc., or that hereafter shall grow, etc., within & upon the woods, etc.," could be construed as transferring the right to the lessee:—*Semble*: a ct. of equity would not carry such a transaction into effect.—**HERRING v. ST. PAUL'S (DEAN & CHAPTER)** (1819), 3 Swan, 492; 2 Wils. Ch. 1; 36 E. R. 949.

**487.** —.].—Defts. demised to pltf. a mansion-house with a reservation to the lessors of timber trees, with the right to cut & carry away same & a covenant by defts. not to sell or take any timber trees growing or to grow on a specified part of the premises save for necessary building or repairs of certain church buildings. The lessee filed a bill to restrain defts. from selling or cutting except for such purposes, & obtained an interim injunction. On defts. showing that the whole of the timber cut was needed for the purpose of repairs, the injunction was dissolved on the ground that the covenant did not extend to deprive them of the right which they might have exercised independently of it:—*Held*: deans & chapters, like other ecclesiastical persons, were not liable to be restrained in cases of waste either by prohibition or injunction except in the Ecclesiastical Ct. or at the suit of the Crown. *Semble*: the right to cut timber for the purpose of repairs extended to selling timber & applying the produce.—**WITHER v. WINCHESTER (DEAN & CHAPTER)** (1817), 3 Mer. 421; 36 E. R. 162.

*Annotations*:—**Consd.** Herring v. St. Paul (1819), 3 Swan. 489; Marlborough v. St. John (1852), 5 De G. & Sm. 174. **Refd.** Ross v. Adcock (1868), L. R. 3 C. P. 655; Sowerby v. Fryer (1869), L. R. 8 Eq. 417.

**488. Prebendary.**].—**ACLAND v. ATWELL** (1630), 3 Swan. 515; 36 E. R. 957.

**489.** —.].—A lease by a prebend for three lives without excepting trees, which had been usually excepted:—*Held*: void.—**SMITH v. BOLE** (1618), Cro. Jac. 458; 79 E. R. 392.

*Annotations*:—**Consd.** Threadneedle v. Linum (1764), Freem. K. B. 179; Doe d. Bartlett v. Rendle (1814), 3 M. & S. 99; Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705.

**490. Rector.**].—A patron of a living was granted an injunction against a rector from cutting down timber so as to commit waste.

A rector may cut down timber for the repairs of the parsonage or the chancel, or for repairing any old pews belonging to the rectory, but not for any other purpose. If it is the custom of the country, he may cut underwood for any purpose; but if he

*Sect. 2.—Property in trees & liabilities of different uses of owners: Sub-sects. 5, 6, 7, 8 & 9, A.]*

grubs it up, it is waste. He is also entitled to botes for repairing barns & outhouses belonging to the parsonage (LORD HARDWICKE, C.).—*STRACHY v. FRANCIS* (1741), 2 Atk. 217; 26 E. R. 534.

*Annotations:—Consd.* Marlborough v. St. John (1852), 5 De G. & Sm. 174; Greenslade v. Darby (1868), L. R. 3 Q. B. 421, where BLACKBURN, J., at p. 426, doubted whether Lord Hardwicke was speaking of trees in a churchyard.

*See, further, BURIAL & CREMATION; ECCLESIASTICAL LAW.*

**491. — Application for injunction—In whose name.]—**In the circumstances of *Strachy v. Francis*, No. 490, *ante*, the application for an injunction need not be in the name of the A.-G.—*BRADLY v. STRACHY* (1740), Barn. Ch. 399; 27 E. R. 695.

**492. —.]—**A rector is justified in cutting timber growing on the glebe, provided he specifically applies it to repairs of the rectory house & buildings on the glebe. The circumstance that the rector had applied a much larger sum in the repairs of the rectory house than the proceeds of the sale of timber cut by him:—*Held*: not a defence to a case made against him of cutting & selling timber in a suit by the patron. *Semble*: if the timber had been cut & sold merely for the purpose of providing other timber more suitable for repairs, the ct. would not have interfered by injunction. At common law, before 13 Eliz. cc. 10, 20, & 14 Eliz. cc. 11, 14, the parson, with the consent of the patron & ordinary, had unlimited power to dispose of timber; & at the present day the ct. would on a proper application direct timber to be cut & the produce to be applied for the benefit of the living. *Semble*: the rector has no more extensive privileges as to waste than an ordinary tenant for life.—*MARLBOROUGH (DUKE) v. ST. JOHN* (1852), 5 De G. & Sm. 174; 21 L. J. Ch. 381; 18 L. T. O. S. 252; 16 Jur. 310; 64 E. R. 1068.

*Annotations:—Expld.* Holden v. Weekes (1860), 1 John. & H. 278. *Consd.* Eccl. Comrs. v. Wodehouse (1896), 60 J. P. 200. *Refd.* Ross v. Adcock (1868), L. R. 3 C. P. 655.

**493. Widow of rector.]—**A patron of a living was granted an injunction to stay waste in cutting timber, grubbing up underwood, & ploughing meadow land against the widow of a rector, during a vacancy.—*HOSKINS v. FEATHERSTONE* (1789), 2 Bro. C. C. 552; 29 E. R. 302.

*Annotations:—Distd.* St. Albans v. Skipworth (1845), 8 Beav. 354. *Refd.* Ross v. Adcock (1868), L. R. 3 C. P. 655.

**494. Vicar.]—**The vicar of a parish cut down timber when repairing the church. On a suggestion that he was going to cut down other timber:—*Held*: a prohibition at common law would lie against him.—*KNOWLE v. HARVEY* (1616), 1 Roll. Rep. 335; 3 Bulst. 158; 81 E. R. 525.

*Annotation:—Dbtd.* Jefferson v. Durham (1797), 1 Bos. & P. 105. The report of *Knowle v. Harvey* is very loose & inaccurate; it is not stated on whose suggestion the prohibition was granted; probably it was at the instance of a party interested (HEATH, J.).

**495. —.]—**The purposes for which a vicar is entitled to cut timber are limited to proper & necessary repairs for the vicarage house, buildings & premises; he may not fell timber for the purpose of making a general repairing fund. *Semble*: where trees are far distant from the spot where they are wanted, the timber may be sold & similar materials purchased on the spot with the proceeds. *Qu.*: whether there is any rule that a patron is not entitled as against a rector or vicar, who has wrongfully cut timber, to an account.—*SOWERBY v. FRYER* (1869), L. R. 8 Eq. 417; 38 L. J. Ch. 617; 20 L. T. 868; 33 J. P. 741; 17 W. R. 879.

**496. Incumbent generally.]—**The patron of a living may have an injunction against the incum-

bent to stay waste, but he is not entitled to an account for proceeds of timber cut & sold. *Semble*: parsons may fell timber for repairs, & they have been indulged in selling such timber where the money has been applied in repairs (LORD HARDWICKE, C.).—*KNIGHT v. MOSELY* (1753), Amb. 176; 27 E. R. 118.

*Annotations:—Expld.* Wither v. Winchester (1817), 3 Mer. 421. *Distd.* A.-G. v. Marlborough (1818), 3 Madd. 498. *Dbtd.* Marlborough v. St. John (1852), 5 De G. & Sm. 174. *Apld.* Holden v. Weekes (1860), 1 John. & H. 278. *Distd.* Ross v. Adcock (1868), L. R. 3 C. P. 655. *Dbtd.* Sowerby v. Fryer (1869), L. R. 8 Eq. 417. It is laid down in the case of *Knight v. Mosely* that a patron cannot file a bill for an account. I confess that doctrine has always seemed to me to be utterly unintelligible (JAMES, V.-C.). *Refd.* Huntley v. Russell (1849), 13 Q. B. 572; Eccl. Comrs. v. Wodehouse, [1895] 1 Ch. 552.

**497. Lessee of ecclesiastical property.]—Held**: (1) an injunction should be granted to restrain the lessee for years of the temporalities of a bishop under a lease affirmed by the dean & chapter, & without impeachment of waste, from felling timber; (2) deft. might fell such timber for his botes & repairs as might be assigned to him by pltf.'s officers.—*WINCHESTER (BP.) v. WOLGAR* (1629), 3 Swan. 515; 36 E. R. 954.

**498. Stranger.]—**Prohibition lies against any one who cuts down an incumbent's trees or does other waste to the parsonage.—*SACCAR'S CASE* (1616), Moore, K. B. 917; 72 E. R. 995.

*Annotation:—Folld.* Knowle v. Harvey (1616), 1 Roll. 335.

SUB-SECT. 6.—EXECUTOR AND HEIR OR DEVISEE.

**499. Trees blown down in testator's lifetime—Quicquid plantatur solo solo cedit.]—**In ascertaining whether trees blown down in the lifetime of the owner in fee belong to his personal representative or his heir or devisee, the test is not whether the trees remain alive or are dead, or whether they will continue to grow in the ordinary way, but whether or not the trees are severed. If severed, they are personal estate. The degree of severance of roots & filaments required is a question of fact in each case; substantial severance is sufficient.—*Re AINSLIE, SWINBURN v. AINSLIE* (1885), 30 Ch. D. 485; 55 L. J. Ch. 615; 53 L. T. 645; 33 W. R. 910; 1 T. L. R. 678, C. A.

*Annotation:—Apld.* *Re Llewellyn, Llewellyn v. Williams* (1887), 73 Ch. D. 317.

**500. Right to proceeds of timber cut by order of Court—Produce passing as personalty.]—**Timber on the estate of a lunatic was cut under order of ct., sold, & the produce paid into the bank on his account. After his death, on petition by his heir for the money:—*Held*: the ct. ought to be very reserved in changing one species of property into another, & to do it only on pressing occasions, & when property was converted, equity would recall it for the representative, if done by breach of trust, not if by accident, the ct., or the tort of a stranger.—*Ex p. BROMFIELD* (1792), 1 Ves. 453; 3 Bro. C. C. 510; 30 E. R. 434.

**501. —.]—***OXENDEN v. COMPTON* (LORD), No. 834, *post*.

*See, also, Nos. 836, 841, post.*

SUB-SECT. 7.—MORTGAGOR AND MORTGAGEE.

**502. Mortgagor in possession—Security sufficient.]—**Injunction to restrain a mtgor. from cutting

timber will not be granted, unless the security be insufficient or scanty without the timber.—*HIPPLEY v. SPENCER* (1820), 5 Madd. 422 ; 56 E. R. 956.

**503.** ———.]—A ct. will not, on the application of a mtgee. out of possession, restrain the mtgor. from proceeding to fell timber growing upon the mtged. estate, unless the security is insufficient.—*KING v. SMITH* (1843), 2 Hare, 239 ; 7 Jur. 694 ; 67 E. R. 99.

*Annotation* :—**Consd. & Apld.** *Harper v. Aplin* (1886), 54 L. T. 383.

**504.** ———.]—If a mtgee. includes timber trees, the mtgor., while he remains in possession, is entitled to cut them down & sell them.—*Re PHILIPS, Ex p. NATIONAL MERCANTILE BANK* (1880), 16 Ch. D. 104 ; 50 L. J. Ch. 231 ; 44 L. T. 265 ; 29 W. R. 227, C. A.

**505.** ——— **Where security insufficient.**]—A mtgor. was restrained from cutting down timber on mtged. premises so as to lessen the mtgee. security.—*USBORNE v. USBORNE* (1740), 1 Dick. 75 ; 21 E. R. 196.

*Annotation* : **Consd. & Apld.** *Harper v. Aplin* (1886), 54 L. T. 383.

**506.** ———.]—Similar order made by LORD THURLOW, C., after a doubt, thinking it was the mtgee.'s fault in permitting the mtgor. to continue in possession.—*GROSS v. CHILTON* (1782), 1 Dick. 75 ; 21 E. R. 196.

*Annotation* :—**Mentd.** *Harper v. Aplin* (1886), 54 L. T. 383.

**507.** ———.]—A mtgee. is entitled to an injunction to restrain a mtgor. in possession from cutting down timber, if the land without it is a scanty security. It may be extended to cutting down underwood contrary to the usual course of husbandry, but not to underwoods generally, although the mtgor. is insolvent.—*HUMPHREYS v. HARRISON* (1820), 1 Jac. & W. 581 ; 37 E. R. 489.

*Annotation* :—**Consd. & Apld.** *Harper v. Aplin* (1886), 54 L. T. 383.

**508.** ———.]—By a mtgee. in 1874 agricultural land was mtged. to pltf. In 1880 the mtgor. advertised trees standing on the land for sale, with other timber standing on adjoining land. The mtgee. brought an action for an injunction to restrain him. It was admitted that the security was insufficient in its then state. Pltf. produced evidence that the land might at some time be used as building land, & for that purpose the timber would increase its value. The mtgor. produced evidence that the chance of the land becoming building land was remote, that the trees were ready to cut, & would only deteriorate if left standing, & if they were cut down the land could be let in allotments at a higher rent. He offered to pay the money received by the sale in reduction of the mtgee. debt. The evidence as to deterioration of the timber by standing was contradicted :—*Held* : the mtgee. had a right to have the timber left standing on the land, & the injunction must be granted.—*HARPER v. APLIN* (1886), 54 L. T. 383.

**509.** ——— **Cutting wood & underwood at seasonable times.**]—Mtgee. of wood & underwood. It is not waste by the mtgor. in possession to cut underwood at seasonable times & of proper growth. Being a bkpt., an injunction was granted on the right of the mtgee. to have the estate sold in the plight in which it was at the bkpcy., & to prove the rest of his debt.—*HAMPTON v. HODGES* (1803), 8 Ves. 105 ; 32 E. R. 292.

*Annotation* :—**Distd.** *Humphreys v. Harrison* (1820), 1 Jac. & W. 581.

**510. Mortgagee.**]—A mtgee. will be restrained from cutting timber, unless his security be defective ; he cannot so cut down to sink the debt.—*WITHERINGTON v. BANKS* (1725), Cas. temp. King, 30 ; 25 E. R. 205.

*See, now, Conveyancing & Law of Property Act, 1881 (c. 38), s. 19.*

**511.** ———.]—If a mtgee. in fee in possession commits waste by cutting timber, & the money arising by sale of the timber is not applied in sinking the interest or principal of his mtgee., the ct. will grant an injunction (LORD HARDWICKE, C.).—*FARRANT v. LOVEL* (1750), 3 Atk. 723 ; 26 E. R. 1214.

*Annotation* :—**Consd. & Apld.** *Harper v. Aplin* (1886), 54 L. T. 383.

**512.** ——— **After order for receiver made.**]—Pltf. purchased the life interest of a mtgor. from the mtgee. Pltf. sued the mtgor. & his agent in respect of the receipt of rents of the mtged. estate, & obtained an order for a receiver. Before the receiver was appointed pltf. proceeded to cut timber on the estate. The mtgor.'s agent applied for an injunction against pltf. :—*Held* : (1) it was improper to cut timber after the order for the appointment of a receiver ; (2) appct., being a person appointed by the mtgor. to collect the rents, had no interest in the estate & no right to an injunction.—*HUNTER v. NOCKOLDS* (1846), 15 L. J. Ch. 320 ; 7 L. T. O. S. 27 ; 10 Jur. 771.

#### SUB-SECT. 8.—TENANTS AT WILL.

**513. Rights generally.**]—A tenant at will of a wood may cut seasonable wood in it, but not the great trees, & if there are only great trees in the wood, he cannot cut it, but can only take the grain (CHOKE, C.J.).—*ANON.* (1472), Y. B., 12 Edw. 4, fo. 8, pl. 20.

**514. Cutting down trees is waste.**]—*WALGRAVE & SOMERSET'S CASE*, No. 941, *post*.

**515.** ———.]—If a lessee at will cuts down trees, an action of trespass lies, because he voluntarily destroyed the demise (POPHAM & FENNER, JJ.).—*SALOP (COUNTESS) v. CROMPTON* (1599), Cro. Eliz. 777, 784 ; 78 E. R. 1007, 1014.

**516. Seasonable wood.**]—*Semble* : so long as a tenant at will is not countermanded he may cut seasonable wood.—*ANON.* (1468), Y. B., 8 Edw. 4, fo. 6, pl. 8.

**517. Right to cut underwood—Custom.**]—In trespass for cutting trees, deft. justified as servant to B., to whom pltf. had leased the land as tenant at will, & said it was underwood & seasonable wood that he cut :—*Held* : if there was a custom of the country to cut such underwood, etc., the right would exist, otherwise not.—*ANON.* (1468), Y. B., 8 Edw. 4, fo. 6, pl. 8.

#### 9.—LANDLORD AND TENANT.

##### A. Ownership and Rights generally.

**518. General rules.**]—If a man leases his land for years excepting the wood, & afterwards grants the wood to the lessee, if the first lessee make a lease of the land, the wood shall not pass to his lessee, & :—*Held* : (1) the lessee for life or years has but a special interest or property in the trees, being timber as things annexed to the land, & if the lessee or any other severs them from the land, the property & interest of the lessee is thereby determined, & the lessor may take them. If there be a lease for life & afterwards the lessor gives the trees to another, & then the lessee dies, such donee cannot take them ; (2) when the lessor leased the land excepting the trees & afterwards granted the trees to the lessee, the lessee had in judgment of law an absolute &



**Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sect. 9, A. B. & C.]**

undivided property in the trees.—**HERLAKENDEN'S CASE** (1589), 4 Co. Rep. 62a; 76 E. R. 1025.

**Annotations:—Consd.** Bowles's Case (1615), 11 Co. Rep. 77b. **Apld.** Williams v. Williams (1808), 15 Ves. 419. **Consd.** Eastern Construction Co. v. National Trust Co. & Schmidt, [1914] A. C. 197, P. C. **Refd.** Rowles v. Mason (1612), 2 Brownl. 88, 192; Liford's Case (1615), 11 Co. Rep. 46b; Abraham v. Bubb (1680), 2 Freem. Ch. 53; Berriman v. Peacock (1832), 9 Bing. 384; Boydel v. M'Michael (1834), 3 Tyr. 974. **Mentd.** Heydon's Case (1613), 11 Co. Rep. 5a; Wilson v. Dodd (1615), 2 Bulst. 335; Squier v. Mayer (1701), 2 Freem. Ch. 248; Cave v. Cave (1705), 2 Vern. 508; Bullythorpe v. Turner (1744), Willes, 475; Elwes v. Maw (1802), 3 East, 38; Channon v. Patch (1826), 5 B. & C. 897; Calvert v. Maggs (1839), 3 Jur. 1171; *Re De Falbe*, Ward v. Taylor, [1901] 1 Ch. 523, C. A.

**519. —.**—[In trespass for breaking & entering certain closes, deft. pleaded a lease of the tenements to pltf. & P. for their lives, & the life of the survivor, excepting the timber trees, etc., not being dotards, & then averred that pltf. & P. entered *virtute*, etc., & were & yet are seised, etc., that afterwards the lessor covenanted to stand seised of the tenements demised to the use of his son R. in tail, who being seised in tail of, etc., deft. by his command entered & showed the trees, & sold six of them to H. L. & W. L. Upon demurrer to this plea deft. had judgment, &:—**Held:** the trees, notwithstanding the exception, remained parcel of the inheritance of the land, & were not chattels, nor should go to exors., but should descend to the heir, if no conveyance were made of the reversion. When a lease of land is made, the lessee has but a special interest in the trees, as to have the mast & fruit of the trees & shadow for his cattle, etc., but the inheritance of the tree is in the lessor. If a wood, whereof a *præcipe* lies, was parcel of the manor of G., by a lease of the manor excepting woods, the soil itself is excepted; but by an exception of trees which grew upon land or pasture the soil itself is not excepted, but sufficient nutriment out of the land is reserved to sustain the vegetative life of the trees; & if the lessor fells them, or by the lessee's licence grubbs them up, the lessee shall have the soil. In the exception in the demise in the pleadings mentioned, five things were observed:—(1) The trees remained as parcel of the inheritance; (2) the soil itself was not excepted, but sufficient nutriment for the growth of the tree; (3) the lessee should have the pasture under the tree; (4) the lessor should have all the benefits of the tree; (5) the young of all birds that bred in the trees, & the fruit.

If tenant in tail sells the trees to another, they are a chattel in the vendee; but if tenant in tail dies before actual severance as to the issue in tail, they are parcel of the inheritance, & the vendee cannot take them. By a grant of the reversion the trees excepted in the demise pass as things annexed to the inheritance.

By the covenant to stand seised of the demised tenements, the inheritance of the whole land passed, & the trees being parcel of the inheritance, passed with it. When the lessor excepted the trees, & afterwards had an intention of selling them, the law gave him power as incident to the exception to enter & show the trees to those who would buy them.—**LIFORD'S CASE** (1614), 11 Co. Rep. 46b; 77 E. R. 1206.

**Annotations:—Folld.** Bowles's Case (1615), 11 Co. Rep. 77b. **Apld.** Whilster v. Paslow (1618), Cro. Jac. 487. **Consd.** [resol. (3) Herring v. St. Paul (1819), 3 Swan. 489; Legh v. Heald (1830), 1 B. & Ad. 622. **Folld.** (last par.) Hewitt v. Isham (1851), 7 Exch. 77. **Refd.** Smith v. Bole (1618), Cro. Jac. 458; Walton v. Tryon (1751), Amb. 130; Paul v. Paul (1752), 1 Wm. Bl. 254; Goodtitle d. Paul v. Paul (1760), 2 Burr. 1089; Bailey v. Stephens (1862), 12 C. B. N. S. 91; Delacherois v. Delacherois (1864), 4 New Rep. 501, H. L. & Ex. Ch. Ir.; Eastern Construction Co. v. National Trust Co. & Schmidt, [1914] A. C. 197, P. C. **Mentd.** Magdalen College, Cambridge,

Master's Case (1616), 11 Co. Rep. 66b; R. v. Rochester & Sir Francis Clark (1674-5), 2 Mod. Rep. 1; St. Davids v. Lucy (1696), 1 Ld. Raym. 539; Rosewell v. Prior (1700), 1 Ld. Raym. 713; Mitchel v. Reynolds (1711), 1 P. Wms. 181; Turner v. Cordwell (1734), Cunn. 129; Wallis v. Pain (1739), 2 Com. 633; Bradley v. Strachy (1740), Barn. Ch. 399; A.-G. v. Duplessis (1752), Park. 144; Jefferson v. Durham (1797), 1 Bos. & P. 105; Ford v. Racster (1815), 4 M. & S. 130; Plase v. Fagg (1829), 4 Man. & Ry. K. B. 277; Mather v. Fraser (1836), 2 K. & J. 536; Garland v. Carlisle (1837), 11 Bl. 421; Hey v. Moorhouse (1839), 6 Bing. N. C. 52; Hellawell v. Eastwood (1851), 6 Exch. 295; Elliott v. Bishop (1854), 10 Exch. 496; Barnett v. Guildford (1855), 11 Exch. 19; Walmsley v. Milne (1859), 7 C. B. N. S. 115; Sumner v. Bromilow (1865), 11 Jur. N. S. 481; *Re Thomas*, *Ex p.* Willoughby D'Eresby (1881), 44 L. T. 781; Goodhart v. Hyett (1883), 25 Ch. D. 182; Pwllbach Colliery Co. v. Woodman, [1915] A. C. 634, H. L.

**520. —.**—[The property in a timber tree remains in the lessor notwithstanding the lease.—**BERRY (BERY) v. HEARD** (1622), Cro. Car. 242; W. Jo. 255; Palm. 327; 79 E. R. 812.

**Annotations:—Consd.** Gordon v. Harper (1796), 7 Term Rep. 9; Attersoll v. Stevens (1808), 1 Taunt. 183.

**521. —.**—[**Held:** tenants for their lives were restrained from felling timber trees, although these were not excepted in the lease for lives.—**COLE v. PEYSON** (1637), 1 Rep. Ch. 106; 21 E. R. 521.

**522. —.**—[**EDWARDS v. HEATHER**, No. 474, ante.

**523. —.**—[A tenant for ninety-nine years, if he should so long live without impeachment of waste, voluntary waste excepted, has no present right or interest in the timber other than the mast, shade, & necessary botes.—**GARTH v. COTTON** (1753), 1 Ves. Sen. 546; 3 Atk. 751; Dick. 183; 27 E. R. 1182, 1196.

**Annotations:—Refd.** Johnstone v. Hall (1856), 2 K. & J. 411; Bagot v. Bagot, Legge v. Legge (1863), 32 Beav. 509; Birch-Wolfe v. Birch (1870), L. R. 9 Eq. 683; *Re Cavendish*, Cavendish v. Mundy, [1877] W. N. 198. **Mentd.** Paget v. Gee (1753), 3 Keny. 31; Lansdowne v. Lansdowne (1815), 1 Madd. 116; Parrott v. Palmer (1834), 3 My. & K. 632; Phillips v. Homfray (1883), 24 Ch. D. 439, C. A. A.-G. v. Glossop, [1907] 1 K. B. 163, C. A.

**524. —.**—[The general property in trees, or that which is likely to become timber, is in the landlord; but the general property in bushes or trees not timber is in the tenant. The landlord cannot maintain trespass against a stranger for cutting bushes & thorns growing in a hedge, although cut improperly, if it were afterwards adopted by the tenant, who took the cuttings.—**BERRIMAN v. PEACOCK** (1832), 9 Bing. 384; 2 Moo. & S. 524; 2 L. J. C. P. 23; 131 E. R. 660.

**525. S. P. DOWGLAS (DEWCLAS) v. KENDAL** (1610), 1 Brownl. 219; 1 Bulst. 93; Cro. Jac. 256; Yelv. 187; 123 E. R. 765.

**Annotations:—Consd.** Berriman v. Peacock (1832), 9 Bing. 384. **Distd.** Bailey v. Stephens (1862), 12 C. B. N. S. 91. **Mentd.** Chesterfield v. Harris, [1908] 2 Ch. 397, C. A.

**B. Landlord.**

**526. Cannot cut or sell trees not reserved.]—A** lessor sold trees growing on land in lease. The vendee cut them down, & the beasts of the lessee which were in the close destroyed the springs:—**Held:** (1) the lessor could not take the trees growing on the land of the lessee, if they were not excepted; (2) it was a tort in the lessor to cut them; (3) he could not compel the lessee to inclose what he had cut down by his own tort. **Semble:** the act of the lessee was not waste.—**ANON.** (1549), Moore, K. B. 9; 72 E. R. 403.

**527. —.**—[If the lessor enter upon the lands leased, & cut down the timber trees & carry them away, whereby the lessee will lose the loppings & shade of them, he cannot have covenant, though he may have an action of trespass, or upon the case, for his special damage (**TWYSDEN, J.**).—**POMFRET v. RICOFT** (1669), 1 Saund. 321; 2 Keb. 505, 543, 569; 1 Sid. 429; 1 Vent. 26, 44; 85 E. R. 454.

**Annotations:—Refd.** Rhodes v. Bullard (1806), 7 East, 116; Seddon v. Senate (1810), 13 East, 63. *Doe d. Douglas v.*

Lock (1835), 2 Ad. & El. 705; Hinchliffe v. Kinnoul (1838), 5 Bing. N. C. 1; Winch v. Thames Conservators (1872), L. R. 7 C. P. 458; Goodhart v. Hyett (1883), 25 Ch. D. 182; Pwllbach Colliery Co. v. Woodman, [1915] A. C. 634, H. L.; Schwann v. Cotton, [1916] 2 Ch. 120. **Mentd.** Hodgson v. Field (1806), 7 East, 613; Bullard v. Harrison (1815), 4 M. & S. 387; Holmes v. Goring, Holmes v. Elliott (1824), 9 Moore, C. P. 166; Harris v. Ryding (1839), 5 M. & W. 60; Blakesley v. Whieldon (1841), 1 Hare, 176; Ricketts v. East & West India Docks & Birmingham Junc. Ry. Co. (1852), 12 C. B. 160; Pinnington v. Galland (1853), 9 Exch. 1; M. S. & L. Ry. Co. v. Wallis (1854), 14 C. B. 213; Gayford v. Moffatt (1868), 4 Ch. App. 133; Carstairs v. Taylor (1871), L. R. 6 Exch. 217; Hoare v. Metropolitan Board of Works (1874), L. R. 9 Q. B. 296; Colebeck v. Girdlers Co. (1876), 1 Q. B. D. 234; London Corpn. v. Riggs (1880), 13 Ch. D. 798; Serff v. Acton L. B. (1886), 31 Ch. D. 679; Buckley v. Buckley, [1898] 2 Q. B. 608, C. A.; Titchmarsh v. Royston Water Co. (1899), 81 L. T. 673; Jones v. Pritchard, [1908] 1 Ch. 630.

**528. Cannot enter & cut trees unless excepted by demise.]—**ASHMEAD v. RANGER, No. 452, *ante*.

**529. Property in trees cut—Reverts to.]—**The case of trees is peculiar, for upon their being cut, the property in them instantly reverts to the lessor (MANSFIELD, C.J.).—ATTERSOLL v. STEVENS (1808), 1 Taunt. 183; 127 E. R. 802.

*Annotation:—*Mentd. Toleman v. Portbury (1870), L. R. 5 Q. B. 288.

**530. ——— Tenant cannot maintain trespass.]—**Deft. cut trees growing on ground which pltf. occupied as tenant for years. In an action of trespass *de bonis asportatis*:—*Held*: pltf. could not recover.

Pltf. had no property or interest in the trees after they were severed from the freehold. They were then in the legal possession of the reversioner, & he alone could maintain trespass for the asportation (LAWRENCE, J.).—EVANS v. EVANS (1810), 2 Camp. 491.

**531. Trees wrongfully cut—No title acquired by.]—**A lessor during the term cut down some oak pollards growing upon the demised premises which were useful for timber:—*Held*: (1) a tenant for life or years would have been entitled to them, if they had been blown down, & was entitled to the usufruct of them during the term, & the lessor could not by wrongfully severing them acquire any right to them; (2) he or his vendor could not maintain trespass against the tenant for taking them.—CHANNON v. PATCH (1826), 5 B. & C. 897; 8 Dow. & Ry. K. B. 651; 4 L. J. O. S. K. B. 316; 108 E. R. 333.

**532. Pannage—Lessor restrained.]—**After a demise of pannage, the lessor felled the trees:—*Held*: the felling must be stayed in equity, so far as the pannage was taken away.—ANON. v. CORHAM (1592), Toth. 145; 21 E. R. 149.

**533. Right to cut timber—Shooting agreement.]—**B. had entered into an agreement in writing to grant G. a lease for twenty years of the exclusive right of shooting over land, of which B. was owner in fee. No lease had been granted. A suit was instituted to restrain B. from cutting down trees on the estate. It was alleged he was about to cut down trees to such an extent as would involve the utter destruction of five of the plantations on the estate as cover for game:—*Held*: there was nothing in such an agreement to prevent B. from cutting timber in the ordinary course of management of the estate.—GEARNS v. BAKER (1875), 10 Ch. App. 355; 44 L. J. Ch. 334; 33 L. T. 86; 39 J. P. 564; 23 W. R. 543, C. A.

*Annotation:—*Folld. Dick v. Norton (1916), 85 L. J. Ch. 623.

**534. ——— With covenant of quiet enjoyment.]—**Where the exclusive right of shooting game over certain land was granted by a lease, & the tenant covenanted to permit the owner to enter the coverts at any reasonable time consistent with non-disturbance of game, for the purpose of thin-

ning the plantations, felling trees, or other forester's work, & the owner covenanted to use his best endeavours to preserve the game for the benefit of the tenant, & to permit the tenant quietly to enjoy the rights thereby granted:—*Held*: (1) even if a covenant by the lessor was to be implied not to enter the coverts except at such times as would be consistent with preservation of game, the lease did not prevent the lessor from turning his property to the best advantage for which it was suited; (2) the lessor having sold the timber on fifty acres to a timber merchant for use in coalfields & in munitions works, the tenant was not entitled to an injunction restraining the lessor from cutting the timber.—DICK v. NORTON (1916), 85 L. J. Ch. 623; 114 L. T. 548; 32 T. L. R. 306; 60 Sol. Jo. 321.

**535. Liability as adjoining owner.]—**CHEATER v. CATER, No. 413, *ante*.

**536. Remedies against.]—**Injunction to restrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct being held to amount to consent to the tenant's plan of improvement, laying out the lawn, etc. Sending a surveyor to mark out trees is a sufficient ground for an injunction.—JACKSON v. CATOR (1800), 5 Ves. 688; 31 E. R. 806.

*Annotations:—*Consd. McManus v. Cooke (1887), 35 Ch. D. 681. *Appl.* Civil Service Musical Instrument Assn. v. Whiteman (1899), 68 L. J. Ch. 484.

**537. Remedies of—Against assignee of tenant.]—**L. leased land to F. for years, & died. F. granted his term to another excepting the wood. In an action of waste against the assignee by the heirs of L.:—*Held*: (1) the action would lie without joining F.; (2) F. could not assign over his term with such an exception.

The lessor should have the windfalls (ANDERSON, C.J., RODES, J., *diss.*).—LEWKNOR & FORD'S CASE (1586), Godb. 114; 78 E. R. 69.

**538. ——— Against stranger.]—**A stranger entered lands leased for life, cut down timber trees, & barked them. The landlord before seizure brought an action in trover for the bark:—*Held*: (1) he might recover notwithstanding that the cutting down & barking were all at one time; (2) the interest of the lessee was determined by the cutting down, unless he had cause for necessary repairs; (3) even if there had been such cause for repair, the lessor might sue, unless the lessee had already brought his action & recovered; (4) (as *reptd.* W. Jo. 255) the landlord had the alternative remedy of an action of waste, but not both.—BERRY (BERY) v. HEARD (1622), Cro. Car. 242; W. Jo. 255; Palm. 327; 79 E. R. 812.

*Annotations:—*Consd. Gordon v. Harper (1796), 7 Term Rep. 9. *Refd.* Attersoll v. Stevens (1808), 1 Taunt. 183.

**539. ———.]—**The landlord of a tenant from year to year, though there is no reservation of the timber on the premises, may support trespass *vi et armis* against a third party for carrying it away after it has been cut down.—WARD v. ANDREWS (1772), 2 Chit. 636.

**540. ———.]—**Where a stranger lopped a fence adjoining his (the stranger's) land & carried the cuttings to the tenant in the occupation of the land to which the fence belonged:—*Held*: an action of trespass, with a count *de bonis asportatis*, brought by the landlord against such stranger, could not be supported.—BERRIMAN v. PEACOCK (1832), 9 Bing. 384; 2 Moo. & S. 524; 2 L. J. C. P. 23; 131 E. R. 660.

**Rights of—Under lease with exception of trees.]—**See Nos. 552, 773—790, *post*.

#### C. Tenant for Years or Lives.

**541. Cutting timber—Great oaks excepted.]—**A landlord demised, granted, & to farm let some land



## AGRICULTURE.

### *Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sect. 9, C.]*

together with all manner of timber trees, great oaks excepted:—*Held*: the lessee might not fell timber.—ANON. (1581), 3 Dyer, 374b; 73 E. R. 840.

**542. — Great trees excepted—In lease with right to take fuel.]—**A. leased land to B. for life, with the right to take fuel, provided he did not cut great trees:—*Held*: (1) for cutting great trees waste would lie; (2) the lessor could not re-enter, since the proviso was not a condition, but a qualification of the grant; (3) at common law, a lessee could only take fuel of bushes & small wood, but under a grant of firebote, if he thus had not sufficient fuel, he could take great trees.—ANON. (1572), 3 Leon. 16; 74 E. R. 511.

**543. — Trees excepted—Right of firebote.]—**A lessee for years, the trees being excepted, has liberty to take shrouds & loppings for firebote, but if he cut any tree, it is waste as well for the loppings as the body of the tree.—RICH (LORD) *v.* MAKEPEACE (1618), Noy, 29; 20 Vin. Abr. 415, tit. Trees A5; 74 E. R. 1000.

**544. — Cutting not waste.]—**If trees be excepted out of a demise, waste cannot be committed by cutting them down, & ejectment cannot be brought as for waste committed in or upon the demised premises.—GOODRIGHT *d.* PETERS *v.* VIVIAN (1807), 8 East, 190; 103 E. R. 315.

*Annotation*:—**Consd.** Doe *d.* Rogers *v.* Price (1849), 8 C. B. 894.

**545. — Beech trees.]—**A termor for years or for life may not cut beech trees of the age of twenty years & under, for they are of the nature of timber & may grow to be timber.—ANON. (Hen. 8), Bro. N. C. 189; 73 E. R. 929.

**546. — Oaks in hedgerow—Rotten pollards.]—**A lessee cannot justify cutting down oak trees because they grow in a hedgerow & are dry, hollow, & rotten, commonly called pollards, & not timber fit for building.—MANWOOD'S CASE (1573), Moore, K. B. 101; Ben. & D. 217, pl. 251; 72 E. R. 468.

**547. — Poles—Special agreement—Custom.]—**Deft., tenant of a farm, held under an agreement, by the terms of which he was to cultivate the demised land in the same way & manner as P. had done, & "at all events, according to the rules of good husbandry as used & accustomed in the neighbourhood." P. had occupied immediately before deft., S. before P., & W. before S. In W.'s time certain poles growing were cut down & sold by him. S. had also, in his time, cut & sold poles, & a valuation of the poles had been made from S. to P. Deft. having, during his occupation, cut poles, an action was brought against him by his landlord for that act. The jury found that, by the custom of the neighbourhood, the poles were the landlord's, unless there was a special agreement on the subject. There was some evidence of the terms on which P. held. The judge omitted to leave to the jury upon what terms P. had held the farm:—*Held*: it ought to have been left to the jury to say what those terms were, & a new trial must be granted.—HOON (VISCOUNT) *v.* KENDALL (1855), 17 C. B. 260; 26 L. T. O. S. 92; 19 J. P. 823; 4 W. R. 123; 139 E. R. 1070.

**548. — Quickset hedges—Large trees.]—**If a lessee destroys a quickset hedge, or cuts large trees & sells them or converts them to his own use, it is waste.—N. *v.* J. (1520), Y. B., 12 Hen. 8, 1, fo. 1, pl. 1.

*Annotations*:—**Mentd.** Clare *v.* Pepys (1585), Cro. Eliz. 41; Taylor *v.* Beal (1591), Cro. Eliz. 222; Matthew *v.* Crasse (1613), 2 Bulst. 89.

**549. Seasonable trees.]—**A termor may take beech, ashes, & the like, which are well seasonable, which have been used to be felled every twenty or sixteen, fourteen or twelve years, & by some at twenty-six, twenty-seven, or thirty years, if it be seasonable wood, which is called *silva cædua*.—ANON. (1550), Bro. N. C. 189; 73 E. R. 930.

**550. — Underwood.]—**In a wood where nothing grows but [trees which are ordinarily] underwood, a termor cannot cut at all. *Contra*, where beech or ash grow amongst them; there he may cut all the underwood.—ANON. (1550), Bro. N. C. 189; 73 E. R. 930.

**551. — Seasonable.]—**If a termor cuts down underwood of hazel, willows, maple, or oak which is seasonable, it is not waste.—GAGE & SMITH'S CASE (1613), Godb. 209; 22 Vin. Abr. tit Waste, E. pl. 3; 78 E. R. 127.

**552. — When sporting rights reserved.]—**In 1857 A. demised to B. a farm called U. Farm, containing 264 acres, about forty of which consisted of timber & underwood, with furze-covers in various other parts of the farm. This lease reserved to the lessor "all timber & other trees, mines, minerals, & quarries on the farm," & also "the exclusive right of shooting, fishing, & sporting on the farm," with liberty to the lessor, his servants, etc., & others by his authority, at all seasonable times to enter for any of the purposes contained in the reservations therein contained. In 1860 A. demised U. Castle & about 60 acres of land adjoining it to C., & also "the exclusive right of shooting & sporting over & taking the game, rabbits, & wild-fowl upon the premises & also upon the entire manor of U.," including the 260 acres under lease to B., reserving to the lessor "all trees, underwood, thorns, & bushes growing on the land, as well as all mines, minerals, & quarries," etc., with a covenant for quiet enjoyment, without interruption by the lessor or any person or persons lawfully claiming by, from, or under him, etc. B. cut all the underwood on his farm, & grubbed up & destroyed the furze covers, & thereby materially interrupted & injured C.'s right of sporting. There was no express covenant to keep up the cover:—*Held*: (1) there was no implied covenant not to grub up or destroy underwood; (2) as these acts on the part of B. were not warranted by the terms of the demise to him, they did not constitute a breach of A.'s covenant for quiet enjoyment in the lease of 1860.

Cutting underwood at due intervals is the only way to enjoy it; such cutting cannot be said to be a wilful destruction of the game (WILLES, J.).—JEFFRYES *v.* EVANS (1865), 19 C. B. N. S. 246; 34 L. J. C. P. 261; 13 L. T. 72; 11 Jur. N. S. 584; 13 W. R. 864; 144 E. R. 781.

*Annotation*:—**Appld.** Dick *v.* Norton (1916), 85 L. J. Ch. 623.

**553. — Underwood usually cut.]—**A termor may cut all underwood which has been usually cut within twenty years. But if the underwood is allowed to grow for more than twenty years, to cut it is waste. By the custom of the country the period may be twenty-six, twenty-eight, or thirty years.—ANON. (1581), Godb. 4; 78 E. R. 3.

**554. — ]—**A tenant for years may fell underwoods of twenty-five years' growth, if same is accustomed to be felled.—DOCKWRAY & BEAL'S CASE (1614), Godb. 256; 78 E. R. 149.

**555. — Willow trees.]—**PHILLIPS *v.* SMITH, No. 886, *post*.

**556. — Lease with leave to cut—Option to lessor to purchase on notice—Assignment.]—**Under a beneficial long lease, reserving liberty to the lessee

### PART IX. SECT. 2, SUB-SECT. 9.—C.

**555 i. Cutting timber—Willow trees.]—**A tenant is not entitled to cut sough or willow trees when they are of a large size.—BOGUE *v.* WHITE (1806), 13 F. C. 582.—SCOT.



to cut down & dispose of all timber & coppice, etc. (the value of which was included in the purchase), then growing or thereafter to grow during the term, subject to a proviso that when & so often as the lessee should intend, during the term, to sell timber, etc., growing on the premises or any part thereof, he should immediately thereupon give notice in writing to the lessor of such intention, who should thereupon have the option of purchasing it, & on the lessor's neglect or refusal to purchase, the lessee might dispose of it absolutely, if the lessee, soon after execution of the lease, *bonâ fide* intend to cut down the whole of the then growing timber & coppice, etc., & give notice in writing to that effect, & the lessor do not accept the purchase, but disclaim it, the lessee may proceed to cut down the whole in different seasons according to his convenience, & is not obliged to give a fresh notice at every succeeding cutting; & this, though the lessor had in the interval assigned his interest in the land to another. But after such assignment, it is sufficient for the lessee, after ejectment brought by the assignee of the lessor for a forfeiture, to give such assignee notice to produce the original notice in writing of the intention to cut the whole, & he is not bound to show that he applied for same to the original lessor (who had left the country), or to his agents, or gave them notice to produce it; for it will be presumed to have been delivered up to the assignee of the reversion as a document relating to the estate; & on default of its production at the trial, he may give parol evidence of it.—*GOODTITLE v. SAVILLE* (1812), 16 East, 87; 104 E. R. 1022.

**557. Taking timber—Windfalls.**—If the house falls by tempest or other act of God the lessee for life or years has a special interest to take the timber to build the house again; but if the lessee pulls down the house the lessor may take the timber.

Dotards without any timber in them, if blown down by accident, belong to the lessee, but if timber trees be blown down the lessor shall have them.—*HERLAKENDEN'S CASE* (1589), 4 Co. Rep. 62a; 76 E. R. 1025.

*Annotations*:—**Folld.** Bowles's Case (1615), 11 Co. Rep. 77b. **Apld.** Channon v. Patch (1826), 5 B. & C. 897; Berriman v. Peacock (1832), 9 Bing. 384. **Consd.** Boyde v. M'Michael (1834), 3 Tyr. 974. **Refd.** Liford's Case (1615), 11 Co. Rep. 46b. **Mentd.** Rowles v. Mason (1612), 2 Brownl. 88, 192; Heydon's Case (1613), 11 Co. Rep. 5a; Wilson v. Dodd (1615), 2 Bulst. 335; Abraham v. Bubb (1680), 2 Freem. Ch. 53; Squier v. Mayer (1701), 2 Freem. Ch. 248; Cave v. Cave (1705), 2 Vern. 508; Bullythorpe v. Turner (1744), Willes, 475; Elwes v. Maw (1802), 3 East, 38; Williams v. Williams (1808), 15 Ves. 419; Calvert v. Maggs (1839), 3 Jur. 1171; *Re De Falbe*, Ward v. Taylor, [1901] 1 Ch. 523, C. A.; Eastern Construction Co. v. National Trust Co. & Schmidt, [1914] A. C. 197, P. C.

**558. S. P. CUMBERLAND'S (COUNTESS) CASE** (1610), Moore, K. B. 812; 72 E. R. 922.

*Annotation*:—**Apld.** Channon v. Patch (1826), 5 B. & C. 897.

**559. Right to cut trees for repairs.**—In an action for cutting down young ash (saplings), it is a good defence that they were seasonable wood & that the lessee took them for housebote & haybote.—*ANON.* (1429), Y. B., 7 Hen. 6, fo. 38, pl. 47.

*Annotations*:—**Refd.** Herlakenden's Case (1589), 4 Co. Rep. 62a; Heydon & Smith's Case (1610), 13 Co. Rep. 67.

**560.** —.—]—If a lessee is bound to repair, he may take trees or other necessary things for repairs; thus at common law he may have haybote, ploughbote, housebote, & hedgebote in the land for his necessary use, although it is not expressed in the lease, but if he takes more than he needs he must be punished in an action for waste (*BROOKE, J.*).—*N. v. J.* (1520), Y. B., 12 Hen. 8, 1, fo. 1, pl. 1.

*Annotations*:—**Mentd.** Clare v. Pepys (1585), Cro. Eliz. 41; Beale & Taylor's Case (1590), 1 Leon, 237; Matthew v. Crasse (1613), 2 Bulst. 89.

**561.** —.—]—If land is leased for life, upon which land there is a house which is ruinous & in decay at

the time of the lease, the lessee is not punishable in waste if it falls, but if he cuts down trees growing upon the land, & repairs it with them, it is justifiable. So he may also do, if the lessor covenants to repair it, etc. So if a man leases a house with land upon which there is a wood, etc., without impeachment of waste for the house, yet if the house becomes ruinous:—*Seemle*: the lessee may cut timber for the repairing & rebuilding of it, & shall not be punished in an action of waste.—(undated), Plowden's Quaeries, p. 9, s. 69; 75 E. R. 868.

**562.** —.—]—In action for waste in respect of apple trees & cutting down oaks on a farm, it was pleaded that the apple trees were damaged by the wind, & deft. cut them down, & as to the oaks deft. cut them to repair the farm:—*Held*: the plea was good as to the oaks, but not as to the apple trees.—*ANON.* (1370), Y. B., 44 Edw. 3, fo. 44, pl. 58.

**563.** —.—]—In an action for waste by a landlord against his tenant, to whom he had let a house & 6 acres of wood, for cutting down oak trees, the tenant pleaded that at the time he took it the house was in decay & he had used the wood for repairing the timbers of the house:—*Held*: (1) the plea was bad; (2) the property in the large trees, namely, the timber, was reserved by law to the lessor, & the removal of the trees was an injury to the inheritance & further might damage the evidences of title of the lessor describing the land; (3) the lessor could not grant it over without the licence of the termor, who had an interest in the timber, namely, to take the mast & fruits growing on it, & also to have shade for his beasts & the shreadings of it for fuel; (4) although the termor had repaired the house of the lessor with the trees, which was to the advantage of the lessor, yet in the absence of authority from, or request by, the lessor, the termor was liable. *Seemle*: a termor might root up bushes, firs & thorns growing on the land, for that is good husbandry, & the termor might use them for fuel.—*MALEVERER v. SPINKE* (1537), 1 Dyer, 35b; 73 E. R. 79.

*Annotations*:—**Refd.** Mouse's Case (1608), 12 Co. Rep. 63; Liford's Case (1615), 11 Co. Rep. 46b. **Mentd.** Cope v. Sharp, [1912] 1 K. B. 496, C. A.

**564.** —.— **Grant of housebote, etc.**—In a lease of Blackacre, the lessee covenanted & granted to the lessor that he should take convenient housebote, firebote & cartbote in Whiteacre:—*Held*: (1) the grant was good, & the lessee should have the right throughout the term; (2) his exors. should have the right as assignees; (3) the grant did not restrain him from taking the housebote, etc., in Blackacre; (4) if there were no great timber on Blackacre & the houses were decaying, & the lessor was under a duty to find & allow to the lessee sufficient great timber to do repairs, the cost of obtaining great timber should be on the lessor, provided there was no fault in the lessee in suffering the great timber of the house to become rotten for want of covering; (5) if the lessor cut down a tree & carried it out of the land, the lessee should have an action of trespass & should recover such damages as the lessor would have recovered against him in an action of waste.—*ANON.* (1550), Moore, K. B. 6, pl. 23; 72 E. R. 401.

**565.** —.— **Effect of covenant to repair.**—The lessee under a lease for life covenanted to repair the house at his own cost. During the term the foundations of the house became rotten, & the lessee cut trees growing on the land to repair them:—*Held*: he was not estopped by his covenant from cutting the trees, the benefit of which was given him by law.—*ANON.* (1550), Moore, K. B. 23, pl. 80; 72 E. R. 414.

**566.** —.— **Extent of right—Cutting unnecessarily.**—It is waste for a lessee to cut down timber trees (oaks) for purposes of repairs, when there is no occa-

*Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sect. 9, C.; sub-sect. 10, A.]*

sion.—*GORGES v. STANFIELD* (1597), Cro. Eliz. 593; 78 E. R. 836.

**567. — Use in coal mines.]**—Defts., tenants under a lease made by pltf.'s predecessor in title of a manor, containing in the parcels the general words "wood, sale of woods, great timber, great trees, etc.," cut the trees for the making of utensils in & about coal mines, part of the demise:—*Held*: (1) by the lease of the coal mines there was no implied power given to fell the trees for the use of the coal mines; (2) same would hold notwithstanding that the mine was open at the time of the lease & both lessor & lessee were accustomed to take timber for those purposes (*HOBART, C.J.*).—*DARCY (LORD) v. ASKWITH* (1618), Hob. 234; Hut. 19; 80 E. R. 380.

*Annotations*:—*Mentd.* *Manby v. Scott* (1663), 1 Keb. 80; *Elwes v. Maw* (1802), 3 East. 38; *Simmons v. Norton* (1831), 7 Bing. 640; *Phillipps v. Smith* (1845), 14 M. & W. 589; *Jones v. Chappell* (1875), L. R. 20 Eq. 539; *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624.

**568. Where trees excepted.]**—Where trees are excepted out of a lease of land, & by the lease a special authority is given to the tenant to take trees for repairs, the tenant ought to follow the exact terms of the authority. But if there is no exception of trees & the special authority fails, he may resort to the general liberty given to him by the law & take what trees are suitable.—*TALBOT v. WOODHOUSE* (1699), 2 Lut. 1471; 125 E. R. 811.

**569. — Evidence.]**—In action of waste for cutting timber deft. cannot give in evidence, even in mitigation of damages, that the timber was cut for the purpose of necessary repairs, but turning out to be unfit for that purpose was exchanged for other timber which was applied to the repairs.—*SIMMONS v. NORTON* (1831), 7 Bing. 640; 5 Moo. & P. 645; 9 L. J. O. S. C. P. 185; 131 E. R. 247.

*Annotations*:—*Distd.* *Huntley v. Russell* (1849), 3 New Mag. Cas. 217. *Refd.* *St. Albans v. Skipworth* (1845), 8 Beav. 354. *Mentd.* *Green v. Jenkins* (1860), 1 De G. F. & J. 454.

**570. — Sale of trees cut, when justified.]**—A lessee cut down trees & sold them:—*Held*: cutting trees for repairs was good, but if the lessee sold them before the repairs were made, the whole act became tortious; even if the lessee might take the trees back by gift or purchase or otherwise, & repair the house, although that might excuse waste to the house, it could not excuse waste in the trees.—*ANON.* (1466), Y. B., 5 Edw. 4, fo. 100b (Long Quinto).

**571. — —.]**—The sale of trees by a tenant for life or years is not waste, if his cutting & felling of them was not waste before. If the lessee cuts & sells timber trees, it is waste, but because of the cutting, not of the selling. If he cut for repairs & afterwards sell, it is waste, not for the selling only, but for the cutting, for the sale merely shows his ill-intent.—*ANON.* (1584), Godb. 28; 78 E. R. 18.

**572. Injury by cattle—Eating germens—Hedge cut by lessor.]**—If a close & underwood between which there is a quickset hedge be leased, & the lessor afterwards cuts & carries away the hedge so that the beasts put into the close are then able to enter the underwood & crop the germens, the lessee is not punishable for this waste.—*PALMES v. PAGE* (1612), 22 Vin. Abr. tit. Waste, L. pl. 3.

**573. — —.]**—Queen Elizabeth leased the manor of D. to F. excepting all trees & timber. A lessee claiming under F.'s assignee used the herbage on a close in which were grape trees during part of the year. King James sold & granted the trees & they were cut down; afterwards he granted the roots & stocks of the trees, which were rooted up;

he then granted the manor in fee to L., who granted to pltf. The tenant put his cattle into the close for pasturage & they fed sometimes on the germens which began to grow in the close. In an action of trespass by pltf. against the lessee:—*Held*: (1) pltf. could not recover because the herbage & feeding belonged to the lessee, & the lessor or any one claiming under him could not hinder him by cutting the great trees; (2) since he could not use the pasturage without consuming the germens this was lawful.—*CLITHERO v. HIGGS* (1636), W. Jo. 338; 82 E. R. 203.

**574. — Barking trees.]**—*GLENHAM v. HANBY*, No. 946, *post*.

**575. Removing border of box.]**—A tenant (not a gardener by trade) cannot remove a border of box planted on the demised premises by himself, unless by special agreement with the landlord.—*EMPSON v. SODEN* (1833), 4 B. & Ad. 655; 1 Nev. & M. K. B. 720; 110 E. R. 603.

*Annotation*:—*Refd.* *Lancaster v. Eve* (1859), 5 C. B. N. S. 717.

**576. Farm let as dairy farm to.]**—In an action by a landlord against a tenant of a farm, let as a dairy farm, for committing waste by turning cattle into fields containing young trees:—*Held*: the tenant was not liable, although it was his duty to tell his landlord he was going to graze the field with cattle, so that the landlord would be able to protect the trees.—*FOWLER v. JOHNSTONE* (1892), 8 T. L. R. 327.

**577. Fruit trees—Right of farmer to sell.]**—A farmer, who raises young fruit trees on the demised land for filling up his lessor's orchards, is not entitled to sell them.

Otherwise of a nurseryman by trade (*HEATH, J.*).—*WYNDHAM v. WAY* (1812), 4 Taunt. 316; 128 E. R. 351.

**578. — Right of nurseryman to remove.]**—A tenant, who plants fruit or other trees for the purposes of his trade as a nurseryman, may remove them at the expiration of his term provided they are not too aged for transplanting.—*WARDALL v. USHER* (1841), 3 Scott, N. R. 508; 10 L. J. C. P. 316; 5 Jur. 802.

*Annotation*:—*Mentd.* *Oakley v. Monck* (1865), 12 L. T. 465.

**579. — Compensation for.]**—*Re MORSE & DIXON*, No. 237, *ante*.

**Trees planted under lease—Compensation for.]**—*See LANDLORD & TENANT.*

**580. Remedies against—Trees wrongfully cut.]**—The lessee of pltf. had during his lease cut down trees. At the end of the term a new lease was granted to a stranger, & pltf. sued for an account:—*Held*: the matter being of small value, & the suit being brought after the lease had expired, the bill should be dismissed. *Semble*: if pltf. had a right, they could sue in trover at law.—*JESUS COLLEGE v. BLOOM* (1745), 3 Atk. 262; 1 Amb. 54; 26 E. R. 953.

*Annotations*:—*Distd.* *Garth v. Cotton* (1753), 3 Atk. 751; *Lansdowne v. Lansdowne* (1815), 1 Madd. 116. *Consd.* *Parrott v. Palmer* (1834), 3 My. & K. 632; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578. *Mentd.* *Wright v. Pitt* (1870), L. R. 12 Eq. 408.

**581. — — Evidence.]**—Case by a reversioner for cutting & carrying away branches of growing trees, with a count in trover for wood carried away. Proof that the occupier held under a written agreement:—*Held*: (1) this agreement must be produced in order to prove the reversion in pltf., as laid in the first count; (2) the count in trover was supported by evidence of branches carried away, though their value was not shown at the trial, for it was there indifferent whether pltf. was in possession of the trees or had only the reversion.—*COTTERILL v. HOBBY* (1825), 4 B. & C. 465; 6 Dow.



& Ry. K. B. 551; 3 L. J. O. S. K. B. 276; 107 E. R. 1133.

*Annotation* :—**Folld.** *Strother v. Barr* (1828), 5 Bing. 136.

**582. — Defence that trees blown down.**—In an action for waste against a lessee for cutting down pear & apple trees it is a good defence that they were blown down by a strong wind.—**ANON.** (1429), Y. B., 7 Hen. 6, fo. 38, pl. 47.

*Annotations* :—**Mentd.** *Herlakenden's Case* (1589), 4 Co. Rep. 62a; *Heydon & Smith's Case* (1610), 13 Co. Rep. 67.

**583. Remedies of—Against stranger.**—In trespass brought by pltf. for cutting down his trees, pltf. was nonsuited because it appeared that he was only lessee.—**ODEL v. KING** (1729), 1 Barn. K. B. 302; 94 E. R. 205.

**584. — — — — —.**—**EVANS v. EVANS**, No. 530, *ante*.

#### SUB-SECT. 10.—TENANT FOR LIFE AND REMAINDERMAN.

##### A. Impeachable for Waste.

**585. General rule—Right to cut—Property in trees felled & proceeds.**—Except in the case of a timber estate, a tenant for life impeachable for waste cannot fell timber. He can fell anything that is not timber, save trees planted for purposes of special utility or ornament, the germens of underwood, & trees which, though too young to be properly timber, would grow into timber. He may fell some, even of these last, if for the purpose of promoting the growth of other timber in the same wood. The property in timber, felled by a tenant for life, or any other person, or blown down by a storm, is in the owner of the first vested estate of inheritance, unless he has colluded with the tenant for life to induce him to fell it, in which case equity will not allow him to get the benefit of his own wrong. The property in trees not timber is in the tenant for life, & at law remains so, though he may have committed waste by felling them wrongfully, & made himself liable for an action of waste; but, *qu.* : if equity would allow him to take the property in trees felled thus. Where timber which is decaying, or which for any special reason requires to be felled, is felled with the sanction of the ct., the proceeds are invested & the income is given to the successive owners of the estate, till the fund is taken away by the owner of the first absolute estate of inheritance. The same course is adopted in cases of equitable waste, where ornamental trees have been felled.—**HONYWOOD v. HONYWOOD** (1874), L. R. 18 Eq. 306; 43 L. J. Ch. 652; 30 L. T. 671; 22 W. R. 749.

*Annotations* :—**Consd. & Apld.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. **Apld.** *Pardoe v. Pardoe* (1900), 82 L. T. 547.

*See, also*, Nos. 838 *et seq.*, *post*.

**586. — — — — —.**—The Countess of C. petitioned in Ch. that the Count should be enjoined to permit her as jointress for life to take birches of two hundred years' growth. The Count pleaded that by custom of the country such birches were used as timber for sheephouses, cottages & mean buildings, & this was borne out by the evidence :—**Held** : the birches were portion of the inheritance & could not be taken by the tenant for life.—**CUMBERLAND'S (COUNTESS) CASE** (1610), Moore, K. B. 812; 72 E. R. 922.

*Annotation* :—**Mentd.** *Channon v. Patch* (1826), 5 B. & C. 897.

**587. — Commencement of interest.**—A tenant for life has no property in the underwood till his estate comes into possession; he cannot have an

account of what was cut wrongfully by a preceding tenant.—**PIGOT v. BULLOCK** (1792), 1 Ves. 479; 3 Bro. C. C. 539; 30 E. R. 447.

*Annotations* :—**Apld.** *Lowndes v. Norton* (1877), 6 Ch. D. 139. **Consd.** *Re Barrington, Gamlen v. Lyon* (1886), 33 Ch. D. 523. **Refd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**588. S. P. GENT v. HARRISON** (1859), John. 517; 29 L. J. Ch. 68; 1 L. T. 128; 5 Jur. N. S. 1285; 8 W. R. 57; 70 E. R. 526.

*Annotations* :—**Consd.** *Higginbotham v. Hawkins* (1872), 7 Ch. App. 677, n.; *Lowndes v. Norton* (1877), 6 Ch. D. 139. **Mentd.** *Seagram v. Knight* (1867), 2 Ch. App. 628.

**589. — Property in timber cut vests in first remainderman with estate of inheritance.**—Where there was a tenant for life with a remainder for life & remainder in fee, & the tenant for life committed waste in trees, & afterwards the remainderman for life died :—**Held** : (1) the remainderman in fee might sue the tenant for life for waste done in the life of the remainderman for life; (2) so also if the remainderman for life after the waste committed had surrendered to the remainderman in fee; (3) when the tree was severed the property belonged to the remainderman in fee.—**PAGET'S CASE** (1593), 5 Co. Rep. 76b; 77 E. R. 170.

*Annotations* :—**Apprvd.** *Bowles's Case* (1615), 11 Co. Rep. 77b; *Bray v. Tracy* (1624), W. Jo. 51. **Refd.** *Garth v. Cotton* (1753), 3 Atk. 751.

**590. — — — — —.**—A tenant for life impeachable for waste cut & sold timber. In an action for trover & conversion by the first tenant in tail in remainder whose estate was vested :—**Held** : (1) a tenant of a particular estate had not an absolute property in the trees, but only a special interest in them so long as they remained annexed to the land; (2) by the cutting down, the absolute property was vested in pltf., unless they had been cut down for repairs & so employed in a convenient time; (3) the action of trover would lie for all the trees, though pltf. never had possession of them; (4) the mean remainders in contingency did not alter the case; (5) deft. by the sale made himself a wrongdoer, though other trees had been bought with the money & employed in repairs.—**UDAL v. UDAL** (1648), Aleyn, 81; 82 E. R. 926; *sub nom.* **UVEDALE v. UVEDALE**, 15 Vin. Abr. 141, tit. Maeresme, pl. 3.

*Annotations* :—**Consd.** *Abraham v. Bubb* (1680), 2 Freem. Ch. 53. **Expld.** (4) *Garth v. Cotton* (1753), 1 Ves. Sen. 546.

**591. — — — — —.**—The rights & interests of tenant for life & remaindermen, in reference to timber felled by a tenant for life impeachable for waste, discussed & considered. Such a tenant for life may cut oak coppices in due course for his own benefit, when the custom of the country so permits, & may also take the profits which arise from periodical thinnings of woods.—**BAGOT v. BAGOT, LEGGE v. LEGGE** (1863), 32 Beav. 509; 2 New Rep. 297; 33 L. J. Ch. 116; 9 L. T. 217; 9 Jur. N. S. 1022; 12 W. R. 35; 55 E. R. 200.

*Annotations* :—**Consd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. **Refd.** *Re Barrington, Gamlen v. Lyon* (1886), 33 Ch. D. 523. **Mentd.** *Re Cavendish, Cavendish v. Mundy*, [1877] W. N. 198; *Elias v. Snowden Slate Quarries Co.* (1879), 4 App. Cas. 454, H. L.; *Re Maynard's S. E.*, [1899] 2 Ch. 347.

**592. Thinnings.**—As between tenant for life & remainderman the thinnings of fir trees under twenty years of age belong to the tenant for life.—**PIDGELEY v. RAWLING** (1845), 2 Coll. 275; 63 E. R. 733.

*Annotations* :—**Consd.** *Bagot v. Bagot, Legge v. Legge* (1863), 32 Beav. 509. **Refd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**593. — — — — —.**—**BATEMAN v. HOTCHKIN**, No. 678, *post*.

**594. — — — — —.**—**BAGOT v. BAGOT, LEGGE v. LEGGE**, No. 874, *post*.



*Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sect. 10, A. & B.]*

**595.** ———.]—*COWLEY v. WELLESLEY*, No. 658, *post*.

**596.** ———.]—*PHILLIPPS (PHILLIPS) v. SMITH*, No. 861, *post*.

**597. Timber required for inclosures—Cannot cut.]**—In the case of lands exchanged under inclosing Acts, tenants for life impeachable for waste cannot cut timber for inclosure, but must raise the money for them by mtge. under the powers in the Act.—*LEE v. ALSTON* (1783), 1 Bro. C. C. 194; 28 E. R. 1078.

*Annotation:—Dtd. Parrott v. Palmer* (1834), 3 My. & K. 632.

**598. Proceeds of wrongly cut timber.]**—A tenant for life punishable for waste, with power under an inclosing Act to mtge. for the expense of the inclosure, felled timber, & applied the produce instead:—*Held*: the money realised must be paid to the owner of the next estate of inheritance.—*LEE v. ALSTON* (1789), 1 Ves. 78; 3 Bro. C. C. 37; 30 E. R. 239.

*Annotations:—Apd. Gower v. Eyre* (1815), Coop. G. 157. *Dtd. Parrott v. Palmer* (1834), 3 My. & K. 632.

**599. Underwood of insufficient growth—Cutting restrained.]**—A bill will lie to restrain a tenant for life from cutting down underwood of a growth insufficient according to the custom of the country.—*BRYDGES v. STEPHENS* (1821), 6 Madd. 279; 56 E. R. 1097.

**600. Trees cut for necessary purposes.]**—In an action against tenants for life for waste in cutting down trees:—*Held*: it was a good defence that they were cut in order to make a necessary watering trough for cattle.—*CHAPELRIE (TWO) v. W. & P.* (1360), Y. B., 33 Lib. Ass. pl. 1.

**601. Trees cut in due course of management—Usage.]**—A man made a feoffment in fee of a manor to the use of himself & his wife & his heirs, in which manor there were underwoods usually to be cut every twenty-one years. The husband having suffered the wood to grow twenty-five years & afterwards died, the question arose whether the wife as tenant for life might cut that underwood:—*Held*: (1) a tenant for life might cut all underwood which had been usually cut within twenty years, & in the wood countries might fell seasonable wood, which was called *silva cardua*, at twenty-six, twenty-eight & thirty years by the custom of the country; (2) while the cutting of oaks at the age of eight years or ten years was waste, the cutting of hornbeams, hazels, willows or sallows at the age of forty years was no waste, because at no time they would be timber.—*ANON.* (1581), Godb. 4; 78 E. R. 3.

*Annotation:—Refd. Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**602. — Usage as to management.]**—A usage as to the mode of management of woods need not be immemorial; the ct. may infer that it is as old as the cultivation of woods of the particular kind, & that it applies to tenants for life although not made expressly unimpeachable for waste. Where a testator has always managed his beechwoods in the customary manner, it will be inferred that he must have known of the usage & made his will with reference to it (*LINDLEY, L.J.*).—*DASHWOOD v. MAGNIAC*, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811; 7 T. L. R. 629, C. A.

*Annotations:—Mentd. Re Chaytor*, [1900] 2 Ch. 804; *Pardoe v. Pardoe* (1900), 82 L. T. 547; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A.; *Re Trevor-Batye's Settlement*, Bull. v. Trevor-Batye, [1912] 2 Ch. 339; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488.

Timber estates, *see, further*, Nos. 710—715, *post*.

**603. — Injunction — Timberlike trees — Breach.]**—Deft., a tenant for life impeachable for

waste, had been restrained by injunction from selling "any timber or timberlike trees" upon an estate. He advertised for sale a number of Scotch firs & larches grown thereon, some of which girthed 6 in.:—*Held*: "timberlike" did not go beyond timber, except so as to include trees which in due course of growth would become timber, & deft.'s act was not a breach of the injunction.—*LOWNDES v. NORTON*, [1876] W. N. 221.

**604. Husband's liability for waste on wife's estate.]**—An estate was given to a lady for life with a direction not to commit waste. The lady married, & acts of waste were committed by her husband. Upon her death a bill was filed for an account of waste & dilapidations:—*Held*: the wife's estate having, by her marriage, become vested in her husband, her husband was alone responsible for the waste, & the legal personal representatives of the wife were not necessary parties to the suit.—*KINGHAM v. LEE* (1846), 15 Sim. 396; 16 L. J. Ch. 49; 8 L. T. O. S. 359; 11 Jur. 4; 60 E. R. 673.

*Annotation:—Refd. Powys v. Blagrove* (1854), Kay, 495.

**605. Right of vendee of timber wrongfully sold.]**—A tenant for life liable for waste, having sold timber, cannot prevent the vendee from cutting it.—*WENTWORTH v. TURNER* (1795), 3 Ves. 3; 30 E. R. 862.

*B. Unimpeachable for Waste.*

**606. Right to fell timber.]**—Where the estate of the tenant of premises was without impeachment of waste:—*Held*: he could not be restrained from felling timber.—*MINSHAL v. MINSHAL* (1663), 1 Rep. Ch. 242; 21 E. R. 561.

**607. — Portions.]**—A tenant for life without impeachment of waste cut timber:—*Held*: not liable to account for the proceeds, or to apply them in raising portions, the portioners having no right to have them raised out of the timber had it been standing.—*SAVILLE (LADY) v. SAVILLE* (1720), 2 Atk. 458, at p. 463; 26 E. R. 677.

*Annotations:—Consd. Tullet v. Tullet* (1759), Dick. 323. *Refd. Powlett v. Bolton* (1797), 3 Ves. 374. *Mentd. Halded v. Mason* (1738), West. temp. Hard. 557; *Price v. Seys* (1740), Barn. Ch. 117; *Watson v. Lincoln* (1756), Amb. 325; *Warren v. Warren* (1783), 1 Bro. C. C. 305.

**608. —.]**—Pltf., a remainderman, sued his father, a tenant for life without impeachment of waste, to have a sum of money raised according to an agreement between them. By a supplemental bill he sued for waste in removing oaks planted by the father himself & turning meadow into plough land:—*Held*: (1) in the circumstances an injunction would be refused; (2) to grant such an injunction there must be destruction & spoliation.—*PEIRS v. PEIRS* (1750), 1 Ves. Sen. 521; 27 E. R. 1180.

**609. —.]**—The ct. will not grant an injunction to restrain a tenant for life without impeachment of waste from cutting down trees merely because they are in a thriving state. It must appear that they are unfit to be cut as timber.—*SMYTHE v. SMYTHE* (1818), 1 Wils. Ch. 426; 2 Swan. 251; 37 E. R. 182.

*Annotation:—Distd. Kekewich v. Marker* (1851), 2 Mac. & G. 311.

**610. — Trees before severance.]**—A tenant for life without impeachment of waste cannot be impeached in any action of waste; but such tenant has no absolute interest in the trees before severance.—*HERLAKENDEN'S CASE* (1589), 4 Co. Rep. 62a; 76 E. R. 1025.

*Annotations:—Consd. Abraham v. Bubb* (1680), 2 Freem. Ch. 53; *Williams v. Williams* (1808), 15 Ves. 419. *Refd. Rowles v. Mason* (1612), 2 Brownl. 88, 192; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197, P. C. *Mentd. Heydon's Case* (1613), 11 Co. Rep. 5a; *Rowles's Case* (1615), 11 Co. Rep. 77b; *Liford's Case* (1615), 11 Co. Rep. 46b; *Wilson v. Dodd* (1615), 2 Bulst.

335; *Squier v. Mayer* (1701), 2 Freem. Ch. 248; *Cave v. Cave* (1705), 2 Vern. 508; *Bullythorpe v. Turner* (1744), Willes, 475; *Elwes v. Maw* (1802), 3 East, 38; *Channon v. Patch* (1826), 5 B. & C. 897; *Berriman v. Peacock* (1832), 9 Bing. 384; *Boydell v. M'Michael* (1834), 3 Tyr. 974; *Calvert v. Moggs* (1839), 3 Jur. 1171; *Re De Falbe*, *Ward v. Taylor*, [1901] 1 Ch. 523, C. A.

**611. — Timber trees after severance.**—Where timber trees are severed from the inheritance either by act of the party or of the law, & become chattels, the whole property of them is in the tenant for life without impeachment of waste.—*BOWLES'S CASE* (1615), 11 Co. Rep. 79b; 77 E. R. 1253; *sub nom. BOWLES v. BERRIE*, 1 Roll. Rep. 177.

*Annotations*:—**Consd.** *Abraham v. Bubb* (1680), 2 Freem. Ch. 53; *Aston v. Aston* (1749), 1 Ves. Sen. 264. **Refd.** *A. G. v. Marlborough* (1818), 3 Madd. 498. **Mentd.** *Bamfield v. Popham* (1701-3), Holt, K. B. 233; *Carrick v. Errington* (1726), Mos. 8; *Cunningham v. Moody* (1748), 1 Ves. Sen. 174; *Doe d. Willis v. Martin* (1790), 4 Term Rep. 39; *Boydell v. M'Michael* (1834), 3 Tyr. 974; *Chambers v. Taylor* (1837), 2 My. & Cr. 376.

**612. — Subordinate to power of trustees.**—Exemption from liability to waste as to timber annexed to a life estate is a special power in the tenant for life to appropriate part of the inheritance, but:—*Held*: in this case subordinate to the discretionary power conferred on the trustees.—*KEKEWICH v. MARKER* (1851), 3 Mac. & G. 311; 21 L. J. Ch. 182; 17 L. T. O. S. 193; 15 Jur. 687; 42 E. R. 280, L. C.

*Annotations*:—**Refd.** *Briggs v. Oxford* (1851), 5 De G. & Sm. 156. **Mentd.** *Dashwood v. Magniac* (1891), 60 L. J. Ch. 809, C. A.

**613. For public interest.**—The reason why the common law gave so large a power to a tenant for life without impeachment of waste was for the interest of the public, as timber might thereby circulate for shipping & other uses (*LORD HARDWICKE, C.*).—*PACKINGTON'S CASE* (1744), 3 Atk. 215; 26 E. R. 925.

*Annotations*:—**Mentd.** *Lempster v. Pomfret* (1752), Amb. 154; *Chamberlayne v. Dummer* (1782), 1 Bro. C. C. 166; *Pyne v. Dor* (1785), 1 Term Rep. 55.

**614. — Where against public interest.**—Where the commission of waste would be against the public interest, an injunction will lie even when the tenant is not impeachable for waste.—*SKELTON v. SKELTON* (1677), 2 Swan. 170, n.; 36 E. R. 579.

**615. — Equitable tenant for life.**—A widow, as equitable tenant for life without impeachment of waste, entered into possession of an estate, & continued in possession until her death. Upon the estate were extensive woods, consisting principally of beech trees (which, according to the custom of Buckinghamshire, were "timber"), besides other timber, such as oak, ash, & elm. During her lifetime she cut & sold large quantities of the timber, received the proceeds, & applied them to her own use, her annual income from this source being considerable. Immediately upon the widow's death the next tenant for life & remainderman under the uses of the will brought an action against her exors. seeking to make her estate liable, on the ground of "waste," for the timber so cut. It was proved that the mode of cutting by the widow was in accordance with local usage & with the practice of testator & his predecessors:—*Held* (*CHITTY, J., & C. A., KAY, L.J., diss.*): the widow had not committed waste in cutting the timber.

Evidence of modern usage as to a particular mode of cultivation of property is just as admissible in construing a devise as in construing a grant or lease (*LINDLEY & BOWEN, L.J.J.*).

There is no exception from the common law as to waste in favour of the limited owner of a "timber estate." A custom sufficient to control the common law as to waste in cutting down timber must be nothing less than an immemorial custom for a

limited owner to commit such waste; mere modern usage or practice to that effect is insufficient (*KAY, L.J.*).

The doctrine of "waste," as applicable to the cutting of timber by a tenant for life of a freehold estate, the meaning of "timber estate," "timber," "seasonable wood," *silva cædua*, & "coppice," & the limitation of time in an action of waste, discussed.—*DASHWOOD v. MAGNIAC*, [1891] 3 Ch. 306; 60 L. J. Ch. 210, 809; 64 L. T. 99; 65 L. T. 811; 7 T. L. R. 189, 629, C. A.

*Annotations*:—**Consd.** *Pardoe v. Pardoe* (1900), 82 L. T. 547. **Mentd.** *Re Chaytor*, [1900] 2 Ch. 804; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A.; *Re Trevor-Batye's Settlement*, *Bull v. Trevor-Batye*, [1912] 2 Ch. 339; *Re Hall*, *Hall v. Hall*, [1916] 2 Ch. 488.

**616. Rights of tenant for life sans waste—Ornamental timber.**—A tenant for life *sans* waste will not be interfered with in the exercise of his legal powers, unless he is proceeding to use those legal powers in a manner inequitable towards those in remainder; he may fell & sell trees planted for ornament, if done in a proper course of husbandry.—*HALLIWELL v. PHILLIPS* (1858), 4 Jur. N. S. 607; 6 W. R. 408.

*Annotation*:—**Dbtd.** *Ford v. Tynte* (1864), 2 De G. J. & Sm. 127.

**617. — Timber cut by stranger.**—A tenant for life without impeachment of waste became a bkpt. The comrs. of his estate sold his estate to deft. In an action by the tenant in tail in remainder against deft. to stay waste, an injunction as to cutting down ornamental timber was continued, but as to the cutting of timber generally was discontinued. If a stranger cut down timber, it belongs to the tenant for life without impeachment of waste, & not to the remainderman.—*ANON.* (1720), Mos. 237; 25 E. R. 369.

— Or other trees — Equitable waste.]

— See Nos. 887—921, *post*.

**618. — Power to lease.** A lessee for life without impeachment of waste & power to make leases for twenty-one years or three lives has interest in the trees as long as the estate continues. He has power to dispose of the trees, & may make a lease excepting the trees, but if he assign over his estate excepting the trees, the exception is void.

Such things which a man has by the law he cannot resign to himself upon his assignment, as the cropping & lopping of trees, as if tenant in tail after possibility, etc. (who is dispensable of waste by freedom of the law), assign over his estate reserving the trees, he cannot cut the trees, but here the lessee has a larger liberty than the law gives to him, & he by virtue of this may give away the trees; but I conceive that if he had assigned over all his estates, he could not have excepted the trees, but here he has not granted over all his estate, for he has a remainder, & may have an estate in possession afterwards, & upon this lease for three lives he may reserve a rent to himself (*JONES, J.*).

If a stranger cut the trees, lessee without impeachment of waste shall have them (*per CUR.*).

The question in dispute, which was not decided, was whether, after the death of the tenant for life, the remainderman could enter & cut the trees during currency of the lease granted by the tenant for life.—*SECHEVEREL v. DALE* (1627), Poph. 193; 79 E. R. 1285.

**619. Tenant in remainder restrained.**—By leave of the lessee of the tenant for life in possession a tenant for life in remainder without impeachment of waste came on the land & felled timber:—*Held*: although it was not growing for shelter or ornament, & no action could be maintained at law, he would be restrained in equity.—*EVELYN'S (LADY) CASE* (undated), cited in *ABRAHAM v. BUBB* (1680),



*Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sect. 10, B. C. & D.]*

R. 1054, & in *SKELTON v. SKELTON* (1677), 2 Swan. 170, n.

**620. S. P. FLEMING v. CARLISLE** (Bp.) (undated), cited in *GARTH v. COTTON* (1753), 3 Atk. 751.

**621. Lands to be sold.**—Devise of lands to be sold, & other lands to be purchased in another county, A. to be tenant for life *sans* waste of the lands to be purchased, & rents & profits of the lands to be sold to be to the same uses:—*Held*: A. could not cut down timber on the lands to be sold, since he thereby would have the benefit of double waste.—*PLYMOUTH (COUNTESS DOWAGER) v. ARCHER (LADY DOWAGER)* (1782), 1 Bro. C. C. 159; 28 E. R. 1052.

*Annotations*:—*Consd.* *Burges v. Lamb* (1809), 16 Ves. 174. *Mentd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**622. Limitation of right by settlement.**—A settlor settled a jointure on his wife for life without impeachment of waste, & on settling another part of his estates credited a term to secure a rentcharge to his wife, & out of the rents & profits to raise money to reimburse her the expenses in repairing her jointure estate. On a bill by a remainderman against the wife showing that she had cut down timber, even such as was not fit for repairs:—*Held*: (1) on the construction of the settlement, as she had cut timber without applying it to repairs, she could have no benefit of the term until she had reimbursed the proceeds of the timber she had unreasonably cut; (2) she should be restrained from cutting timber until further order.—*ASTON v. ASTON* (1750), 1 Ves. Sen. 264, 396; *Belt's Sup.* 134; 27 E. R. 1021, 1103.

*Annotations*:—*Refd.* *Chamberlayne v. Dummer* (1782), 1 Bro. C. C. 166; *Halliwell v. Phillips* (1858), 6 W. R. 408. *Mentd.* *Stackhouse v. Barnston* (1805), 10 Ves. 453.

**623. Construction of devise—Exception—Limitation of.**—A. by his will devised to B. & his assigns for his life all his real estates in W. without impeachment of waste, except the timber growing in the park avenues, demesne lands, & woods adjoining to the capital messuage called Arbury, remainder in trust for C. for life, remainder to his first & other sons in tail male:—*Held*: (1) the restriction as to cutting timber was confined to the premises specified in the exception clause, & ought not to extend to the woods adjoining to the excepted parts, nor to the avenues made by testator in those woods; (2) no proceeding for equitable waste could be maintained as to trees planted, etc., for ornament, etc.—*NEWDEGATE v. NEWDIGATE* (1834), 8 Bli. N. S. 734; 2 Cl. & Fin. 601; 5 E. R. 1113, H. L.

**624. Rights under devise of rents & profits.**—A testatrix devised the rents & profits of an estate to her husband for life without impeachment of waste. In a suit by the husband for an account:—*Held*: pltf. must hold the premises devised to him subject to the order of the ct., but must not fell timber without leave of the ct., unless for necessary repairs & botes.—*PARTRIDGE (PARTERICHE) v. PAWLET* (1736), 1 Atk. 467; *West temp. Hard.* 1; 26 E. R. 297.

*Annotation*:—*Refd.* *Garth v. Cotton* (1753), 1 Ves. Sen. 524.

**625. Liability to account.**—The tenant for life without impeachment of waste of certain estates felled & converted to his own use certain timber growing thereon. The tenant in tail in remainder filed a bill to restrain the cutting of the timber & for an account of the timber already felled. The tenant for life refused to account on the ground that he was entitled to the timber in right of his interest in the estate:—*Held*: the evidence showing a considerable felling of trees, it was not unreasonable

that pltf. should know what timber was felled, & the tenant for life must set forth the account.—*NEWRY (VISCOUNT) v. KILMOREY (EARL)* (1870), 24 L. T. 15; 19 W. R. 271.

**626. Incidence of estate duty.**—A tenant for life not impeachable for waste, who receives the proceeds of timber sold apart from the land, has to bear the duty thereon, & such duty is not, since Finance Acts, 1909-10 (c. 8), 1912 (c. 8), as prior thereto it was, a charge on the full value of the land including the value of the timber. *Qu.*: whether the general expression used in s. 61 (5) of the Act of 1910, & s. 9 of the Act of 1912, "the owners or trustees of such land," may not include a tenant for life, who has power to sell the timber & keep the proceeds.—*Re SMYTH, EDWARDS v. SMYTH*, [1918] 1 Ch. 118; 87 L. J. Ch. 40; 117 L. T. 703, C. A.

*C. Partially unimpeachable for Waste.*

**627. Limited qualification—Rights under.**—A settlor, by his marriage settlement, limited an estate to himself for life without impeachment of or for any manner of waste except spoil or destruction, or voluntary or permissive waste, or suffering buildings to go out of repair:—*Held*: (1) the tenant for life was in a position intermediate to that of an ordinary tenant for life & a tenant for life without impeachment of waste; (2) he might cut all timber (not ornamental) which an owner in fee, having a due regard to his own interest & the advantage of the estate, would cut, but no other.—*VINCENT v. SPICER* (1856), 22 Beav. 380; 25 L. J. Ch. 589; 27 L. T. O. S. 226; 2 Jur. N. S. 654; 4 W. R. 667; 52 E. R. 1154.

**628. Voluntary waste excepted—Effect—Who can recover.**—A. was tenant for ninety-nine years, if he should so long live, "without impeachment of waste, except voluntary waste," with remainder to trustees to preserve, etc., then to his first son in tail, with the reversion to B. in fee. A. having no son for a long while, sold timber, & divided the profits with B., the reversioner, by agreement between themselves. A. afterwards had a son:—*Held*: (1) A. was punishable for wilful waste, & had no interest in the timber, other than the mast & shade, & necessary botes; (2) the son as owner of the inheritance was entitled to recover what A. so received.—*GARTH v. COTTON* (1753), 1 Ves. Sen. 524, 546; 3 Atk. 751; *Dick.* 183; 27 E. R. 1182, 1196.

*Annotations*:—*Consd.* *Stansfield v. Habergham* (1804), 10 Ves. 273. *Appld.* *Bagot v. Bagot*, *Legge v. Legge* (1863), 32 Beav. 509. *Expld.* *Birch-Wolfe v. Birch* (1870), L. R. 9 Eq. 683. *Foll.* *Re Cavendish*, *Cavendish v. Mundy*, [1877] W. N. 198. *Refd.* *Lansdowne v. Lansdowne* (1815), 1 Madd. 116; *Parrott v. Palmer* (1834), 3 My. & K. 632. *Mentd.* *Paget v. Gee* (1753), 3 Keny. 31; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578; *Phillips v. Homfray*, [1892] 1 Ch. 465, C. A.; *A.-G. v. Glossop*, [1907] 1 K. B. 163, C. A.

**629. ———.**—A testator empowered the persons becoming beneficially entitled to the estates settled by his will as & when in possession to fell such timber, except ornamental trees about a mansion house, as might be necessary for repairs. A tenant for life in remainder brought an action against the exors. of a previous tenant for life, who was also ultimate remainderman in fee, for felling & selling timber & applying proceeds to his own use:—*Held*: (1) the rule in *Garth v. Cotton* (No. 628, *ante*), that the first person entitled to an immediate estate of inheritance is the only person who can recover the value of timber cut improperly by a tenant impeachable for waste, & that where by fraudulent collusion between a tenant for life & the owner of the inheritance such timber is cut, the ct. will interfere notwithstanding the existence of a legal remedy, will not be applied, unless the ct. is satisfied that the facts did amount to a case of actual



fraud & collusion; (2) the fact that a tenant in remainder allows a tenant for life to cut down timber in consideration & upon condition of the tenant for life laying out considerable sums of money in improvements for the benefit of the estate is no ground for inferring fraud; (3) the right of action, if any, arose on the death of the tenant for life & must be brought within six years of such death.—*BIRCH-WOLFE v. BIRCH* (1870), L. R. 9 Eq. 683; 39 L. J. Ch. 345; 23 L. T. 216; 18 W. R. 594.

**630. Tenant for life entitled to timber for repairs cannot sell.]**—A tenant for life entitled to timber for repairs cannot sell same to reimburse herself expenses incurred in repairs.—*GOWER v. EYRE* (1815), Coop. G. 156; 35 E. R. 514.

**631. Sale of underwood—Right to proceeds.]**—Testator devised his estate to his wife for life, "with liberty to cut timber & underwood for her own use, but not to sell"; she cut underwood & sold it, & died:—*Held*: her estate was not accountable for the money produced to the next taker for life impeachable for waste, he having no property in the underwood till his estate came into possession.—*PIGOT v. BULLOCK* (1792), 1 Ves. 479; 3 Bro. C. C. 539; 30 E. R. 447.

*Annotations*:—*Appld.* *Lowndes v. Norton* (1877), 6 Ch. D. 139. *Consd.* *Re Barrington, Gamlen v. Lyon* (1886), 33 Ch. D. 523; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**632. Power of management.]**—A testator by his will devised his estate to his wife, deft., for life, with remainder to P. in fee, & appointed deft. sole extrix. with full & absolute control over all testator's property during her life. P. died, having by his will settled the estate subject to deft.'s life interest on pltf. in tail male with remainder over. Deft. cut & sold timber, & an action was brought for a declaration that this constituted waste & for an injunction;—*Held*: (1) the will did not render deft. punishable for waste, but merely conferred on her large powers of management; (2) deft. had committed waste which did not fall within the exceptions in *Honywood v. Honywood* (No. 585, ante) & *Dashwood v. Magniac* (No. 615, ante); (3) pltf. was entitled to a declaration to this effect; (4) deft. was only entitled to cut timber in a due course of management for the benefit & preservation of the estate, & must account for the proceeds of sale that had taken place.—*PARDOE v. PARDOE* (1900), 82 L. T. 547; 16 T. L. R. 373; 44 Sol. Jo. 449.

#### D. Rights and Remedies of Remainderman.

**633. Right of remainderman in fee simple.]**—A remainderman in fee simple expectant on determination of a life estate has the timber inheritance vested in him, but he has no present right to take & use it, & if he does so, trustees seised of the freehold may restrain him by injunction, & the owner of a prior estate of freehold may bring trespass against him for his entry & tortious act.—*GARTH v. COTTON* (1753), 1 Ves. Sen. 524, 546; 3 Atk. 751; Dick. 183; 27 E. R. 1182, 1196.

*Annotations*:—*Appld.* *Stansfield v. Habergham* (1804), 10 Ves. 273. *Consd.* *Birch-Wolfe v. Birch* (1870), L. R. 9 Eq. 683. *Refd.* *Parrott v. Palmer* (1834), 3 My. & K. 632; *Bagot v. Bagot, Legge v. Legge* (1863), 32 Beav. 509; *Re Cavendish, Cavendish v. Mundy*, [1877] W. N. 198. *Mentd.* *Paget v. Geo* (1753), 3 Keny. 31; *Lansdowne v. Lansdowne* (1815), 1 Madd. 116; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578; *Phillips v. Homfray* (1883), 24 Ch. D. 439, C. A.; *Phillips v. Homfray*, [1892] 1 Ch. 465, C. A.; *A.-G. v. Glossop*, [1907] 1 K. B. 163, C. A.

**634. Rights as against tenant for life with remainders.]**—A., tenant for life, remainder to his first, etc., son in tail, remainder to B. for life, remainder to his first, etc., son in tail, remainder to C. in tail. A. cut down timber. A. & B. having no:—*Held*: C. entitled to the timber both at law

& in equity.—*WHITFIELD v. BEWIT* (1724), 2 P. Wms. 240; 24 E. R. 714.

*Annotations*:—*Folld.* *Lee v. Alston* (1789), 1 Ves. 78. *Consd.* *Powlett v. Bolton* (1797), 3 Ves. 374; *Re Barrington, Gamlen v. Lyon* (1886), 33 Ch. D. 523; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. *Refd.* *Parrott v. Palmer* (1834), 3 My. & K. 632; *Daly v. Beckett* (1857), 24 Beav. 114.

**635. Right to cuttings by tenant for life impeachable.]**—*BAGOT v. BAGOT, LEGGE v. LEGGE*, No. 656, post.

**636. Remainderman not in esse at time when timber cut.]**—A tenant in tail in remainder sued the exors. of a tenant for life for a declaration that the latter's estate was liable in respect of the cutting down of ornamental & other timber on the settled estates, the proceeds of which were applied for the tenant for life's own use. The timber was cut down & sold at times when the next vested estate of inheritance belonged to persons not parties to the action, since pltf. had been born since the tenant for life's death:—*Held*: (1) if timber was wrongfully cut by the tenant for life, the produce at once became the property at law of the owner of the first vested estate of inheritance, who might bring trover for it or file his bill in equity for an account; (2) a demurrer on the ground that pltf. was then the only person entitled to sue was overruled.—*Re CAVENDISH, CAVENDISH v. MUNDY*, [1877] W. N. 198.

**637. Mesne remainderman's interest.]**—Where A. is tenant for life, remainder to his children, & B. has an interest in the growing timber, which, in the usual course of management, will come to be felled during the continuance of A.'s estate, the infants can have no interest in, & cannot be made parties to, an agreement between A. & B. for the purchase of B.'s interest in the growing timber.—*ANON.* (1822), 1 L. J. O. S. Ch. 33.

**638. Entitled to life estates.]**—*PIGOT v. BULLOCK*, No. 587, ante.

**639. —.]**—*WALDO v. WALDO*, No. 651, post.

**640. Heir & remainderman.]**—*GENT v. HARRISON*, No. 663, post.

**641. — Injunction.]**—An heir, entitled by way of resulting trust until determination of an event, upon which future contingent estates were to arise, was restrained from cutting timber.—*STANSFIELD v. HABERGHAM* (1804), 10 Ves. 273; 32 E. R. 849.

*Annotation*:—*Consd.* *Turner v. Wright* (1860), 2 De G. F. & J. 234.

**642. Consent to tenant for life's acts.]**—An estate was settled on A. without impeachment of waste except in pulling down houses & felling timber, with a remainder over for life without impeachment of waste generally, & remainder to issue in tail with remainder to deft. in tail. The remainderman for life needing money, timber was felled on the estate by A. for the purpose. Deft. brought an action to recover damages for waste. Deft. had notice of the intention to cut timber & made no complaint for ten years:—*Held*: deft. would be restrained by injunction from bringing the action of waste. *Semble*: timber blown down or cut by a stranger vests in the person having the first vested estate of inheritance.—*ASTON v. ASTON* (1750), 1 Ves. Sen. 264, 396; Belt's Sup. 134; 27 E. R. 1021, 1103.

*Annotations*:—*Refd.* *Chamberlayne v. Dummer* (1782), 1 Bro. C. C. 166. *Mentd.* *Stackhouse v. Barnston* (1805), 10 Ves. 453; *Halliwell v. Phillips* (1858), 6 W. R. 408.

**643. Remedy—Action by reversioner—Proof of title.]**—In an action by a reversioner in fee simple against a tenant for life for cutting down trees, pltf. must prove his title to the parcels of land in which waste is alleged by him & denied by deft.—*LEIGH v. LEIGH* (1690), 2 Lut. 1539; 125 E. R. 846.

**644. — Injunction.]**—Limitation to A. for life to trustees to preserve, etc., to the first, etc., sons of A., in tail, remainder to B. for life, remainder to the

*Sect. 2.—Property in trees & liabilities of different classes of owners : Sub-sect. 10, D. & E. (a).]*

first, etc., sons in tail, reversion in fee to A. A. cut down timber, against whom B. brought his bill for an injunction to stay waste :—*Held* : though B. had no right to the timber, yet as he had an interest in the mast & shade, if A. should die without sons, & as B. could not maintain an action, not having the immediate remainder, the injunction should be continued.—*PERROT v. PERROT* (1744), 3 Atk. 94 ; 26 E. R. 857.

*E. Right to Proceeds of Timber Cut or Sold.*

*(a) Rightfully.*

**645. Timber—First estate of inheritance.]—**Where timber is cut or blown down the property in it belongs to the owner of the first estate of inheritance.—*HONYWOOD v. HONYWOOD* (1874), L. R. 18 Eq. 306 ; 43 L. J. Ch. 652 ; 30 L. T. 671 ; 22 W. R. 749.

*Annotations :—Mentd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. ; *Pardoe v. Pardoe* (1900), 82 L. T. 547.

**646. ———.]—**Where a tenant for life unimpeachable for waste cuts & sells timber planted for ornament or shelter, the proceeds of that timber belong to the person having then the first vested estate of inheritance, & parties having intervening estates for life have no right to an account of the proceeds of the timber so cut, or to have such proceeds invested upon the same trusts with the lands.—*ORMOND v. KYNNEERSLEY, BUTLER v. KYNNEERSLEY* (1830), 7 L. J. O. S. Ch. 150 ; 8 L. J. O. S. Ch. 67.

*Annotation :—N.F.* *Honywood v. Honwood* (1874), L. R. 18 Eq. 306.

**647. Trees not timber—Tenant for life.]—**A tenant for life is entitled at law to the proceeds of trees (not timber) cut by him, whether rightfully or wrongfully, though liable in the latter case to an action of waste. *Semble* : equity would not allow him to retain the proceeds of wrongful cuttings.—*HONYWOOD v. HONYWOOD* (1874), L. R. 18 Eq. 306 ; 43 L. J. Ch. 652 ; 30 L. T. 671 ; 22 W. R. 749.

*Annotations :—Mentd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. ; *Pardoe v. Pardoe* (1900), 82 L. T. 547.

**648. Infant tenant in fee simple—Real estate.]—**If a guardian of an infant tenant in fee simple cuts down timber, the proceeds of sale are real estate.—*TULLIT v. TULLIT* (1759), Amb. 370 ; Dick. 322 ; 27 E. R. 246.

*Annotations :—Folld.* *Powlett v. Bolton* (1797), 3 Ves. 371 ; *Tooker v. Annesley* (1832), 5 Sim. 235.

**649. Tenant for life unimpeachable—Sale restrained—Death.]—**A tenant for life without impeachment of waste had agreed to sell the timber on the estate. On a bill by his creditors he was restrained from selling ; afterwards the creditors obtained an order for sale, & a receiver was appointed for the money arising from the sale. The tenant for life died before the timber was felled. The question being whether his representatives were entitled to the benefit of the timber :—*Semble* : the ct. would not allow its own act to deprive him of the benefit.—*PARTRIDGE v. PAWLET* (1744), Ridg. temp. H. 254 ; 27 E. R. 821.

**650. Settlement—Application of proceeds.]—**A., tenant for life, remainder to his sons successively in tail male, remainder to B. for life & to her sons in the same manner, with trustees to preserve contingent remainders. A., being also seised of the reversion in fee, cut & sold timber before the birth of a tenant in tail ; afterwards B. had a son, who died soon after his birth, & another son, who survived A. :—*Held* : the produce of the timber must be laid out in the funds during the life of A., & upon his death without having had a son must be laid out in land, to be settled to the uses of the estate, upon which the timber was cut.—*POWLETT v.*

*BOLTON (DUCHESS)* (1797), 3 Ves. 374 ; 30 E. R. 1061.

*Annotation :—Folld.* *Butler v. Kynnersley* (1830), 8 L. J. O. S. Ch. 67.

**651. ——— Power to sell—Produce of timber.]—**A tenant for life without impeachment of waste, with power to sell, if he sells, is not entitled to the produce of the timber on the estate.—*DORAN v. WILTSHIRE* (1792), 3 Swan. 699 ; 36 E. R. 1027.

*Annotation :—Apld.* *Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317.

**652. ———.]—**A tenant for life entitled under a settlement without impeachment of waste sold timber of the estate for £270. He afterwards sold the estate, the standing timber being valued at £350 :—*Held* : he was entitled to the £270, but not to the £350.—*WOLF v. HILL* (1806), 2 Swan. 170 ; 36 E. R. 575.

**653. Tenant for life sans waste subject to devise to trustees to sell & pay debts.]—**Devise to trustees, in trust to sell for payment of testator's debts, & subject thereto to A. for life sans waste, remainder to his first & other sons in tail. The trustees sold timber on the estates, & applied the proceeds in payment of the debts :—*Held* : A. was entitled to have the amount raised by sale of the estates, & paid to him.—*DAVIES v. WESCOMB* (1828), 2 Sim. 425 ; 57 E. R. 847.

*Annotations :—Consd.* *Marker v. Kekewich* (1850), 8 Haro, 291. *Distd.* *Kekewich v. Marker* (1851), 2 Mac. & G. 311.

**654. Rights of next tenant for life unimpeachable.]—**Timber was cut by trustees, with the consent of the tenant for life impeachable for waste [& of the next tenant for life who was unimpeachable], & the proceeds were laid out in the purchase of stock, the dividends being paid to such tenant for life. On the death of that tenant for life, the next tenant for life in possession was unimpeachable for waste :—*Held* : he was entitled to have the principal of the stock & moneys, produced by such timber, transferred & paid to him.—*WALDO v. WALDO* (1841), 12 Sim. 107 ; 10 L. J. Ch. 312 ; 59 E. R. 1072.

*Annotations :—Folld.* *Phillips v. Barlow* (1841), 11 Sim. 263. *Consd.* *Lowndes v. Norton* (1877), 6 Ch. D. 139. *Refd.* *Gent v. Harrison* (1859), 1 John. 517.

**655. Tenant for life acquiring base fee.]—**No action lies by the reversioner & owner of the inheritance to recover the value of timber cut by the deceased tenant for life after a fine levied by her, whereby she acquired a base fee, & before the avoidance of such fine & base fee by the entry of the reversioner for that purpose, such entry not revesting the reversioner's old estate by relation during continuance of the base fee thus created, so as to entitle him at law to the timber & other mesne profits taken during that interval. Even supposing that after Stat. Limitations had run against the appropriate action, by the reversioner against the tenant for life, for mesne profits or for waste, upon the original wrongful act of cutting down & converting the trees, an action of *assumpsit* for money had & received for the purchase-money of the trees sold, which was in fact paid to the former tenant for life within the six years, was maintainable against her representatives after her death.—*HUGHES v. THOMAS* (1811), 13 East, 474 ; 104 E. R. 454.

**656. Investment of proceeds—Income.]—***Semble* : (1) the tenant for life may cut oak coppice in due course for his own benefit, when the custom of the country so permits, & may also take the profits which arise from the periodical thinnings of woods ; (2) the proceeds of timber properly cut, having regard to the benefit of an estate, by a tenant for life impeachable for waste, will, by the rules of the equity ct., be invested & dealt with as part of the



*corpus* of the estate, the tenant for life, though impeachable for waste, receiving the income; (3) the proceeds of timber improperly cut, at a time when there is no person *in esse* unimpeachable for waste, must be similarly dealt with, except that the tenant for life so improperly acting cannot receive the income; (4) the proceeds of timber improperly cut by a tenant for life impeachable of waste, at the time when there is in existence a remainderman entitled indefeasibly to the first estate unimpeachable for waste, belong absolutely to such remainderman.

—*BAGOT v. BAGOT*, *LEGGE v. LEGGE* (1863), 32 Beav. 509; 2 New Rep. 297; 33 L. J. Ch. 116; 9 L. T. 217; 9 Jur. N. S. 1022; 12 W. R. 35; 55 E. R. 200.

*Annotations*:—*Consd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. *Mentd.* *Re Cavendish*, *Cavendish v. Mundy*, [1877] W. N. 198; *Elias v. Snowden Slate Quarries Co.* (1879), 4 App. Cas. 454, H. L.; *Re Barrington*, *Ganlen v. Lyon* (1886), 33 Ch. D. 523; *Re Maynard's S. E.*, [1899] 2 Ch. 347.

**657. — Underwood & trees cut according to custom.**—The owner of woodlands had been accustomed, every year, to cut about one-twelfth of the underwood & also such of the trees on the same ground as were likely to obstruct & prejudice the growth of the timber:—*Held*: the tenant for life under his will was entitled to the produce both of the underwood & trees cut according to that custom.—*COWLEY (EARL) v. WELLESLEY* (1866), L. R. 1 Eq. 656; 35 Beav. 635; 14 L. T. 245; 14 W. R. 528; 55 E. R. 1043.

*Annotations*:—*Consd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. *Reid.* *Honywood v. Honwood* (1874), L. R. 18 Eq. 306. *Mentd.* *Brigstocke v. Brigstocke* (1878), 8 Ch. D. 357, C. A.; *Elias v. Snowden Slate Quarries Co.* (1879), 4 App. Cas. 454, H. L.; *Re Kemeys Tynte*, *Kemeys Tynte v. Kemeys Tynte*, [1892] 2 Ch. 211; *Re Maynard's S. E.*, [1899] 2 Ch. 347.

**658. — Capital not income.**—The trustees of a will felled some trees in the woodlands for the purpose of improving the growth of those remaining, but during testator's lifetime the trees had not been thinned:—*Held*: as between tenant for life & remainderman, the produce was capital & not income.—*COWLEY (EARL) v. WELLESLEY* (1866), L. R. 1 Eq. 656; 35 Beav. 635; 14 L. T. 245; 14 W. R. 528; 55 E. R. 1043.

*Annotations*:—*Reid.* *Honywood v. Honwood* (1874), L. R. 18 Eq. 306. *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. *Mentd.* *Brigstocke v. Brigstocke* (1878), 8 Ch. D. 357, C. A.; *Elias v. Snowden Slate Quarries Co.* (1879), 4 App. Cas. 454, H. L.; *Re Kemeys Tynte*, *Kemeys Tynte v. Kemeys Tynte*, [1892] 2 Ch. 211; *Re Maynard's S. E.*, [1899] 2 Ch. 347.

**659. Timber cut in due course of management.**—An equitable tenant for life impeachable for waste cut timber not otherwise than in due course of management. The proceeds had been brought into ct. & the income ordered to be paid to her. On her death her son, being the next tenant for life dispensable for waste, petitioned for payment to him of the timber money in ct.:—*Held*: he was entitled to the money, as he would have been entitled to the trees which produced it.—*LOWNDES v. NORTON* (1877), 6 Ch. D. 139; 46 L. J. Ch. 613; 25 W. R. 826.

**660. Sale under settlement—Timber cut—Application of proceeds.**—Previous to the coming into operation of Settled Land Act, 1882 (c. 38), & during the minority of the tenant for life, the trustees of a settlement, dated in 1856, sold timber under the powers of the settlement, the proceeds being applied under the settlement as money derived from the sale of the estates:—*Held*: the proceeds were applicable under the provisions of the settlement, the infant tenant for life not being impeachable for waste.—*Re NEWCASTLE'S (DUKE) ESTATE* (1883), 31 W. R. 782.

*Annotations*:—*Mentd.* *Constable v. Constable* (1886), 32 Ch. D. 233; *Re Hanbury's S. E.* (1913), 57 Sol. Jo. 646; *Re Rayer*, *Rayer v. Rayer*, [1913] 2 Ch. 210.

**661. Power in settlement to cut timber—Right to proceeds of sale of uncut timber.**—A tenant for life of land settled by a will had power to cut & sell timber, which had begun to decay or which injured the underwood, & to apply the proceeds to his own use. The will also contained a power for the trustees at the direction of the tenant for life to sell the estate or any part thereof. In 1881 a sale was contemplated, but the remainderman brought an action to restrain it, which in 1884 was dismissed with costs. In 1885 the tenant for life sold the estate under Settled Land Acts, 1882 (c. 38) & 1884 (c. 18), one of the conditions of sale being that the purchaser should pay for the timber at a valuation. At the time of the sale there was standing timber on the estate which had begun to decay. The tenant for life claimed to be paid out of the purchase-money so much as represented the decaying timber, & also, under s. 35 of the Act of 1882, one-fourth of the residue of the purchase-money realised by the sale of the timber:—*Held*: the claim failed, on the ground that so long as the timber was standing it formed part of the inheritance, & the tenant for life was not absolutely entitled within s. 21 (9) of the above Act.—*Re LLEWELLIN*, *LLEWELLIN v. WILLIAMS* (1887), 37 Ch. D. 317; 57 L. J. Ch. 316; 58 L. T. 152; 36 W. R. 347; 4 T. L. R. 170.

*Annotation*:—*Mentd.* *Re Smith's S. E.*, [1891] 3 Ch. 65.

**662. Tenant for life without impeachment—Income.**—A tenant for life without impeachment of waste other than wilful waste:—*Held*: entitled to the interest of money produced by sale of timber. Any claim of the tenant for life to cut timber is a question at law only.—*WICKHAM v. WICKHAM* (1815), Coop. G. 288; 19 Ves. 419; 35 E. R. 561.

*Annotations*:—*Distd.* *Butler v. Kynnersley* (1830), 8 L. J. O. S. Ch. 67. *Folld.* *Tooker v. Annesley* (1832), 5 Sim. 235. *Mentd.* *Tollemache v. Tollemache* (1842), 1 Hare, 456; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**663. — Commencement of tenancy.**—An estate was devised to A. for life, with remainder to trustees to preserve, with contingent remainders in tail male to A.'s male issue, with like remainders in favour of B. & his male issue, with like remainders in favour of C. & his male issue, with remainder to D. for life without impeachment of waste, with remainder to his male issue in tail male. A. was in possession from 1818 to Mar. 1855, when he died without issue male; B. was then in possession till May, 1856, when he died without issue male; C. died in B.'s lifetime, & D. entered upon B.'s death, never having had any male issue up to the date of the bill. In 1820 A. cut timber, & the proceeds were invested in the names of the trustees to preserve, & the income paid to A. & the successive tenants for life for the time being. In 1848 A. again cut timber, the proceeds of which were received by him in 1854, & paid to the trustees by A.'s exors. in 1857. In 1856 B. cut timber & received the proceeds, which were, in 1857, paid by his exors. to the trustees. The amounts of the proceeds were agreed, & D. thereupon filed his bill to have all the capital of the timber money paid to him, & also to be paid by the exors. of A. & B. the income of the timber money of 1820, received by them respectively from the trustees. The bill alleged that the heir of testator could not be ascertained:—*Held*: (1) if the timber were rightfully cut, D. had no title to the income before commencement of his own tenancy; (2) if it were wrongfully cut, the remedy, if any, was in the first instance by trover, & afterwards by action for money had & received. *Qu.*: as to the relative rights of the heir & the remainderman for life without impeachment of waste, in respect of timber wrongfully cut by a previous tenant.—*GENT v. HARRISON* (1859),



**Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sect. 10, E. (a), (b) & (c) & F.; sub-sect. 11.]**

John. 517; 29 L. J. Ch. 68; 1 L. T. 128; 5 Jur. N. S. 1285; 8 W. R. 57; 70 E. R. 526.

**Annotations:—****Expld.** Higginbotham v. Hawkins (1872), 7 Ch. App. 677, n. **Refd.** Seagram v. Knight (1867), 2 Ch. App. 628; Lowndes v. Norton (1877), 6 Ch. D. 139.

(b) *Under Order of Court.*

See Nos. 833—849, *post*.

(c) *Wrongfully.*

**664. Tenant for life impeachable for waste.]—**If a tenant for life impeachable for waste cuts timber without leave of the ct., he will never be allowed to derive any advantage from his wrongful act.—**SEAGRAM v. KNIGHT** (1867), 2 Ch. App. 628; 36 L. J. Ch. 918; 17 L. T. 47; 15 W. R. 1152.

**Annotations:—****Mentd.** Dashwood v. Magniac, [1891] 3 Ch. 306, C. A.; **Re** Benzon, Bower v. Ochetwynd (1914), 83 L. J. Ch. 658, C. A.

**665. —.]—**A tenant for life punishable for waste, who cuts timber on lands allotted under an inclosing Act, with power to charge them for the expenses of inclosure, & sells such timber for such expenses, must account for the proceeds to the next taker of the inheritance.—**LEE v. ALSTON** (1789), 1 Ves. 78; 3 Bro. C. C. 37; 30 E. R. 239.

**Annotations:—****Consd.** Parrott v. Palmer (1834), 3 My. & K. 632. **Refd.** Gower v. Eyre (1815), Coop. G. 157.

**666. — Investment of proceeds.]—**B. was tenant for life with remainder to his first & other sons in tail, remainder to O. for life, remainder to her first & other sons in tail with other contingent remainders, with remainder to B. in fee. O. had a child who died almost immediately. Before any other contingent remainderman came in *esse*, B. cut down timber, his own remainder in fee being the next existent estate of inheritance, but afterwards O. had another child:—**Held**: B. could not take advantage of his own wrong by taking the timber so cut, nor was the second child of O. entitled until it could be seen whether B. would have a child, but the produce should be paid into ct. by B. with interest at 4 per cent., & accumulate for the benefit of such person as should appear at the death of B. to have title to it.—**WILLIAMS v. BOLTON (DUKE)** (1784), 1 Cox, Eq. Cas. 72; 29 E. R. 1068.

**Annotations:—****Distd.** Dare v. Hopkins (1788), 2 Cox, Eq. Cas. 110. **Consd.** Butler v. Kynnersley (1830), 8 L. J. O. S. Ch. 67. **Appld.** Tooker v. Annesly (1832), 5 Sim. 235. **Apprvd.** Seagram v. Knight (1867), 2 Ch. App. 628. **Appld.** Birch-Wolfe v. Birch (1870), L. R. 9 Eq. 683. **Mentd.** Frances v. Wigzell (1816), 1 Madd. 256; Day v. Markham (1904), 6 W. C. C. 115.

**667. —.]—**A tenant for life committing waste by cutting timber can gain no advantage from his wrongful act, but the produce is invested & accumulated for the benefit of the first estate of inheritance.—**BATEMAN v. HOTCHKIN** (1862), 31 Beav. 486; 32 L. J. Ch. 6; 54 E. R. 1227.

**Annotations:—****Refd.** Bagot v. Bagot, Legge v. Legge (1863), 12 W. R. 35. **Mentd.** Dashwood v. Magniac, [1891] 3 Ch. 306, C. A.

**668. — Income.]—****BAGOT v. BAGOT, E v. LEGGE**, No. 656, *ante*.

**669. — Lands incumbered with debts—Decree as to proceeds.]—**A. devised lands incumbered with debts to B. for life, remainder to C. in fee. B. cut down timber from the estate. B. was decreed to pay two-fifths of the debts, & C. the remaining three-fifths, & B. to account for the timber which he had cut, & this to be taken as part of the three-fifths, which the remainderman was to pay.—**JAMES v. HALES** (1692), 2 Vern. 267; 23 E. R. 773.

**670. Tenant unimpeachable for waste—Fiduciary position—Collusive agreement.]—**G. being seised in fee by will devised lands to B., father of pltf., for

ninety-nine years, if he should so long live, without impeachment of waste, voluntary waste excepted, on condition he took the name of G., & from & after determination of that estate, to trustees to preserve contingent remainders, with remainder to his first & other sons in tail, with other mesne remainders over which determined soon after testator's death, with an ultimate remainder to C., deft.'s grandfather. Pltf.'s father entered & took the name of G. He made through his attorney an agreement with C. that there should be an inspection & marking of timber fit to be cut, & that the parties should agree which marked trees should be cut & sold. The proceeds of sale were to be applied in payment of testator's debts & the residue was to be divided into equal moieties between pltf.'s father & C.; it was provided also that the death of pltf.'s father without issue male or having issue male should make no alteration in the terms. In pursuance of this agreement timber was cut, in respect of which C. received £1,000. Ten years afterwards pltf. was born; on his attaining twenty-one years of age he disentailed the estate & three years afterwards sued C. for an account of the sum so received by him. C. died pending suit which was revived against his exors., defts.:—**Held**: (1) pltf.'s father was in a fiduciary position as regarded pltf. to see that the timber was preserved; (2) the timber not being applicable under the will for payment of testator's debts, the stipulations in the agreement were collusive & fraudulent as against pltf.; (3) the value of the timber must be secured & laid out in land for the benefit of pltf.; (4) the delay of thirty-four years was not laches to be imputed to pltf.; (5) the disentail by pltf. did not affect his right; (6) the right to an account for the cutting did not die with the person of C.—**GARTH v. COTTON** (1753), 1 Ves. Sen. 524, 546; 3 Atk. 751; Dick. 183; 27 E. R. 1182, 1196.

**Annotations:—****Appld.** (6) Lansdowne v. Lansdowne (1815), 1 Madd. 116. **Consd.** Birch-Wolfe v. Birch (1870), L. R. 9 Eq. 683; (6) Phillips v. Homfray (1883), 24 Ch. D. 439, C. A. **Refd.** Stansfield v. Habergham (1804), 10 Ves. 273; (6) Sawyer v. Goodwin (1867), 36 L. J. Ch. 578; **Re** Cavendish, Cavendish v. Mundy, [1877] W. N. 198; (1) A.-G. v. Glossop, [1907] 1 K. B. 163, C. A. **Mentd.** Paget v. Gee (1753), 3 Keny. 31; Parrott v. Palmer (1834), 3 My. & K. 632; Johnstone v. Hall (1856), 2 K. & J. 414; Bagot v. Bagot, Legge v. Legge (1863), 32 Beav. 509; Phillips v. Homfray, [1892] 1 Ch. 465, C. A.

*F. Rights in respect of Windfalls.*

**671. First estate of inheritance.]—**The right to timber fallen by tempest is in those entitled to the first estate of inheritance at the time of severance.—**BEWICK v. WHITFIELD** (1734), 3 P. Wms. 267; 24 E. R. 1058.

**Annotations:—****Consd.** *Re* Barrington, Gamlen v. Lyon (1886), 33 Ch. D. 523. **Mentd.** Garth v. Cotton (1753), 3 Atk. 751; Lee v. Alston (1789), 1 Ves. 78; Powlett v. Bolton (1797), 3 Ves. 374; Parrott v. Palmer (1834), 3 My. & K. 632; Daly v. Beckett (1857), 24 Beav. 114; Seagram v. Knight (1867), 2 Ch. App. 628; Dashwood v. Magniac, [1891] 3 Ch. 306, C. A.; White v. Summers, [1908] 2 Ch. 256.

**672. —.]—**Windfalls of timber go to the owner of the reversion, though not if they are dotards & not timber.—**CUMBERLAND'S (COUNTESS) CASE** (1610), Moore, K. B. 812; 72 E. R. 922.

**Annotation:—****Refd.** Channon v. Patch (1826), 5 B. & C. 897.

**673. —.]—**At W. great quantities of timber were blown down in a storm, & though there were several tenants for life, remainder to their first & every other son in tail, yet, these having no son born, the timber was decreed to belong to the first remainderman in tail.—**NEWCASTLE (DUKE) v. VANE** (undated), cited 2 P. Wms. 241.

**674. — First vested estate of inheritance.]—****Semble**: timber blown down or cut by a stranger vests in the person having the first vested estate of

inheritance.—*ASTON v. ASTON* (1750), 1 Ves. Sen. 396; *Belt's Sup.* 184; 27 E. R. 1103.

*Annotations*:—*Mentd.* *Chamberlayne v. Dummer* (1782), 1 Bro. C. C. 166; *Stackhouse v. Barnston* (1805), 10 Ves. 453; *Halliwell v. Phillips* (1858), 6 W. R. 408.

**675. S. P. FERRAND v. WILSON** (1845), 4 Hare, 344; 15 L. J. Ch. 41; 9 Jur. 860.

*Annotations*:—*Refd.* *Kekewich v. Marker* (1851), 3 Mac. & G. 311. *Mentd.* *Dungannon v. Smith* (1845-6), 12 Cl. & Fin. 546, H. L.; *Briggs v. Oxford* (1852), 1 De G. M. & G. 363; *Langdale v. Briggs* (1856), 8 De G. M. & G. 391; *Carroll v. Graham* (1865), 11 Jur. N. S. 1012; *Birmingham Canal Co. v. Cartwright* (1879), 11 Ch. D. 421; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**676. —**—Where timber is cut down or blown down the property in it belongs to the owner of the first estate of inheritance.—*HONYWOOD v. HONYWOOD* (1874), L. R. 18 Eq. 306; 43 L. J. Ch. 652; 30 L. T. 671; 22 W. R. 749.

*Annotations*:—*Mentd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.; *Pardoe v. Pardoe* (1900), 82 L. T. 547.

**677. Tenant for life impeachable.**—*Semble*: if a tenant for life impeachable for waste takes timber blown down by the wind, an action of trover will lie against the tenant for life by the owner of the first estate of inheritance.—*BOWLES' CASE* (1615), 11 Co. Rep. 79b; 77 E. R. 1253; *sub nom.* *BOWLES v. BERRIE*, 1 Roll. Rep. 177.

*Annotations*:—*Mentd.* *Abraham v. Bubb* (1680), 2 Freem. Ch. 53; *Bamfield v. Popham* (1701-3), Holt, K. B. 233; *Carrick v. Errington* (1726), Mos. 8; *Cunningham v. Moody* (1748), 1 Ves. Sen. 174; *Aston v. Aston* (1749), 1 Ves. Sen. 264; *Doe d. Willis v. Martin* (1790), 4 Term Rep. 39; *A.-G. v. Marlborough* (1818), 3 Madd. 498; *Boydell v. M'Michael* (1834), 3 Tyr. 974; *Chambers v. Taylor* (1837), 2 My. & Cr. 376.

**678. —**—*Thinnings, etc.*—Where timber is blown down a tenant for life impeachable for waste is absolutely entitled to such parts as he would be entitled to cut himself as thinnings, etc., & also to the interest produced by the investment of the produce of the rest.—*BATEMAN v. HOTCHKIN* (1862), 31 Beav. 486; 32 L. J. Ch. 6; 54 E. R. 1227.

*Annotations*:—*Expld.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. *Refd.* *Bagot v. Bagot*, *Legge v. Legge* (1863), 12 W. R. 35.

**679. Tenant for life unimpeachable.**—When timber trees are blown down or severed from the inheritance, either by act of the party or of the law, & become chattels, the whole property of them is in the tenant for life without impeachment of waste.—*BOWLES' CASE* (1615), 11 Co. Rep. 79b; 77 E. R. 1253; *sub nom.* *BOWLES v. BERRIE*, 1 Roll. Rep. 177.

*Annotations*:—*Consd.* *Abraham v. Bubb* (1680), 2 Freem. Ch. 53; *Aston v. Aston* (1749), 1 Ves. Sen. 264. *Refd.* *A.-G. v. Marlborough* (1818), 3 Madd. 498. *Mentd.* *Bamfield v. Popham* (1701-3), Holt, K. B. 233; *Carrick v. Errington* (1726), Mos. 8; *Cunningham v. Moody* (1748), 1 Ves. Sen. 174; *Doe d. Willis v. Martin* (1790), 4 Term Rep. 39; *Boydell v. M'Michael* (1834), 3 Tyr. 974; *Chambers v. Taylor* (1837), 2 My. & Cr. 376.

**680. Proceeds to be invested.**—Notwithstanding the popular notion to the contrary, the proceeds of windfalls of timber must be invested & dealt with as part of the *corpus* of the rented estate.—*BAGOT v. BAGOT*, *LEGGE v. LEGGE* (1863), 32 Beav. 509; 2 New Rep. 297; 33 L. J. Ch. 116; 9 L. T. 217; 9 Jur. N. S. 1022; 12 W. R. 35; 55 E. R. 200.

*Annotations*:—*Refd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.; *Re Cavendish*, *Cavendish v. Mundy*, [1877] W. N. 198; *Ellis v. Snowden Slate Quarries Co.* (1879), 4 App. Cas. 454. *Mentd.* *Re Barrington*, *Gamlen v. Lyon* (1886), 33 Ch. D. 523; *Re Maynard's S. E.*, [1899] 2 Ch. 347.

**681. —**—*Larch trees—Sale by trustees—Application of proceeds.*—An estate which comprised larch plantations was settled as personalty by the medium of trustees for sale. The trustees had power to pay all outgoings, & to determine what

part of the property was *corpus* & what income. A large number of trees were blown down by extraordinary gales, & the plantations were so much injured that it became necessary to clear & replant the ground. The income from the plantations was derived from thinnings, & varied considerably according to the age of the trees. The trees blown down were about thirty-five years old, & in ordinary course would have come to full maturity in fifteen or twenty years, & they would then have been cut down & the ground cleared & replanted:—*Held*: (1) the proceeds of the sale of the larch trees blown down & felled by reason of the gales did not belong to the equitable tenant for life, but must be invested by the trustees; (2) the ct., having regard to the average income which would have been derived from the plantations if no gales had occurred, fixed an annual sum to be paid to the tenant for life out of the income, & if necessary, the capital of the invested fund, subject to the right of the trustees to have recourse to the fund in order to replant the plantations.—*Re HARRISON'S TRUSTS*, *HARRISON v. HARRISON* (1884), 28 Ch. D. 220; 54 L. J. Ch. 617; 52 L. T. 204; 33 W. R. 240; 1 T. L. R. 167, C. A.

*Annotation*:—*Consd.* *Re Terry*, *Terry v. Terry* (1918), 87 L. J. Ch. 577, C. A.

#### SUB-SECT. 11.—TENANTS IN COMMON.

**682. Rights inter se—Cutting down trees.**—One of several tenants in common of a tree may maintain an action against the others for cutting it down.—*WATERMAN v. SOPER* (1698), 1 Ld. Raym. 737; 91 E. R. 1393.

*Annotation*:—*Refd.* *Holder v. Coates* (1827), Mood. & M. 112.

**683. Co-heirs.**—Pltf. & deft. were co-heirs-at-law to an intestate. Deft. got into possession by virtue of an ejectment, cut down some timber & threatened to cut down the rest. Pltf. sued for an injunction to stay waste:—*Held*: (1) deft. could not be stopped from cutting timber; (2) the only remedy pltf. had was to get a partition.—*GOODWYN v. SPRAY* (1786), 2 Dick. 667; 21 E. R. 431.

*Annotations*:—*Consd.* *Twort v. Twort* (1809), 16 Ves. 128. *Refd.* *Smallman v. Onions* (1792), 3 Bro. C. C. 621; *Wilkinson v. Haygarth* (1847), 12 Q. B. 837.

**684. Injunction to restrain cutting.**—An injunction to stay cutting timber, when pltf. is tenant in common with deft. who is not possessed, will in general be refused. Where pltf. & deft. are equitable tenants in common, & the person committing the waste has no title to the possession & is insolvent, the injunction will be granted.—*SMALLMAN v. ONIONS* (1792), 3 Bro. C. C. 621; 29 E. R. 733.

**685. —**—*Seizure by other.*—A., one of two tenants in common, felled trees & laid them on his own land. B., the other, entered & carried them away:—*Held*: (1) trespass lay against B. because the taking away of the trees by A. was not wrongful; (2) B. might have seized them before they were carried off the land held in common.—*POLLYES CASE* (1620), Godb. 282; 78 E. R. 165.

**686. —**—*Destruction by one restrained.*—An estate was settled in undivided thirds on each of three persons for life without impeachment of waste, with remainders over. One of them cut coppice wood in the wrong months for cutting:—*Held*: (1) an interim injunction would be granted against cutting saplings, or any timber trees or underwood at unseasonable times, on the ground



## AGRICULTURE.

**Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sects. 11, 12, 13 & 14.]**

that that amounted to destruction; (2) otherwise there would be no ground for preventing waste by one tenant in common at the suit of another.—**HOLE v. THOMAS** (1802), 7 Ves. 589; 32 E. R. 237.

**Annotations:—****Consd.** Twort v. Twort (1809), 16 Ves. 128.  
**Distd.** Durham & Sunderland Ry. Co. v. Wawn (1840),  
4 Jur. 764.

687. .]—In a suit for partition between tenants in common, pltf., tenant in fee of one-fourth & entitled to one-fourth in remainder, sued for an injunction to restrain defts. against cutting timber & ploughing ancient meadow. One of defts. was father of pltf. & occupied the premises with consent of pltf. & other deft.:—*Held*: an injunction would be granted on the ground that the father was occupying tenant of pltf. *Semle*: otherwise no injunction would be granted as between tenants in common except in a case of destruction.—*TWORT v. TWORT* (1809), 16 Ves. 128 ; 33 E. R. 932.

*Annotation* :—**Distd.** Durham & Sunderland Ry. Co. v. Wawn (1840), 4 Jur. 764.

-].—A tenant was in possession of lands & had cut trees. Plffs. claimed to be equitable tenants in common with the tenant:—*Held*: (1) deft. was only managing the property according to the proper course of husbandry, not doing that which was destructive to the property, & the ct. would not in such a case interfere between her & the other tenants in common; (2) had she been doing that which would be destructive to the property, the ct. would have granted an injunction.—*ARTHUR v. LAMB* (1865), 2 Drew. & Sm. 428; 12 L. T. 338; 62 E. R. 683.

**689. ——— One tenant of other.]**—If A. & B. are tenants in common of a wood, & A. leases his share to B. for a term, & B. cuts down trees & commits waste, A. will be liable for half the waste.—ANON. (1563), Moore, K. B. 71 ; 72 E. R. 448.

**690.** ————.]—One tenant in common cannot maintain an action on the case in nature of waste against another tenant in common (in possession of the whole, having a demise of the moiety from the first) for cutting down trees of a proper age & growth for being cut.—*MARTYN v. KNOLLYS* (1799), 8 Term Rep. 145 ; 101 E. R. 1313.

*Annotations:—***Apprvd.** Fennings v. Grenville (1808), 1 Taunt. 241. **Apld.** Jacobs v. Seward (1869), 1 L. R. 4 C. P. 328.

### SUB-SECT. 12.—TENANT IN DOWER.

**691. Rights of dowress.]**—A testator died seised of certain estates, out of which his widow was held entitled to dower; the heir of testator entered into possession of the estates & cut down timber, the proceeds of which were paid into ct. :—*Held*: the heir had no right to denude the estate of timber as against the dowress, & the widow was entitled to one-third of the produce of the timber for life.—**BISHOP v. BISHOP** (1841), 10 L. J. Ch. 302; 5 Jur. 931.

**692.** —.—.]—In the administration by the ct. of an intestate's estates, his widow, as receiver & under an order of ct., felled poles & small timber on the estate & accounted for the proceeds of sale in her accounts. It was admitted that she was entitled in respect of her dower to one-third of the yearly income which had arisen or might arise from the purchase-money.—**DICKIN v. HAMER** (1860), 1 Drew. & Sm. 284 ; 20 L. J. Ch. 778 ; 2 L. T. 276 ; 62 E. R. 387.

### SUB-SECT. 13.—TENANTS IN TAIL.

**698. Right in general—Infant.]—**A guardian of a tenant in tail cut wood & timber on settled estate & converted it into personal estate:—*Held*: the remainderman not entitled to an injunction to stay the waste.—**SAVILLE (SAVIL) v. SAVILLE (SAVIL)** (1727), cited in Amb. 371, n. & in 2 Eq. Cas. Abr. 704; 27 E. R. 246.

**Annotation** :— **Refd.** *Glenorchy v. Bosville* (1733), *Cas. temp.* Talb. 3.

**694.** ———.]—A guardian of a tenant in tail cut wood & timber on settled estate & converted it into personal estate :—*Held* : the remainderman not entitled to an injunction to stay the waste.—*HUSSEY v. HUSSEY* (1820), 5 Madd. 44 ; 56 E. R. 811.

**Annotations:—****Mentd.** Tooker v. Annesley (1832), 5 Sim. 235; Tollemache v. Tollemache (1842), 1 Hare, 456; Ferrand v. Wilson (1845), 4 Hare, 344; Scagram v. Knight (1867), 2 Ch. App. 628.

**695. Right to timber when cut.]**—A stranger cut trees on lands of which deft. was tenant in tail, & sold them to pltf., who lost them. Deft. found & took possession of them. In an action of trover against him, deft. pleaded these facts :—*Held* : pltf. could not reply *de injuriâ sua propria*.—CANTERBURY (ARCHBP.) *v.* KEMP (1597), Cro. Eliz. 539 ; 78 E. R. 786.

**Annotation :—****Dbtd.** Cockerill v. Armstrong (1738), Willcs. 19.

**696. Sale by tenant in tail—Effect.]**—If a tenant in tail sells the trees to another, they are a chattel in the vendee & his exors. shall have them, but if the tenant in tail dies before severance, they are parcel of the inheritance & go with it for the benefit of the issue in tail, & the vendee cannot take them.—**LIFORD'S CASE** (1614), 11 Co. Rep. 46b ; 77 E. R. 1206.

*Annotations :—***Refd.** Bowles' Case (1615), 11 Co. Rep. 77b. **Mentd.** *Bradly v. Strachy* (1740), Barn. Ch. 399; *A.-G. v. Duplessis* (1752), Park. 144; *Goodtitle d. Paul v. Paul* (1760), 2 Burr. 1089; *Ford v. Raester* (1815), 4 M. & S. 130; *Garland v. Carlisle* (1837), 11 Bl. 421; *Hellawell v. Eastwood* (1851), 6 Exch. 295; *Elliott v. Bishop* (1854), 10 Exch. 496; *Burnett v. Guildford* (1855), 11 Exch. 19; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91; *Delacherais v. Delacherais* (1864), 4 New Rep. 501, H. L.; *Goodhardt v. Hyett* (1883), 25 Ch. D. 182.

**697. Rights unaffected by collateral powers.]**—A private Act empowered trustees, with the consent of persons in possession or entitled to rents & profits of settled estates, to cut timber, the produce to be laid out in the purchase of other lands to be settled to the same uses. The first tenant in tail being a lunatic, timber was cut & sold during his lunacy by authority of the committee of his estate, who was also a trustee under the private Act:—*Held*: (1) the Act did not affect the rights of the tenant in tail to cut at common law; (2) the produce of the timber was to be taken as personal estate & belonged to the lunatic's estate, & not to the heir-at-law.—*Ex p.* CLAYTON (1830), 1 Russ. & M. 639; 39 E. R. 143.

**698.** —.]—A will, after restraining each tenant for life from cutting timber, gave power to the exors. at any time afterwards, until some person entitled in possession to an estate tail should attain twenty-one years, to cut timber & invest the proceeds in the purchase of land to be settled to the uses of the will:—*Held*: whether the power was imperative or permissive only, it was void in so far as it was in derogation of the rights of the infant tenant in tail, as being within the rule against perpetuities.—*FERRAND v. WILSON* (1845), 4 Hare, 344; 15 L. J. Ch. 41; 9 Jur. 860; 67 E. R. 680.

**Annotations :—** **Distd.** *Kekewich v. Marker* (1851), 3 Mac. & G. 311; *Briggs v. Oxford* (1852), 1 De G. M. & G. 363. **Consd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. **Refd.** *Dungannon v. Smith* (1845-6), 12 Cl. & Fin. 546,



H. L. **Mentd.** Langdale v. Briggs (1856), 8 De G. M. & G. 391; Carroll v. Graham (1865), 11 Jur. N. S. 1012; Birmingham Canal Co. v. Cartwright (1879), 11 Ch. D. 421.

**699. After possibility of issue extinct.]—Semble :** a tenant in tail after possibility, who was originally tenant in tail before the death of her spouse, is unimpeachable for waste.—**BOWLES' CASE** (1615), 11 Co. Rep. 79b.; 77 E. R. 1253; *sub nom.* **BOWLES v. BERRIE**, 1 Roll. Rep. 177.

**Annotations :—****Distd.** Williams v. Williams (1808), 15 Ves. 419. **Consd.** A.-G. v. Marlborough (1818), 3 Madd. 498. **Refd.** Abraham v. Bubb (1680), 2 Freem. Ch. 53. **Mentd.** Bamfield v. Popham (1701-3), Holt, K. B. 233; Carrick v. Errington (1726), Mos. 8; Aston v. Aston (1749), 1 Ves. Sen. 264; Boydell v. M'Michael (1834), 3 Tyr. 974; Chambers v. Taylor (1837), 2 My. & Cr. 376.

**700. —.]—An injunction to restrain waste will not be granted where the tenant actually has a "jus in arboribus"; it is otherwise where he has only "impunitatem."** An injunction may be granted against a tenant in tail after possibility of issue extinct.—**SKELTON v. SKELTON** (1677), 2 Swan. 170, n.; 36 E. R. 579.

**701. S. P. GARTH v. COTTON** (1753), 1 Ves. Sen. 524, 546; Dick. 183; 3 Atk. 751; 27 E. R. 1182, 1196.

**Annotations :—****Appld.** Paget v. Gee (1753), Amb 807. **Consd.** Williams v. Williams (1808), 15 Ves. 419. **Mentd.** Stansfield v. Habergam (1804), 10 Ves. 273; Lansdowne v. Lansdowne (1815), 1 Madd. 116; Parrott v. Palmer (1834), 3 My. & K. 632; Johnstone v. Hall (1856), 2 K. & J. 414; Vincent v. Spicer (1856), 22 Beav. 380; Turner v. Wright (1860), John. 710; Bagot v. Bagot, Legge v. Legge (1863), 32 Beav. 509; Sawyer v. Goodwin (1867), 36 L. J. Ch. 578; Birch-Wolfe v. Birch (1870), L. R. 9 Eq. 683; *Re* Cavendish, Cavendish v. Mundy, [1877] W. N. 198; Phillips v. Homfray (1883), 24 Ch. D. 439, C. A.; Phillips v. Homfray, [1892] 1 Ch. 465, C. A.; A.-G. v. Glossop, [1907] 1 K. B. 163, C. A.

**702. —.]—A tenant in tail after possibility of issue extinct may be enjoined from committing waste in cutting timber. Only waste which might deface the seat was restrained; trees marked out by the ancestor for payment of his debts were allowed to be felled.**—**ABRAHAM (ABRAHAM) v. BUBB** (1680), 2 Swan. 172; 2 Show. 69; Freem. Ch. 53; 2 Eq. Cas. Abr. 757; 36 E. R. 581.

**Annotations :—****Consd.** Garth v. Cotton (1753), 3 Atk. 751; Williams v. Williams (1808), 15 Ves. 419. **Refd.** Aston v. Aston (1749), 1 Ves. Sen. 264.

**703. —.]—On a motion for an injunction to restrain waste in cutting timber against a jointress tenant in tail after possibility extinct, she was restrained from wilful waste in the site of the house.**—**COOKE v. WHALEY (WINFORD)** (1701), 1 Eq. Cas. Abr. 221, pl. 2, 400, pl. 5; 21 E. R. 1004, 1132.

**Annotations :—****Consd.** Aston v. Aston (1749), 1 Ves. Sen.

**704. —.]—A woman tenant in tail after possibility of issue extinct was restrained from committing waste in cutting down trees, which stood in defence of the house, & fruit trees in the garden; but for some turrets of trees, which stood a land's length or two from the house, the ct. would grant no injunction, because she had by law power to commit waste, & yet notwithstanding, she was restrained in the particulars aforesaid because that seemed to be malicious.**—**ANON.** (1704), Freem. Ch. 278; 22 E. R. 1209.

**705. —.]—By settlement before marriage the husband's estate was conveyed to trustees to the use of the husband for life *sans* waste, remainder to trustees to preserve contingent remainders, remainder to the use of the wife for life for her jointure & in bar of dower, remainder to the first & other sons of the marriage in tail male, remainder to the first & other daughters in tail male, remainders to the heirs of the body of the husband & wife, remainder to the right heirs of the husband. The wife survived the husband, & had no issue, & after possibility of issue by the husband extinct :—**

**Held :** (1) she was tenant in tail after possibility, etc.; (2) she was unimpeachable for waste, & entitled to the property of the timber when cut by her.—**WILLIAMS v. WILLIAMS** (1810), 12 East, 209; 104 E. R. 81.

**706. Tenant in tail restrained from barring issue.]—Held :** the Duke of Marlborough for the time being, was, under 5 Anne, c. 3, bound to maintain Blenheim House, & was not, therefore, at liberty to cut trees, which were essential to its ornament or shelter.

A tenant in tail, restrained by stat. from barring issue & those in remainder, is not, for that reason, within the principle of equitable waste.—**A.-G. v. MARLBOROUGH** (1816), 3 Madd. 498; 56 E. R. 588.

**Annotations :—****Consd.** Turner v. Wright (1860), 2 De G. F. & J. 231. **Refd.** *Re* Marlborough's Parliamentary Estates (1891), 8 T. L. R. 179. **Mentd.** *Re* Bolton Estates, Russell v. Meyrick, [1903] 2 Ch. 461, C. A.

**707. Express restriction on cutting on all tenants in tail is invalid.]—MILDMAY v. MILDMAY**, No. 819, *post*.

**708. Restriction on cutting timber for specified period determined by barring entail.]—A testator bequeathed a sum of stock upon trust during a specified period to lay out the dividends in repairing the houses on two farms, it being his desire that on no account should the timber of such farms be cut down during a specified period, on pain that the person so cutting such timber should lose all interest in the estates as if he were dead, & upon trust to pay the surplus of the dividends equally among the persons for the time being in possession of the estates under his will during continuance of the trust, & immediately after expiration thereof to transfer the fund in moieties to persons in possession of the farms respectively. Testator then devised each of the farms to the trustees in strict settlement. The tenants for life & their eldest sons barred the entail in the farms & resettled same, & applied for payment out of ct. of the fund, before the end of the period :—**Held :** (1) the restriction against cutting timber had been determined by barring the entail; (2) the fund being intended for the benefit of the persons barring the entail, the period for enjoyment of the capital of the fund had been accelerated by barring the entail.—*Re* COLSON'S TRUSTS (1853), Kay, 133; 2 Eq. Rep. 257; 23 L. J. Ch. 155; 2 W. R. 111; 69 E. R. 57.**

**709. Malicious waste.]—Defts. were tenants in tail in possession & pltf. tenant in tail in remainder of a settled estate. On an application by pltf. showing that defts. were stripping the land of trees for the supposed purpose of destroying the value of pltf.'s property, an injunction was granted to restrain the cutting of timber or timberlike trees on the estate.**—**NEALE v. CRIPPS** (1858), 4 K. & J. 472; 32 L. T. O. S. 251; 70 E. R. 197.

**Annotation :—****Consd.** Lowndes v. Bettie (1864), 3 New Rep. 409.

#### SUB-SECT. 14.—TENANTS OF TIMBER ESTATES.

**710. Timber estates—Exception to general rule.]—To the rule that a tenant for life impeachable for waste cannot cut down timber trees there is an exception in favour of owners of timber estates, that is, estates which are cultivated merely for the produce of saleable timber & where the timber is cut periodically (JESSEL, M.R.).—**HONYWOOD v. HONYWOOD** (1874), L. R. 18 Eq. 306; 43 L. J. Ch. 652; 30 L. T. 671; 22 W. R. 749.**

**Annotations :—****Consd.** Dashwood v. Magniac, [1891] 3 Ch. 306, C. A. If his [SIR GEORGE JESSEL'S] observations are confined to estates, the trees on which, though timber, may by virtue of a local usage be cut periodically when grown in woods, with a view to ensure a succession of

**Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sects. 14 & 15.]**

timber & to preserve such woods, I see no reason to dissent from him; but if he intended to go further, he may have gone too far (LINDLEY, L.J.); *Pardoe v. Pardoe* (1900), 82 L. T. 547.

**711. Right to cut in due management.]—**As between tenant for life & remainderman in a question of waste of an estate, which was almost all woodland:—*Held*: the tenant for life entitled to cut timber fit & proper to be cut & felled in the course of a due & husbandlike management of the woods.—*BRIDGES v. STEPHENS* (1817), 2 Swan. 170; 36 E. R. 575.

**712. Periodical cutting.]—**A tenant for life under a will of an estate, upon which were extensive woods consisting principally of beech trees, during her life annually cut & sold a large quantity of the beech trees, together with a small quantity of oak, elm, & ash growing in the woods, & applied the proceeds to her own use. The tenant for life had no express power to cut timber except for repairs, & by the custom of the county beech was timber. It was proved that the mode of cutting adopted by the tenant for life was in accordance with local usage & with the practice of testator & his predecessors:—*Held* (KAY, L.J., *diss.*): the tenant for life had not committed waste in cutting the timber, & was entitled to the proceeds.—*DASHWOOD v. MAGNIAC*, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811; 7 T. L. R. 629, C. A.

*Annotations*:—*Consd.* *Pardoe v. Pardoe* (1900), 82 L. T. 547. *Expld. & Apld.* *Re Trevor-Batye's Settlement*, Bull v. Trevor-Batye, [1912] 2 Ch. 339. *Mentd.* *Re Chaytor*, [1900] 2 Ch. 804; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A.; *Re Hall*, Hall v. Hall, [1916] 2 Ch. 488.

**713. — Rents & profits.]—**By a marriage settlement made in 1902 personal property of the wife was settled upon usual trusts, the wife taking the first life interest, & power was given to the trustees to sell any part of the trust premises & invest the proceeds in purchase of freehold lands to be conveyed to the trustees upon trust for sale, & until sale the trustees were to pay rents & profits to the person to whom the income of the trust premises invested in the purchase thereof would have been payable, if such investment had not been made. In 1904 the trustees exercised this power & purchased an estate in the county of Buckinghamshire, having a large number of beech trees on it. In the proper management of the estate the trustees had recently cut & sold a number of beech trees:—*Held*: the proceeds of sale arising from periodical cuttings, after deducting the expense of replanting & fencing incurred in a proper course of management, were not "profits" of the estate within the settlement, & payable to the tenant for life.—*Re TREVOR-BATYE'S SETTLEMENT*, BULL v. TREVOR-BATYE, [1912] 2 Ch. 339; 81 L. J. Ch. 646; 107 L. T. 12; 56 Sol. Jo. 615.

**SUB-SECT. 15.—TRUSTEES AND EQUITABLE TENANTS FOR LIFE, ETC.**

**714. Interest passing—Right to cut.]—**A testator devised his real estates to trustees in fee in trust for certain persons in succession, & bequeathed his personal estate to the trustees in trust for certain other persons in succession. He directed that the timber or wood which should be upon his real estates should be from time to time made use of for repairing the houses thereon or otherwise for the benefit & advantage of his estates, or that same should be sold & the proceeds applied in the same manner as his personal estate:—*Held*: (1) the devise of the real estates carried the underwood; (2) the trustees, leaving sufficient timber on the estate for re-

pairs, might cut down such timber as was of proper growth & not standing for shelter or ornament, but were not entitled to cut underwood.—*BUTLER v. BORTON* (1820), 5 Madd. 40; 56 E. R. 809.

*Annotations*:—*Consd.* *Silvester v. Bradley* (1842), 13 Sim. 75. *Mentd.* *Hughes v. Eades* (1842), 11 L. J. Ch. 297.

**715. — — — When it ceases.]—**In the circumstances of *Butler v. Borton* (No. 714, *ante*):—*Held*: the direction or trust respecting timber & wood on the estates was not perpetual, but ceased on the inheritance vesting in possession in adult persons.—*SILVESTER v. BRADLEY* (1842), 13 Sim. 75; 11 L. J. Ch. 365; 60 E. R. 29.

**716. Trust to raise fund—Onus of charge & interest—Tenant for life & remainderman.]—**Limitation of estates to successive tenants for life, with remainders in tail, subject to a term vested in trustees, the trusts of which were, in the first place, by cutting & selling timber of full growth, or by demising, mtgng., or selling the estate (except the mansion house) for all or any part of the term, or by all or any of the ways or any other reasonable ways, to raise £30,000, & pay same to the parties therein mentioned:—*Held*: (1) as between the tenants for life not impeachable for waste & the remaindermen, the *corpus* of the estate must bear the charge; (2) the interest of the charge must be paid by the tenant for life in possession, who, in the meantime, was entitled (as part of the profits of the estate) to the timber, which, as such tenant for life, he had a right to cut.

The trustees of the term in such a case have not an unlimited discretion to raise the charge in such manner as they may think fit; & it does not follow that, because their discretion in the mode of raising the charge has been honestly exercised, the charge will be left to be finally borne by those parties upon whom their act might chance to throw it. To a bill by one of the successive tenants for life under the limitation against the trustees of the term, & the tenant for life in possession, to restrain the trustees from raising the £30,000 by sale or mtge. of the estate until the timber of full growth (of which it was alleged that a large quantity was standing on the estate) had been cut & applied towards that purpose, demurrers were allowed.—*MARKER v. KEKEWICH* (1850), 8 Hare, 291; 19 L. J. Ch. 492; 14 Jur. 544; 68 E. R. 372.

*Annotation*:—*Consd.* *Re Bute*, Bute v. Ryder (1884), 27 Ch. D. 196.

**717. — — — Discretionary power — Settlement.]—**By a settlement certain estates, consisting of a mansion house & other premises, were limited to the use of trustees for a term of one thousand years without impeachment of waste, save only the cutting of ornamental timber, & subject to the term to the use of the settlor for life without impeachment of waste save as aforesaid, then to the use of A. B. & his assigns for life without impeachment of waste save as aforesaid, with divers limitations over. The trusts of the term were, in the first place, by cutting, felling, selling, & converting into money all or any part or parts of the timber standing & growing on the lands, which should be of full & ripe growth & not ornamental to the mansion or pleasure grounds attached thereto or any of the views or prospects of same, of which timber it was declared that enough of the most ornamental should always remain to preserve the beauty of the place unimpaired, or by demising, mtgng., or selling the premises comprised in the term or any part or parts thereof, save & except the mansion house & certain other premises therein mentioned, or by all or any of the ways & means to levy & raise the sum of £10,000 for the settlor, & after the death of the settlor in like manner to levy & raise two sums of £10,000 each for other parties:—*Held*: (1) the



trustees had a discretionary power to enter on the estates & cut fit & proper timber, & apply the proceeds in discharge of the sums directed to be raised; (2) the ct. would protect them in the exercise of that power, there being an absence of all *mala fides*, or of any wanton or unreasonable exercise of discretion; (3) an injunction was granted at the suit of the trustees restraining A. B., the tenant for life in possession, from cutting the timber on the estates on the ground that his doing so would interfere with the discretionary power vested in the trustees.

Exemption from liability to waste annexed to a life estate is a special power in the tenant for life to appropriate part of the inheritance, & in this case:—*Held*: it was by the terms of the settlement made subordinate to the discretionary power conferred on the trustees.—*KEKEWICH v. MARKER* (1851), 3 Mac. & G. 311; 21 L. J. Ch. 182; 17 L. T. O. S. 193; 15 Jur. 687; 42 E. R. 280, L.C.

*Annotations*:—*Reid*. *Briggs v. Oxford* (1851), 5 De G. & Sm. 156. *Mentd.* *Dashwood v. Magniac* (1891), 60 L. J. Ch. 809, C. A.

**718. — Will—Sale.]**—A testator by his will devised all his real estates to trustees for ninety-nine years without impeachment of waste, & subject thereto, to the use of his son for life without impeachment of waste, with remainder to the use of his granddaughter for life without impeachment of waste, with remainder to her first & other sons in tail, etc. The trustees of the term were, in the event of his personal estate being deficient, to raise money to pay debts & legacies. The will contained an express provision against cutting down any timber on the estates, except for necessary repairs, until the granddaughter should attain twenty-one, when the trustees were empowered to cut such timber “as they shall think fit,” & to sell & pay the proceeds to the granddaughter. The son entered into possession & died before the granddaughter attained twenty-one. She then became tenant for life. Some time afterwards, after she attained her majority, the trustees sold the term by auction in order to pay debts. It was stated in one of the conditions of sale that the estate was sold subject to any rights under the provisions in the will:—*Held*: (1) the will created no obligatory trust in favour of the granddaughter, but the power to cut was merely discretionary, to be exercised in a proper state of circumstances such as that of the granddaughter attaining twenty-one in her father’s lifetime; (2) the purchaser was entitled to timber standing at the time of sale.—*WATLINGTON v. WALDRON* (1853), 4 De G. M. & G. 259; 23 L. J. Ch. 713; 22 L. T. O. S. 207; 18 Jur. 317; 2 W. R. 120; 43 E. R. 506, L.C. & L.JJ.

**719. — Settlement by reference.]**—The trustees of a settlement had vested in them (*inter alia*) a power to cut timber, but had no legal estate except to preserve contingent remainders. The first tenant for life devised his own estates to other trustees in fee simple, to the same uses & subject to like powers as the settled estates stood limited:—*Held*: the powers for the devised estates were exercisable by the trustees of the settlement, & not by the trustees of the will, who were mere conduit pipes for transfer of property passing by the will.—*TAYLOR v. MILES* (1860), 28 Beav. 411; 3 L. T. 115; 6 Jur. N. S. 1063; 54 E. R. 424.

**720. Trustees taking estate pur autre vie—Property in trees cut down.]**—Certain lands together with the woods were conveyed to plffs. under a marriage settlement, which the ct. construed as giving them an estate *pur autre vie*. Deft., a stranger, cut trees by order of the husband of the tenant for life & carried them away:—*Held*: plffs. could not claim trover against deft. for the trees, since, while they had a certain property in the trees

while standing, that property ceased when they were cut down.—*BLAKER v. ANSCOMBE* (1804), 1 Bos. & P. N. R. 25; 127 E. R. 366.

**721. Construction of trust deed as to cutting timber.]**—A grant to trustees on a charitable trust prohibited the trustees from cutting timber for forty years except such as should be wanted for the necessary repairs of materials, etc., & other appurtenances belonging to the estate, & except certain slabs & tillers of oak as should be necessary for better selling the underwood, & after expiration of the forty years empowered the trustees to cut as they should think fit. On an information against the trustees:—*Held*: (1) the trustees were not restrained after expiration of forty years from cutting for purposes of repairs, nor from cutting timber on one part of the estate for repairs on another part, nor from selling timber when cut & applying the proceeds in necessary repairs, so long only as they cut no more timber on the whole property than the repairs on the whole property required; (2) the power of cutting slabs & tillers still continued with the qualifications annexed to it.—*A.-G. v. GEARY* (1817), 3 Mer. 513; 36 E. R. 197.

Administration of charitable property, *see*, generally, CHARITIES.

**722. Cutting by cestui que trust—Consent of trustees.]**—A testator devised an estate to trustees, giving them the legal estate, upon trust to pay the rents to or permit same to be received by A. for life with remainders over. A. took possession of the estate, & the trustees acquiesced for four years. A. cut timber which, it was alleged, was cut in proper management of the estate. In an action by the trustees to recover the deeds & receive the rents:—*Held*: (1) it was A.’s duty not to cut timber without the consent of the trustees; (2) he should not mix his own timber & timber belonging to the estate; (3) the proceedings by the trustees would be restrained on undertakings being given by him (*inter alia*) not to cut timber without their consent.—*DENTON v. DENTON* (1844), 7 Beav. 388; 3 L. T. O. S. 98; 8 Jur. 388; 40 E. R. 1115.

*Annotation*:—*Consd.* *Powys v. Blagrave* (1854), Kay. 495.

**723. Estate purchased by trustees—Right of cestuis que trust.]**—A residue was bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively without impeachment of waste, with various limitations in strict settlement, all the estates for life being without impeachment of waste, & the ultimate remainder in fee. The trustees laid out part of the fund in an estate with a considerable quantity of timber upon it:—*Held*: (1) taking that to be a sound exercise of discretion, the first tenant for life could not cut the whole; (2) equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, to timber merely ornamental, viz., an extensive wood. *Qu.*: whether, if the trustees were not by their character prevented from taking any benefit, the tenant for life might have any, & what proportion, of the timber, & how the excess was to be disposed of.—*BURGES v. LAMB* (1809), 16 Ves. 174; 33 E. R. 950.

:—*Refd.* *Cholmeley v. Paxton* (1825), 3 207; *Davenport v. Davenport* (1863), 33 L. J. Ch. *Mentd.* *Londesborough v. Somerville* (1854), 19 295; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**724. Rights of equitable tenant for life.]**—A tenant for life without impeachment of waste, in order to preserve the timber, assigned for valuable consideration to the trustees of the settlement all timber & timberlike trees then growing & being, & which should thereafter grow & be, upon the estate:—*Held*: (1) this included not only wood which was considered timber everywhere, as oak, ash & elm, but



*Sect. 2.—Property in trees & liabilities of different classes of owners: Sub-sects. 15 & 16. Sect. 3: Sub-sects. 1, 2, 3 & 4.]*

wood which was timber by the custom of the county; (2) it was proper that the wood should be properly thinned & that the thinning should be employed & used on the estate for fencing & other matters; (3) such thinnings, & the rights of determining what were proper thinning, belonged to the trustees; (4) an injunction against cutting timber & timberlike trees should be granted against the tenant for life.—*GORDON v. WOODFORD* (1859), 27 Beav. 603; 29 L. J. Ch. 222; 1 L. T. 260; 6 Jur. N. S. 59; 54 E. R. 239.

**725. Settlement—Right of infant tenant in tail—Perpetuity.]**—Timber on an estate in strict settlement, if regarded as part of the inheritance, is yet not preserved from alienation during infancy of the tenant in tail; & the settlor cannot superadd to the tenancy in tail a provision which would render the timber inalienable during such infancy. If the power of trustees to cut timber for the purposes of the settlement be permissive only, not imperative, it is at least concurrent with the right of the infant tenant in tail to the timber, & to the extent in which it derogates from that right, it is liable to the objection of creating a perpetuity. Exors, cutting timber upon a supposed trust, afterwards held to be void, might be personally chargeable in equity as trustees for the owner of the timber, if they acted fraudulently or retained the proceeds of the timber, or gained any benefit by it; but not if they acted by mere mistake, & held no part of the proceeds in their hands. In the latter case the exors. might be regarded in equity as strangers who, under a mistaken supposition of right, had done a legal wrong, for which there was a legal remedy.—*FERRAND v. WILSON* (1845), 4 Hare, 344; 15 L. J. Ch. 41; 9 Jur. 860; 67 E. R. 680.

*Annotations:—Distd.* *Kekewich v. Marker* (1851), 2 Mac. & G. 311; *Briggs v. Oxford* (1852), 1 De G. M. & G. 363. *Consd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. *Mentd.* *Dungannon v. Smith* (1845-6), 12 Cl. & Fin. 546, H. L.; *Langdale v. Briggs* (1856), 8 De G. M. & G. 391; *Carroll v. Graham* (1865), 11 Jur. N. S. 1012; *Birmingham Canal Co. v. Cartwright* (1879), 11 Ch. D. 421.

**726. — Incumbrances—Relief of inheritance.]**—By a settlement, dated 1832, certain real estates were vested in trustees in fee, upon trust to keep down interest upon incumbrances affecting the estates out of the rents, & by mtges. & sales to raise moneys towards the discharge of the principal, & subject thereto, upon trust for O. for life, with remainder in trust for his son H. for life without impeachment of waste, but subject to the power thereafter given to the trustees to fell timber, with remainder in trust for the first & other sons of the son of H. in tail male, with remainder in trust for the heirs & assigns of O. in fee. Power was then given to the trustees at any time or times thereafter, so long as there should be any incumbrances upon the estates (but, after the death of O., not without the consent of the son, H., if living, in writing), to fell timber upon the estates, & to apply the proceeds in discharge of the incumbrances. After the death of O. the son claimed the right to fell timber & apply the proceeds for his own use, & gave notice to the trustees that it was his intention not to consent to any sale of timber by them under their power. Upon bill filed by the trustees for an injunction to restrain the son from preventing the sale of timber by them so long as there were incumbrances upon the estate:—*Held*: (1) the timber growing upon the estate during the life of deft., the son, was to be applicable, not to his own purposes, but to relieve the inheritance from the incumbrances; (2) the power to fell timber given to the trustees was not void as an infringement of the law against perpetuities.—*BRIGGS v. OXFORD* (EARL)

(1852), 1 De G. M. & G. 363; 21 L. J. Ch. 829; 18 L. T. O. S. 341; 16 Jur. 558; 42 E. R. 592, L.JJ.

*Annotation:—Mentd.* *Re Stamford & Warrington, Payne v. Grey*, [1912] 1 Ch. 343, C. A.

**727. Devise by will—Codicil—Trust to let & invest—Revocation.]**—A will devising estates for life without impeachment of waste is not revoked by a codicil directing the trustees to let until the tenant for life marries, by leases under which the lessees shall be impeachable for waste, & the rents are to be accumulated & invested in land; & the tenant for life remains entitled to the timber.—*LUSHINGTON v. BOLDERO* (1815), Coop. G. 216; 35 E. R. 536.

*Annotation:—Mentd.* *Cleobury v. Beckett, Cleobury v. Turner* (1851), 14 Beav. 583.

**728. Management generally.]**—Timber growing amongst underwood must be cut down not to prejudice the underwood, especially where underwood bears a great price, etc., &:—*Held*: such cutting was too much for a trustee to do, & an injunction must be granted to stay waste (LORD HARDWICKE, C.).—*KNIGHT v. DUPLESSIS* (1751), 2 Ves. Sen. 360; 28 E. R. 230.

*Annotations:—Consd.* *Burgess v. Lamb* (1809), 16 Ves. 174. Lord Hardwicke's opinion is material, that it is not waste to cut timber, where necessary for the growth of the underwood, in which it is situated (LORD ELDON, C.). *Refd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**729. Ornamental timber.]**—The case of a trust or restriction created for preservation of ornamental timber is not like a trust for purposes of benevolence (as to which the objects are unlimited, & no standard can be found), but *semble* is a trust or restriction which the ct. will endeavour to execute or enforce.

*Semble*: (1) there are cases in which the ct. may execute a trust for the application of money to purposes of taste or ornament, & in so doing, may, in the absence of any prescribed standard, or if the standard be more or less indefinite, act upon opinions of persons who are consulted by others in such matters, as it acts in other cases upon opinions of persons of science; (2) the ct. may more readily act in enforcing a restriction on exercise of the legal power in a matter of taste or ornament, where the restriction is connected with a trust, than in the common law case of equitable waste in the absence of any such trust.—*MARKER v. MARKER* (1851), 9 Hare, 1; 20 L. J. Ch. 246; 17 L. T. O. S. 176; 15 Jur. 663; 68 E. R. 389.

*Annotations:—Refd.* *Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721 (WOOD, V.-C.); *Ashby v. Hincks* (1888), 58 L. T. 557; *Stafford v. Sutherland* (1892), 36 Sol. Jo. 381.

**730. —.]**—Trustees in whom an estate is vested ought not to cut down ornamental trees alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the ct. for its authority; & the *onus* of showing that the trees are prejudicial lies on the trustees. A perpetual injunction was granted against trustees, who cut down three ornamental trees, & failed in proving, to the satisfaction of the ct., that they were prejudicial to the residence. A bill filed against trustees & the tenant to prevent equitable waste was dismissed with costs as against the tenant, it not being shown that he had committed or intended to commit any waste, though some had been committed by the trustees at his request.—*CAMPBELL v. ALLGOOD* (1853), 17 Beav. 623; 51 E. R. 1177.

**731. Trustee taking advantage of his position.]**—A. seised in fee of land demised the premises to trustees, B., C., & D., for five hundred years in trust to pay debts & for a charity. B., one of the trustees, being in possession, & as a receiver appointed by the ct., cut down £1,000 worth of timber, D., one of the other trustees, consenting:—*Held*: B., the trustee for the charity or as receiver, ought not to

## PART IX.—TREES AND TIMBER.

have taken advantage of his having possession, without which he could not cut down the timber.—**BAYS v. BIRD** (1726), 2 P. Wms. 397 ; 24 E. R. 784. Trustees not being able to purchase trust property, *see* TRUSTS & TRUSTEES.

**732. Assignment by trustee—Omission of “without impeachment of waste.”**—A trustee had vested in him a term of five hundred years without impeachment of waste. For the purpose of his trust he sold & conveyed it by grant & demise, omitting the words “without impeachment of waste”;—*Held*: the estate of the purchaser was unimpeachable for waste.—**BEAUMONT v. SALISBURY (MARQUIS)** (1854), 19 Beav. 198 ; 3 Eq. Rep. 369 ; 24 L. J. Ch. 94 ; 24 L. T. O. S. 166 ; 1 Jur. N. S. 458 ; 52 E. R. 325.

*Annotation* :—**Mentd.** **Lewis v. Rees** (1836), 3 K. & J. 132.

**733. After death of trustees.**—**HEWETT v. HEWETT**, No. 832, *post*.

### SUB-SECT. 16.—VENDORS AND PURCHASERS.

*See, also*, Sect. 3, *post*.

**734. Purchaser before completion—Injunction.**—An injunction was granted to restrain deft., who had contracted to purchase an estate & had obtained possession from the tenant, from cutting timber.—**CROCKFORD v. ALEXANDER** (1808), 15 Ves. 138 ; 33 E. R. 707.

*Annotation* :—**Refd.** **Lowndes v. Bettle** (1864), 3 New Rep. 409.

**735.** ———. ]—An injunction to restrain cutting timber was granted against a purchaser, who had not paid his purchase-money.—**CASAMAJOR v. STRODE** (1823), 1 Sim. & St. 381 ; 57 E. R. 152.

*u* :—**Refd.** **Re Goren** (1838), 2 Jur. 391.

### SECT. 3.—CONTRACTS RELATING TO TREES AND TIMBER.

SUB-SECT. 1.—APPLICATION OF STATUTE OF FRAUDS AND SALE OF GOODS ACT, 1893 (c. 71).

*See* Nos. 285, 286, 289, 290, *ante*.

#### SUB-SECT. 2.—CONSTRUCTION.

*See* Nos. 804—810, *post*.

#### SUB-SECT. 3.—EFFECT OF SALE.

**736. Effect of sale.**—The effect of sale is to sever the trees from the inheritance before physical severance.—**STUKELEY v. BUTLER** (1615), Hob. 168 ; 80 E. R. 316.

*Annotations* :—**Consd.** **Cardigan v. Armitage** (1823), 2 B. & C. 197. **Mentd.** **Foot v. Berkley** (1666), O’Brigg. 527 ; **Jones v. Cherney** (1680), Freem. K. B. 530 ; **Cudlip v. Randall** (1696), 11 Mod. Rep. 14 ; **Fisher v. Wigg** (1699), 1 Ld. Raym. 622 ; **Idle v. Cooke** (1705), 2 Ld. Raym. 1144 ; **Bradley v. Peixoto** (1797), 3 Ves. 324 ; **Burton v. Barclay** (1831), 7 Bing. 745 ; **Hardwick v. Hardwick** (1873), 42 L. J. Ch. 636.

#### PART IX. SECT. 3, SUB-SECT. 3.

**736 i. Effect of sale.**—Trees being attached to the earth are included in the legal incidents of the land & pass to the

transferee under a deed of sale of the land in which they stand, unless a different intention is expressed or necessarily implied. No such intention is necessarily implied because the trees

are mtged. prior to the sale & no mention of the mtge. is made in the sale-deed.—**PANDURANG SHESHAGIR v. BHIMRAV KESHAV HIRAJIKIR** (1897), I. L. R. 22 Bom. 610.—**IND.**

#### SUB-SECT. 4.—REMEDIES FOR BREACH.

**737. Sale of timber—Specific performance.**—*Semble*: although purchasers of timber may be entitled, in some cases, to insist upon delivery of the specific timber contracted for & to enforce it by suit for specific performance, a special case is required for the purpose, & the ordinary remedy of such purchasers is in damages (**TURNER, V.-C.**).—**MARKER v. MARKER** (1851), 9 Hare, 1 ; 20 L. J. Ch. 246 ; 17 L. T. O. S. 176 ; 15 Jur. 663 ; 68 E. R. 389.

*Annotations* :—**Mentd.** **Micklethwait v. Micklethwait** (1857), 26 L. J. Ch. 721 ; **Ashby v. Hincks** (1888), 58 L. T. 557 ; **Stafford v. Sutherland** (1892), 36 Sol. Jo. 381.

**738. Specific performance—Error—Abatement.**—Specific performance enforced against trustees for infants upon the mere mistake of their agent without fraud, etc., but the relief adapted to the justice of the case, viz., the purchase being of wood upon a gross valuation, without regard to the quantity of land, an abatement for a deficiency of quantity, from erroneously inserting the hedges & fences, not included in the purchase, was directed with reference to land merely, not woodland.—**HILL v. BUCKLEY** (1811), 17 Ves. 394 ; 34 E. R. 153.

*Annotations* :—**Expld.** **Wheatley v. Slade** (1830), 4 Sim. 126. **Consd.** **Crompton v. Melbourne** (1832), 5 Sim. 353 ; **Jones v. Evans** (1848), 12 L. T. O. S. 24 ; **Durham v. Legard** (1865), 34 Beav. 611 ; *Re Aspinall & Powell’s Contract* (1889), 5 T. L. R. 446.

**739. Contract for purchase of timber to be cut & removed—Repudiation—Injunction—Specific performance.**—Pltfs. entered into a contract with deft. for purchase of certain timber growing on his property. By the contract they were to have the right to enter upon the property, cut the timber, & saw it up thereon, to erect sawmills, & to remove the timber, & deft. was to give free exit for all timber to hard roads & free sites for sawmills. Pltfs. erected a sawmill & commenced to cut timber, saw it up, & remove it. Deft. repudiated the contract & forcibly ousted pltfs. & their men from the estate. Pltfs. brought an action against deft., asking for an injunction restraining him from preventing due execution of the contract, & for damages. Deft. contended, *inter alia*, that the claim for an injunction was equivalent to a claim for specific performance, & that the ct. would not grant specific performance of such a contract, but would leave pltfs. to their remedy by way of damages :—*Held* : (1) although the ct. might be unable to compel pltfs. to cut the timber if they refused to do so, it had jurisdiction to give them relief by way of specific performance ; (2) the injunction ought to be granted.—**JONES (JAMES) & SONS, LTD. v. TANKERVILLE (EARL)**, [1909] 2 Ch. 440 ; 78 L. J. Ch. 674 ; 101 L. T. 202 ; 25 T. L. R. 714.

*Annotation* :—**Refd.** **Hurst v. Picture Theatres**, [1915] 1 K. B. 1, C. A.

**740. Timber estate—Misrepresentation as to size—Specific performance.**—Bill by a vendor for specific performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood “with upwards of 65 acres of fine oak timber trees, the average size of which approached 50 ft.” & in the particulars of the lot described it only as “65 acres, 2 roods, & 12 perches of growing timber.” It appeared on the evidence for pltf. that the average size of the trees was about 35 ft., but on that for deft. that it was only about 22 ft. ; & deft. alleged that it was sold at a time when he had no means of seeing the wood, & that he relied on the particulars of sale :—*Held* : (1) as the representation in the particulars of sale had proved



**Sect. 3.—Contracts relating to trees & timber: Sub-sect. 4. Sect. 4: sub-sect. 1, A. & B.]**

to be incorrect, & as it was not shown that deft. knew it to be incorrect at the time of making the contract, the ct. would not, at all events, enforce specific performance of the contract without compensation; (2) as the particulars of sale did not express what number of trees or quantity of timber the wood contained, it was not a case in which the ct. could measure the extent of the deficiency, or ascertain the amount of compensation; (3) the bill must be dismissed.—**BROOKE (LORD) v. ROUNTHWAITE** (1846), 5 Hare, 298; 15 L. J. Ch. 332; 10 Jur. 656; 67 E. R. 926.

**Annotation:—***Refd.* **Denny v. Hancock** (1870), 18 W. R. 566.

**741. Sale of copyhold land & timber—Specific performance.]—***CROSSE v. LAWRENCE*, No. 809, *post*.

**SECT. 4.—CONSTRUCTION AND EFFECT OF GRANTS, LEASES, ETC., OF TREES AND OF COVENANTS AND CONTRACTS RELATING TO TREES.**

**SUB-SECT. 1.—WHAT PASSES UNDER GRANTS, LEASES, ETC.**

**A. Whether the Soil passes or does not pass.**

**742. Difference between grant & exception.]—**Deft. was lessee under a lease of land “excepting woods & underwoods & herons & shovellers building their nests therein.” He took birds in their nests on the trees:—*Held*: the lessor could maintain trespass for breaking his close & taking the birds.

There are differences between grants & exceptions of trees. A gift of a wood, or of a wood known by a particular name, passes the soil. By a gift of land, except the wood & underwood, all trees great & small are excepted, but not apple trees, since they are not ordinarily known as “wood.” A sale of all trees in the manor of D. does not include apple trees (**BRUDNEL, J.**).—**LONDON (BP.) v. N.** (1522), Y. B. 14 Hen. 8, fol. 1, pl. 1.

**Annotations:—***Consd.* *Ive's Case* (1597), 5 Co. Rep. 11a. *Refd.* *Anon.* (1554), Ben. & D. 11; *Liford's Case* (1615), 11 Co. Rep. 46b; *Smith v. Bole* (1618), Cro. Jac. 458; *London v. Southwell* (1618), Hob. 303. *Mentd.* *Case of Swans* (1592), 7 Co. Rep. 15b; *Blades v. Higgs* (1862), 12 C. B. N. S. 501.

**743. Exception of woods—Excepts soil.]—**If a man lets his manor *exceptis boscis*, the soil also is excepted; if he afterwards grants a lease to the same lessee of all woods growing upon the manor, & grants a term of the manor to the same lessee to commence after the end of the first term, the acceptance of this third lease is an implied surrender of the second lease, & the woods are not severed from the manor.—**IVE (IVES) v. SAMS (SAMMES)** (1597), Cro. Eliz. 521; 2 And. 51; 78 E. R. 770; *sub nom.* *IVE'S CASE*, 5 Co. Rep. 11a.

**Annotations:—***Refd.* *Rowles v. Mason* (1612), 2 Brownl. 192; *Liford's Case* (1615), 11 Co. Rep. 46b; *Whilster v. Paslow* (1618), Cro. Jac. 487; *Bullen v. Denning* (1826), 5 B. & C. 842. *Mentd.* *Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713.

**744. Grant of woods, etc.—Held not to pass soil.]—**(1) By a grant to one & his heirs of all woods, underwoods, etc., then growing, & all timber trees, woods, etc., which thereafter should grow, in a certain part of the forest of H. (except land & soil of

the same wood), with liberty to enclose them for preservation of the spring of wood, etc., as by the laws & stats. of the realm is appointed, etc., without interruption by the grantor, etc., the grantee has an inheritance in fee, as a profit appender *in alieno solo*, & the soil remains to the grantor; (2) 22 Edw. 4, c. 7, which in certain circumstances authorises proprietors of grounds in forests, after a felling, to enclose them without the King's licence for seven years, to preserve the springing wood, extends to the grantee, but does not extend to the wood of any subject in which another has a right of common; (3) the commoners, as appears by the preamble, are not any of the parties between whom the Act was made, & their right is not taken away by it; (4) if the Act had extended to wood in which others had a right of common, yet the woods could not be so enclosed as to exclude the commoners; (5) 35 Hen. 8, c. 17, which enacts “that it shall not be lawful to any persons which have or shall have any woods wherein any ought to have any common, etc., to fell & cut down the same woods (except it be to his own use & occupation) until such time as the fourth part of the ground or soil, etc., be divided, etc., fenced & enclosed, etc.,” restrains the owner of the wood from felling his own wood on a penalty, but does not exclude the commoner of his common; (6) the words in the Act, “except it be to his own proper use or occupation,” exempt the owner from the penalty, & are to be intended of his necessary use, as to repair his house, or to burn in his house, etc.; (7) the above Acts are general Acts.—**BARRINGTON'S CASE** (1611), 8 Co. Rep. 136b; 77 E. R. 681; *sub nom.* **CHOLKE (CHALKE) v. PETERS** (1610), 2 Brownl. 289, 322; Godb. 167; *affd.* in error **BARRINGTON v. —** (1615), 1 Roll. Rep. 137.

**Annotations:—***Consd.* *Brewster v. Kitchin* (1697), 1 Ld. Raym. 317; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91. *Refd.* *Liford's Case* (1615), 11 Co. Rep. 46b; *Lucy v. Lovington* (1671), 1 Vent. 175; *Riddell v. White* (1794), 1 Anst. 281; *Dibben v. Anglesea* (1834), 4 Tyr. 926; *Dawson v. Paver* (1847), 5 Hare, 415; *Nicholls v. Mitford* (1882), 20 Ch. D. 380.

**745. Exception of trees in lease—Effect.]—**Trees excepted remain part of the inheritance. The soil is not excepted, but sufficient nutriment for the growth of the trees. The lessee has the pasture under the trees. The lessor has all the benefit of the tree & fruits.—**LIFORD'S CASE** (1614), 11 Co. Rep. 46b; 77 E. R. 1206.

**Annotations:—***Refd.* *Bowles' Case* (1616), 11 Co. Rep. 77b; *Barry v. Heard* (1622), Cro. Car. 242; *Goodtitle d. Paul v. Paul* (1760), 2 Burr. 1089; *Ford v. Racster* (1815), 4 M. & S. 130; *Bailey v. Stephens* (1862), 12 C. B. N. S. 91. *Mentd.* *Bradly v. Strachy* (1740), Barn. Ch. 399; *A. d. v. Duplessis* (1752), Park. 144; *Garland v. Carlisle* (1837), 11 Bli. N. S. 421, H. L.; *Hollawell v. Eastwood* (1851), 6 Exch. 295; *Elliott v. Bishop* (1854), 10 Exch. 496; *Barnett v. Guildford* (1855), 11 Exch. 19; *Delacherois v. Delacherois* (1864), 4 New Rep. 501, H. L.; *Goodhart v. Hyett* (1883), 25 Ch. D. 182.

**746. Grant of woods, etc.—Held not to pass soil.]—**A bargain & sale of “all those her woods, & underwoods & hedgerows as have been accustomed to be felled & sold standing, growing & being upon, etc.”:—*Held*: not to constitute a lease of the land.—**GLOVER v. ANDREW** (1562), 1 And. 7; 123 E. R. 324; *sub nom.* **ANDREW v. GLOVER**, Ben. & D. 42.

**747. Lease—Exception of wood—Exception of timber trees.]—**By an exception in a lease of all “woods, underwoods, coppices & hedgerows,” the soil itself is excepted; but by an exception of “all timber trees” no soil is excepted but that in which

**PART IX. SECT. 4, SUB-SECT. 1.—A.**

**747 1. Lease—Exception of timber trees.]—**A lease contained a covenant on the tenant's part to keep the demised premises, & all improvements thereon,

in repair, & also an exception by the landlord of all timber trees growing on the premises, & a reservation of a right of ingress on the premises. The tenant suffered the timber to be cut down:—*Held*: the landlord could not recover

damages against the tenant for the cutting down of the timber in an action on the covenant to keep the premises in repair.—**ALLEN v. CARVER** (1863), 9 L. T. 55.—**IR.**



they grow.—**WHILSTER v. PASLOW** (1619), Cro. Jac. 487; 79 E. R. 416; *sub nom.* **HIDE v. WHISTLER**, Poph. 146.

*Annotations* :—**Consd.** **Legh v. Heald** (1830), 1 B. & Ad. 622. **Refd.** **Simpson v. Brook** (1855), 19 J. P. 436.

**748. — Lease of saleable woods—Held not to pass soil.**—A grant of all saleable woods growing:—**Held**: not to pass the soil.—**PINCOMB v. THOMAS** (1619), Cro. Jac. 524; 79 E. R. 448.

*Annotation* :—**Consd.** **Legh v. Heald** (1830), 1 B. & Ad. 622.

**749. — Exception of trees.**—If trees are excepted in a lease, the land on which they grow is necessarily excepted also. Where a tenant under such a lease cut down the trees:—**Held**: the landlord might maintain trespass for breaking his close & cutting them down.—**ROLLS v. ROCK** (1729), 2 Selwyn, Law of Nisi Prius, 13th. ed., p. 1244.

**750. — Exception of timber & other trees, woods, etc.**—Demise of a tenement called W. containing 19 acres, "except all timber & other trees, wood, underwoods, sand, marl, mines, etc." The question being whether the soil of a woodland close, part of W., called R., was excepted by these words, or only the wood growing thereon:—**Held**: the words "woods, etc.," were qualified by the words "timber & other trees," & so the soil of R. passed by the demise, & was not excepted.—**LEGH v. HEALD** (1830), 1 B. & Ad. 622; 9 L. J. O. S. K. B. 98; 109 E. R. 918.

**751. Exception of woods, etc.—Reserves the soil.**—In an agreement for a lease the landlord excepted & reserved to himself "all quarries, woods, underwoods, trees & plantations, with liberty to make new plantations & fence same, & also to enter & cut down, sell & carry away all timber & underwood, allowing unto A., the tenant, a reasonable compensation for all damage he may sustain by permitting such privilege":—**Held**: (1) the soil upon which the plantations stood was reserved to the landlord; (2) he was justified in taking down gates admitting to a plantation on the demised premises during the term, & erecting fences in their stead; (3) it was a question of fact whether a strip of grass-land between the trees & an upright fence was a fence to the plantation, & if it were, it was within the exception.—**SIMPSON v. BROOK** (1855), 19 J. P. 436.

#### *B. What passes other than the Soil.*

**752. Grant of land—Wood held to pass.**—(1) Wood will pass by the name of land, if there be no other land whereby the words may be otherwise supplied; (2) the tenant for years may fell underwoods of twenty-five years' growth, if same is accustomed to be felled.—**DOCKWRAY & BEAL'S CASE** (1614), Godb. 256; 78 E. R. 149.

**753. — Passes trees if not excepted.**—**LIFORD'S CASE**, No. 519, *ante*.

**754. S. P.** **DOE d. DOUGLAS v. LOCK** (1835), 2 Ad. & El. 705; 4 Nev. & M. K. B. 807; 4 L. J. K. B. 113; 111 E. R. 271.

*Annotations* :—**Refd.** **Doe d. Croft v. Tildbury** (1851), 2 C. L. R. 347; **Proud v. Bates** (1865), 6 New Rep. 92. **Mentd.** **Wickham v. Hawker** (1840), 7 M. & W. 63; **Durham & Sunderland Ry. Co. v. Walker** (1842), 2 Q. B. 940, Ex. Ch.; **Wallis v. Harrison**, **Durham & Sunderland Ry. Co. v. Walker** (1842), 11 L. J. Ex. 440, Ex. Ch.; **Doe d. Egremont v. Stephens** (1844), 13 L. J. Q. B. 350; **Doe d. Wyndham v. Stephens** (1846), 6 Q. B. 208; **Doe d. Biddulph v. Hole** (1850), 15 Q. B. 848; **Williams v. Hayward** (1859), 5 Jur. N. S. 1417; **Theellusson v. Liddard**, [1900] 2 Ch. 635.

**755. —**—Where a tenant for life without impeachment of waste makes an absolute sale & conveyance of land under 42 Geo. 3, c. 116, s. 51, for the purpose of redeeming the land tax on other property, the growing timber, though not mentioned in the conveyance, passes with the land.—

**DOE d. BLEWITT v. PHILLIPS** (1841), 1 Q. B. 84; Arn. & H. 256; 4 Per. & Dav. 562; 10 L. J. Q. B. 68; 5 Jur. 745; 113 E. R. 1061.

*Annotation* :—**Consd.** **Whidborne v. Eccl. Comrs. for England** (1877), 7 Ch. D. 375.

**756. Grant of trees—Trees that could reasonably be spared—Held void.**—A landlord agreed to sell to his lessee "all the trees that could reasonably be spared." In an action by the assignee of the landlord against the lessee for waste in cutting & selling trees:—**Held**: the agreement for sale to the lessee was void for uncertainty.—**MERVYN v. LYDS** (1553), 1 Dyer, 90a; 73 E. R. 195.

*Annotations* :—**Refd.** **Herlakenden's Case** (1589), 4 Co. Rep. 62a; **Liford's Case** (1614), 11 Co. Rep. 46b; **Stukeley v. Butler** (1615), Hob. 168; **Berry v. Heard** (1632), Cro. Car. 242.

**757. Future trees.**—There may be a grant or reservation of trees thereafter to grow on the soil.—**BARRINGTON'S CASE** (1611), 8 Co. Rep. 136b; 77 E. R. 681; *sub nom.* **CHOLKE (CHALKE) v. PETERS** (1610), 2 Brownl. 289, 322; Godb. 167; *affd.* in error **BARRINGTON v. —** (1615), 1 Roll. Rep. 137.

*Annotations* :—**Refd.** **Brewster v. Kitchin** (1697), 1 Ld. Raym. 317; **Stanley v. Williams** (1811), 14 East. 332; **Bailey v. Stephens** (1862), 12 C. B. N. S. 91; **Shuttleworth v. Le Fleming** (1865), 19 C. B. N. S. 687. **Mentd.** **Liford's Case** (1614), 11 Co. Rep. 46b; **Lucy v. Levington** (1671), 1 Vent. 175; **Riddell v. White** (1794), 1 Anst. 281; **Dibben v. Angelsea** (1834), 4 Tyr. 926; **Dawson v. Payer** (1847), 5 Hare, 415; **Shrewsbury v. Scott** (1859), 6 C. B. N. S. 1; **Nicholls v. Mitford** (1882), 20 Ch. D. 380; **Western Counties Ry. Co. v. Windsor & Annapolis Ry. Co.** (1882), 7 App. Cas. 178, P. C.; *Re Wilton's S. E.*, [1907] 1 Ch. 50.

**758. Apple trees—Common in gross.**—If a man grant all his woods & trees, apple trees will not pass, & common in gross will not pass by the words trees, tenements past & pasture (*per CUR.*).—**LONDON v. SOUTHWELL COLLEGIATE CHURCH (CHAPTER)** (1618), Hob. 303; 80 E. R. 447.

*Annotations* :—**Mentd.** **R. v. Rochester** (1675), 2 Mod. Rep. 1; **Orby v. Mohun** (1706), Gilb. Ch. 45; **Barret v. Glubb** (1776), 2 Wm. Bl. 1052; **Rennell v. Lincoln** (1825), 3 Bing. 223; **Mirchouse v. Rennell** (1832), 8 Bing. 490, H. L.; **Crompton v. Jarratt** (1885), 30 Ch. D. 298.

**759. Limitation of time for cutting.**—A., seised of certain lands, bargained & sold by indenture all trees there growing to be cut & carried away within twenty years after the date of the indenture. The twenty years expired, & the bargainee cut down the trees. In trespass for cutting down the trees:—**Held**: (1) the property in the trees vested in the bargainee, & the limitation of time was to hasten the cutting down, within which, if the vendee did not cut them, he should be punished as a trespasser as to the land, & not as to the trees (**WRAY, J.**); (2) the conditional property vested in the vendee, & because the condition was broken the property of the trees was vested in A. (**GAWDY, J.**).—**ANON.** (1584), 1 Leon. 275; 74 E. R. 250.

**760. Grant of walk in forest.**—A. grants a walk in the forest; B. his heir confirms it, & further grants another walk in same forest, provided that the grantee shall not cut down any trees *super præmissa*. This is a good condition, & extends to both the grants, though the soil is not granted, & the *præmissa* properly relates only to the thing (*viz.*, the walks) conveyed. He who has the custody of the walk has *quasi* the custody of the soil itself, & of the things growing thereupon, *viz.*, the herbage, & pannage for the deer; which is the reason, that if the keeper of a park cut down the trees, it is a forfeiture of his office, for it is an hurt to the game, & therefore, this condition is necessary & reasonable.—**PEMBROKE (EARL) v. SYMS (SIMONS)** (1600), Cro. Eliz. 781; 2 Co. Rep. 71b; 11 Co. Rep. 51a; 78 E. R. 1012.

**761. Grant of woods—Future trees.**—A man made a lease for thirty years, & bargained & sold

**Sect. 4. — Construction & effect of grants, leases, etc., of trees & of covenants & contracts relating to trees: Sub-sect. 1, B.; sub-sects. 2 & 3.]**

woods in & upon the premises to the lessee, & that he might carry them off the lands during the time of thirty years. The lessee cut down all the woods, & afterwards other wood grew, which he also cut within the term. The lessor brought waste:—*Held*: only trees growing at time of sale were included.—*ANON.* (1573), 3 Leon. 29; 74 E. R. 520.

**762. Grant of all great trees, etc.—Underwood.]—**A grant of “all great trees, woods & timber”:—*Held*: to include underwood.—*KENSON v. READING* (1591), Cro. Eliz. 244; 78 E. R. 499; *sub nom.* *KENSAM (KENISHAM) & REDING'S (REDDING'S) CASE* (1591), 1 Leon. 247; Hob. 170.

**763. Grant of all thorns—Thorns cut by third party.]—**If a man claim all thorns growing on such a place, under a licence given by the freeholder, he may take them, though cut by another.—*DOWGLAS (DEWCLAS) v. KENDAL* (1610), Cro. Jac. 256; 1 Brownl. 219; 1 Bulst. 93; Yelv. 187; 79 E. R. 220.

*Annotations*:—*Consd.* *Berriman v. Peacock* (1832), 9 Bing. 384. *Expld.* *Bailey v. Stephens* (1862), 12 C. B. N. S. 91. *Refd.* *Chesterfield v. Harris*, [1908] 2 Ch. 397, C. A.

**764. Grant of all trees—New trees on old stumps.]—**Upon a grant of “all the trees,” the grantee afterwards cut them, & new ones grew upon the stumps, which in time would be trees:—*Held*: the grantee should have them also.—*TOPPING v. KING* (1622), Win. 5; 124 E. R. 5.

**765. Grant of wood blown down, etc.—Trees felled.]—**By a grant to a ranger of a forest of all wood blown or thrown down by the wind, & all dead wood, & boughs & branches of trees, & wood in the forest cut off or thrown down, branches cut from trees felled for His Majesty's use do not pass.—*A.-G. v. STAWELL (LORD)* (1795), 2 Anst. 592; 145 E. R. 976.

**766. Lease of woods, etc.—Timber trees not included.]—**Lease for years, by a dean & chapter, of “woods, groves, hedgerows & springs (describing them), & all trees, woods, & underwoods growing, etc., or that hereafter shall grow, etc., within & upon the woods, etc., except & reserved to the lessors upon every fall of the woods, etc., twelve staddles or storers of oak, ash, elm, or hornbeam, that should be most likely for timber, for every acre of the woods, etc.,” with a covenant by the lessee upon every fall of the woods, etc., to leave standing to the use of the lessors upon every acre to be felled, twelve staddles or storers of oak, ash, elm, or hornbeam, most fit or convenient to be timber according to the stat. in such case made & provided: the staddles or storers to be appointed as follows; the lessees for every acre felled first to choose & appoint four of the best trees growing upon any acre so felled; then the lessee to take out to her own use four other of the next best trees upon any of the same acres; & then, thirdly, the lessors to choose & appoint eight other trees upon every of the acres at their pleasure for making up the twelve staddles or storers for every acre felled, with liberty of ingress, etc., for the lessors to cut & take the trees, staddles, or storers left standing, & a covenant by the lessee to leave the demised woods, etc., of certain specified growths at the end of the term. The lease was granted on the surrender of a former lease, & on payment of a fine amounting to one year & a quarter's rent, calculated on the value of the coppice & underwood & not of the timber:—*Held*: the lease did not comprise timber trees, but merely coppice & underwoods, & the lessors having during the term cut down on the demised premises a large quantity of timber, a bill filed against them by the lessee for an account was dismissed with costs.—

*HERRING v. ST. PAUL'S (DEAN & CHAPTER)* (1819), 3 Swan. 492; 2 Wils. Ch. 1; 36 E. R. 949.

**767. Grant of timber & timber trees—Timber by custom—Thinnings.]—**A tenant for life without impeachment of waste, in order to preserve the timber, assigned for valuable consideration to the trustees of the settlement “all timber & timberlike trees then growing & being, & which should thereafter grow & be, upon the estate”:—*Held*: (1) this included both ordinary timber & that which, by the custom of the county, was considered timber; (2) the thinnings & the rights of determining what were proper thinnings belonged to the trustees, & it rested solely with the trustees to determine what thinnings should be made, & at what time.—*GORDON v. WOODFORD* (1859), 27 Beav. 603; 29 L. J. Ch. 222; 1 L. T. 260; 6 Jur. N. S. 59; 54 E. R. 239.

**768. Devise of land in lease—Excepted woods pass.]—**Lands at C., in tenure of A. B. devised by will, comprise woods & timber excepted in the lease, being words of additional description.—*GOODTITLE d. PAUL v. PAUL* (1760), 2 Burr. 1089; 97 E. R. 724.

*Annotation* —*Refd.* *Turner v. Husler* (1780), 1 Bro. C. C. 78.

**769. Grant of all woods, timber trees, etc., “namely”—Time limit.]—**An owner in fee simple leased lands for three lives excepting all timber trees, & afterwards sold all the woods & underwoods, timber, & trees growing on the land, “namely, in & above all” particular coppices, with a covenant that the vendee & his assigns during five years might sell & carry away the woods. Pltf. was an assignee of the reversion on the lease, & deft. was an assignee of the vendee on the sale of the trees:—*Held*: (1) deft. had a good title to all the trees felled by him; (2) the “namely” did not restrict the effect of the general clause granting all the woods on the manor; (3) the covenant to take the trees within five years did not control the grant, & the vendee might take them whenever he would; (4) by the grant of trees to a tenant in fee simple they absolutely passed away from the grantor & his heir & vested in the grantee, being in law chattels divided from the freehold, & the grantee had power incident to the grant to fell them when he would.—*STUKELEY v. BUTLER* (1615), Hob. 168; 80 E. R. 316.

*Annotations*:—*Consd.* *Bradley v. Peixoto* (1797), 3 Ves. 321; *Cardigan v. Armitage* (1823), 2 B. & C. 197. *Dctd.* *Hardwick v. Hardwick* (1873), 42 L. J. Ch. 636. *Refd.* *Footc v. Berkley* (1664), O'Brigg. 527; *Cudlip v. Rundall* (1691), 11 Mod. Rep. 14; *Idle v. Cooke* (1699), 2 Ld. Raym. 1144; *Burton v. Barclay* (1831), 7 Bing. 745. *Mentd.* *Jones v. Cherney* (1680), Freem. K. B. 530; *Fisher v. Wigg* (1699), 1 Ld. Raym. 622.

**770. Construction in favour of Crown.]—**The Queen by letters patent granted the site of a manor with all the woods & underwoods on the site, but except all great trees, woods, & timber, & with a proviso that the lessee should have sufficient housebote, hedgebote, etc.:—*Held*: in favour of the Queen, underwoods did not pass to the lessee.—*KENSON v. READING* (1591), Cro. Eliz. 244; 78 E. R. 499; *sub nom.* *KENSAM (KENISHAM) & REDING'S (REDDING'S) CASE*, 1 Leon. 247; Hob. 170; 74 E. R. 247.

**SUB-SECT. 2.—EFFECT OF GRANTS, ETC.**

**771. Grant of trees—Implied right to enter & cut.]—***BAILEY v. STEPHENS*, No. 813, *post*.

**772. ———.]—***HEWITT v. ISHAM*, No. 787, *post*.



## SUB-SECT. 3.—EFFECT OF EXCEPTIONS, RESERVATIONS AND PROVISOS, ETC.

**773. Exceptions & reservations of trees in lease—Effect—Lease under power—Validity.]—**A tenant in fee simple devised lands in London, & a manor & lands in P. in Somersetshire, to a tenant for life, with power to let the lands in London for twenty-one years in possession, & also to make leases of the lands in the manor of P. for ninety-nine years, determinable on one, two, or three lives, in possession or reversion, of such parts as were or had been anciently demised for one, two, or three lives, so as the ancient & accustomed yearly rents & reservations should be thereby reserved, & also to let all other lands in P. for twenty-one years, all the leases being made & granted in same manner & form, with & under such & the like reservations, restrictions, covenants, conditions, & agreements, as were usually & customarily contained in leases of same kind in the several & respective parishes & places where same premises were situate. Leases for ninety-nine years, determinable on lives as aforesaid, having been made by the tenant for life:—*Held*: (1) to show whether the first proviso in such power be complied with, the previous leases of same premises, but not other similar leases in P., were evidence, & *semble*: the latest preceding lease of same premises was the most proper evidence; (2) exceptions & reservations (so called) from the demise of timber trees, mines, & quarries, were exceptions, not reservations, nor would they necessarily be construed as coming within the word “reservations” in a power, though the power mentioned rent & reservations, & there appeared to be in fact no reservation besides, except rent; at any rate, the construction would not be such where there were in fact reservations besides rent; (3) the ancient lease excepting from the demise all timber, trees & trees likely to prove timber then standing, growing, or being, or which during the term granted should stand, etc., on the premises, & the lease under the power excepting all timber trees, bodies of pollard & other trees whatsoever standing etc., the latter lease was not good, the difference in the exception varying the subject-matter of the demise & the rent not being the ancient rent.—*DOE d. DOUGLAS v. LOCK* (1835), 2 Ad. & El. 705; 4 Nev. & M. K. B. 807; 4 L. J. K. B. 113; 111 E. R. 271.

*Annotations*:—*Consd.* *Doe d. Biddulph v. Hole* (1850), 15 Q. B. 848. *Refd.* *Doe d. Croft v. Tidbury* (1853), 2 C. L. R. 347; *Williams v. Hayward* (1859), 5 Jur. N. S. 1417; *Thellusson v. Liddard*, [1900] 2 Ch. 635. *Mentd.* *Wickham v. Hawker* (1840), 7 M. & W. 63; *Durham & Sunderland Ry. Co. v. Walker* (1842), 2 Q. B. 940; *Wallis v. Harrison, Durham & Sunderland Ry. Co. v. Walker* (1842), 11 L. J. Ex. 440; *Doe d. Egremont v. Stephens* (1844), 13 L. J. Q. B. 350; *Doe d. Wyndham v. Stephens* (1846), 6 Q. B. 208; *Proud v. Bates* (1865), 6 New Rep. 92.

**774. Exception of timber trees—Underwood & herbage not included.]—**A. leased to B. a manor “except all manner of timber trees & great woods”:—*Held*: this exception did not extend to “the underwood & herbage of the woods.”—*ANON.* (1553), 1 Dyer, 79a; 73 E. R. 169.

*Annotations*:—*Refd.* *Kensam & Reding's Case* (1591), 1 Leon. 247; *Ive's Case* (1598), 5 Co. Rep. 11a; *Whilster v. Paslow* (1618), Cro. Jac. 487.

**775. Exception of timber woods & underwoods—Trees in hedgerows & pastures.]—**A lease of lands was made excepting timber woods & underwoods:—*Semble*: trees growing *sparsim* in hedgerows & pastures were excepted.—*ANON.* (1586), Godb. 98; 78 E. R. 60.

**776. Exception of great trees—Future trees.]—**Lease of a manor for years, excepting & reserving the great trees upon the premises, with right of re-entry if the lessee committed voluntary waste. The lessee cut down trees, which at the time of the demise were little trees, but had in course of time

become great trees:—*Held*: (1) the exception did extend to trees which became great; (2) such trees were never demised; (3) the condition did not extend to them.—*GAMOCK & CLIFF'S CASE* (1587), 1 Leon. 60; 74 E. R. 56.

**777. Exception of trees—Future trees.]—**A clause in an indenture of lease reserving, out of the demise, to the lessor “all wood & underwood, timber & timber trees, standing, growing, or being thereon, or at any time thereafter to stand or grow thereon, with full & free liberty of ingress & egress, to take & carry away same,” applies only to trees standing when the lease was granted, not to those afterwards planted by the tenant. Its operation is so restricted by 23 & 24 Geo. 3, c. 39.—*GALWEY (GALWAY) v. BAKER* (1840), 7 Cl. & Fin. 379; West, 467; 7 E. R. 1114, H. L.

**778. — Dotards.]—**If in a lease trees are excepted, although they become dotards during the lease that does not divest the property of the lessor.—*PARK v. FIFIELD* (1697), Comb. 453; 90 E. R. 586.

—*Effect on passing of soll.]—See* Nos. 745, 747, 749—751, *ante*.

**779. Exception of all trees—Apple trees.]—**In a lease of a farm in Devonshire, where it was usual for greater or less part of the farm to be orchard, & for farmers to be their own nurserymen & to raise trees for the purpose of keeping up the orchards, there was an exception of “all trees, woods, coppice, wood-grounds of what kind or growth soever”:—*Held*: (1) the exception meant trees useful for their wood, & did not except apple trees; (2) the tenant could not remove young standard apple trees planted during the term, unless he were a nurseryman & made it his trade (*HEATH J.*).—*WYNDHAM v. WAY* (1812), 4 Taunt. 316; 128 E. R. 351.

**780. S. P. LONDON (BP.) v. N.** (1522), Y. B., 14 Hen. 8, fo. 1, pl. 1.

*Annotations*:—*Refd.* *Ive's Case* (1597), 5 Co. Rep. 11a; *London v. Southwell* (1618), Hob. 303. *Mentd.* *Liford's Case* (1614), 11 Co. Rep. 46b; *Smith v. Bole* (1618), Cro. Jac. 458.

**781. Exception of timber & trees—Apple trees.]—**By deed a lessor demised certain lands in Dorsetshire except & reserved to the lessor all timber trees & other trees, but not the annual fruit thereof. In that county cider was made & apples constituted a great part of the annual produce:—*Held*: apple trees were not within the exception, since the words of the lease were to be construed in favour of the lessee, & “fruit” might be used to denote the produce not only of orchard but of timber trees.

The words “other trees” do not extend to fruit trees (*HOLROYD, J.*).

The word “trees” generally means wood applicable to buildings & does not include orchard trees (*LITLEDAL, J.*).—*BULLEN v. DENNING* (1826), 5 B. & C. 842; 8 Dow. & Ry. K. B. 657; 4 L. J. O. S. K. B. 314; 108 E. R. 313.

*Annotations*:—*Refd.* *Blackett v. Royal Exchange Assoc.* (1832), 1 L. J. Ex. 101; *Savill v. Beltrell*, [1902] 2 Ch. 523, C. A.

**782. Exception of timber, etc., “other than,” etc.—Repairs.]—**Pltf. demised land by indenture, excepting all timber, timber trees, & other trees, etc., bushes & thorns, other than such bushes & thorns as should be necessary for repair of fences. The lessee covenanted to keep the fences in repair during the term, finding all materials, except that the lessor should find rough wood for such repairs, if growing upon the premises, & the lessor covenanted during the term to provide the lessee sufficient rough timber, stakes & bushes, if growing on the premises, for doing such repairs:—*Held*: (1) the provision as to bushes & thorns necessary for repairs was not an exception out of the exception, but all trees, bushes, & thorns were excepted out of



**Sect. 4.—Construction & effect of grants, leases, etc., of trees & of covenants & contracts relating to trees: Sub-sects. 3 & 4.]**

the demise, whether part of the fences or not, or whether necessary for repairs or not; (2) on the trial of an action against wrongdoers for cutting some of the bushes & thorns, a direction by the judge that, if they were cut by defts., pltf. was entitled to a verdict, was right, without previously putting any question to the jury whether the bushes etc., were part of the fence, or were necessary for repairs. *Semble*: before the lessee could take any of the thorns, etc., for repairs, they must have been assigned for that purpose by the lessor (POLLOCK, C.B., *dub.*).—JENNEY v. BROOK (1844), 6 Q. B. 323; 1 New Sess. Cas. 323; 13 L. J. Q. B. 376; 8 J. P. 484; 8 Jur. 781; 115 E. R. 124, Ex. Ch.

**783. Exception of woods, etc.—Power to enter & cut—Power to make ways—Effect as easement.]—**DURHAM & SUNDERLAND RY. CO. v. WALKER, No. 786, *post*.

**784. Exception in lease by lessor for life.]—**An exception of "wood, underwood & trees" in a lease by a lessor for life is good, but in an assignment it would be bad.—BACON v. GYRLING (1612), Cro. Jac. 296; 79 E. R. 254.

**785. Reservation—Right to enter & cut implied.]—**If a man make a lease reserving the woods, he may justify an entry to cut them & carry them away. *Qu.* whether a lessee can make such a reservation in an assignment of his interest.—FOSTER v. SPOONER (1583), Cro. Eliz. 17; 78 E. R. 283.

**786. S. P. DURHAM & SUNDERLAND RY. CO. v. WALKER (1842), 2 Q. B. 940; 3 Ry. & Can. Cas. 36; 2 Gal. & Dav. 326; 11 L. J. Ex. 442; 114 E. R. 364, Ex. Ch.**

*Annotations*:—**Distd.** Hamilton v. Graham (1871), L. R. 2 Sc. & Div. 166. **H. L. Refd.** Wallis v. Harrison (1842), 3 Ry. & Can. Cas. 63. **n. Mentd.** Midgley v. Richardson (1845), 14 M. & W. 595.

**787.** —.]—A parol demise of land reserved to the landlord "all the hedges, trees, thorn bushes, fences, with lop & top":—*Held*: such reservation operated as a licence to enter the land for the purpose of cutting & carrying away the trees.—HEWITT v. ISHAM (1851), 7 Exch. 77; 21 L. J. Ex. 35; 18 L. T. O. S. 78; 16 J. P. 231; 155 E. R. 863.

**788. Saving of shrowds & loppings—No right to cut trees.]—**A man covenanted to stand seised to the use of his son, saving that his wife should have the shrowds & loppings of the trees:—*Held*: an action on the case would lie against the son for cutting down the trees. In an action for waste, where

all the loppings are pltf.'s property, the quantity cut need not be shown.—TREGMIELL v. REEVE (1636), Cro. Car. 437; 79 E. R. 980.

*Annotations*:—**Mentd.** Fountain v. Smith (1659), 2 Sid. 128; Jones v. Meredith (1739), 2 Com. 661.

**789. Proviso not an exception.]—**In a lease there was a proviso that it should be lawful for the lessor & his heirs at any time during the term to fell, sell, cut down, & carry away all wood & trees on the premises:—*Held*: this was not an exception of the trees, but a covenant only.—LUSHFORD v. SANDERS (1599), Cro. Eliz. 690; 78 E. R. 926; *sub nom.* LASHBROOKE v. SAUNDERS, 1 Brownl. 241.

**790. Proviso—Whether wood included.]—**A lease contained a proviso "provided that the lessee shall not fell the wood":—*Held*: this was not an exception, but the wood was demised to the lessee.—LASHBROOKE v. SAUNDERS (1599), 1 Brownl. 241; 123 E. R. 778; *sub nom.* LUSHFORD v. SANDERS, Cro. Eliz. 690.

**SUB-SECT. 4.—COVENANTS RELATING TO TREES.**

**791. Best trees—Necessity for choice.]—**Grant under a covenant of twelve of the best trees of the grantor to be chosen by the grantee. The grantor may not cut till choice is made, or a request made within the time they are to be cut.—MOTTERAM (MOTTRAM) v. JOLLY (1675), 3 Keb. 477, 493; 2 Lev. 142; 1 Vent. 271; 84 E. R. 833, 840.

**792. Covenant that covenantee may cut trees—Derogation from grant.]—**A dowress of land covenanted with the reversioner that he might lawfully cut each year twenty trees. Afterwards she cut down the whole wood:—*Held*: the reversioner might sue for breach of the covenant.—ANON. (1559), Moore, K. B. 18, pl. 65; 72 E. R. 411.

**793. Covenant to pay for all coppice standing at end of term.]—**A covenant in an indenture of lease for twenty-one years from Michaelmas provided that the tenant should not, during the term, cut down any of the coppice of less than ten years' growth, or at any unseasonable time of the year, but that at the end of the term the landlord agreed to pay the tenant the value of all such growth of coppice as should be then standing & growing:—*Held*: (LE BLANC, J., *diss.*) according to its grammatical construction (uncontrolled by any other part of the instrument showing a different intent) the covenant bound the landlord, to whom the words of the covenant were to be attributed, to pay the tenant for the value of

**PART IX. SECT. 4, SUB-SECT. 3.**

**785 i. Reservation—Of full enjoyment of land to vendor of timber.]—**Pltf. was the owner of a farm, two-thirds of which was heavily wooded, & the rest cleared & cultivated. Defts. became the purchasers of the trees & timber upon the land under an agreement, which provided that the purchaser should have "full liberty to enter into & upon the lands for the purpose of removing the trees & timber, at such times & in such manner as he may think proper," but reserved to pltf. the full enjoyment of the land "save & in so far as may be necessary for the cutting & removing of the trees & timber":—*Held*: defts. had a right to remove the timber by the most direct & available route, & the reservation in favour of pltf. did not minimise or modify defts. right, under the general grant of the trees, to remove the trees across the cleared land.—STEPHENS v. GORDON (1893), 22 S. C. R. 61.—CAN.

**PART IX. SECT. 4, SUB-SECT. 4.**

**h. Covenant that covenantee may use lying down timber.]—**Under a covenant

in a lease made in pursuance of Short Forms Act, the lessee was not to cut down timber for any purpose whatever, except for fire wood, but he was to have the privilege of using for any purpose all lying down hard wood timber, cedar only excepted:—*Held*: the covenant was a restriction of the statutory covenant, but was an extension of the common law right, which was limited to lying down dead timber, & the covenant allowed the lessee to use all the lying down hard wood timber, sound or unsound, except in so far as restricted by the exception as to cedar.—SMELLIE v. WATSON (1904), 7 O. L. R. 635; 2 O. W. R. 118; 3 O. W. R. 475.—CAN.

**j. Covenant to take proper care of fruit trees.]—**A covenant in a lease that the lessee will "take proper care of the fruit trees," *prima facie* only applies to the trees planted & growing on the premises at the time the lease is executed. *Semble*: (1) it would not apply to trees planted by the lessor under an oral agreement subsequent to the execution; (2) if, before the lease was executed, it had been expressly agreed that the

trees to be afterwards planted by the lessor should be included in the covenant, & upon that understanding they were planted, the covenant might apply to them, but such agreement must be established by the lessor by undoubted testimony.—CROZIER v. TABB (1876), 26 C. P. 369.—CAN.

**k. Covenant not to cut except for fences or buildings.]—**A lessee covenanted that during the term he would not cut any standing timber upon the lands except for rails or buildings on the demised premises, & also would sufficiently repair & keep repaired the erections & buildings, fences & gates, erected or to be erected upon the premises, the lessor finding or allowing on the premises all rough timber for same, or allowing lessee to cut & fell so many timber trees upon the premises as should be requisite:—*Held*: there was nothing to indicate that the landlord was to control the use of the timber so that he might limit it to the buildings, fences, & erections existing at the date of the lease.—COOK v. EDWARDS (1886), 10 O. R. 341.—CAN.

all the coppice of less than ten years' growth left standing on the demised premises at the end of the term, though no special consideration appeared on the face of the deed for the landlord's agreeing to make a compensation to the tenant for the value of such part of the coppice which the tenant was not entitled to cut.—*LOVE v. PARES* (1810), 13 East, 80; 104 E. R. 297.

**794. Covenant not to lop trees—Penalty or liquidated damages.]**—A declaration stated that defts. covenanted "they would not lop or top any tree, without the consent in writing of pltf., under a penalty of £20 for each tree which should be so lopped or topped, over & above the actual value of the tree." Breach, that defts. "lopped twenty trees, without the consent in writing of pltf., which trees were of the value of £80, & defts. then became liable to pay, & ought to have paid to pltf., the sum of £80, being the value of the trees, & also the further sum of £20 for each of the trees so lopped by defts., being the amount of penalties then incurred & forfeited by defts., to pltf. for lopping the trees":—*Held*: assuming the £20 penalty to be liquidated damage pltf. could not recover it on this breach, as it did not allege that the penalty was not paid.—*HURST v. HURST* (1849), 4 Exch. 571; 19 L. J. Ex. 410; 14 L. T. O. S. 257; 154 E. R. 1341.

*Annotations*:—*Consd.* *Lagh v. Lillie* (1860), 6 H. & N. 165. *Mentd.* *Re Bodingfield & Herring's Contract*, [1893] 2 Ch. 332.

**795. Covenant not condition.]**—A covenant in a lease that the lessee should have housebote, etc., without committing any waste upon pain of forfeiture, is not a condition.—*ARCHDEACON v. JENNER* (1599), Cro. Eliz. 604; 78 E. R. 847.

*Annotation*:—*Mentd.* *Keeble v. Hickeringill* (1706), Holt K. B. 14.

**796. Construction of lease of orchard—Trees properly removed.]**—A lessee covenanted to deliver up at the end of the term all trees, which were at date of the lease standing in the orchard whole & undamaged, reasonable use & wear only excepted, & there was a proviso for re-entry on breach of covenant. Deft. cut down trees in the orchard which were decayed & past bearing, the orchard being too crowded with trees. In an ejectment for breach of the covenant:—*Held*: the removal of the trees past bearing from the too crowded orchard must be considered the reasonable use of the orchard & the trees, & deft.'s act was within the exception.—*DOE d. JONES v. CROUCH* (1810), 2 Camp. 449.

**797. Covenant to leave trees—Trees wrongfully cut—Right of action.]**—A lessee covenanted to leave the houses, trees & woods at the end of the term in as good plight as he found them; & afterwards the lessee cut down a tree:—*Held*: the covenant was broken, & the lessor should not stay until the end of the term to bring his action of covenant, because it was apparent the tree could not grow again & be in as good plight as it was when the lease was taken (*DODDERIDGE, J.*).—*WATERER & MOUNTAGUE'S CASE* (1623), Godb. 335; 78 E. R. 197.

**798. Repairs—Covenant to deliver timber for.]**—Covenant to deliver timber (growing on the premises) sufficient for the repairs thereof. Averment, that there was timber growing on the premises sufficient for the repairs, but deft. had not delivered it. Plea, that there was not timber growing on the premises sufficient & proper for the repairs:—*Semble*: (1) the covenant meant the timber should be sufficient in quality as well as quantity; (2) the plea was good (not having been demurred to), without stating that there was not timber sufficient for any part of the repairs.—*SNELL v. SNELL* (1825),

4 B. & C. 741; 7 Dow. & Ry. K. B. 249; 4 L. J. O. S. K. B. 44; 107 E. R. 1236.

*Annotation*:—*Mentd.* *Smith v. Jennings* (1840), 4 Jur. 1160.

**799. Covenant to plant trees & keep them in order.]**—In an action on an agreement by pltf. to plant a quantity of trees, & "well & sufficiently to keep them in order" for two years, & to replant such as should die during that period, except from injury by sheep, game, or cattle, the judge rejected evidence tendered by deft., that the trees had been destroyed by being choked up with weeds & grass & were of no value, & the jury found a verdict for pltf., & that "well & sufficiently to keep in order" meant pruning only:—*Held*: (1) the evidence was improperly rejected, & the agreement was not rightly construed; (2) as the verdict was not perverse, deft. could have a new trial only on payment of costs.—*ALLEN v. CAMERON* (1833), 1 Cr. & M. 832; 3 Tyr. 907; 2 L. J. Ex. 263; 149 E. R. 635.

*Annotations*:—*Mentd.* *Baillie v. Kell* (1838), 4 Bing. N. C. 638; *Dawson v. Collis* (1851), 10 C. B. 523; *Charles v. Altin* (1854), 15 C. B. 46.

**800. Remove or grub up—Covenant not to.]**—A covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another; & so it is by taking away trees, even if the lessee plant a greater quantity than he takes away, unless those taken away are dead.—*DOE d. WETHERELL v. BIRD* (1833), 6 C. & P. 195.

**801. Lease of quarries—Covenant not to commit waste in trees—Cutting necessary to work quarry.]**—A lease contained a demise of land & quarries with power to open & work them at certain rent & royalties, with an exception of trees on the premises. The lessee covenanted not to commit waste by cutting the trees. There was a proviso for re-entry on the lessee committing waste by any of the means aforesaid. The lessee cut down trees which it was necessary to remove in order to work the quarries:—*Held*: (1) the covenant was not to be construed (a) as prohibiting waste generally, (b) as an unqualified covenant not to cut down the trees excepted, (c) nor as not to cut down trees excepted so as to amount to waste in the technical sense; (2) the covenant meant the lessee should not so cut the trees excepted as that the cutting should amount to an excess of the rights which it was intended the lessee should exercise; (3) the lessee's act was not a breach of covenant working a forfeiture.—*DOE d. ROGERS v. PRICE* (1849), 8 C. B. 891; 19 L. J. C. P. 121; 14 L. T. O. S. 329; 137 E. R. 760.

*Annotation*:—*Consd.* *Swindell v. Birmingham Canal Navigations Co.* (1860), 9 C. B. N. S. 241.

**802. Covenant to pay for trees planted—Running with land.]**—A covenant in a lease to pay for trees & bushes as a valuation does not run with the land, unless the assignees be expressly named in the lease as covenantors.—*GREY v. CUTHBERTSON* (1785), 2 Chit. 482; 4 Doug. K. B. 351; 99 E. R. 917.

*Annotation*:—*Refd.* *Canham v. Rust* (1818), 2 Moore, C. P. 164.

**803. Covenant not to fell trees excepted from lease—Running with land—Right to sue.]**—A covenant not to fell, etc., trees excepted from a demise does not run with the land, & as regards a breach committed in the lifetime of the deceased lessor his exor. may sue in respect thereof.—*RAYMOND v. FITCH* (1835), 2 Cr. M. & R. 588; 1 Gale, 337; 5 Tyr. 985; 5 L. J. Ex. 45; 150 E. R. 251.

*Annotations*: *Refd.* *Ricketts v. Weaver* (1844), 12 M. & W. 718; *Jackson v. Watson*, [1909] 2 K. B. 193, C. A.; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197, P. C. *Mentd.* *Drake v. Beckham* (1843), 11 M. & W. 315; *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Formby v. Barker* (1903), 89 L. T. 249, C. A.



*Sect. 4.—Construction & effect of grants, leases, etc., of trees & of covenants & contracts relating to trees: Sub-sect. 5. Sects. 5, 6 & 7: Sub-sect. 1.]*

**SUB-SECT. 5.—CONTRACTS RELATING TO TREES.**

*See, further, Nos. 285, 286, 289, 290, ante; SALE OF GOODS.*

**804. Contract to take timber by valuation—What is timber.]—**On a contract to take coppice & timber by valuation:—*Held*: (1) the custom of the country should decide which trees were timber; (2) chestnut & lime trees might, if their bodies were sound & good, be timber under the contract, otherwise if not sound.—*CHANDOS (DUKE) v. TALBOT* (1731), 2 P. Wms. 601; 24 E. R. 877.

*Annotations:—Mentd.* Hall v. Terry (1738), West. temp. Hard. 500; Prowse v. Abingdon (1738), 1 Atk. 482; Nicholls v. Judson (1742), 2 Atk. 300; A.-G. v. Milner (1744), 3 Atk. 112; Basset v. Basset (1744), 3 Atk. 203; Chester v. Willes (1754), Amb. 246; Pearce v. Loman (1796), 3 Ves. 135; Astley v. Milles (1827), 1 Sim. 298; Honner v. Morton (1828), 3 Russ. 65; Horton v. Smith (1858), 27 L. J. Ch. 773; Remnant v. Hood (1859), 27 Beav. 74; Henty v. Wrey (1882), 21 Ch. D. 332, C. A.

**805. Sale of woods, etc., then growing—Construction.]—**D., being seised of the manor of C., by indenture bargained & sold to A. all those her woods, underwoods & hedgerows, as had been accustomed to be felled & sold, standing, growing, being in, upon & within C., to have & to hold during the natural life of D., A. paying £10 yearly during the term. A. cut down all the woods, etc., growing at the time of the indenture. Afterwards D., by her servants, felled all the other woods growing in the same manor:—*Held*: in trespass, after the bargainee had once felled he should never after fell in the same place, notwithstanding the rent yearly reserved, & the words "to have & to hold during the life of D."—*ANDREWS & GLOVER'S CASE* (1562), 3 Leon. 7; 1 And. 7; 74 E. R. 505.

**806. Contract to value "timber"—Meaning.]—**Deft. having told pltf., a land surveyor, that he was tenant for life of an estate, & wanted to sell every stick of timber on it, engaged him to value it roughly, at a certain rate per cent., & gave him a written order to that effect, signed only by himself. The witnesses on both sides agreed that timber ordinarily meant trees of a certain growth, & the valuation included mere saplings, so that it did not show the value of the timber:—*Held*: there was nothing to show that the word timber was not used in its ordinary sense, & the valuation not being what was ordered & being proved to be grossly incorrect, the jury might find it worthless.—*WHITTY v. DILLON (LORD)* (1860), 2 F. & F. 67.

**807. Contract of sale—"Timber"—Meaning.]—**Resp. agreed to sell to applts. at an agreed price shares in a saw mills co., which had extensive rights of cutting timber over a large area of ground for long periods of time. The agreement contained a provision to the effect that the vendor was to give a satisfactory guarantee to the purchasers "that the quantity of timber on the different tracts of land as shown by the state . . . attached hereto . . . is true & accurate," & in the event of the quantity of timber on the various tracts failing, on verification, to reach the quantity represented in the attached statement the vendor was to repay to the purchasers the amount of shortage:—*Held*: the word "timber" must be held to mean all timber trees growing on the land which were reasonably fit for use in such a business as that carried on by the co., & should not be restricted to such trees as were

at the date of the agreement capable of being felled & sold at a profit at the then current prices.—*SWIFT v. DAVID* (1912), 107 L. T. 71, P. C.

**808. Agreement made in ignorance of death of tenant for life.]—**A tenant in tail, expectant on the death of a tenant for life who was insolvent, being desirous of preserving the timber on the estate from being cut, signed an agreement with the agent of the assignee of the tenant for life, agreeing that the assignee should have the same right to the timber as if he had actually cut it, on a past day named, which was prior to the death of the tenant for life, & the assignee agreed to refrain from cutting it for a month. It turned out that the tenant for life was dead at the date of the agreement, although both the tenant in tail & the agent of the assignee were ignorant of the fact:—*Held*: (1) the agreement was founded on a mistake; (2) it was without consideration, & the ct. should refuse to enforce it.—*COCHRANE v. WILLIS* (1865), 1 Ch. App. 58; 35 L. J. Ch. 36; 13 L. T. 339; 11 Jur. N. S. 870; 14 W. R. 19, L.JJ.

*Annotations:—Consd.* Scott v. Coulson, [1903] 1 Ch. 453. *Refd.* Huddersfield Banking Co. v. Lister (1895), 72 L. T. 703, C. A. *Mentd.* Jones v. Clifford (1876), 3 Ch. D. 779.

**809. Sale of copyholds & freeholds with timber—Specific performance.]—**Lands of copyhold & freehold tenure lying intermixed & undistinguishable were sold with the timber standing on them. The conditions of sale stipulated that the vendor was not to be bound to distinguish the freeholds from the copyholds, & that the timber was to be taken at a valuation made for purposes of that sale, the value of the timber on each lot being specified. The deposit was paid of £10 per cent. on the whole price of the land & timber. It was also stipulated that in case of delay in the completion of the purchase, interest at £5 per cent. should be payable on the whole price of the land & timber:—*Held*: (1) the contract was an entire contract for sale of land with timber on it, not two contracts, one for sale & another for timber; (2) the purchaser was not entitled to any abatement, though he could not cut a single tree, not being able to distinguish any one tree as standing on freehold ground; (3) in the case of one lot sold under the same conditions & particulars of sale, & which consisted entirely of copyholds, the purchaser was equally bound to pay the stipulated price for the timber, although he could not cut any of it.—*CROSSE v. LAWRENCE* (1852), 9 Hare, 462; 21 L. J. Ch. 889; 18 L. T. O. S. 314; 16 Jur. 142; 68 E. R. 591.

**810. Sale of growing timber—Seller forcibly preventing due execution of contract—Remedy of purchaser.]—**By contracts contained in letters deft. sold to pltf. certain growing timber on his estates, pltf. being entitled to enter on the estates with their servants to fell the timber, to erect sawmills for the purpose of cutting it up, & to remove the timber when so cut up. Considerable sums were paid by pltf. to deft. under these contracts, & pltf. erected sawmills, bothies for their workmen, & other erections on the estates, & they removed a considerable part of the timber. Deft. then purported to repudiate the contracts, & forcibly, by his servants & agents, prevented pltf. from entering on the estates to cut the timber, pulled down the sawmills & bothies erected by pltf., & carried away parts of the machinery. In an action by pltf. for an injunction to restrain deft. from preventing due execution of the contracts, & for damages:—*Held*: (1) in such a case damages only

**PART IX. SECT. 4, SUB-SECT. 5.**

**807 i. Contract of sale—"Blue gum"—Meaning.]—"Blue gum" timber means timber taken from the *Eucalyptus***

*Globulus.*—*RODNEY (SHIRE) v. VIBERT* (1915), V. L. R. 388.—*AUS.*

**810 i. Sale of growing timber—Subsequent growth.]—**The right, by virtue of agreement, to cut & remove a certain

kind of wood from land, during a fixed period, extends to subsequent growths of the same kind of wood as long as the period endures.—*BELOVIN v. HOVEY* (1906), Q. R. 28 S. C. 31.—*CAN.*



would not be an adequate remedy for what pl'ts. had suffered; (2) they were entitled to an injunction as well as damages.—*JONES (JAMES) & SONS, LTD. v. TANKERVILLE (EARL)*, [1909] 2 Ch. 440; 78 L. J. Ch. 674; 101 L. T. 202; 25 T. L. R. 714.

*Annotations*:—*Refd.* *Hurst v. Picture Theatres*, [1915] 1 K. B. 1, C. A.

#### SECT. 5.—CUSTOMS, USAGES, AND PRESCRIPTION RELATING TO TREES.

Customs as to what are timber trees, *see* Nos. 352, 358—376, *ante*.

**811. Custom for householders to cut rotten boughs—Bad.]**—A custom for poor & indigent householders living in A. to cut & carry away rotten boughs & branches in a chase in A. cannot be supported; the description of the persons entitled being too vague. Where deft. justified in trespass under such a custom, which was found for him, the ct. set aside the verdict on that issue, & entered a verdict for pl'tf. with nominal damages.—*SELBY v. ROBINSON* (1788), 2 Term Rep. 758; 100 E. R. 409.

*Annotations*:—*Refd.* *Mortimer v. Moore* (1845), 8 Q. B. 294; *Rivers v. Adams*, *Rivers v. Isaacs*, *Rivers v. Ferrett* (1878), 3 Ex. D. 361.

**812. Prescription to have loppings.]**—Prescription to have all loppings of all trees, called pollards, in such a place:—*Held*: good.—*DICKINS v. HAMPSTEAD* (1729), Fitz-G. 87; 94 E. R. 666.

**813. Right to cut timber in alieno solo as appurtenance—Bad.]**—A claim of a prescriptive right in the owners & occupiers of close A. to enter close B. (belonging to a third party), & to cut down & carry away & convert to their own use all the trees & wood growing & being thereon "as to the close A. appertaining," is void as being too large.—*BAILEY v. STEPHENS (STEVENS)* (1862), 12 C. B. N. S. 91; 31 L. J. C. P. 226; 6 L. T. 356; 8 Jur. N. S. 1063; 10 W. R. 868; 142 E. R. 1077.

—*Consd.* *Edgar v. English Fisheries Comrs.* (1870), 23 L. T. 732; *Chesterfield v. Harris*, [1908] 2 Ch. 397, C. A. *Refd.* *Constable v. Nicholson* (1863), 14 C. B. N. S. 230; *Ellis v. Bridgnorth Corpn.* (1863), 15 C. B. N. S. 52; *Shuttleworth v. Le Fleming* (1865), 19 C. B. N. S. 687; *Johnson v. Barnes* (1872), L. R. 7 C. P. 592; *Sutherland v. Heathcote*, [1891] 3 Ch. 504; *Whitmore v. Stanford*, [1909] 1 Ch. 427; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 110, C. A. *Mentd.* *Hill v. Tupper* (1863), 8 L. T. 792.

**814. Evidence of usage.]**—Evidence of a modern usage well-known in a district, as to a particular mode of cultivation of timber or trees, is admissible in construing a grant, lease or will.—*DASHWOOD v. MAGNIAC*, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811; 7 T. L. R. 629, C. A.

*Annotations*:—*Consd.* *Pardoe v. Pardoe* (1900), 82 L. T. 547. *Mentd.* *Re Chaytor*, [1900] 2 Ch. 804; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A.; *Re Trevor-Batye's Settlement*, *Bull v. Trevor-Batye* [1912] 2 Ch. 339; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488.

**815. Usage to disregard fractions of quarter of inch.]**—In the hardwood trade there is a custom, by which measurements are taken in cross dimensions by rejecting fractions of measurements below a quarter of an inch.—*YOUNG v. CANNING JARRAH TIMBER CO., LTD.* (1899), 4 Com. Cas. 96.

*See, further, CUSTOM & USAGES.*

#### SECT. 6.—CROWN GRANTS AND LICENCES.

**816. Crown grant to inhabitants of parish to lop trees.]**—By grant of Queen Elizabeth to the inhabi-

tants of L., which was a Crown manor & parish, the labouring or poor people inhabiting the parish, & having families, were to be at liberty at all times, from Nov. 11 in every year to Apr. 23 in the following year, to cut or lop the boughs & branches above the height of 7 ft. from the ground on the trees growing upon waste lands of the manor & parish for their own use & consumption, & for sale, for their own relief, to all or any of the inhabitants for their consumption within the same parish as fuel:—*Held*: a valid grant.—*WILLINGALE v. MAITLAND* (1867), L. R. 3 Eq. 103; 36 L. J. Ch. 64; 31 J. P. 296; 12 Jur. N. S. 932; 15 W. R. 83.

*Annotations*:—*Expld.* *Chilton v. London Corpn.* (1878), 7 Ch. D. 735. *Consd.* *Rivers v. Adams*, *Rivers v. Isaacs*, *Rivers v. Ferrett* (1878), 3 Ex. D. 361. *Refd.* *Austin v. Amhurst* (1877), 38 L. T. 217; *Tyne Improvement Comrs. v. Inrie. A.-G. v. Tyne Improvement Comrs.* (1899), 81 L. T. 174. *Mentd.* *Mills v. Colchester Corpn.* (1867), 16 L. T. 626; *De La Warr v. Miles* (1881), 17 Ch. D. 535, C. A.; *Hyde Corpn. v. Bank of England* (1882), 21 Ch. D. 176.

**Crown grants.]**—*See, further, CONSTITUTIONAL LAW.*

**Timber licences.]** *See* REAL PROPERTY CHATTELS REAL.

#### SECT. 7.—MANAGEMENT BY COURT.

##### SUB-SECT. 1.—POWER TO ALLOW CUTTING.

**817. Remainderman in fee allowed to cut—To pay legacies.]**—Lands were devised to A. for life, remainder to B. in fee, paying several legacies within a limited time, & in default of payment, the remainder to C., he paying the legacies:—*Held*: leave would be given to B. to cut timber for payment of legacies, though it was opposed by A. & C., on terms of B. making satisfaction to A. for breaking the ground by carriage, waste, etc.—*CLAXTON v. CLAXTON* (1690), Prec. Ch. 15; 2 Vern. 152; 1 Eq. Cas. Abr. 400, pl. 7; 24 E. R. 8.

**818. Remainderman in need.]**—A term for years was limited for payment of debts, remainder to A. for his life *sans* waste, remainder to his first, etc., son in tail. A. being in want, the ct. gave him leave to cut timber for his support, not exceeding the value of £500, although the debt had not been paid.—*ASPINWALL v. LEIGH* (1690), 2 Vern. 218; 1 Eq. Cas. Abr. 400, pl. 8; 23 E. R. 741.

**819. Timber fit to be cut & decaying—Inquiry.]**—Timber on settled estates was fit to be cut & in danger of running to decay. The tenants for life had not power to commit waste, except to cut coppice wood. On application by an infant tenant in tail in remainder the Lord Chancellor ordered an inquiry whether it would be for the benefit of pl'tf. & other persons interested to have the timber cut:—*Held*: (1) the order was wrong in doing for the tenant in tail what he could not have done for himself; (2) the proceeds of sale must be invested until he came of age, when the claims must be discussed.—*MILDMAY v. MILDMAY* (1792), 4 Bro. C. C. 76; 29 E. R. 786.

*Annotations*:—*Refd.* *Tollemache v. Tollemache* (1842), 1 Hare, 456; *Gent v. Harrison* (1859), John. 517; *Dashwood v. Magulac*, [1891] 3 Ch. 306, C. A.

**820. ———.]**—Devise in strict settlement, with a clause of forfeiture by cutting any trees. Upon a bill by the infant remainderman in tail showing that many trees had been for a long time in a state of decay & if not felled, would be of very little value, an inquiry was directed, whether any trees in the park, not ornamental, or affording shel-

#### PART IX. SECT. 7, SUB-SECT. 1.

1. *Timber blown down—Order to sell—Receiver.]*—Practice as to timber trees blown down on an estate, over which a receiver had been appointed.—*CROFTS v. POE* (1839), Jo. & Car. 193.—*IR.*

Sect. 7.—Management by court: Sub-sects. 1 & 2.]

ter to the mansion-house, were proper to be felled, & whether it would be for the benefit of all parties interested that they should be felled & sold, & the money laid out in other estates, to be settled to the same uses.—*DELAPOLE v. DELAPOLE* (1810), 17 Ves. 150; 34 E. R. 58.

—*Distd.* *Ormond v. Kynnersley, Butler v. Kynnersley* (1830), 7 L. J. O. S. Ch. 150; *Butler v. Kynnersley* (1830), 8 L. J. O. S. Ch. 67. *Expld.* *Tollemache v. Tollemache* (1842), 1 Hare, 456. *Refd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**821.** *S. P. WICKHAM v. WICKHAM* (1815), 19 Ves. 419; *Coop. G.* 288; 34 E. R. 573.

*Annotations* :—*Distd.* *Butler v. Kynnersley* (1830), 8 L. J. O. S. Ch. 67. *Folld.* *Tooker v. Annesley* (1832), 5 Sim. 235. *Expld.* *Tollemache v. Tollemache* (1842), 1 Hare, 456. *Refd.* *Bewick v. Whitfield* (1734), 3 P. Wms. 267; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**822.** —.]—An injunction had been granted to prevent the cutting of timber or other trees standing or growing for the shelter or ornament of Blenheim House, but on petition showing that there were large quantities of trees, which by good husbandry ought to be cut down because they were going to decay, or were growing so thickly together that they injured & destroyed each other, or that they destroyed the ornamental surface of the ground, a reference was made to inquire & state whether any of such timber & other trees might be cut with advantage to the then ornamental character of the gardens, etc., or because they were too thickly planted to admit the most ornamental growth, or for any other reason.—*A.-G. v. MARLBOROUGH (DUKE)* (1820), 5 Madd. 280; 56 E. R. 902.

*Annotations* :—*Refd.* *Tollemache v. Tollemache* (1842), 1 Hare, 456; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**823.** —.]—A testator settled his freeholds on plff. for life, subject to impeachment of waste, but with power of cutting timber necessary for repairs, with remainders over. On proof that timber on the estate was going much to decay, an inquiry was directed as to whether there were any timber trees in a state of decay, which would not improve by standing, or the standing of which would be prejudicial to other trees, & which it would be for the benefit of all parties to have felled.—*TOOKER v. ANNESLEY* (1832), 5 Sim. 235; 58 E. R. 325.

*Annotations* :—*Folld.* *Waldo v. Waldo* (1835), 7 Sim. 261; *Consett v. Bell* (1842), 1 Y. & C. Ch. Cas. 569; *Tollemache v. Tollemache* (1842), 1 Hare, 456. *Expld.* *Ferrand v. Wilson* (1845), 4 Hare, 344. *Folld.* *Bagot v. Bagot, Legge v. Legge* (1863), 32 Beav. 509. *Refd.* *Waldo v. Waldo* (1841), 12 Sim. 107; *Marker v. Kekewich* (1850), 19 L. J. Ch. 492; *Hartley v. Pendarves*, [1901] 2 Ch. 498. *Mentd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**824.** —.]—The tenant for life under a settlement was impeachable for waste. A decree was made referring it to the master "to inquire whether any & which of the timber, or trees likely to become timber, or any wood on the several estates, which do not serve for shelter or ornament to any mansion-house, are in a decaying state, or which would deteriorate if left longer standing." The master having made his report:—*Held*: the whole of the trees mentioned in the master's report to be felled & cut. *LYGON v. BEAUCHAMP (EARL)* (1832), 6 L. J. Ch. 158.

*Annotation* :—*Folld.* *Peters v. Blake* (1837), 6 L. J. Ch. 157.

**825.** —.]—Form of the reference to inquire whether it is proper to cut timber during continuance of the estate of a tenant for life of the lands impeachable for waste.—*TOLLEMACHE v. TOLLEMACHE* (1842), 1 Hare, 456; 6 Jur. 364; 66 E. R. 1111.

*Annotation* :—*Refd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**826.** —.]—Upon a bill filed by an infant devisee for life without impeachment of waste (except as to ornamental timber), praying the establishment of the will, the administration of the trusts & maintenance, an inquiry was directed as to timber in the form adopted in *Tooker v. Annesley* (No. 823, ante), excluding ornamental timber.—*CONSETT v. BELL* (1842), 1 Y. & C. Ch. Cas. 569; 11 L. J. Ch. 401; 6 Jur. 869; 62 E. R. 1020.

*Annotations* :—*Mentd.* *Finden v. Stephens* (1846), *Coop. temp. Cott.* 318; *Stainton v. Carron Co.* (1854), 18 Beav. 146; *Alexander v. Brame* (1855), 25 L. T. O. S. 298, C. A.

**827. Leave to cut timber—When granted.]**—The ct. would not be justified in ordering timber to be cut on the application of a tenant for life impeachable for waste, merely because it was ripe for cutting, unless it were also decaying, or injuring the growth of other timber. If a tenant for life impeachable for waste cuts timber without leave of the ct., he will never be permitted to derive any advantage from his wrongful act. In such a case, the act being wrongful, Stat. Limitations begins to run against the remainderman from the time of the cutting.—*SEAGRAM v. KNIGHT* (1867), 2 Ch. App. 628; 36 L. J. Ch. 918; 17 L. T. 47; 15 W. R. 1152, C. A.

*Annotations* :—*Consd. & Distd.* *Re Benzon, Bower v. Chetwynd* (1914), 83 L. J. Ch. 658, C. A. *Refd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**828. — Decaying timber—Order to cut—Apportionment of proceeds—Infant.]**—A. was tenant for life, remainder to B. in tail, as to one moiety, remainder to C., an infant, in tail, as to the other moiety, remainder over. There was timber on the premises greatly decaying. B. brought a bill, praying that the decaying timber might be cut down, sold, & the money divided betwixt him & the infant, & the tenant for life insisted to have part of the money :—*Held*: (1) the tenant for life must have sufficient left for repairs, etc., & an allowance for all damage done to him on the ground, but no allowance for the timber, which, when severed by accident, or by a trespasser, belonged to the first owner of the inheritance; (2) decaying timber, if for ornament or safety, was not to be cut down; (3) where an infant was interested in the inheritance, no timber could be cut down, but by the approbation of the master, & the infant's moiety of the money to be put out for his benefit.—*BEWICK v. WHITFIELD* (1734), 3 P. Wms. 267; 24 E. R. 1058.

*Annotations* :—*Consd.* *Garth v. Cotton* (1750), 1 Ves. Sen. 546; *Tooker v. Annesley* (1832), 5 Sim. 235. With respect to the case of *Bewick v. Whitfield*, it appears, when it is contrasted with the extract from the registrar's book, which is contained in a note upon that case, that not only the facts of the case, but also what is represented as the Lord Chancellor's judgment, are not correctly given; but it is observable that the Lord Chancellor in his judgment admits that, if there be any damage done to the tenant for life, he ought to have compensation in respect of that damage (*SHADWELL, V.-C.*). *Refd.* *Lee v. Alston* (1789), 3 Bro. C. C. 37; *Hony v. Honny* (1824), 1 Sim. & St. 568; *Seagram v. Knight* (1867), 2 Ch. App. 628; *Re Barrington, Gamlen v. Lyon* (1886), 33 Ch. D. 523. *Mentd.* *Jesus College v. Bloom* (1745), 1 Amb. 54; *Bell v. Wilson* (1866), 1 Ch. App. 303, L.J.J.

*See, also*, No. 823, ante.

**829. Infant tenant.]**—In the case of an infant tenant in tail in possession the ct. will authorise the cutting of all timber fit to be felled in a due course of management, but where there is a tenant for life impeachable for waste, with remainder over, the ct. will only authorise the cutting of timber where the interest of the succession requires it, namely, such timber as is decaying, or timber which it is beneficial to cut because it injures the growth of other trees.—*HUSSEY v. HUSSEY* (1820), 5 Madd. 44; 56 E. R. 811.

*Annotations* :—*Consd.* *Tooker v. Annesley* (1832), 5 Sim. 235. *Refd.* *Tollemache v. Tollemache* (1842), 1 Hare, 456; *Ferrand v. Wilson* (1845), 4 Hare, 344; *Seagram v. Knight* (1867), 2 Ch. App. 628.



**830. Lunatic.]—**Timber on the estate of a lunatic cut under order of ct. was sold, & the produce paid into a bank on account of the lunatic; after his death, on petition by his heir:—*Held*: the ct. might cut timber for lunatic's benefit, but only on pressing occasions.—*Ex p. BROMFIELD* (1792), 1 Ves. 453; 3 Bro. C. C. 510; 30 E. R. 434.

**Receiver.]—**A receiver was authorised to cut & sell timber for the purpose of repairs.—*A.-G. v. BOOTHBY* (1860), 1 Seton's Jud. & Orders, 6th ed., p. 799.

**832. — After death of trustees.]—**By a will power was given to the devisees for life, who were impeachable for waste, when in possession to cut down timber as four trustees, or the survivors or survivor of them, should assign or direct. All the four trustees were dead:—*Held*: the ct. would execute the trust by referring it to a master to see what timber was fit to be cut down from time to time.—*HEWITT v. HEWITT* (1765), Amb. 508; 27 E. R. 328; *sub nom. HEWETT v. HEWETT*, 2 Eden, 332.

**Annotation:—Distd.** *Watlington v. Waldron* (1853), 4 De G. M. & G. 259.

#### SUB-SECT. 2.—APPLICATION OF PROCEEDS.

**833. Whether realty or personalty — Lunatic's estate.]—**Timber on the estate of a lunatic was cut under order of ct., sold, & the produce paid into the bank on his account. After his death, on petition by his heir for the money:—*Held*: (1) when property was converted, equity would recall it for the representative, if done by breach of trust, not if by accident, the ct., or the tort of a stranger; (2) on account of its consequence & the difficulty of reversing an order made on petition, the ct. would refuse to give it to either representative without a bill.—*Ex p. BROMFIELD* (1792), 1 Ves. 453; 3 Bro. C. C. 510; 30 E. R. 434.

**834. — — —.]—**The ct., in dealing with the estate of a lunatic, cut timber during his life:—*Held*: when that was severed it became personalty, & on the death of the lunatic went as personalty to his next of kin, & not to the heir-at-law.—*OXENDEN v. COMPTON (LORD)* (1793), 2 Ves. 69; 4 Bro. C. C. 231; 30 E. R. 527.

**Annotations:—Expld. & Distd.** *Cooke v. Dealey* (1855), 22 Beav. 196. **Distd.** *Re Leeming* (1861), 3 L. T. 686, C. A. **Consd.** *Dyer v. Dyer* (1865), 34 Beav. 504. **Refd.** *Re Smith* (1874), 10 Ch. App. 79, L.J.J.; *Steed v. Preece* (1874), L. R. 18 Eq. 192; *Re Freer, Freer v. Freer* (1882), 22 Ch. D. 622; *Re Pickard, Turner v. Nicholson* (1885), 53 L. T. 293; *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672, H. L.; *Re Gist*, [1904] 1 Ch. 398, C. A.

**835. — — —.]—**In lunacy an inquiry was ordered as to timber decaying, or which would not improve by standing, or which impeded the growth of other timber. On a petition by the heir-at-law, & one of the next of kin, the proceeds of timber so cut were applied for payment of debts of the lunatic. There is no equity for a charge in favour of the next of kin.—*Ex p. PHILLIPS* (1812), 19 Ves. 118; 34 E. R. 463.

**Annotation:—Consd.** *A. G. v. Allesbury* (1885), 16 Q. B. D. 408, C. A.

**Conversion — No reconversion.]—**Where timber growing on settled land has been rightfully felled & sold under an order of the ct., it becomes personal estate, & all the consequences of a conversion must follow; & there is no equity for reconversion as between the heir-at-law & the legal personal representatives of the tenant in fee in remainder.—*HARTLEY v. PENDARVES*, [1901] 2 Ch. 498; 70 L. J. Ch. 745; 85 L. T. 64; 50 W. R. 56.

**Annotations:—Consd.** *Burgess v. Booth*, [1908] 2 Ch. 648, C. A. **Mentd.** *Fauntleroy v. Beebe* (1911), 80 L. J. Ch. 654, C. A.

**837. Settled on same trusts as estate.]—**An estate was limited to one for life, with a clause of forfeiture & a gift over, on his cutting timber. There was, on the estate, timber which required felling. The ct., on a bill filed for that purpose by the tenant for life, authorised same to be cut down, & directed a reference to the master for that purpose. The money arising from the timber in such cases is settled on trusts similar to those on which the estate stands limited.—*PETERS v. BLAKE* (1837), 6 L. J. Ch. 157.

**838. Right of tenant for life sans waste in remainder.]—**An estate was devised to A. for life impeachable for waste, remainder to B. for life without impeachment of waste, with remainder to C. in fee. It became necessary, during A.'s life, to cut timber; the proceeds were invested, & the interest paid to A. for life. A. died, & B. claimed the proceeds of the timber for his own benefit. C., the reversioner in fee, resisted the claim, & contended that they formed part of the *corpus* of the estate:—*Held*: B. entitled to receive the proceeds.—*PHILLIPS v. BARLOW* (1844), 14 Sim. 263; 14 L. J. Ch. 35; 4 L. T. O. S. 130a; 60 E. R. 359.

**Annotations:—Distd.** *Lowndes v. Norton* (1877), 6 Ch. D. 139. **Refd.** *Gent v. Harrison* (1859), John. 517.

**839. — — —.]—**A. was tenant for life with impeachment of waste, with remainder to her issue in tail, with remainder to B. for life, with remainder to his issue in tail, with remainder to B. in fee. The ct. directed some timber to be cut in the life of A., & the produce to be invested. Both A. & B. died without issue:—*Held*: as between the heir & exor. of B. the timber money was realty, & belonged to the heir.—*FIELD v. BROWN, SMITH v. BROWN* (1859), 27 Beav. 90; 54 E. R. 35.

**Annotations:—Consd.** *Dyer v. Dyer* (1865), 34 Beav. 504. **Dbtd.** *Hartley v. Pendarves*, [1901] 2 Ch. 498.

**840. Equitable tenant for life unimpeachable — Rents & profits.]—**An equitable tenant for life unimpeachable for waste was entitled for estates, subject to a trust for payment by the trustees out of the rents & profits, but not by sale or mtge. of such estates, of certain mtges. on the estates. Timber had been cut on the estates by the direction of the ct.:—*Held*: (1) the term "rents & profits" meant annual rents & profits, & the trustees were not entitled to apply the proceeds of this timber which was a portion of the inheritance to discharge mtges.; (2) the tenant for life in possession, though not in possession of the rents & profits of the estate, was entitled to all other rights incident to his estate, unless they would interfere with the execution by the trustees of their trusts; (3) he was entitled to the proceeds of the timber which had been cut.—*LOVAT (LORD) v. LEEDS (DUCHESS)* (1862), 2 Drew. & Sm. 75; 10 W. R. 398; 62 E. R. 550.

**Annotation:—Mentd.** *Leppington v. Freeman* (1891), 66 L. T. 357, C. A.

**841. Infant tenant in fee—Personalty.]—**A. was tenant in fee simple of an estate, subject to an executory devise over in the event of his death under twenty-one without issue. During the minority of A., timber, which was deteriorating, was cut with the sanction of the ct. A. died under twenty-one without issue:—*Held*: the produce of the timber passed, as personalty, to his legal personal representative.—*DYER v. DYER* (1865), 34 Beav. 504; 6 New Rep. 79; 34 L. J. Ch. 513; 12 L. T. 442; 11 Jur. N. S. 721; 13 W. R. 732; 55 E. R. 730.

**Annotation —Consd.** *Hartley v. Pendarves*, [1901] 2 Ch. 498.

**842. Larch trees sold before maturity—Not in due course of management—Exceptional circumstances.]—**A testator by his will devised his residuary real estate upon trust for sale with full power of post-



**Sect. 7.—Management by court: Sub-sect. 2. Sect. 8: Sub-sects. 1 & 2.]**

ponement, & directed that until sale the annual produce of the estate should be treated as income & applied accordingly, & he directed that the net proceeds of the sale & conversion should (in the events which happened) be held on trust in equal amounts for his two sons for life, with remainder to their respective issue. Larches planted on the estate were cut & sold when the trees were some thirty years old, & by reason of the urgent demand arising out of the European War for trees of this size, realised at least as large a price as they would nominally have realised at maturity—that is, when fifty or sixty years old. *ASTBURY, J.*, held they had not been cut in a due & proper course, & the purchase-money was not payable to the tenants for life as annual produce of the estate, but, being a profit arising to the estate owing to an exceptional or accidental occurrence, must, after payment thereout of the costs of sale & of replanting the plantations, be divided into moieties, of which one moiety should be capitalised & the other paid to the tenants for life as income:—*Held*: under the above order (which should be affirmed) the tenants for life were receiving at least as much as they could possibly be entitled to.—*Re TERRY, TERRY v. TERRY* (1918), 87 L. J. Ch. 577.

**843. Investment — Income — Principal.]—**Where the ct. orders timber to be cut down for any reason, the proper course is for the proceeds to be invested, & the income given to the successive owners of the estate until there is an absolute estate of inheritance, the owner of which is entitled to the principal; & the same rule applies to cases of equitable waste.—*HONYWOOD v. HONYWOOD* (1874), L. R. 18 Eq. 306; 43 L. J. Ch. 652; 30 L. T. 671; 22 W. R. 749.

*Annotations*:—*Consd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.; *Pardoe v. Pardoe* (1900), 82 L. T. 547.

**844. — Lunatic tenant for life—Conversion—Personal estate.]—**Both the tenant for life impeachable for waste & the tenant in fee in remainder of land subject to an administration suit were lunatic. Under an order made in Ch. & in Lunacy timber was cut & sold:—*Held*: the proceeds of the timber were, subject to the life interest, personal estate of the tenant in fee.—*HARTLEY v. PENDARVES*, [1901] 2 Ch. 498; 70 L. J. Ch. 745; 85 L. T. 64; 50 W. R. 56.

*Annotations*:—*Consd.* *Burgess v. Booth*, [1908] 2 Ch. 648, C. A. *Mentd.* *Fauntleroy v. Beebe* (1911), 80 L. J. Ch. 654, C. A.

*See, also*, Nos. 833–835, *ante*.

**845. Construction of devise.]—**Devise of real estates to A. & B. & their heirs to the use of them & their heirs, in trust to permit C. to receive the rents & profits for life, & after her decease to stand seized of the premises, in trust for the second son of D. & heirs male of his body, remainder in trust for the third, fourth, & other sons of D. in tail male, remainder in trust for E. for life without impeachment of waste, remainder to trustees to preserve, etc., remainder to the first & other sons of E. in tail male, etc. Proviso that in case there should not be a second son of D. at the time of the death of C., then, until such second son should be born, the trustees should pay rents & profits of the estates to such person as was next in remainder, & should be entitled to receive same in case no such son should be born. C. having cut timber, this was sold under an order of the ct., & the produce paid into the bank. At C.'s death D. had no son, & E. was dead, leaving F. his eldest son:—*Held*: the produce of the timber belonged to F. absolutely, & did not abide the event of D.'s having a son.—*DARE v. HOPKINS* (1788), 2 Cox, Eq. Cas. 110; 30 E. R. 51.

**846. Interest on proceeds—Tenant for life im-**

**peachable.]—**A tenant for life subject to impeachment for waste is entitled to the interest of money produced by the sale of timber cut by order of the ct.—*TOOKER v. ANNESLEY* (1832), 5 Sim. 235; 58 E. R. 325.

*Annotations*:—*Consd.* *Waldo v. Waldo* (1841), 12 Sim. 107. *Refd.* *Waldo v. Waldo* (1835), 7 Sim. 261; *Marker v. Kekewick* (1850), 19 L. J. Ch. 492; *Hartley v. Pendarves*, [1901] 2 Ch. 498. *Mentd.* *Tollemache v. Tollemache* (1842), 1 Hare, 456; *Consett v. Bell* (1842), 1 Y. & C. Ch. Cas. 569; *Ferrand v. Wilson* (1845), 4 Hare, 344; *Bagot v. Bagot*, *Legge v. Legge* (1863), 32 Beav. 509; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**847. Tenant for life without impeachment.]—**A tenant for life without impeachment of waste further than wilful waste is entitled to the interest of money produced by the sale of decaying timber, cut by order of the ct.—*WICKHAM v. WICKHAM* (1815), Coop. G. 288; 19 Ves. 419; 35 E. R. 561.

*Annotations*:—*Distd.* *Butler v. Kynnersely* (1830), 8 L. J. O. S. Ch. 67. *Expld.* *Tollemache v. Tollemache* (1842), 1 Hare, 456. *Refd.* *Bewick v. Whitfield* (1734), 3 P. Wms. 267; *Tooker v. Annesley* (1832), 5 Sim. 235; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**848. Dividends on investment of proceeds.]—**Testatrix devised an estate to a trustee in trust to settle it on A. for life, with power to cut timber for repairs only, remainder to B. for life *sans* waste, remainder to his first & other sons in tail. The trustee, under a surveyor's advice, & with the consent of the tenants for life, ordered timber on the estate to be felled, & invested the proceeds in the purchase of stock in his own name:—*Held*: A. entitled to the dividends of the stock for her life.—*WALDO v. WALDO* (1835), 7 Sim. 261; 58 E. R. 837.

*Annotation*:—*Consd.* *Ferrand v. Wilson* (1845), 4 Hare, 344.

**849. — Capital.]—**Estates were devised to A. in fee, in trust to settle them on B. for life, remainder to C. for life without impeachment of waste, remainder to C.'s first & other sons in tail. Soon after testator's death A., with the consent of B. & C., cut & sold some timber on the estates which was going to decay, & invested the proceeds in Consols. A suit was instituted by C. against A., B., & C.'s infant eldest son, in which the stock was ordered to be transferred into ct. The ct. having ascertained the circumstances in which the timber had been cut, ordered the dividends of the stock to be paid to B. for life, & afterwards, B. having died, the capital was to be transferred to C.—*WALDO v. WALDO* (1841), 12 Sim. 107; 10 L. J. Ch. 312; 59 E. R. 1072.

*Annotations*:—*Consd.* *Phillips v. Barlow* (1841), 14 Sim. 263; *Gent v. Harrison* (1859), John. 517. *Distd.* *Lowndes v. Norton* (1877), 6 Ch. D. 139.

## SECT. 8.—WASTE AS REGARDS TREES.

Waste in general as between landlord & tenant, *see* LANDLORD & TENANT.

As between the owner of a particular estate or remainderman, *see* SETTLEMENTS.

### SUB-SECT. 1.—GENERAL PRINCIPLES.

**850. Rule generally.]—**Waste properly is in timber trees, either by cutting of them down or topping of them or doing any act whereby the timber may decay. Cutting down of willows, beech, birch, ash, maple, or the like standing in the defence & safeguard of the house is destruction (*PARKE, B.*)—*PHILLIPPS (PHILLIPS) v. SMITH* (1845), 14 M. & W. 589; 15 L. J. Ex. 201; 10 J. P. 533; 153 E. R. 610.

*Annotation*:—*Consd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**851.** .]—The question whether cutting timber is waste depends upon the questions (1) whether the consumption of the timber is necessary for its reasonable enjoyment, & (2) whether in any reasonable view of the circumstances the grantor must have intended the timber to be reasonably enjoyed. Reasonable necessity of construction, not the prudent management of estates, lies at the bottom of the doctrine (BOWEN, L.J.).—DASHWOOD v. MAGNIAC, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811; 7 T. L. R. 629, C. A.

*Annotations* :—*Reid*. *Pardoe v. Pardoe* (1900), 16 T. L. R. 373; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488. *Mentd.* *Re Chaytor*, [1900] 2 Ch. 804; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A.; *Re Trevor-Batye's Settlement*, *Bull v. Trevor-Batye*, [1912] 2 Ch. 339.

**852. What is waste.**]—An action for waste will not lie for cutting young ash trees, say of the age of seven or eight years. Waste is only for things which are prejudicial to the inheritance, as in houses, great ash trees, & the like, & not in small things (BRIAN, C.J.).—ANON. (1497), Y. B., 13 Hen. 7, fo. 20, pl. 3.

**853. What is not waste.**]—Those acts are not waste which are not prejudicial to the inheritance, as the cutting of willows, maples, beeches, & thorns which were not timber by law or by local custom.—*BARRET v. BARRET* (1628), 11et. 34; 124 E. R. 321.

*Annotations* :—*Consd.* *Simmons v. Norton* (1831), 7 Bing. 640; *Doe d. Grubb v. Burlington* (1833), 5 B. & Ad. 507. *Reid*. *Phillips v. Smith* (1845), 14 M. & W. 589; *Jones v. Chappell* (1875), L. R. 20 Eq. 539; *Tucker v. Linger* (1882), 21 Ch. D. 18, C. A.; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.; *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624.

**854. Questions for jury.**]—In a writ of waste founded on Stat. Gloucester (c. 5), it appeared that deft., a tenant for life, had cut down trees on the estate at three different times, the last of which was more than four years before the writ was sued out, & plffs.' witnesses admitted that several of such trees had been felled for the benefit of the estate. At the trial it was left to the jury to say whether they thought the felling of the trees had been injurious to the inheritance, & if so, that they should find a verdict for plffs., but if they should be of opinion that they were cut down *bona fide*, & with a view to improve the estate, then for deft.; & the jury found a verdict for the latter. The ct. granted a new trial, on the ground that the whole of the case had not been gone into at the original trial.—*REDFERN v. SMITH* (1823), 1 Bing. 382; 8 Moore, C. P. 443; 2 L. J. O. S. C. P. 30; 130 E. R. 154.

**855. De minimis non curat lex.**]—*Semble*: the destruction of one or two hazels, willows, or apple trees growing in a wood of ash trees, is not waste; but the destruction of a garden of apple trees is waste.—ANON. (1494), Y. B., 10 Hen. 7, fo. 2, pl. 3.

*See, further*, ACTION, Vol. I., pp. 36—40.

**856. Evidence admissible in construction of settlement or will.**]—Evidence is admissible, not only of the custom which makes trees of a particular kind timber, but to prove a usage as to management, with reference to which parties may have contracted or made testamentary or other dispositions of their property (LINDLEY, L.J.).—DASHWOOD

v. MAGNIAC, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811; 7 T. L. R. 629, C. A.

*Annotations* :—*Mentd.* *Pardoe v. Pardoe* (1900), 16 T. L. R. 373; *Re Chaytor*, [1900] 2 Ch. 804; *Chaytor v. Trotter* (1902), 87 L. T. 33, C. A.; *Re Trevor-Batye's Settlement*, *Bull v. Trevor-Batye*, [1912] 2 Ch. 339; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488.

#### SUB-SECT. 2.—PARTICULAR ACTS.

**857. Dead wood.**]—Cutting of dead wood is not waste at law.—ANON. (1427), Fitz. N. B. 59 (M.); 22 Vin. Abr. tit. Waste, M., pl. 20.

**858. Decayed timber.**]—Cutting down decayed timber is as much waste as cutting down any other.—*PERROT v. PERROT* (1744), 3 Atk. 94; 26 E. R. 857.

**859. Decaying wood.**]—Deft. was tenant for life under a settlement with remainder to his first & other sons in tail, with remainder to pltf. for life, & with the ultimate reversion in fee to deft. On application by pltf. for an injunction to stay cutting timber, deft. contended that he had only cut down decayed trees which it was in the public interest to cut down :—*Held*: (1) the question did not concern the interest of the public, unless it had been in the King's forests & chases, but was merely a private interest between the parties; (2) there was no distinction between young timber trees that had not come to their full growth & decayed timber; (3) an injunction would be granted, since pltf. could not sue deft. at law.—*PERROT v. PERROT* (1744), 3 Atk. 94; 26 E. R. 857.

**860. S. P. *Re LLEWELLIN, LLEWELLIN v. WILLIAMS*** (1887), 37 Ch. D. 317; 57 L. J. Ch. 316; 58 L. T. 152; 36 W. R. 347; 4 T. L. R. 170.

*Annotation* :—*Mentd.* *Re Smith's S. E.*, [1891] 3 Ch. 65.

**861. Firs.**]—Cutting a fir tree down to the ground would be waste, because it would not grow again (ROLFE, B.).—*PHILLIPPS (PHILLIPS) v. SMITH* (1815), 14 M. & W. 589; 15 L. J. Ex. 201; 10 J. P. 533; 153 E. R. 410.

*Annotation* :—*Consd.* *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**862. Fruit trees.**]—Cutting pear trees or apple trees may be waste.—ANON. (1429), Y. B., 7 Hen. 6, fo. 38, pl. 47; 22 Vin. Abr. tit. Waste, E., 8 & 9.

**863.** —]—Cutting down filbert trees & apple trees in an orchard is waste. *Semble*: had they been growing in a wood of timber trees, & not been for the protection of the house, to cut them would not have been waste.—ANON. (1494), Y. B., 10 Hen. 7, fo. 5, pl. 7.

**864. Germens.**]—Cutting germens, that is to say, the roots of trees, so that the spring cannot grow, or allowing the close to be open & cattle to enter & destroy the spring, is waste.—ANON. (1466), Y. B., 5 Edw. 4, fo. 100b (Long Quinto).

**865.** —]—The destroying of germens is waste.—ANON. (1433), Y. B., 11 Hen. 6, fo. 1, pl. 3; 22 Vin. Abr. tit. Waste, E., pl. 26.

**866. S. P. *PHILLIPPS (PHILLIPS) v. SMITH*** (1815),

#### PART IX. SECT. 8, SUB-SECT. 1.

**853 i. What is not waste.**]—A tenant for life in Canada may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, & perhaps destroy such timber, but he cannot cut down timber, even for the same purposes, & sell it.—*SAUNDERS v. BREAKIE* (1884), 5 O. R. 603.—CAN.

#### PART IX. SECT. 8, SUB-SECT. 2.

**m. Timber on wild land.**]—It is not waste in a tenant for life to cut down timber on wild land for the sole purpose of bringing it into cultivation, provided the inheritance be not damaged thereby, & it is done in conformity with the rules of good husbandry.—*DRAKE v. WIGLE* (1874), 24 C. P. 405.—CAN.

**n. — Pleading.**]—*DRAKE v. WIGLE* (1872), 22 C. P. 341.—CAN.

**o. Tapping trees.**]—It is a question for the jury whether the tapping of trees for sugar making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes; & if so found, a covenant not to cut down timber except for the lessee's use, or for purposes of improvement on the premises, will be broken by such tapping.—*CAMPBELL v. SHIELDS* (1879), 44 U. C. R. 449.—CAN.

**Sect. 8.—Waste as regards trees: Sub-sects. 2 & 3.]**

14 M. & W. 589; 15 L. J. Ex. 201; 10 J. P. 533; 153 E. R. 610.

*Annotation* :—**Consd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**867.** —.]—Allowing germens to be destroyed by cattle is waste.—*EVERWIK (DUKE) v. EVERWIK (DUCHESS)* (1431), Y. B., 9 Hen. 6, fo. 65, pl. 21.

**868. Hedgerows.**—A hedge may be on a different footing as regards waste, if important as marking boundaries (*ROLFE, B.*).—*PHILLIPPS (PHILLIPS) v. SMITH* (1845), 14 M. & W. 589; 15 L. J. Ex. 201; 10 J. P. 533; 153 E. R. 610.

*Annotation* :—**Consd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**Hedges as boundaries.**—*See, further, BOUNDARIES, FENCES & PARTY WALLS.*

**869. Lopping & topping timber.**—Lopping & topping ashes & elms is waste.—*SAMUEL v. JOHNSON* (1549), 1 Dyer, 65a; 73 E. R. 138.

**870. Oaks, hornbeams, etc.**—Cutting oaks at the age of eight or ten years is waste, but cutting hornbeams, hazels, willows or salallows of the age of forty years is in general not waste, because at no time will they be timber.—*ANON.* (1581), Godb. 4; 78 E. R. 3.

**871. Seasonable wood.**—If oaks are seasonable & accustomed to be cut at the age of twenty years, it is not waste to cut them.—*ANON.* (1433), Y. B., 11 Hen. 6, fo. 1. pl. 3; 22 Vin. Abr. tit. Waste, E., pl. 6.

*Annotation* :—**Mentd.** *Bowles' Case* (1615), 11 Co. Rep. 79b.

**872.** — **Oaks.**—After the age of twenty years, oaks cannot be said to be seasonable wood, & it is waste to cut them.—*ANON.* (1433), Y. B., 11 Hen. 6, fo. 1, pl. 3; 22 Vin. Abr. tit. Waste, E., pl. 7.

**873. Standils.**—Cutting down oaks, remaining on the land as standils, of a growth of from sixteen to twenty years, & in respect of which tithes were paid, is not waste, & even if they be twenty to twenty-four years' standing it is not waste, if the custom of the parties is to sell them for "seasonable" wood & if tithes be paid for them, as then they are not timber.—*BROOK v. COBB* (1612), 2 Brownl. 150; 123 E. R. 867.

*Annotation* :—**Refd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**874. Thinnings generally.**—Not all cutting of timber is waste. In places where oak coppice is felled regularly the felling would constitute the flower of the land, to which the tenants for life would be entitled. Further, proper & regular thinning of a wood for the purpose of improving the rest of the trees within certain limits would not be waste.—*BAGOT v. BAGOT, LEGGE v. LEGGE* (1863), 32 Beav. 509; 2 New Rep. 297; 33 L. J. Ch. 116; 9 L. T. 217; 9 Jur. N. S. 1022; 12 W. R. 35; 55 E. R. 200.

*Annotations* :—**Mentd.** *Re Cavendish, Cavendish v. Mundy*, [1877] W. N. 198; *Elias v. Snowdon Slate Quarries Co.* (1879), 4 App. Cas. 454, H. L.; *Re Barrington, Gamlen v. Lyon* (1886), 33 Ch. D. 523; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.; *Re Maynard's S. E.*, [1899] 2 Ch. 347.

**875. Thorns.**—Cutting whitethorns may be waste.—*ANON.* (1372), Y. B., 46 Edw. 3, fo. 17, pl. 13; 22 Vin. Abr. tit. Waste, E., pl. 1.

**876.** —.]—The lessee of a manor & warren cut down thorns:—*Held*: not waste to stub thorns growing upon the land, but only to cut down thorn trees that had stood sixty or one hundred years.—*MOYLE v. MAYLE* (1599), Owen, 66; 74 E. R. 905.

*Annotation* :—**Mentd.** *Elias v. Griffith* (1878), 8 Ch. D. 521, C. A.

**877.** —.]—Eradicating whitethorns is waste, but cutting them & selling the cuttings is not waste,

unless they grew in a pasture for the defence of cattle & were of the greatness of timber.—*LASHMER v. AVERY* (1606), Cro. Jac. 126; 79 E. R. 110.

**878.** —.]—It is waste to cut beech & whitethorn, if timber by custom. The cutting up of quicksets is not waste, if it preserves the spring.—*PALMER'S CASE* (1611), Co. Litt. 53a, n. (10).

**879.** —.]—The eradicating of whitethorn is waste, but not of blackthorn, unless the blackthorn grow in a hedge & the whole hedge is destroyed. It is not waste to cut quickset hedges. If a man has underwoods of hazel, willows, thorns, & is accustomed to cut them & sell them every ten years, his lessee does not commit waste if he fell them, but if he dig them up by the roots or suffer the germens to be bitten with cattle after they are felled so they will not grow again, it is a destruction of the inheritance, & an action of waste will lie for it. But if he mow the stocks with a wood scythe it is a malicious waste; & continual mowing & biting is destruction.—*GAGE & SMITH'S CASE* (1613), Godb. 209; 78 E. R. 127.

**880.** —.]—To cut whitethorns used to defend a manor-house from the wind, or standing in a pasture field & used for the shade of the beasts depasturing & intended approximately to remain in that form, is waste.—*PHILLIPPS (PHILLIPS) v. SMITH* (1845), 14 M. & W. 589; 15 L. J. Ex. 201; 10 J. P. 533; 153 E. R. 610.

*Annotation* :—**Consd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**881. Trees excepted—No waste to cut.**—If trees be excepted out of a demise, waste cannot be committed by cutting them down; & ejectment cannot be brought as for waste committed in or upon the demised premises.—*GOODRIGHT d. PETERS v. VIVIAN* (1807), 8 East, 190; 103 E. R. 315.

*Annotation* :—**Consd.** *Doe d. Rogers v. Price* (1849), 8 C. B. 894.

**882. Trees standing in defence of house.**—If trees are cut down which are in defence of the house, whereby the house is blown down by tempest, this is a waste.—*STICKLEHORNE v. HATCHMAN* (1585), Owen, 43; 74 E. R. 887.

**883. Underwoods or thorns.**—Raising up by the roots underwoods or thorns is waste (*NEEDHAM, J.*).—*ANON.* (1466), Y. B., 5 Edw. 4, fo. 100b (Long Quinto).

**884. Willows.**—If willows are in view of a manor-house & keep off the wind, or are in a bank in order to keep up the bank, to cut them down is waste (*BRUDNEL, J.*).—*N. v. J.* (1520), Y. B., 12 Hen. 8, fo. 1, pl. 1.

*Annotations* :—**Consd.** *Matthew v. Crasse* (1613), 2 Bulst. 89. **Distd.** *Phillips v. Smith* (1845), 14 M. & W. 589. **Mentd.** *Anon.* (undated) Plowd. Qrs. 9, § 69; *Clare v. Pepys* (1585), Cro. Eliz. 41; *Beale & Taylor's Case* (1590) 1 Leon. 237; *Taylor v. Beal* (1591), Cro. Eliz. 222.

**885.** —.]—It is waste to cut down willows which support the bank of a river.—*STRIPPING'S CASE* (1621), Win. 15; 124 E. R. 13.

**886.** —.]—A tenant for years is not guilty of waste in cutting down willow trees for sale, which spring up again from the stools, unless they serve to protect the house, or to support the bank of a stream.—*PHILLIPPS (PHILLIPS) v. SMITH* (1845), 14 M. & W. 589; 15 L. J. Ex. 201; 10 J. P. 533; 153 E. R. 610.

*Annotation* :—**Consd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**SUB-SECT. 3.—EQUITABLE WASTE—ORNAMENTAL AND OTHER TIMBER.**

**887. General principle.**—*Semble*: (1) the principle on which the ct. protects ornamental timber



is that if testator or author of the interest has gratified his own taste by planting for ornament, his taste, like his will, binds the parties, notwithstanding that it is made to appear to the ct. that the reverse taste was correct; (2) the question which is in fact the most fit method of clothing an estate with timber for the purpose of ornament cannot be entrusted to the ct. (LORD ELDON, C.).—*Downshire (Marquis) v. Sandys (Lady)* (1801), 6 Ves. 107; 31 E. R.

*Annotations* :—*Consd.* *Wombwell v. Belasyse* (1825), 6 Ves. 116, n. *Expld.* *Marker v. Marker* (1851), 9 Hare, 1. *Distd.* *Micklethwait v. Micklethwait* (1857), 1 De G. & J. 504. *Mentd.* *Halliwell v. Phillips* (1858), 4 Jur. N. S. 607.

**888.** —.].—Equitable waste consists of cutting either timber planted for ornament or shelter, or saplings & young trees, before fit for timber. It is not equitable waste to cut trees which have not attained their full growth & maturity; & an injunction to restrain a tenant for life unimpeachable for waste from such cutting, cannot be sustained. The ct. will not maintain an injunction against equitable waste, unless it is proved that it either has been committed or is threatened. — *Potts v. Potts* (1825), 3 L. J. O. S. Ch. 176.

**889.** —.].—A tenant for life without impeachment of waste has a right at law to cut timber on the estate, & has a property in the trees, but having abused that power by cutting ornamental trees & trees not ripe for cutting, a ct. of equity says he shall not do these things with impunity, but interposes to restrain the legal right; & equity not only restrains him from doing further waste, but directs an account of the waste done & will not suffer the individual to pocket the produce of the wrong, but directs the money produced by such waste to be laid up for the benefit of those who succeed to the estate (PLUMER, V.-C.).—*Lansdowne (Marquis) v. Lansdowne (Marchioness Dowager)* (1815), 1 Madd. 116; 56 E. R. 44.

*Annotations* :—*Consd.* *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578. *Phillips v. Homfray* (1883), 24 Ch. D. 439, C. A. *Mentd.* *Peck v. Gurney* (1873), L. R. 8 H. L. 377, H. L.

**890.** —.].—In preservation of ornamental timber the ct., by applying the doctrine of equitable waste, controls & restrains excessive use of the legal power incident to an estate unimpeachable for waste, but with reference only to the presumed will & intention of the party by whom the power was created. The protection of the ct. is confined to timber planted & left standing for shelter or ornament; & the question, whether the protection should be extended to particular timber, is one of fact.—*Marker v. Marker* (1851), 9 Hare, 1; 20 L. J. Ch. 246; 17 L. T. O. S. 176; 15 Jur. 603; 68 E. R. 389.

*Annotations* :—*Consd.* *Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721. *Folld.* *Ashby v. Hincks* (1888), 58 L. T. 557. *Refd.* *Stafford v. Sutherland* (1892), 36 Sol. Jo. 381.

— **Limits of doctrine.**].—Equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, to timber merely ornamental, viz., an extensive wood.—*Burges v. Lamb* (1809), 16 Ves. 174; 33 E. R. 950.

*Annotations* :—*Mentd.* *Cholmeley v. Paxton* (1825), 3 Bing. 207; *Londesborough v. Somerville* (1854), 19 Beav. 295; *Davenport v. Davenport* (1863) 33 L. J. Ch. 33; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.

**892.** —.].—Where the owner of an estate, with a residence, purchases adjoining lands with ornamental woods, the ct. will not, from that fact alone, infer that he intended to be left standing for ornament all such trees as he did not in his lifetime cut down; there must be some act of dedication, e.g., planting an avenue, cutting a vista, erecting obelisks, etc. A tree or trees may be highly ornamental, & yet not be entitled to the protection of

the ct. as being planted or left standing for ornament. Saplings are not within the doctrine, nor are hedgerow trees, or any trees, however ornamental, if planted also for profit.

A tenant for life *sans* waste will not be interfered with in the exercise of his legal powers unless he is proceeding to use those legal powers in a manner inequitable towards those in remainder; & he may fell & sell trees planted for ornament, if done in a proper course of husbandry.—*Halliwell v. Phillips* (1858), 4 Jur. N. S. 607; 6 W. R. 408.

*Annotation* :—*Consd.* *Ford v. Tynte* (1864), 2 De G. J. & Sm. 127.

**893.** —.].—To whom doctrine applies.—**Tenant for life with liberty to cut timber.**].—Testator provided by a codicil to his will that his wife (whom he had made tenant for life) might cut timber “for her own use & benefit at seasonable times.” Pltf. applied for an injunction to stay the cutting of ornamental timber, or such as served for shelter to any of the mansion houses & also of young wood not come to maturity :—*Held* : the injunction should issue to restrain from cutting any timber or other trees planted for the protection of the house or for ornament, or any trees except at seasonable times, or trees which were saplings & not proper to be cut as timber.—*Chamberlayne v. Dummer* (1782), 1 Bro. C. C. 166; 28 E. R. 1057; subsequent proceedings *sub nom.* *Chamberlain v. Dummer*, Dick. 700.

*Annotations* :—*Folld.* *Strathmore v. Bowes* (1786), 2 Bro. C. C. 88. *Consd.* *Downshire v. Sandys* (1801), 6 Ves. 107.

**894.** —.].—A tenant for life, with liberty to cut timber at seasonable times, is not to cut trees planted for ornament or shelter to the mansion-house, or sapling trees not fit to be cut or felled for timber.—*Chamberlayne v. Dummer* (1792), 3 Bro. C. C. 549; 29 E. R. 693.

*Annotation* :—*Consd.* *Downshire v. Sandys* (1801), 6 Ves. 107.

**895.** —.].—**Tenant in tail restrained from barring issue.**].—*A.-G. v. Marlborough (Duke)*, No. 706, *ante*

**896. What is ornamental timber—Form of inquiry.**].—In a suit by an encumbrancer for the purpose of enforcing his security on a settled estate, the application was made that a receiver might be at liberty to cut down & sell a number of trees. In the ct. below an inquiry had been directed to be made by a referee, with regard to a particular wood, as to whether any trees could be cut by a prudent owner in the proper management of the particular wood as a belt to the park, & with regard to other trees, whether they would not be cut by a prudent owner in the ordinary course of management :—*Held* : (1) the question what a prudent owner would do in the proper or ordinary course of management was no measure of the obligation on the tenant for life without impeachment of waste, with reference to timber planted or left standing for ornament, for such tenant for life was bound by the taste or want of taste of any absolute owner, by whom the timber might have been there planted or left standing; (2) the trees might have been planted or left standing for ornament or shelter, although the wood extended beyond the park. *Semble* : there could be no settled form of inquiry applicable to ornamental timber.—*Ford v. Tynte* (1864), 2 De G. J. & Sm. 127; 3 New Rep. 676; 10 L. T. 209; 10 Jur. N. S. 429; 12 W. R. 613; 46 E. R. 323, L.JJ.

*Annotations* :—*Refd.* *Baker v. Sebright* (1879), 13 Ch. D. 179. *Mentd.* *Adamson v. Gill* (1868), 17 L. T. 464.

**897.** —.].—**Distance from house.**].—An injunction restraining a tenant for life without impeachment of waste from cutting timber growing for ornament or shelter was extended to clumps of firs on a com-

**Sect. 8.—Waste as regards trees: Sub-sect. 3.]**

mon two miles from the house, having been planted for ornament. The power of a tenant for life under the general words "without impeachment of waste" is not enlarged by implication from more extensive powers given to trustees for special purposes after her death.—*DOWNSHIRE (MARQUIS) v. SANDYS (LADY)* (1801), 6 Ves. 107; 31 E. R. 962.

*Annotations:—***Consd.** *Micklethwait v. Micklethwait* (1857), 1 De G. & J. 504. **Mentd.** *Wombwell v. Belasyse* (1825), 6 Ves. 116, n.; *Marker v. Marker* (1851), 9 Hare, 1; *Halliwell v. Phillips* (1858), 4 Jur. N. S. 607.

**898. — Trees excluding objects from view.]—**Injunction against cutting ornamental timber, upon a principle of equitable waste, extended to trees planted for the purpose of excluding objects from view.—*DAY v. MERRY* (1810), 16 Ves. 375; 33 E. R. 1026.

**899. — Conduct — Decaying or injurious trees.]—**Whether timber is left standing for ornament or shelter is to be proved by conduct. Timber so left standing is not to be cut, though decayed or injurious to adjoining trees, unless its removal is essential to the intended purposes of ornament or shelter.—*LUSHINGTON v. BOLDERO* (1819), 6 Madd. 149; 56 E. R. 1048.

*Annotations:—***Mentd.** *Ford v. Tynte* (1864), 2 De G. J. & Sm. 127, L.J.J.; *Baker v. Sebright* (1879), 13 Ch. D. 179.

**900. — Object with which planted or left.]—**In an action to restrain the cutting of timber on the ground of equitable waste, the question to be decided is whether the timber was in fact planted or left for ornament or shelter, not whether it is ornamental or useful for shelter; but the ct. will accept the evidence of competent persons, founded on inference from the present appearance & condition of the timber, as some evidence that it was so planted or left.—*WELD-BLUNDELL v. WOLSELEY*, [1903] 2 Ch. 664; 73 L. J. Ch. 45; 89 L. T. 59; 51 W. R. 635; 47 Sol. Jo. 653.

**901. — Cutting to avoid gaps.]—**The ct. cannot determine what is ornamental timber, it being merely a matter of taste; they, therefore, say that what was planted for ornament must be considered as ornamental. If a tempest produces gaps in a piece of ornamental planting cutting a few trees to produce an uniform & consistent appearance would not be waste.—*MAHON (LORD) v. STANHOPE (LORD)* (1808), 3 Madd. 523, n.; 56 E. R. 597.

**902. — Trees protecting house from sea.]—**Deft. was tenant for life without impeachment of waste of an estate situated on the sea coast. He had assigned his life interest to R. in trust for his creditors. R. gave plffs., who were remaindermen, notice of his intention to cut timber, & plffs. sued for an injunction to restrain cutting:—*Held*: (1) an injunction should not be granted merely on sending a notice; (2) a general injunction against committing waste must be refused; (3) an injunction would not be granted against cutting timber or trees which protected the house or pleasure grounds from the effects of the sea.—*COFFIN v. COFFIN* (1821), Jac. 70; 6 Madd. 17; 37 E. R. 776.

**903. — Where mansion-house pulled down.]—**A mansion-house, park & pleasure grounds, with certain villas on the estate, were limited in strict settlement, & the trustees were empowered to grant building leases of the settled estates, & at the request of the tenant for life, to pull down the mansion-house, sell the materials, & apply the proceeds in paying off incumbrances on the estate. The house was pulled down, but the tenant for life unimpeachable for waste was afterwards restrained from felling the ornamental timber in the park & grounds.—*WELLESLEY v. WELLESLEY* (1834), 6 Sim. 497; 58 E. R. 680.

*la'ions:—***Consd.** *Morris v. Morris* (1847), 15 Sim. 505. **Mentd.** *Micklethwait v. Micklethwait* (1857), 1 De G. & J. 504; *Bagot v. Bagot*, *Legge v. Legge* (1863), 12 W. R. 35.

**904. —.]—**A tenant for life without impeachment of waste pulled down a mansion-house & rebuilt it in a more eligible situation, & this act was not complained of by the remainderman. But an injunction was granted to restrain the tenant for life from destroying timber which had formed an ornament & shelter to the original mansion.—*MORRIS v. MORRIS* (1847), 15 Sim. 505; 16 L. J. Ch. 201; 11 Jur. 178; 60 E. R. 715; *affd.* 11 Jur. 196.

*Annotation:—***Consd.** *Micklethwait v. Micklethwait* (1857), 1 De G. & J. 504.

**905. — Ceasing to be protected after mansion-house pulled down.]—**A testator left his mansion-house on B. estate, went to reside on another estate at the distance of about eight miles, pulled down B. mansion-house, cut down some of the ornamental timber about it, turned the estate into a cover for game, & altogether acted so as to show that he had no intention that the mansion-house should be rebuilt:—*Held*: the rest of what had originally been ornamental timber on the B. estate was not, as between the parties claiming under the will, protected as ornamental, but might be cut by a tenant for life, whose estate was without impeachment of waste.

Testator, when he did the above acts, was only tenant for life in possession, with an ultimate reversion to himself in fee, expectant on the failure or determination of a subsequent estate for life & various estates tail which did not fail & determine till after his death:—*Held*: as between the parties claiming under his will, the case stood on the same footing as if he had been entitled in fee simple in possession.

Testator devised his estates to A. for life without impeachment of waste, "except voluntary waste in pulling down houses & not rebuilding the same or others of equal or greater value." A. pulled down the mansion-house, with the intention of forthwith building a better one on the site, & was proceeding with all reasonable dispatch to carry such intention into effect:—*Held*: the person entitled to the next vested remainder was not entitled to have a receiver of the rents appointed in order to secure the rebuilding of the mansion.—*MICKLETHWAIT v. MICKLETHWAIT* (1857), 1 De G. & J. 504; 26 L. J. Ch. 721; 30 L. T. O. S. 5; 3 Jur. N. S. 1279; 5 W. R. 861; 14 E. R. 818, L.J.J.

*Annotations:—***Distd.** *Halliwell v. Phillips* (1858), 4 Jur. N. S. 607. **Consd.** *Turner v. Wright* (1860), 2 De G. F. & J. 231; *Baker v. Sebright* (1879), 13 Ch. D. 179; *Weld-Blundell v. Wolseley*, [1903] 2 Ch. 664. **Refd.** *Stafford v. Sutherland* (1892), 36 Sol. Jo. 381.

**906. — New mansion-house.]—**Pltf. was tenant in tail in remainder, & deft. tenant *pur autre vie* of an estate settled in 1855. At the date of the settlement there was no mansion-house on the estate, but one was acquired in 1859 by exchange under a power in the settlement. Deft. felled certain trees in the vicinity of the mansion-house, marked others for cutting, & advertised a sale of timber, & pltf. applied for an injunction:—*Held*: there must be an inquiry in the form adopted in *Marker v. Marker* (No. 890, *ante*) as to what trees could be cut without impairing the beauty of the place, or shelter given to the mansion-house as at the acquisition thereof in 1859, an undertaking by pltf. in damages, & an injunction as prayed, but conditional on pltf. giving such undertaking.—*ASHBY v. HINCKS* (1888), 58 L. T. 557.

**907. Ornamental timber—Injunction.]—**Deft. was enjoined during his life from felling trees that were for the ornament or shelter of the capital messuage, & as to trees not certified to be fit for cutting.—*LAWLEY v. LAWLEY* (1717), Jac. 71, n.; 37 E. R. 777.

**908. —.]—**An injunction was granted against a tenant for life without impeachment of



waste cutting timber for the ornament of a mansion-house, or in avenues or ridings for the ornament of a park. Form of order.—PACKINGTON'S CASE (1744), 3 Atk. 215; 7 Bac. Abr. 291; 26 E. R. 925; subsequent proceedings; *sub nom.* PACKINGTON *v.* PACKINGTON (1745), Dick. 101.

*Annotations* :—*Consd.* Pyne *v.* Dor (1785), 1 Term Rep. 55. *Refd.* Lempster *v.* Pomfret (1752), Amb. 154; Chamberlayne *v.* Dummer (1782), 1 Bro. C. C. 166.

**909.** ———.]—An injunction was granted against a tenant for life without impeachment of waste from cutting trees planted or growing in vistas or for shelter or ornament, at the instance of the eldest son of deft., entitled in remainder after his death under deft.'s marriage settlement.—PACKINGTON *v.* PACKINGTON (1745), Dick. 101; 21 E. R. 206.

**910.** ———.]—Injunction to restrain tenant for life from cutting down any timber trees or other trees growing on the estates planted or growing there for ornament or shelter of the mansion-house, or that grew in vistas, planted walks, or lines, for the ornament of the park part of the estate, & also from cutting down any saplings growing on any part of the estates not proper to be felled, till answer or further order.—O'BRIEN *v.* O'BRIEN (1751), Amb. 107; 1 Bro. C. C. 167, n.; 27 E. R. 69.

*Annotation* :—*Folld.* Chamberlayne *v.* Dummer (1782), 1 Bro. C. C. 166.

**911.** ———.]—Injunction to restrain deft., tenant for life without impeachment of waste, except voluntary waste in houses, from cutting down timber or doing any waste to the rides or avenues to the house, or cutting timber that was of shade or ornament to the house & trees unfit to cut as timber. In granting the injunction:—*Held*: it ought to include everything useful or ornamental to the house, & trees, although growing naturally & not planted, were none the less ornamental, & the injunction extended to cutting young saplings & trees not fit to cut as timber.—STRATHMORE (COUNTESS) *v.* BOWES (1786), 2 Bro. C. C. 88; 1 Cox, Eq. Cas. 263; Dick. 673; 29 E. R. 51.

*Annotations* :—*Refd.* Hanson *v.* Gardiner (1802), 7 Ves. 305. *Mentd.* Norway *v.* Rowe (1812), 19 Ves. 144; Smythe *v.* Smythe (1818), 1 Swan. 252.

**912.** ———.]—*Form of order.*—A tenant for life without impeachment of waste was restrained by injunction from cutting timber planted or left standing for ornament or shelter by an absolute owner of the estate, whether ornamental or otherwise; the protection extended beyond the mansion-house to rides or avenues through a wood at a considerable distance, but not to the whole wood, to prevent cutting other parts for repairs & sale. Security to reimburse the tenant for life, if wrongfully restrained, was ordered to be ascertained by the master; & issues were directed whether the timber, or any part, was planted or left standing for ornament or shelter by any former owner, of what estate & interest to be indorsed on the postea, & whether consistently with such purpose any & what part might be cut for repairs or sale.—WOMBWELL *v.* BELASYSE (1825), 6 Ves. 116; 31 E. R. 966.

*Annotations* :—*Consd.* Micklethwait *v.* Micklethwait (1887), 26 L. J. Ch. 721. *Dbtd.* Ford *v.* Tynte (1864), 2 De G. J. & Sm. 127. *Refd.* Halliwell *v.* Phillips (1858), 4 Jur. N. S. 607; Ashby *v.* Hincks (1888), 58 L. T. 557; Stafford *v.* Sutherland (1892), 36 Sol. Jo. 381. *Mentd.* Marker *v.* Marker (1851), 9 Hare, 1.

**913.** ———.]—An injunction was granted to restrain a tenant for life without impeachment of waste from cutting timber or other trees planted or growing for shelter or ornament, & from cutting except in a husbandlike manner.—TAMWORTH (LORD) *v.* FERRERS (LORD) (1801), 6 Ves. 419; 31 E. R. 1123.

**914.** ———.]—*Limits*—"Contribute to ornament."—Injunction against cutting ornamental timber confined to timber standing for ornament or shelter, the ct. refusing to extend it by inserting the words "contribute to ornament."—WILLIAMS *v.* M'NAMARA (1802), 8 Ves. 70; 32 E. R. 278.

**915.** ———.]—*Adjoining.*—A. was tenant for life without impeachment of waste, except as to "the timber growing in the park, avenues, demesne lands, & woods adjoining to the capital messuage." There were no woods of that description. He cut timber in woods which were an ornament or shelter to the messuage:—*Held*: he was guilty of equitable waste, & an account was directed & an injunction granted.

The term "adjoining" I interpret as adjoining, or near to, adjoining, or so near to as to be connected with the enjoyment, or as to serve for ornament or shelter (LEACH, V.-C.).—NEWDEGATE *v.* NEWDIGATE (1826), 8 Bli. N. S. 734, 761; 5 E. R. 1113, 1123.

**916.** *Right to produce of trees cut.*—An estate was devised to A. for life without impeachment of waste, with remainder to his issue in tail, with remainder to B. for life, without impeachment, etc., with remainder to his issue in tail. A. had no issue; his assignees committed equitable waste by cutting ornamental timber:—*Held*: the right to the produce could not be determined until A.'s death, as he might have issue who possibly would be entitled to an interest in such produce.—LUSHINGTON *v.* BOLDERO (1850), 13 Beav. 418; 51 E. R. 161; subsequent proceedings (1851), 15 Beav. 1.

**917.** ———.]—*Proceeds when wrongfully cut down.*—A., being tenant for life without impeachment of waste, with remainder to B. for life without impeachment of waste, with remainders over, carried on business as a banker in partnership with B. & others, & the firm having become bkpt., the assignees cut down ornamental timber:—*Held*: they were not entitled to the income arising from the proceeds of the timber wrongfully cut down either during the life of A. or that of B., but such proceeds, together with the accumulated income thereof, belonged to the first tenant in tail.—LUSHINGTON *v.* BOLDERO (1851), 15 Beav. 1; 21 L. J. Ch. 49; 18 L. T. O. S. 151; 16 Jur. 140; 51 E. R. 435.

*Annotations* :—*Consd.* Bagot *v.* Bagot, Legge *v.* (1863), 32 Beav. 509. *Refd.* Scagram *v.* Knight (1867), 36 L. J. Ch. 918.

**918.** ———.]—*Proceeds when properly cut—Supervision of court.*—An equitable tenant for life unimpeachable for waste is entitled to the proceeds of ornamental timber cut by him, where it is such as the ct. would itself direct to be cut for preservation & improvement of the remaining ornamental timber; but it does not follow that the ct. will not, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which it has become necessary & proper to cut, & direct that the cutting be done under its supervision. Form of inquiry as to ornamental timber.—BAKER *v.* SEBRIGHT (1879), 13 Ch. D. 179; 49 L. J. Ch. 65; 41 L. T. 614; 28 W. R. 177.

**919.** *Evidence—Plaintiff's title.*—An injunction to restrain waste in cutting ornamental timber is not granted without positive evidence of pltf.'s title.—DAVIS *v.* LEO (1802), 6 Ves. 784; 31 E. R. 1307.

**920.** ———.]—On the question whether particular timber was ornamental within a settlement, the facts that there was no evidence of there being any other timber on the estate of that description, & that the settlor lived for nearly two years after execution of the settlement & never cut any



**Sect. 8.—Waste as regards trees: Sub-sect. 3.**  
**Sect. 9: Sub-sect. 1.]**

timber in the particular woods, although they were crowded with timber, were held to outweigh affidavits on the part of deft. simply stating that the woods were not planted or left standing for ornament or shelter, without assigning any reason, & outweighed also the conclusion as to the existence of stools or stumps, there being no information as to the circumstances under which the trees were cut down.—*MARKER v. MARKER* (1851), 9 Hare, 1; 20 L. J. Ch. 246; 17 L. T. O. S. 176; 15 Jur. 663; 68 E. R. 389.

**Annotations:—***Refd.* *Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721; *Ashby v. Hincks* (1888), 58 L. T. 557; *Stafford v. Sutherland* (1892), 36 Sol. Jo. 381.

**921. Measure of damage—When ornamental timber cut.]—**Although the Ct. of Ch. will grant an injunction to restrain a tenant for life from cutting down ornamental timber, irrespective of the question whether any damage would be occasioned to the inheritance by such cutting, yet when the ornamental timber has been actually felled & the reversioner claims damages from the tenant for life in respect of such equitable waste, the measure of damage can only be measured by the damage to the inheritance.—*BUBB v. YELVERTON, Ex p. HASTINGS* (1870), L. R. 10 Eq. 465; 40 L. J. Ch. 38; 18 W. R. 1127, 1146.

**SECT. 9.—REMEDIES IN RESPECT OF TREES**  
**WRONGFULLY CUT OR TO BE CUT.**

**SUB-SECT. 1.—INJUNCTION.**

**922. Injunction to restrain cutting timber.]—**An injunction will be granted to restrain cutting of timber in a case where the reversioner could have trover for the trees when felled.—*ABRAHAM (ABRAHAM, ABRAHAM) v. BUBB* (1680), 2 Swan. 172; 2 Show. 69; Freem. Ch. 53; 2 Eq. Cas. Abr. 757; 36 E. R. 581.

**Annotations:—***Consd.* *Garth v. Cotton* (1753), 3 Atk. 751; *Williams v. Williams* (1808), 15 Ves. 419. *Refd.* *Aston v. Aston* (1749), 1 Ves. Sen. 264; *Garth v. Cotton* (1750), 1 Ves. Sen. 546.

**923. Saplings, wavers, & fruit trees.]—**Injunction granted to stay cutting down saplings, wavers & fruit trees.—*KAYE v. BANKS* (1770), Dick. 431; 21 E. R. 337.

**924. — Not on ground of past cutting.]—**An injunction must be against present waste, & is not granted merely on wood having been cut in the past.—*ANON.* (1773), Lofft, 151; 98 E. R. 582.

**925. — Against removal of timber wrongfully cut.]—**Order made to prevent removal of timber wrongfully cut.—*ANON.* (1790), 1 Ves. 93; 30 E. R. 246.

**926. — When doubtful whether waste threatened.]—***Held:* an injunction to stay waste

would not be granted, where it was doubtful whether the acts complained of were waste, as where it was said the trees were cut in due management: pltf. must first try the question of waste, or no waste, at law.—*LYON v. WILKINSON* (1823), 1 L. J. O. S. Ch. 155.

**927. — Against trespasser.] —**Injunction against a trespasser, cutting timber by collusion with the tenant, without prejudice to the case of mere trespass.—*COURTHOPE v. MAPPLESDEN* (1804), 10 Ves. 290; 32 E. R. 856.

**Annotations:—***Consd.* *Talbot v. Hope Scott* (1858), 4 K. & J. 96; *Lowndes v. Bettie* (1864), 3 New Rep. 409. *Refd.* *Haigh v. Jagger* (1845), 2 Coll. 231.

**928. When title is disputed—General rule.] —**A person not in possession of an estate claimed it as heir-at-law, & entered upon it, cut down trees, cut sods & threatened to repeat his conduct in order to establish his alleged title as against the possessor, who by himself & his ancestors had been in possession of the estate for upwards of eighty years. On a bill filed by the possessor against claimant:—*Held:* (1) where deft. is in possession of an estate & pltf. claiming possession of it seeks to restrain him from cutting down trees & digging sods, & other such like acts, the ct. will not interfere, unless the acts complained of amount to such flagrant instances of spoliation as to justify it in departing from the general rule; 2) where pltf. is in possession & the person doing the acts complained of is an utter stranger, not claimant under colour of right, then the tendency of the ct. is not to grant an injunction, unless there are special circumstances, but to leave pltf. to his remedy at law, though if the acts tend to the destruction of the inheritance, the ct. will grant an injunction; (3) where pltf. in possession seeks to restrain one who claims by an adverse title, the tendency of the ct. will be to grant an injunction, at least when the acts committed do or may tend to the destruction of the estate; (4) as the acts of deft. might be injurious to the inheritance, he must be restrained by injunction from committing them.—*LOWNDES v. BETTIE* (1864), 3 New Rep. 409; 33 L. J. Ch. 451; 10 L. T. 55; 10 Jur. N. S. 226; 12 W. R. 399.

**Annotations:—***Consd.* *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551; *Stanford v. Hurlstone* (1873), 9 Ch. App. 116, L.J.J.

**929. — Plaintiff in possession.]—**Deft., not having or claiming any right, & being a mere trespasser, cut down timber on an estate:—*Held:* since an action of trespass would lie against him, an injunction to stay waste would be refused.—*MOGG v. MOGG* (1786), Dick. 670; 21 E. R. 432.

**Annotation:—***Refd.* *Lowndes v. Bettie* (1864), 3 New Rep. 409.

**930. —.]—**In 1859 deft. brought ejectment against pltf. to recover a piece of woodland. Pltf. set up adverse possession for more than twenty years, & the action was discontinued. Deft. shortly afterwards took up his residence in a house close to the wood, & frequently walked in the wood, turned

**PART IX. SECT. 9, SUB-SECT. 1.**

**922 i. Injunction to restrain cutting.]—**The ct. in a proper case will restrain not only the further cutting of timber, but the removal of timber already cut. Effect of Administration of Justice Act, 1873, s. 32, considered.—*MCLEAN v. BURTON* (1877), 24 Gr. 134.—CAN.

**922 ii. — Red gum trees.]—**A lease, under Transfer of Land Act, contained a covenant by the lessee not to fell growing or living timber, or timber-like trees, & a condition for re-entry upon breach. An injunction was granted to restrain the felling of growing or living red-gum trees.—*MUNDAY v. PROWSE* (1878), 4 V. L. R. 101.—AUS.

**922 iii. — Proof of injury not so strict as required in England.]—**An injunction against cutting timber may be granted (since 20 Vict. c. 56, C. S. U. C. c. 12, s. 27), without proof of spoil, trespass & injury to the extent or of the character which might be necessary in England.—*WIGHTMAN v. FIELDS* (1872), 19 Gr. 559.—CAN.

**922 iv. — In action of ejectment.]—**A writ of injunction will be granted in the first instance upon an *ex p.* application under C. L. P. Act, 1856, s. 286, in an action of ejectment, to restrain deft. from cutting & carrying away timber from off the land, the subject of the action.—*ROBINS v. PORTER*, 2 C. L. J. O. S. 230.—CAN.

**922 v. — Præcipe decree continuing injunction.]—**Where in a foreclosure suit an *interim* injunction has been granted to restrain cutting timber, the registrar has no power to grant a decree on *præcipe*, with a provision for continuing the injunction. For this purpose the cause must be brought on for hearing.—*KING v. FREEMAN* (1865), 1 Ch. Ch. 350.—CAN.

**928 i. — When title is disputed.]—**Deft. commenced to fell timber growing on a strip of land claimed by deft., but vested in pltf., according to comrs.' report. The ct. restrained such felling until a decision of a pending motion to quash the report.—*CHRISTIE v. LONG* (1852), 3 Gr. 630.—CAN.

cattle into it, & cut the brambles there. In 1873 he cut down a tree in the wood, & threatened to cut more, upon which pltf. filed his bill for an injunction:—*Held*: (1) after deft. had, by bringing ejectment, admitted pltf. to be in possession of the wood, the acts done by deft. must be looked upon only as acts of trespass not putting him into possession; (2) pltf. being in possession was entitled to an interlocutory injunction to restrain him from cutting timber.—*STANFORD v. HURISTONE* (1873), 9 Ch. App. 116; 30 L. T. 140; 22 W. R. 422, L.JJ.

*Annotations*:—*Refd.* *Goodson v. Richardson* (1874), 30 L. T. 142, C. A. *Mentd.* *A.-G. v. Tomline* (1877), 5 Ch. D. 750.

**931. — Defendant in possession.**—If A. is tenant for life, remainder to B. for life, remainder to the first & other sons of B. in tail male, remainder to B. in tail, etc., & B. before the birth of any son brings a bill against A. to stay waste, & A. demurs to this bill because pltf. had no right to the trees, & none that had the inheritance was party, yet the demurrer will be overruled, because waste is to the damage of the public, & B. is to take care of the inheritance for his children, if he has any, & has a particular interest himself in case he comes to the estate.—*DAYRELL v. CHAMPNESS* (1700), 1 Eq. Cas. Abr. 400; 21 E. R. 1131.

*Annotations*:—*Refd.* *Aston v. Aston* (1750), 1 Ves. Sen. 396; *Garth v. Cotton* (1753), 3 Atk. 751.

**932. Title in dispute.**—Injunction against cutting timber refused, where the title was disputed, as between devisee & heir-at-law.—*SMITH v. COLLYER* (1803), 8 Ves. 89; 32 E. R. 286.

*Annotations*:—*Dbtd.* *Jones v. Jones* (1817), 3 Mer. 161. In *Smith v. Collyer* an injunction was refused when applied for by the devisee against the heir; I own I cannot see a very good reason why the ct., which interferes for the preservation of personal property pending a suit in the Ecclesiastical Ct., should not interpose to preserve real property pending a suit concerning the validity of a devise (*GRANT, M.R.*); *Haigh v. Jaggard* (1845), 2 Coll. 231. One of the most remarkable cases is *Smith v. Collyer*, that was before no less a person than Lord Eldon, yet I am not perfectly satisfied that in the same circumstances (as far as they are to be collected from the report) this ct. would not grant an injunction (*Knight Bruce, V.-C.*). *Consd.* *Lowndes v. Bettie* (1864), 3 New Rep. 409. *Refd.* *Talbot v. Hope Scott* (1858), 4 K. & J. 96; *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719, L.JJ.

**933. —**—Deft. was in possession of an estate & cut down & felled timber & other trees. Pltf., alleging he was entitled to the estate & had recently discovered his title & was bringing an ejectment against deft., sued for an injunction to restrain deft. from cutting down timber:—*Held*: the demurrer for want of equity would be allowed, & the ct. would refuse to act until pltf.'s right was established at law.—*DAVENPORT v. DAVENPORT* (1849), 7 Hare, 217; 18 L. J. Ch. 163; 13 Jur. 227; 68 E. R. 89.

*Annotations*:—*Refd.* *Crowther v. Crowther* (1857), 23 Beav. 305; *Talbot v. Hope Scott* (1858), 4 K. & J. 96; *Lowndes v. Bettie* (1864), 18 L. T. 55. *Mentd.* *East Lancashire Ry. Co. v. Hattersley* (1849), 8 Hare, 72.

**934. — — —**—A party in possession of lands, & proceeding to cut timber wastefully, may be restrained by injunction from so doing at the instance of another claiming under a title at law.—*NEALE v. CRIPPS* (1858), 4 K. & J. 472; 32 L. T. O. S. 251; 70 E. R. 197.

*Annotation*:—*Refd.* *Lowndes v. Bettie* (1864), 3 New Rep. 409.

**935. — — — Property in jeopardy.**—An interim injunction to stay cutting timber by a person in possession may be granted *ex p.*, where the object of the application is to preserve the property during litigation.—*ANWYL v. OWENS* (1853), 22 L. J. Ch. 995; 1 W. R. 205.

**938 i. Trivial acts.**—Application to restrain the cutting of timber dismissed, the matter in dispute being too insignificant to call for the interference of the ct. by injunction.—*BERNARD v. GIBSON* (1874), 21 Gr. 195.—CAN.

**936. — — —**—Pltf. claimed to be entitled to real estates inalienably annexed to a title to an earldom by Act of Parliament. Defts., claiming under a will of the late earl, by favour of some of the tenants had cut down timber on the estates, some of an ornamental character & some not ripe for cutting. Pltf. sued, pending proceedings to establish his claim to the earldom, for the appointment of a receiver & for an injunction against the cutting of timber:—*Held*: (1) the waste alleged was not such as to justify interference; (2) the ct. would not interfere to restrain waste at the instance of a party claiming the property under a legal title against parties in possession, except where the waste was malicious or destructive, such as no owner would do or which would destroy the property before they could be arrested at law.—*TALBOT (EARL) v. HOPE SCOTT* (1858), 4 K. & J. 96; 27 L. J. Ch. 273; 31 L. T. O. S. 392; 4 Jur. N. S. 1172; 6 W. R. 269; 70 E. R. 40.

*Annotations*:—*Consd.* *Wright v. Wilkin* (1859), 7 W. R. 337; *Lowndes v. Bettie* (1864), 33 L. J. Ch. 451. *Dbtd.* *Berry v. Keen* (1882), 51 L. J. Ch. 912, C. A.; *Talbot v. Hope Scott* is no longer law, having been overruled by Jud. Act, 1873 (c. 66), s. 25 (*JESSEL, M.R.*); *Foxwell v. Van Grutten*, [1897] 1 Ch. 64, C. A. In my opinion Jud. Act, 1873, s. 25 (8), overrules the decision of *WOOD, V.-C.*, in *Talbot v. Hope Scott* (*KEENE, J.*). *Refd.* *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719, L.JJ.

**937. Where damages would compensate.**—An information filed by the A.-G. suggested that an information had been previously filed against deft. for an encroachment by him on the royal forest of W. by inclosing land therein (about 12 acres) with a ditch & fence, & that, pending the judgment of the ct. on a demurrer in that cause, deft. had very lately commenced cutting down & clearing away all the holly trees & underwood on the land so inclosed by him, such trees, etc., being part of the vert & covert of the forest. The later information prayed that deft. might be restrained from cutting any more trees or underwood growing within the forest. The answer stated that deft. was seised in fee of the *locus in quo* by having bought it three years before, that it was not part of or within the forest, & that he cut the holly trees & underwood at the proper season & in the course of the proper management of the estate as it had been cut for the last twenty years:—*Held*: (1) the vert of a forest was a necessary part of it; (2) as no irreparable injury to the vert was shown, the act of deft., assuming the *locus in quo* to be within the forest, was a trespass in the nature of waste, which might be compensated in damages; (3) no injunction could be granted.—*A.-G. v. HALLETT* (1847), 16 M. & W. 569; 16 L. J. Ex. 131; 8 L. T. O. S. 450; 11 J. P. 744; 153 E. R. 1316.

*Annotation*:—*Mentd.* *A.-G. v. Barker & Hodgson* (1872), 26 L. T. 34.

**938. Trivial acts.**—A remainderman in fee simple sued for an injunction to restrain his father, a tenant for life impeachable for waste, from cutting down trees. On evidence that what had been done was necessary to admit the growth of contiguous trees, that the timber produced was of very small value & had been applied to repairs:—*Held*: (1) the father could not justify himself in equity by saying the waste was productive of beauty & improvement; (2) the acts were too trivial for the ct. to act upon, although the ct. would act on a small degree of waste manifesting an intent to do more; (3) pltf. to succeed must satisfy the ct. that the property was put into some hazard; (4) pltf.'s proceeding having been dilatory, an injunction was refused.—*BARRY v. BARRY* (1820), 1 Jac. & W. 651; 37 E. R. 516.

*p. Breach of injunction*—No excuse that trees cut of little value.—*BROWN v. SAGE* (1865), 12 Gr. 25.—CAN.



**Sect. 9.—Remedies in respect of trees wrongfully cut or to be cut: Sub-sects. 1, 2, 3, 4, 5, 6 & 7.]**

**939. Acquiescence—Delay.]**—If a man allows half his trees to be cut down before he applies, the ct. will not allow the remaining half to be cut down.—*A.-G. v. EASTLAKE* (1853), 11 Hare, 205; 2 Eq. Rep. 145; 22 L. T. O. S. 20; 18 J. P. 262; 17 Jur. 801; 1 W. R. 323; 68 E. R. 1249.

**Annotations:—***Refd.* *Elias v. Griffith* (1878), 8 Ch. D. 521, C. A. *Mentd.* *Beaumont v. Oliveira* (1869), 4 Ch. App. 309, L.J.J.; *A.-G. v. West Hartlepool Improvement Comrs.* (1870), L. R. 10 Eq. 152; *Re St. Bride's, Fleet St.* (1877), 35 Ch. D. 147, n.; *A.-G. v. Dartmouth Corpn.* (1883), 48 L. T. 933; *Re St. Botolph without Bishopsgate Parish Estates* (1887), 35 Ch. D. 142; *Smith v. Kerr*, [1900] 2 Ch. 511.

**940. Parties—Security for costs—Acquiescence.]**—Where a tenant for life without impeachment of waste had sold a quantity of timber trees, which the ct. afterwards restrained him from felling, on the supposition that it would be equitable waste:—*Held*: (1) the purchasers of the timber were not necessary parties to the injunction suit; (2) *pltf.* must give security to *deft.*, not only for the value of all the trees which *deft.* should be prevented from cutting by the injunction, but also for any loss or damage *deft.* might incur or sustain by reason of his being prevented from completing the sale.

Acquiescence by one of several other co-*pltf.*s. in the act complained of precludes interference of the ct. upon an interlocutory application as much as upon decree; & the rule is the same although some of co-*pltf.*s. are infants.—*MARKER v. MARKER* (1851), 9 Hare, 1; 20 L. J. Ch. 246; 17 L. T. O. S. 176; 15 Jur. 663; 68 E. R. 389.

**Annotations:—***Refd.* *Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721; *Ashby v. Hincks* (1888), 58 L. T. 557; *Stafford v. Sutherland* (1892), 36 Sol. Jo. 381.

**SUB-SECT. 2.—ACTION FOR BREACH OF COVENANT OR CONTRACT.**

**941. Executor may sue on covenant not to cut.]**—An exor. is entitled to sue the lessee of testator for the breach of a covenant not to fell, stub up, lop, or top timber trees excepted out of the demise, such breach having been committed in the lifetime of testator.—*RAYMOND v. FITCH* (1835), 2 Cr. M. & R. 588; 1 Gale, 337; 5 Tyr. 985; 5 L. J. Ex. 45; 150 E. R. 251.

**Annotations:—***Folld.* *Ricketts v. Weaver* (1844), 12 M. & W. 718. *Refd.* *Drake v. Beckham* (1843), 11 M. & W. 315, Ex. Ch.; *Beckham v. Drake* (1849), 2 H. L. Cas. 579, H. L.; *Jackson v. Watson*, [1909] 2 K. B. 193, C. A. *Mentd.* *Formby v. Barker* (1903), 89 L. T. 249, C. A.; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197, P. C.

**SUB-SECT. 3.—ACTION FOR TRESPASS.**

**942. Writ of trespass.]**—A writ of trespass cannot lie between a lessor & lessee for an act of waste.—*ANON.* (1497), Y. B., 13 Hen. 7, fo. 20, pl. 3.

**Annotation:—***Mentd.* *Peto v. Checy* (1611), 2 Brownl. 128.

**943. Action of trespass—Lessor.]**—An action of trespass was brought by a landlord against his tenant for a term of years for cutting trees. On *deft.* pleading possession:—*Held*: this was a good defence in that action, although *deft.* might be

liable in an action of waste.—*ANON.* (1498), Y. B., 13 Hen. 7, fo. 9, pl. 4.

**944. ———.]**—In trespass, the case was that a tenant at will cut down trees, & the lessor brought trespass *vi et armis*:—*Held*: the action was well maintainable.—*WALGRAVE & SOMERSET'S CASE* (1587), 4 Leon. 167; 74 E. R. 798.

**945. ———.]**—A lessor during the term cut down some oak pollards growing upon the demised premises which were unfit for timber:—*Held*: (1) as a tenant for life or years would have been entitled to them, if they had been blown down, & was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them; (2) he or his vendee could not maintain trespass against the tenant for taking them.—*CHANNON v. PATCH* (1826), 5 B. & C. 897; 8 Dow. & Ry. K. B. 651; 4 L. J. O. S. K. B. 316; 108 E. R. 333.

**946. ——— Tenant's cattle barking trees.]**—A demised pasture land to B., excepting the trees. B.'s cattle, put in to feed, barked the trees:—*Held*: A. could not have trespass against B.—*GLENHAM v. HANBY* (1699), 1 Ld. Raym. 739; 91 E. R. 1395.

**947. ——— Equitable plea—Sale by plaintiff's predecessor.]**—To a count in trespass for cutting down & carrying away timber growing on *pltf.*'s land, *deft.* pleaded for defence, on equitable grounds, that the person who devised the land to *pltf.* had, by parol agreement, sold certain timber growing thereon to *deft.*, with liberty for him to go on the land from time to time to cut it down & carry it away, paying for it as he took it, & that *deft.* had during the lifetime of testator cut down, carried away, & paid for a portion of the timber sold, & that the alleged trespass was committed in further pursuance of the agreement:—*Held*: the plea was bad, on the ground that a ct. of law could not do final justice between the parties.—*WAKLEY v. FROGGATT* (1863), 2 H. & C. 669; 3 New Rep. 88; 33 L. J. Ex. 5; 9 L. T. 340; 9 Jur. N. S. 1248; 12 W. R. 86; 159 E. R. 277.

**SUB-SECT. 4.—ACTION FOR TROVER.**

**948. Trover for trees wrongfully cut & removed by stranger.]**—If a stranger enters my close, & cuts my trees & carries them away, I may have trover, although after the cutting & before the carrying away I could not claim them, & no actual possession in me (*per Cur.*).—*SKIDNES v. HUSON* (1608), Noy, 125; 74 E. R. 1080.

**949. ——— Tenant in tail.]**—An action of trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life without impeachment of waste for timber which grew upon, & was severed from, the estate.—*PYNE v. DOR* (1785), 1 Term Rep. 55; 99 E. R. 968.

**Annotation:—***Refd.* *Re Barrington, Gamlen v. Lyon* (1886), 33 Ch. D. 523.

**950. Settlement—Cutting by order of husband.]**—Certain lands, together with the woods, etc., were conveyed under a marriage settlement to A. & B., their heirs & assigns, during the life of C. in trust to pay rents & profits as C. should appoint, during her life, & after her decease, to the use of such child or children of the marriage & in such shares as C. should appoint, & for want of appointment, to the use of the children equally, etc., & the heirs of their bodies, with cross-remainders, & in default of such issue, to the use of the right heirs of C. for ever:—*Held*: A. & B. could not

**PART IX. SECT. 9, SUB-SECT. 3.**

**943 i. Action of trespass—Lessor.]**—A landlord may maintain trespass against

his tenant for the value of trees cut down the land which the tenant held. & carried away by him, & which were *CHESTNUT v. DAY* (1843), 6 O. S. 637. not demised to him, though growing on CAN.



maintain trover against deft., a stranger, for certain trees, which had been cut down by order of O.'s husband & carried away by deft.—**BLAKER v. ANSCOMBE** (1804), 1 Bos. & P. N. R. 25; 127 E. R. 366.

**951. Trover against executor of person wrongly cutting.]**—An exor. shall not be chargeable for the injury done by his testator in cutting down another man's trees, but he shall be for the benefit arising to his testator for the value or sale of the trees.—**HAMBLY v. TROTT** (1776), 1 Cowp. 371; 98 E. R. 1136.

*Annotations:—***Expld.** *Birch v. Wright* (1786), 1 Term Rep. 378. **Consd.** *Lansdowne v. Lansdowne* (1815), 1 Madd. 116; *Monypenny v. Bristow* (1832), 2 Russ. & M. 117. **Mentd.** *Bennett v. Francis* (1801), 2 Bos. & P. 550; *Hughes v. Thomas* (1811), 13 East, 474; *Foster v. Stewart* (1814), 3 M. & S. 191; *Finlay v. Chirney* (1888), 20 Q. B. D. 494, C. A.

**952. Defence—Justification.]**—To trover for an oak tree, deft. pleaded he was seised in fee of a close, & being so seised, cut down the oak tree & delivered it to A., who delivered it to pltf., whereupon deft. took it out of pltf.'s possession, as he lawfully might, which was the conversion complained of:—**Held**: the plea was good.—**MORANT v. SIGN** (1836), 5 Dowl. 319; 2 M. & W. 95; 2 Gale, 237; 6 L. J. Ex. 14; 150 E. R. 684.

*Annotations:—***Distd.** *Acraman v. Cooper* (1842), 10 M. & W. 585. **Folld.** *Ashton v. Brevitt* (1845), 14 M. & W. 106. **Expld.** *Young v. Cooper* (1851), 2 L. M. & P. 217.

#### SUB-SECT. 5.—ACTION FOR DAMAGES IN NATURE OF ACTION FOR WASTE.

*See, generally, LANDLORD & TENANT.*

**953. Damage must be real.]**—The old writ of waste is gone, but an action in the nature of waste still exists in the cts. of common law. In such an action nominal damages cannot be recovered; the jury can only find for pltf. where there is substantial & real damage (**LORD BLACKBURN**).—**DOHERTY v. ALLMAN (ALLEN)** (1878), 3 App. Cas. 709; 39 L. T. 129; 42 J. P. 788; 26 W. R. 513, H. L.

*Annotations:—***Mentd.** *Re McIntosh & Pontypridd Improvements Co.* (1891), 61 L. J. Q. B. 164; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A.; *Blekmere v. Dimmer* (1902), 88 L. T. 78, C. A.; *McKacharn v. Colton*, [1902] A. C. 104, P. C.; *Formby v. Barker*, [1903] 2 Ch. 539, C. A.; *Leng v. Andrews* (1908), 78 L. J. Ch. 80, C. A.; *Elliston v. Reacher*, [1908] 2 Ch. 374.

*See Stat. Gloucester*, 1278 (c. 5), repealed by Civil Procedure Acts Amendment Act, 1879 (c. 59); Real Property Limitation Act, 1833 (c. 27), s. 36, which abolished writs of waste.

**954. Acquiescence—Action restrained.]**—A jointress having given leave to the next in remainder for life without impeachment, etc., to cut timber, the remainderman in tail having acquiesced & encouraged his so doing, the latter was restrained by perpetual injunction from bringing action of waste against the jointress.—**ASTON v. ASTON** (1750), 1 Ves. Sen. 396; Belt's Sup. 134; 27 E. R. 1103.

*Annotations:—***Refd.** *Chamberlayne v. Dummer* (1782), 1 Bro. C. C. 166; *Halliwell v. Phillips* (1858), 6 W. R. 408. **Mentd.** *Stackhouse v. Barnston* (1805), 10 Ves. 453.

#### SUB-SECT. 6.—ACTION FOR ACCOUNT.

**955. Not against tenant for life without impeachment.]**—The husband of a tenant for life without impeachment of waste cut down trees planted for shelter or ornament:—**Held**: (1) pltf., tenant for

J.—VOL. II.

life in remainder, not entitled to an account in respect of the timber so cut.—**ROLT v. SOMERVILLE** (1737), 2 Eq. Cas. Abr. 759; 22 E. R. 645.

*Annotations:—***Consd.** *Butler v. Kynnersley* (1830), 8 L. J. O. S. Ch. 67. **Refd.** *Chamberlayne v. Dummer* (1792), 3 Bro. C. C. 549; *Ormond v. Kynnersley, Butler v. Kynnersley* (1830), 7 L. J. O. S. Ch. 150.

**956. Against tenant for life—Ornamental timber.]**—The restraint on a tenant for life felling ornamental timber is treated as a breach of trust. The estate of a deceased tenant for life is answerable to the remaindermen for such breach of trust in an action for an account.—**ORMONDE v. KYNNERSLEY** (1820), 5 Madd. 369; 56 E. R. 936.

*Annotations:—***Expld.** *Kingham v. Lee* (1846), 15 Sim. 396; *Powys v. Blagrave* (1854), 18 Jur. 462.

**957. ———.]**—Where a tenant for life unimpeachable for waste cuts & sells timber planted for ornament or shelter, the proceeds of that timber belong to the first vested estate of inheritance, & parties having intervening estates for life have no right to an account of the proceeds of the timber so cut, or to have such proceeds invested upon the same trusts with the lands.—**ORMOND v. KYNNERSLEY, BUTLER v. KYNNERSLEY** (1830), 7 L. J. O. S. Ch. 150; 8 L. J. O. S. Ch. 67.

*Annotation:—***Dtd.** *Honywood v. Honywood* (1874), L. R. 18 Eq. 306. There is a decision of Lord Lyndhurst in *Ormond v. Kynnersley* the other way, but modern decisions have settled the law, namely, that where ornamental trees, which could not otherwise be cut down even by a tenant for life unimpeachable for waste, are cut down, there the proceeds are invested so as to follow the uses of the settlement (**JESSEL, M.R.**).

**958. ———.]**—A tenant for life without impeachment of waste cut a quantity of ornamental timber. The first tenant in tail was then nine years old; on his coming of age he joined his father in disentail & in resettlement. The tenant for life died thirty years after cutting timber:—**Held**: (1) an account would be directed against the estate of the tenant for life even thirty-eight years after the waste was committed; (2) time ran against pltf.'s right only from the date of his becoming entitled in possession.

In the above circumstances it was found impossible to take the account accurately, & the master arbitrarily charged the exors.:—**Held**: the wrongdoer's estate must suffer from consequences of the impossibility, & the master's report was supported. **LEEDS (DUKE) v. AMHERST (EARL)** (1846), 2 Ph. 117; 16 L. J. Ch. 5; 10 Jur. 956; 41 E. R. 886; subsequent proceedings (1850), 20 Beav. 239; 15 L. T. O. S. 129; 52 E. R. 595.

*Annotations:—***Distd.** *Bright v. Legerton* (1861), 2 De G. F. & J. 606. **Refd.** *Morris v. Morris* (1847), 8 L. T. O. S. 510; *Gent v. Harrison* (1859), John. 517; *Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A. **Mentd.** *Somersetshire Coal Canal Co. v. Harcourt* (1858), 2 De G. & J. 596; *Hogg v. Scott* (1874), L. R. 18 Eq. 444; *De Bussche v. Alt* (1878), 8 Ch. D. 286, C. A.; *Northumberland v. Bowman* (1887), 56 L. T. 773.

**959. Extent of remedy.]**—A bill would not lie for an account of timber felled except so far as the account was asked for as incident to an injunction.—**HIGGINBOTHAM v. HAWKINS** (1872), 7 Ch. App. 676; 41 L. J. Ch. 828; 27 L. T. 328; 20 W. R. 955, L.JJ.

*Annotation:—***Mentd.** *Dashwood v. Magniac*, [1891] 3 Ch. 306 C. A.

#### SUB-SECT. 7.—ACTION FOR PROCEEDS AS MONEY HAD AND RECEIVED.

**960. Extent of remedy.]**—**GENT v. HARRISON**, No. 663, *ante*.

**961. ———.]**—**HUGHES v. THOMAS**, No. 655, *ante*.

**Sect. 9.—Remedies in respect of trees wrongfully cut or to be cut: Sub-sects. 8 & 9. Sects. 10, 11, 12 & 13. Part X.1.**

**SUB-SECT. 8.—PROHIBITION.**

**962. Bishop.]—JEFFERSON v. DURHAM (Bp.),** No. 485, *ante*.

**963. Rector.]—Semble:** a prohibition of waste, the ancient remedy against tenants for life, lay, if it does not still lie, at the suit of the patron against a rector to prevent waste in the glebe (PARKER, V.-C.) —MARLBOROUGH (DUKE) v. ST. JOHN (1852), 5 De G. & Sm. 174; 21 L. J. Ch. 381; 18 L. T. O. S. 252; 16 Jur. 310; 64 E. R. 1068.

**Annotations:—Reid.** Holden v. Weekes (1860), 1 John. & H. 278; Turner v. Wright (1860), John. 740; Ross v. Adcock (1868), L. R. 3 C. P. 655; Eccl. Comrs. v. Wodehouse, [1895] 1 Ch. 552.

*Sec, however, Stat. Westminster the Second (c. 5).*

**SUB-SECT. 9.—EFFECT OF LAPSE OF TIME.**

**964. Statutory limitations.]—A tenant for life cut timber in excess of what he was entitled to cut. Nearly twenty years after his death the succeeding tenant for life filed a bill for an account, & to make the estate of the deceased tenant for life liable for the timber cut in excess:—Held:** pltf. was barred by lapse of time, & the bill was dismissed with costs.—HARCOURT v. WHITE (1860), 28 Beav. 303; 30 L. J. Ch. 681; 3 L. T. 4; 6 Jur. N. S. 1087; 8 W. R. 715; 54 E. R. 382.

**Annotation:—Mentd.** Ainslie v. Harcourt (1860), 28 Beav. 313.

**965. .]**—If a tenant for life cuts timber wrongfully, Stat. Limitations begins to run against the remainderman from the time of the cutting.—SEAGRAM v. KNIGHT (1867), 2 Ch. App. 628; 36 L. J. Ch. 918; 17 L. T. 47; 15 W. R. 1152, C. A.

**Annotations:—Reid.** Dashwood v. Magniac, [1891] 3 Ch. 306, C. A. **Mentd.** Re Benzon, Bower v. Chetwynd (1914), 83 L. J. Ch. 658, C. A.

**966. .]**—If a tenant for life cuts timber which is ripe for cutting, but not decaying or overcrowding, the act is tortious, & the right of the remainderman accrues, & Stat. Limitations begins to run immediately. If after Stat. Limitations has begun to run the right to sue & the liability to be sued meet by act of law in the same person, the running of the stat. is suspended.

A tenant for life, with remainder to his son in fee, wrongfully cut timber in the years 1831, 1842, & subsequent years, & appropriated the proceeds to his own use. The son attained his majority in 1834, & died in 1844, intestate, & the tenant for life took out letters of administration to his estate. The tenant for life died in 1864. In 1866 the heir-at-law & personal representative of the remainderman in fee filed his bill against the personal representative

of the tenant for life, for an account of the timber cut:—**Held:** (1) as to the timber cut in 1831, the claim was barred by Stat. Limitations; (2) as to the timber cut in 1842, the running of the stat. was suspended during the time that the tenant for life was administrator of the remainderman.—SEAGRAM v. KNIGHT (1867), 2 Ch. App. 628; 36 L. J. Ch. 918; 17 L. T. 47; 15 W. R. 1152, C. A.

**Annotations:—Reid.** Dashwood v. Magniac, [1891] 3 Ch. 306, C. A. **Mentd.** Re Benzon, Bower v. Chetwynd (1914), 83 L. J. Ch. 658, C. A.

**967. .]**—A tenant for life was extrix. of a preceding tenant for life, both being impeachable for waste, & both having committed waste by cutting timber:—**Held:** (1) Stat. Limitations began to run against the remaindermen in fee from the time when the timber was cut, not from the time of the death of the tenant for life; (2) though an injunction & an account were granted against the existing tenant for life, yet as no injunction could be granted against the preceding tenant for life, no account could be granted against her extrix. for waste committed by the preceding tenant for life.—HIGGINBOTHAM v. HAWKINS (1872), 7 Ch. App. 676; 41 L. J. Ch. 828; 27 L. T. 328; 20 W. R. 955, L.J.J.

**Annotation:—Reid.** Dashwood v. Magniac, [1891] 3 Ch. 306, C. A.

**SECT. 10.—TREES ON HIGHWAYS.**

**968. Ownership.]—In the King's highway the King has only the right of passage for him & his people, but the freehold & all the profits, such as trees, are in the lord of the soil (*per* CUR.).—ANON. (1468), Y. B., 8 Edw. 4, 4 Mich. 9, pl. 7.**

**969. Tree falling across highway.]—Where a tree, blown down in a violent gale, has fallen across a highway so as to cause an obstruction thereto, the occupier of the land over which the tree was growing is under no obligation by virtue of either s. 65 or s. 72 of Highway Act, 1835 (c. 50), to light the tree or to warn persons passing along the highway of the existence of the obstruction.—HUDSON v. BRAY, [1917] 1 K. B. 520; 86 L. J. K. B. 576; 116 L. T. 122; 81 J. P. 105; 33 T. L. R. 118; 61 Sol. Jo. 234; 15 L. G. R. 156.**

**970. Duty to protect public from danger—Lighting].—Defts., an urban authority acting under Public Health Act Amendment Act, 1890 (c. 20), s. 43, planted trees in certain of their highways, & surrounded each tree with an iron spiked guard. Subsequent to the erection of the guards an order was made under Defence of the Realm Regulations, by which all street lights in defts.' area were ordered to be extinguished at a certain hour. Pltf., who was crossing a road at night in the darkness, came into contact with one of the guards & suffered very serious injury. In an action to recover damages:**

**PART IX. SECT. 10.**

**968 i. Ownership.]—The owner of land adjoining a highway has, under R. S. O. 1877, c. 187, such a special property in the shade & ornamental trees growing on such highway opposite to his land as to entitle him to maintain an action against a wrongdoer to recover damages for the cutting down or destroying such trees; & he is not restricted to the penalty given by s. 5. The Act refers to trees of natural growth as well as to those planted.—DOUGLAS v. FOX (1880), 31 C. P. 140.—CAN.**

**g. Injury to roots of trees adjoining highway.]—Deft., a road comr., cut &**

**damaged the roots of trees of a proprietor abutting on the public road, whilst in the course of levelling same. In an action for damages:—Held:** as the trees were planted since the road was constructed, deft. was not liable, as the owner should have guarded against their roots intruding on the highway.—EVANS v. BELL (1891), 7 Nfld. L. R. 564. —NFLD.

**970 i. Duty to protect public from danger—Overhanging trees.]—The liability to keep in repair extends to overhanging trees liable to fall upon the road & cause damage to passers by.**

**Defts.' servants, in getting materials on land adjoining the road for its repair,**

**felled a tree, which in falling lodged against another tree near the road, & being left there, afterwards fell & killed pltf.'s wife while passing along the road:—Held:** defts. liable.—GILCHRIST v. CARDEN (TOWNSHIP) (1876), 26 C. P. 1.—CAN.

**970 ii. ———.]—The owner of property, on which trees grow close to a public thoroughfare, is liable for damages caused by the fall through decay of a branch on a passer-by, & for accidents that happen in consequence of his failure to have them properly inspected & pruned.—LAMARCHE v. LES REVERENDS PERES OBLATS (1905), Q. R. 29 S. C. 138.—CAN.**

for negligence, the jury found that the guard was dangerous in the circumstances of the darkness that existed, & that defts. had not taken reasonable measures to neutralise the danger, & the judge entered judgment for pltf.:—*Held*: after the promulgation of the lighting order there was a continuing duty on defts. to take reasonable measures to prevent the guard from being a danger to the public lawfully using the road, & pltf. was entitled to maintain his action.—*MORRISON v. SHEFFIELD CORPN.*, [1917] 2 K. B. 866; 86 L. J. K. B. 1456; 117 L. T. 520; 81 J. P. 277; 33 T. L. R. 492; 61 Sol. Jo. 611; 15 L. G. R. 667, C. A.

See, further, HIGHWAYS, STREETS, & BRIDGES; NEGLIGENCE; TELEGRAPHS & TELEPHONES.

#### SECT. 11.—TREES ON COMMONS.

See COMMONS & RIGHTS OF COMMON.

#### SECT. 12.—CRIMES RELATING TO TREES.

See CRIMINAL LAW & PROCEDURE.

#### SECT. 13.—TIMBER LICENCES.

See REAL PROPERTY & CHATTELS REAL.

## Part X.—Fertilisers, Feeding Stuffs and Seeds.

NOTE.—The Acts on this subject are Adulteration of Seeds Act, 1869 (c. 112), Fertilisers, etc., Act, 1893 (c. 56), & Fertilisers, etc., Act, 1906 (c. 27), referred to respectively as Act of 1869, Act of 1893, & Act of 1906.

**971. Seeds—Dyeing—Act of 1869, s. 3.]—**Resp. sold old white clover seed, which he had previously subjected to sulphur smoking, as young white clover seed; he was summoned, & the police magistrate dismissed the summons on the ground that no offence was proved under the Act:—*Held*: the magistrate was right, for there had been no “adulteration” of the seed, nor had it been given the appearance of seed “of another kind” within s. 2 of the Act, but only “of another quality,” & there was no offence under the Act.—*FRANCIS v. MAAS* (1878), 3 Q. B. D. 341; 47 L. J. M. C. 83; 38 L. T. 100; 42 J. P. 392; 26 W. R. 422.

**972. False invoice—Evidence—Act of 1893, s. 5.]—**An analysis by the district analyst & the taking of samples in accordance with the above sect. are not conditions precedent to a prosecution by a county council under the Act. An invoice that states the article “contains 38 to 45 per cent. total phosphates,” whereas it contains only about 31 per cent., is false in a material particular to the prejudice of the purchaser within s. 3 (1) (b) of the Act, notwithstanding that the invoice states “Minimum guaran-

teed subject to conditions printed on the back hereof,” & such conditions make provision that, if on analysis the phosphates are below the minimum, a *pro rata* allowance will be made to the purchaser.

K., the managing director of the sellers of an article, was cognisant of the form of the invoice used. He signed letters proving that he knew that the article contained various uncertain proportions of phosphates that might have to be ascertained in a particular way. It appeared that sales of the article would come under his notice, & the invoice would not be sent out with a guarantee without his knowledge, but there was no evidence that he saw the particular invoice:—*Held*: there was evidence upon which K. might be convicted of aiding & abetting the commission of an offence under the above sect.—*KORTEN v. WEST SUSSEX COUNTY COUNCIL* (1903), 72 L. J. K. B. 514; 88 L. T. 466; 67 J. P. 167; 19 T. L. R. 354; 20 Cox, C. C. 402; 1 L. G. R. 445.

*Annotations*:—*Folld. Laird v. Dobell*, [1906] 1 K. B. 131. *Refd. Needham v. Worcestershire County Council* (1909), 100 L. T. 901.

**973. Guilty knowledge—Act of 1893, s. 3 (1) b.]—**Guilty knowledge that an invoice is false in a material particular is not necessary under the above sect. It is sufficient if the description is in fact untrue.

### PART X.

**971 i. Seeds—Sale of unclean seed—Measure of damages.]—**Pltf. bought seed barley from deft. guaranteed to be clean. The seed was sown, & it was afterwards discovered that it was mixed with a weed called wild vetches or wild peas, which took root & grew up with the barley. Pltf. had not sustained any damage to his crop. In an action to recover damages for depreciation in the value of the farm:—*Held*: pltf. should have been allowed to substantiate, if he could, that the necessary consequence of sowing the foul seed was to lower appreciably the value of the farm.—*McMULLEN v. FREE* (1887), 13 O. R. 57.—CAN.

**971 ii. —.]—**Where seed is delivered, without any warranty, by one person, honestly believing it to be clean, to another, to be grown on the land of the latter, the produce thereof to be returned & paid for at a fixed price per bushel, the transaction is a bailment & not a sale, & damages arising from other innocuous seed having been mixed therewith, & on harvesting having become scattered on the ground & coming up the following year on the land, are too remote.—*STEWART v. SCULTHORP* (1894), 25 O. R. 544.—CAN.

**971 iii. —.]—***NARGONG v. KIRBY* (1911), 18 W. L. R. 625; 4 Sask. L. R. 306.—CAN.

**971 iv. — “Wilfully” giving false name & address of person from whom procured.]—**The manager of a shop, in which agricultural seeds were kept for sale, gave to an officer of the Department of Agriculture & Technical Instruction for Ireland a sample of certain agricultural seeds, & stated that the seeds had been procured from a certain firm in Belfast. In fact the seeds had not been procured there:—*Held*: the owner of the shop was guilty of an offence under Weeds & Agricultural Seeds (Ireland) Act, 1909 (c. 31), s. 5 (2), the word “wilfully” in the sub-sect. meaning “intentionally,” & not by mistake or inadvertence.—*DEPARTMENT OF AGRICULTURE v. BURKE*, [1915] 2 I. R. 128; 49 I. L. T. 84.—IR.

**971 v. — Method of taking samples—Delivery in bags & delivery in bulk—Act of 1893.]—**Regulations made under the above Act provided for a method of taking samples where the stuff was delivered in two or more bags, & another method where it was delivered in bulk:—*Held*: (1) (LORD O'BRIEN, C.J. & PALLES, C.B.) delivery in one bag did not come under either head, & was a

*casus omissus* in the regulations, & delivery in bulk meant delivery in a loose & unpacked condition; (2) (MADDERN & WRIGHT, JJ.) delivery in one bag did not fall under the first head, but was delivery in bulk, & delivery in bulk meant delivery of the stuff, unseparated into packages.—*CORK AGRICULTURAL COMRS. v. CLARK* (1904), 38 I. L. T. 83.—IR.

**971 vi. — “Official sampler”—Possession as carrier—Act of 1906.]—**K. was a person appointed by the Department of Agriculture & Technical Instruction for Ireland as their sampler, to take samples of fertilisers & feeding stuffs for the purposes of the above Act. Defts. had in their possession in Cork a quantity of manure, consigned from Liverpool to merchants in Ireland. Their possession was solely as carriers. K. applied to defts. for permission to take samples of the manure, but defts. refused to allow him to do so:—*Held*: (1) K. was an “official sampler” within s. 8 (a), of the above Act; (2) defts. were persons entrusted for the time being with the charge or custody of an article within the sub-sect., & defts. were guilty of an offence under the sect.—*DEPARTMENT OF AGRICULTURE & KENNEDY v. CITY OF CORK STEAM PACKET CO.*, [1909] 2 I. R. 479.—IR.



An invoice described an article as "Galveston Dect. C.S. Cake Meal":—*Held*: no offence had been committed under ss. 2 & 3 (1) (a) of the Act for not adding to this description a statement whether it had been prepared from one substance or seed, or from more than one.—*LAIRD v. DOBELL*, [1906] 1 K. B. 131; 75 L. J. K. B. 163; 93 L. T. 842; 54 W. R. 506; 21 Cox, C. C. 66; 4 L. G. R. 232.

*Annotation*:—*Reid. Needham v. Worcestershire County Council* (1909), 100 L. T. 901.

**974. Offence—Act of 1906, s. 6 (1) (a), (b).]**—A seller of an article for use as food for cattle or poultry, who delivers an invoice stating the percentage of oil & albuminoids contained in the article, does not, if the invoice is incorrect, commit an offence against s. 6 (1) (a), which requires the delivery of an invoice stating the percentage of oil & albuminoids, but his offence, if any, is against s. 6 (1) (b), which prohibits the delivery of an invoice false in any material particular to the prejudice of the purchaser.—*NEEDHAM & Co. v. WORCESTERSHIRE COUNTY COUNCIL* (1909), 100 L. T. 901; 73 J. P. 293; 25 T. L. R. 471; 7 L. G. R. 595.

*Annotation*:—*Distd. & Expld. Kyle v. Jewers* (1914), 112 L. T. 422.

**975. Failure to deliver invoice—Consent to prosecution—Act of 1906, ss. 6 (3), 12.]**—Resps. in England sent to a purchaser in Ireland an article as food for cattle, & were prosecuted in England by the Department of Agriculture & Technical Instruction for Ireland, which had taken a sample of the article in Ireland & had it analysed there, for having failed without reasonable excuse to give to the purchaser an invoice as required by the above Act. The consent of the Board of Agriculture & Fisheries to the institution of the prosecution had not been obtained:—*Held*: (1) the consent of the Irish Department to the institution of the prosecution was not sufficient; (2) the consent of the Board of Agriculture & Fisheries was necessary under s. 6 (3) of the Act notwithstanding s. 12.—*HILL v. PHOENIX VETERINARY SUPPLIES, LTD.*, [1911] 2 K. B. 217; 80 L. J. K. B. 669; 105 L. T. 73; 75 J. P. 321; 22 Cox, C. C. 508; 9 L. G. R. 731.

**976. — Poultry food—Act of 1906, s. 1 (2).]**—Resps. sold a quantity of poultry food without giving to the purchaser an invoice stating what were the respective percentages of oil & albuminoids contained in it. The food was composed of three substances, namely, (a) biscuits made by resps. by baking a cereal substance, (b) greaves, the refuse or sediment left in making tallow or soap grease, purchased by resps. in blocks, & (c) oyster

shells broken to a suitable size. The biscuits were broken by resps.' machinery to the size required, & the greaves chopped to pieces; the broken fragments of biscuits, the pieces of greaves, & the broken pieces of oyster shells were then mixed together by the machinery, & the resulting mixture formed the poultry food:—*Held*: the food was an article artificially prepared "otherwise than by being mixed, broken, ground or chopped" within the above sub-sect., & resps. had committed an offence in failing to supply to the purchaser an invoice stating the percentages of oil & albuminoids contained in the food as required by that sub-sect.—*LATHOM (LATHAM) v. SPILLERS & BAKERS, LTD.*, [1913] 2 K. B. 355; 82 L. J. K. B. 833; 108 L. T. 996; 77 J. P. 277; 23 Cox, C. C. 422; 11 L. G. R. 539.

*Annotation*:—*Distd. & Expld. Worcestershire County Council v. Notley*, [1914] 3 K. B. 330.

**977. — Sharps—Act of 1906, s. 1 (2).]**—Resps. sold for use as food for cattle or poultry an article called sharps, which contained oil & albuminoids. Sharps are an offal of wheat & are that part of the wheat which remains after the flour & bran have been removed, & are made in the following way. Wheat is taken in the whole grain & passed by the miller through his mill. The wheat meal thus made is then by mechanical means in the mill passed by air currents through a series of sieves, whereby it is separated & divided into three substances, namely, flour, sharps, & bran. The chemical composition of each of these three substances (when made) differs both from that of each other & from that of the original wheat. The mechanical process does not otherwise effect any chemical change:—*Held* (*ROWLATT, J., diss.*): (1) sharps were not an article which had been artificially prepared within the Act, & if they were, they were not artificially prepared otherwise than by being ground; (2) resps. were not bound to give to the purchaser an invoice stating the percentages of oil & albuminoids contained in the article.—*WORCESTERSHIRE COUNTY COUNCIL v. NOTLEY BROTHERS*, [1914] 3 K. B. 330; 83 L. J. K. B. 1750; 111 L. T. 382; 78 J. P. 340; 30 T. L. R. 516; 24 Cox, C. C. 316; 12 L. G. R. 874.

**978. — Insufficient invoice—Act of 1906, s. 6 (1) (a).]**—Resp., on the sale of "greaves," gave an invoice stating merely that they contained "not less than 15 per cent. albuminoids & 2½ per cent. oil":—*Held*: resp. was properly summoned under the above sub-sect. for failing to give the invoice required by the Act, inasmuch as the invoice did not purport to comply with s. 1 (2).—*KYLE v. JEWERS* (1914), 84 L. J. K. B. 255; 112 L. T. 422; 79 J. P. 176; 24 Cox, C. C. 543; 13 L. G. R. 260.

## Part XI.—Miscellaneous.

### SECT. 1.—AGRICULTURAL GANGS, ETC.

See EDUCATION; PUBLIC HEALTH & LOCAL ADMINISTRATION.

### SECT. 3.—DOGS.

See ANIMALS; REVENUE.

### SECT. 2.—DESTRUCTION OF CROPS, ETC., BY SPARKS FROM LOCOMOTIVES.

See RAILWAYS & CANALS.

### SECT. 4.—MALICIOUS DAMAGE TO CROPS AND THRESHING MACHINERY.

See CRIMINAL LAW & PROCEDURE.

**975 i. Failure to deliver invoice—Consent to prosecution—Act of 1906, s. 6.]**—A prosecution for an offence under s. 6 of the above Act cannot be instituted until the consent of the Department of Agriculture & Technical Instruction has first been obtained to such prosecution. *Semble*: such consent must be in writing, being the consent of a body corporate. *Qu.*: whether the Department of Agriculture & Technical Instruction can "appear as complainants" in prosecutions under the Act.—*DEPARTMENT OF AGRICULTURE & MARCHBANK v. PORTER* (1909), 44 L. T. 13.—*IR.*

## SECT. 5.—POISONED FLESH AND GRAIN.

See ANIMALS.

## SECT. 8.—SUNDAY TRADING.

See TIME.

## SECT. 6.—REGULATIONS AS TO SALE AND ADULTERATION.

## SUB-SECT. 1.—FERTILISERS AND FEEDING STUFFS.

See Part X., *ante*.

## SUB-SECT. 2.—HAY AND STRAW.

See MARKETS &amp; FAIRS.

## SUB-SECT. 3.—HOPS.

See FOOD &amp; DRUGS.

## SUB-SECT. 4.—SEEDS.

See Part X., *ante*.

## SECT. 9.—THISTLES AND NOXIOUS WEEDS.

**979. Seeds blown on to adjoining land—Liability of owner of land.]—**Deft. occupied certain land which had originally been forest land, but had recently been brought into cultivation. As soon as this land was brought into cultivation thistles sprang up all over it. Deft. neglected to cut these thistles, & the seeds were blown in large quantities on to the adjoining land, which was occupied by pltf. Pltf. having brought an action to recover damages from deft. for injury done to his land :—*Held* : deft. was under no duty towards pltf. to cut the thistles, which were the natural growth of the soil, & was not liable for damage caused to pltf.'s land.—GILES v. WALKER (1890), 24 Q. B. D. 656 ; 59 L. J. Q. B. 416 ; 62 L. T. 933 ; 54 J. P. 599 ; 38 W. R. 782.

## SECT. 7.—SALE OF CATTLE BY WEIGHT.

See MARKETS &amp; FAIRS.

## SECT. 10.—CLEARING LAND BY FIRE.

See cases *infra*.

## PART XI. SECT. 9.

*r. Thistles in leased field—Tenant's right to recover damages.]—*Pltf. rented to deft. a field for the purpose of growing flax. In answer to a claim for rent, deft. attempted to show that he had sustained damage by reason of the ground being full of thistles, & that it had been stipulated that an allowance was to be made in such case for the loss to deft. :—*Held* : evidence was properly admitted for the guidance of the jury, in adjusting such allowance, as to how deft. had himself settled with other persons, who had thistles in their fields rented by him.—WEINHOLD v. KLEIN (1884), 10 A. R. 20.—CAN.

*s. Powers of weed inspector under Noxious Weeds Act (c. 39), 1913, Sask., ss. 6 & 8.]—Re FERTILE BELT (1915), 32 W. L. R. 265 ; 9 W. W. R. 103.—CAN.*

*t. Noxious weed—Duty to keep down.]—*An occupier of land is under no duty at common law to keep down a noxious weed, such as prickly pear, growing naturally on his land so as to prevent it from spreading or extending to his neighbour's land ; & if, owing to his failure to keep it down, it grows in such a way as to damage his neighbour's fence that is not sufficient to render him liable.—SPARKE v. OSBORNE (1908), 7 C. L. R. 51.—AUS.

## PART XI. SECT. 10.

*a. Liability of landowner.]—*A person kindling a fire on his own land for the

purpose of clearing it is not liable at all risks for any injurious consequences that may ensue to the property of his neighbours.—DEAN v. MCCARTY (1846), 2 U. C. R. 448.—CAN.

*b. —.]—*Where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time & season, & managed with due care, he is not responsible for damage occasioned by it.—FURLONG v. CARROLL (1882), 7 A. R. 145.—CAN.

*c. — Landowner not insurer.]—*GILLSON v. NORTH GREY R. W. CO. (1874), 35 U. C. R. 475.—CAN.

*d. — Question for jury.]—*A man must exercise care & discretion as to the time & mode of clearing his land, & if his neighbour be injured by rashness or inconsiderateness on his part in setting out fire for that purpose, he will be liable to him ; but this is always a question for the jury.—WILKINS v. ROW (1865), 15 C. P. 325.—CAN.

*e. — Injury by wind suddenly rising.]—*Persons have a right to set out fire on their land for the purpose of clearing it, & if the flames spread under the influence of a wind suddenly arising, & cause damage to a neighbour, no action will lie without proof of negligence. It is a misdirection to tell the jury that defts. were bound to have anticipated the rising of the wind, & to use extraordinary caution.—BUCHANAN v. YOUNG (1873), 23 C. P. 101.—CAN.

*f. Injury by wind changing.]—*Deft., for the purpose of clearing his land, set out fire on same, but before so doing, consulted with pltf., who had some lumber piled on an adjoining lot, who agreed that the weather was favourable, the wind blowing in a direction away from pltf.'s property, & to prevent its spreading thereto, deft. burnt up the stubble, etc., around pltf.'s property. Subsequently there were indications of a change of wind, & deft. sent his son to watch the fire, but when the latter arrived on the ground, the wind was blowing a heavy gale, & the fire communicated to pltf.'s property, which was destroyed. Even if deft. had been watching he could not have prevented the fire spreading :—*Held* : deft. not liable.—MURPHY v. DALTON (1884), 5 O. R. 541.—CAN.

*g. — How pleaded.]—*HENDERSON v. CHAPMAN (1864), 3 P. R. 331.—CAN.

*h. — Proof of negligence.]—*In Aug. deft. set out fire on his own land for the purpose of clearing it. This fire continued to burn till Oct., when, in consequence of a very high wind, sparks were carried to pltf.'s land, & set fire to some ties & posts stored thereon :—*Held* : the question of deft.'s liability for negligence should be determined having regard to the circumstances existing in Oct., & not to those existing in Aug.—BEATON v. SPRINGER (1897), 24 A. R. 297.—CAN.

## AIR.

*See* EASEMENTS AND PROFITS À PRENDRE.

## ALE AND BEER.

*See* INTOXICATING LIQUORS.

## ALIENATION.

Restraint on.—*See* HUSBAND AND WIFE; PERPETUITIES; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.



# ALIENS.

	PAGE
PART I. WHAT CONSTITUTES ALIENAGE . . . . .	121
SECT. 1. BIRTH OUTSIDE ALLEGIANCE OF CROWN . . . . .	121
SECT. 2. BIRTH WITHIN ALLEGIANCE OF CROWN . . . . .	126
SECT. 3. OTHER CASES . . . . .	128
PART II. RIGHTS, LIABILITIES, AND DISABILITIES OF ALIENS IN TIME OF PEACE .	128
SECT. 1. GENERAL POSITION IN REGARD TO BRITISH LAW . . . . .	128
SECT. 2. RIGHT TO SUE AND LIABILITY TO BE SUED . . . . .	130
SUB-SECT. 1. RIGHT TO SUE . . . . .	130
SUB-SECT. 2. LIABILITY TO BE SUED . . . . .	132
SECT. 3. EXPULSION . . . . .	132
SECT. 4. IMMIGRATION . . . . .	132
SECT. 5. MILITARY SERVICE : <i>see</i> ROYAL FORCES. . . . .	
SECT. 6. PERSONAL PROPERTY . . . . .	132
SECT. 7. REAL PROPERTY AND CHATTELS REAL. . . . .	134
SUB-SECT. 1. AT COMMON LAW . . . . .	134
SUB-SECT. 2. UNDER STATUTE . . . . .	137
SECT. 8. RIGHT TO HOLD OFFICE AND FRANCHISE . . . . .	138
PART III. ALIENS IN TIME OF WAR . . . . .	139
SECT. 1. WHO IS AN ALIEN ENEMY . . . . .	139
SUB-SECT. 1. DEFINITIONS AND GENERAL RULES . . . . .	139
SUB-SECT. 2. ENEMY SUBJECTS . . . . .	141
SUB-SECT. 3. NEUTRALS . . . . .	142
SUB-SECT. 4. BRITISH SUBJECTS . . . . .	144
SUB-SECT. 5. COMPANIES . . . . .	145
SECT. 2. POSITION OF ALIEN ENEMY . . . . .	147
SUB-SECT. 1. IN GENERAL . . . . .	147
SUB-SECT. 2. AS REGARDS GOODS AND PROPERTY, BUSINESS ASSETS, GOODWILL, ETC. .	147
A. In General . . . . .	147
B. Control and Management of Enemy Property, Assets, Goodwill, etc. . . . .	149
(a) Appointment and Powers of Controller . . . . .	149
(b) Appointment and Powers of Custodian . . . . .	151
(c) Appointment and Powers of Receiver or Inspector . . . . .	153
(d) Appointment and Powers of Administrateur-séquestre . . . . .	154

	PAGE
SUB-SECT. 3. AS REGARDS ENGLISH COURTS . . . . .	
A. Right to sue or otherwise initiate Proceedings on his own Behalf . . . . .	154
B. Appointment of Alien Enemies as Executors, etc., and their Rights to sue as such . . . . .	158
C. Position when Defendant . . . . .	158
D. Suits by British Subjects as representing or as jointly interested with Alien Enemies . . . . .	160
E. Plea of Alien Enemy and Replication thereto . . . . .	161
PART IV. TRADING AND COMMUNICATING WITH THE ENEMY . . . . .	162
SECT. 1. IN GENERAL . . . . .	162
SECT. 2. WHAT CONSTITUTES TRADING OR COMMUNICATING APART FROM WAR LEGISLATION, 1914-1918. . . . .	161
SECT. 3. UNDER WAR LEGISLATION, 1914-1918 . . . . .	169
SUB-SECT. 1. WHAT CONSTITUTES TRADING WITH THE ENEMY . . . . .	169
SUB-SECT. 2. OTHER CASES . . . . .	173
SECT. 4. EFFECT OF PARTY TO EXECUTORY CONTRACT BECOMING ALIEN ENEMY . . . . .	174
SECT. 5. TRADING UNDER CROWN LICENCE . . . . .	178
SUB-SECT. 1. IN GENERAL . . . . .	178
SUB-SECT. 2. CONSTRUCTION . . . . .	182
A. Whose Goods protected . . . . .	182
B. What Goods protected . . . . .	185
C. Restrictions as to Time. . . . .	186
D. Restrictions as to Ship . . . . .	187
E. Restrictions as to Port of Loading . . . . .	187
F. Restrictions as to Destination . . . . .	188
PART V. ACQUISITION OF BRITISH NATIONALITY . . . . .	188
SECT. 1. DENIZATION . . . . .	188
SECT. 2. ANNEXATION OR CESSION TO CROWN . . . . .	189
SECT. 3. NATURALISATION . . . . .	189
PART VI. LOSS OF BRITISH NATIONALITY . . . . .	190
PART VII. RE-ADMISSION TO BRITISH NATIONALITY . . . . .	192
PART VIII. IMMIGRATION AND EXPULSION OF ALIENS . . . . .	
PART IX. REGISTRATION. INTERNMENT, AND OTHER RESTRICTIONS . . . . .	191

<i>Administration of Assets</i> . . . . .	See EXECUTORS & ADMINISTRATORS.	<i>Extradition Foreign companies and corporations, generally</i> . . . . .	See EXTRADITION. COMPANIES; CORPORATIONS.
<i>Allegiance, generally</i> . . . . .	„ CONSTITUTIONAL LAW.	<i>Guardianship of Infants</i> . . . . .	„ INFANTS & CHILDREN.
<i>Conflict of Laws</i> . . . . .	„ CONFLICT OF LAWS.	<i>Interpleader</i> . . . . .	„ INTERPLEADER.
<i>Criminal jurisdiction</i> . . . . .	„ CRIMINAL LAW & PROCEDURE.	<i>Prize Law</i> . . . . .	„ PRIZE LAW & JURISDICTION.
<i>Erecution</i> . . . . .	„ EXECUTION.		

## Part I.—What Constitutes Alienage.

NOTE.—*The cases in this Part must be read subject to the provisions of British Nationality & Status of Aliens Act, 1914 (c. 17), which repealed 25 Edw. 3, stat. 1, Foreign Protestants (Naturalisation) Act, 1708 (c. 5), British Nationality Acts, 1730 (c. 21) & 1772 (c. 21), & Naturalisation Act, 1870 (c. 14).*

### SECT. 1.—BIRTH OUTSIDE ALLEGIANCE OF CROWN.

**1. Persons born abroad.]**—An alien is a subject that is born out of the ligeance of the King, & under the ligeance of another. Every man is either *alienigena*, an alien born, or *subditus*, a subject born. There are three incidents to a subject born: (1) that the parents be under the actual obedience of the King; (2) that the place of his birth be within the King's dominion; (3) the time of his birth is the date to be considered.

*Antenati*, i.e., persons born in Scotland before the union of the Crown in James I., were aliens born as regards England.—**CALVIN'S CASE** (1608), 7 Co. Rep. 1a; 2 State Tr. 559; 77 E. R. 377.

**Annotations:—****Consd.** *De Gear v. Stone* (1882), 22 Ch. D. 242. **Refd.** *R. v. Cowle* (1759), 2 Burr. 834; *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895, H. L.; *Gibson v. Gibson*, [1913] 3 K. B. 379; *R. v. Francis*, [1918] 1 K. B. 617. **Mentd.** *R. v. Hampden* (1637), 3 State Tr. 825; *Collingwood v. Pace* (1661), O'Brigg. 410; *Manby v. Scott* (1663), 1 Keb. 361; *Thomas v. Sorrell* (1672), 3 Keb. 143; *Anon.* (1678), *Freem. K. B.* 249; *R. v. Knowles* (1693), 12 Mod. Rep. 55; *R. v. Tucker* (1694), 1 Ld. Raym. 1; *Owen v. Saunders* (1696), 1 Ld. Raym. 158; *Clayton v. Kinaston* (1697), 1 Ld. Raym. 419; *Scot v. Schawrtz* (1739), 2 Com. 677; *Omychund v. Barker* (1745), 1 Atk. 21; *Campbell v. Hall* (1774), 1 Cowp. 204; *Queen Caroline's Claim to be Crowned* (1821), 1 State Tr. N. S. 949, P. C.; *Ruding v. Smith* (1821), 2 Hag. Con. 371; *Jephson v. Riera* (1836), 3 Knapp, 130; *Lane v. Bennett* (1836), 1 M. & W. 70; *Lyons Corp. v. East India Co.* (1836), 1 Moo. Ind. App. 175, P. C.; *Brunswick v. Hanover* (1844), 6 Beav. 1; *Taylor v. Best* (1854), 14 C. B. 487; *Rittson v. Sturdy* (1855), 3 Eq. Rep. 1039; *Ex p. Anderson* (1861), 3 E. & E. 487; *Ex p. Brown* (1864), 5 B. & S. 289; *Low v. Routledge* (1865), 1 Ch. App. 42, L.J.J.; *The Franconia* (1876), 2 Ex. D. 63, C. C. R.; *Re Stepney Petn., Isaacson v. Durant* (1886), 17 Q. B. D. 54; *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821; *R. v. Speyer*, [1916] 2 K. B. 858, C. A.; *Bowman v. Secular Soc.*, [1917] A. C. 406, H. L.; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**2. —.]**—All not born under the King's allegiance, naturalised or made denizen, are aliens. None can be looked upon as English but such as are natives, naturalised or denizens. All others are esteemed aliens (**COMYNS, C.B.**).—**SCOT v. SCHAWRTZ** (1739), 2 Com. 677; 92 E. R. 1265.

**Annotations:—****Refd.** *Bell v. Reid*, *Bell v. Buller* (1813), 1 M. & S. 726. **Mentd.** *Marryat v. Wilson* (1799), 1 Bos. & P. 430.

**3. —.]**—The son born abroad of an alien father & English mother is an alien.—**DOE d. DUROURE v. JONES** (1791), 4 Term Rep. 300; 100 E. R. 1031.

**Annotations:—****Consd.** *De Gear v. Stone* (1882), 22 Ch. D. 243. **Refd.** *R. v. Speyer*, [1916] 2 K. B. 858, C. A. **Mentd.** *Cotterell v. Dutton* (1813), 4 Taunt. 826; *Tolson v. Kaye* (1822), 6 Moore, C. P. 542; *Rhodes v. Smethurst* (1840), 6 M. & W. 351.

**4. —.]**—The word "alien" is a legal term; an alien must be alien *né*. It implies being born out of the allegiance of the King, & within that of

some other State.—**DAUBIGNY v. DAVALLON** (1794), 2 Anst. 462; 145 E. R. 936.

**Annotation:—****Mentd.** *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**5. —.]**—A testator, born in America in 1764, went to Scotland when a minor for the purposes of education, & after he had attained his majority in 1788 sailed for India, describing himself in the ship's books as an American. He remained in India thirty years, when he returned to Europe, leaving the bulk of his property in Bengal, & afterwards, having been in America, visited England, Scotland, & the Continent, when he returned to America, entered into agricultural pursuits there & continued to draw his property to that country until his death at New York in 1826:—**Held**: he was an American citizen.—**Re BRUCE** (1832), 2 Cr. & J. 436; 2 Tyr. 475; 1 L. J. Ex. 153; 149 E. R. 185.

**Annotations:—****Consd.** *Charitable Donations Comrs. v. Devereaux* (1832), 13 Sim. 14. **Refd.** *Thompson v. Advocate-General* (1845), 12 Cl. & Fin. 1, H. L.; *Re Stepney Petn., Isaacson v. Durant* (1886), 17 Q. B. D. 54. **Mentd.** *Tyler v. Bell* (1836), Donnelly, 190; *Salkeld v. Johnston* (1846), 1 Hare, 196; *Re Wallop's Trust* (1864), 1 De G. J. & Sm. 656.

**6. —.]**—X. was a domiciled Frenchman, & he died leaving issue three daughters only, who were all French & married to Frenchmen, & resident in France. In an administration action, in which a petition was presented by two of the daughters & their husbands:—**Held**: the petitioners were aliens in the strictest sense, as they were not the children of British subjects, nor the children of a person whose father was a British subject, & they did not come within the statutory definition of British subjects any more than they did within the common law definition of British subjects.—**BROWN v. COLLINS** (1883), 25 Ch. D. 56; 53 L. J. Ch. 368; 49 L. T. 329.

**Annotation:—****Mentd.** *Re McGrath*, [1892] 2 Ch. 496.

**7. —.]**—**How pleaded.]**—An averment of "not born within the kingdom" does not imply that the party was born out of the King's allegiance.—**R. v. BUSHEIR** (1708), 11 Mod. Rep. 167; 88 E. R. 966.

**8. —.]**—**Birth in Hanover & Prussia before & after 1837.]**—Persons born in Hanover before Queen Victoria's accession, resident in this country & not naturalised, persons born in Hanover since Queen Victoria's accession, resident in this country & not naturalised, & persons born in Prussia of Hanoverian parents born before Queen Victoria's accession, & now resident in this country & not naturalised, are all aliens & not entitled to the franchise.

It has long been settled that while the Crowns of two countries are held by the same person, the inhabitants are not aliens in the two countries respectively. In both they are subjects, & in the allegiance, of the same person, though in his natural, not in his politic, capacity (**LORD COLERIDGE, C.J.**)—**Re STEPNEY ELECTION PETITION, ISAACSON v. DURANT** (1886), 17 Q. B. D. 54; 55 L. J. Q. B. 331; 54 L. T. 684; 34 W. R. 547; 2 T. L. R. 559.

**Annotation:—****Mentd.** *Re Southampton School Board Petn., Phillips & Morgan v. Goff* (1886), 2 T. L. R. 900.

**9. —.]**—**Father partially naturalised.]**—In 1866 a Frenchman came to reside in England, & in 1871

### PART I. SECT. 1.

**1 i. Persons born abroad.]**—Although naturalised in Canada, a man born in China of Chinese parents is a Chinaman within 2 Geo. 5 (Sask.), c. 17, prohibiting employment of white women in restaurants & other places of business kept by a Chinaman.—**R. v. QUONG WING**

(1914), 24 W. L. R. 918; 4 W. W. R. 1135; 12 D. L. R. 656; 21 Can. Crim. Cas. 326; 6 Sask. L. R. 242; 49 S. C. R. 440; 6 W. W. R. 279; 18 W. L. R. 121; 23 Can. Crim. Cas. 113.—**CAN.**

**1 ii. —.]**—**Residence with naturalised mother.]**—Residence with a naturalised

mother in New Zealand does not confer naturalisation on the offspring born abroad, unless the mother is a widow.—**MASEMANN v. MASEMANN** (1917), N. Z. L. R. 769.—**N. Z.**

**9 i. —.]**—**Adoptive father becoming naturalised.]**—M. was born in Germany of German parents & was adopted by a



**Sect. 1.—Birth outside allegiance of Crown.]**

obtained the usual qualified certificate of naturalisation as a British subject under Naturalisation Act, 1870 (c. 14), s. 7, but he did not obtain from the French Govt. the necessary authority required by the law of France to his becoming a naturalised British subject. In 1880 he married an English lady & then returned with her to France, where he resided till his death. By his will, in French form, he gave his residuary estate, which included considerable personal estate in England, to his widow for life, with remainder to his two infant children, both of whom were born in France. On the death of the widow, who had continued to reside in France, a guardian of the infants was appointed by the French cts.:—*Held*: (1) the father was at the time of his death a French subject; (2) his children were also French subjects; (3) the ct. had no jurisdiction to appoint an English guardian of the infants.—*Re BOURGOISE* (1889), 41 Ch. D. 310; 58 L. T. 563; 4 T. L. R. 195; *affd.* without deciding this point, 41 Ch. D. 318, C. A.

*Annotation*:—*Mentd.* *Re Chatard's Settlement Trust* (1899), 68 L. J. Ch. 350.

**10. Inhabitants of conquered & ceded territory.]**—The inhabitants of a country conquered by the British arms, once received under the King's protection, become subjects, & are to be universally considered in that light, not as enemies or aliens.—*CAMPBELL v. HALL* (1774), 20 State Tr. 239; 1 Cowp. 204; Lofft, 655; 98 E. R. 1045.

*Annotations*:—*Consd.* *Bedreechund v. Elphinstone* (1830), 2 State Tr. N. S. 379. *Mentd.* *Snowdon v. Davis* (1808), 1 Taunt. 359; *The Foltina* (1814), 1 Dods. 450; *A.-G. v. Stewart* (1817), 2 Mer. 143; *Ruding v. Smith* (1821), 2 Hag. Con. 371; *Cameron v. Kyte* (1835), 3 Knapp. 332; *Jephson v. Riera* (1835), 3 Knapp. 130; *Lyons Corpn. v. East India Co.* (1836), 1 Moo. Ind. App. 175, P. C.; *R. v. Island of Cape Breton* (1846), 6 State Tr. N. S. 283; *Phillips v. Eyre* (1870), 10 B. & S. 1004, Ex. Ch.; *Sottomayer v. De Barros* (1879), 5 P. D. 94; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; *A.-G. for Dominion of Canada v. Cain*, *A.-G. for Dominion of Canada v. Gilhula*, [1906] A. C. 542, P. C.; *R. v. Crewe, Ex p. Sekgome*, [1910] 2 K. B. 576, C. A.

**11. ———.]**—When the King of England became King of Canada, the natives of Canada became his subjects; Canada became part of his dominions subject to be governed by its local laws. Italians & others, who were born out of the allegiance of the King of England, became aliens in Canada (*SHADWELL, V.-C.*).—*DONEGANI v. DONEGANI* (1835), 3 Knapp. 63; 12 E. R. 571, P. C.

*Annotations*:—*Mentd.* *Re Adam* (1837), 1 Moo. P. C. C. 460, P. C.; *A.-G. for Dominion of Canada v. Cain*, *A.-G. for Dominion of Canada v. Gilhula*, [1906] A. C. 542, P. C.

**12. ———.]**—Upon a conquest the inhabitants *antenati*, as well as *postnati*, of the conquered country become denizens of the conquering country.

The introduction of the English law into a con-

quered or ceded country does not draw with it that branch which related to aliens, if the acts of the power introducing it show that it was introduced not in all its branches, but with the exception of this portion. The English law incapacitating aliens from holding real property to their own use & transmitting it by devise or descent was never expressly introduced into Bengal. The right of the Crown to lands of deceased aliens is not a necessary incident of acquisition of sovereignty by the Crown over a conquered or ceded country.—*LYONS CORPN. v. EAST INDIA CO.* (1837), 1 Moo. Ind. App. 175; 1 Moo. P. C. C. 175; 3 State Tr. N. S. 647; 18 E. R. 66, P. C.

German subject, who subsequently went to New Zealand & was naturalised there. M. lived with his adoptive father during his minority in New Zealand:—*Held*: Aliens Act, 1908, s. 12 did not apply, & M. was an alien.—*MASEMANN v. MASEMANN* (1917), N. Z. L. R. 769.—N.Z.

**10 i. — Inhabitants of conquered & ceded territory.]**—In 1871 a portion of the Orange Free State was annexed by proclamation to the Cape Colony, & applt., a subject of the former State by birth, resided in that portion. He continued to reside there & allowed his name to be placed on the voters' list, but was never formally naturalised. On the outbreak of the South African War the civil & military administrations of that portion of the country in which applt. resided fell into the hands of the Govt. of the Orange Free State. By the

orders of the representatives of that Govt. he joined the forces of his native country:—*Held*: he had become a British subject, & he was properly convicted of high treason.—*R. v. GEYER* (1900), 17 S. C. 501; 10 C. T. R. 707.—S. AF.

**10 ii. ———.]**—P., a burgher of the late South African Republic, surrendered during the South African War, & was allowed to come into the Colony as a prisoner on parole. He did not take the oath of allegiance, nor were letters of naturalisation granted to him, but he remained in the Colony after the annexation & claimed the franchise:—*Held*: he had elected to become a British subject, & entitled to be registered.—*Re PIENAAR* (1903), 22 S. C. 300.—S. AF.

**10 iii. ———.]**—R., a burgher of the Orange Free State, left for Cape

Colony in 1869 & lived in Cape Colony since that date, & continued to reside there since the annexation & claimed the franchise. Letters of naturalisation were never issued to him:—*Held*: he had elected to become a British subject, & entitled to be registered.—*Re RADLOFF* (1905), 22 S. C. 298.—S. AF.

*Annotations*:—*Reid.* *Mitford v. Reynolds* (1842), 1 Ph. 185; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381, P. C.; *Lyons Corpn. v. Bengal Adv.-Gen.* (1876), 1 App. Cas. 91, P. C.; *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, P. C. *Mentd.* *A.-G. v. Brodie* (1846), 6 Moo. P. C. C. 12, P. C.; *Maclean v. Cristall* (1849), 7 Notes of Cases, Supp. xvii.; *Whicker v. Hume* (1851), 14 Beav. 509; *Adv.-Gen. of Bengal v. Ranee Swinomoye Dossee* (1863), 9 Moo. Ind. App. 391, P. C.; *Re Taylor, Martin v. Freeman* (1888), 58 L. T. 538.

**13. ———.]**—On a petition by A., a native of France & resident in the Mauritius, complaining that he had been unlawfully deported & seeking compensation therefor:—*Held*: (1) the status of A. must be determined by the laws of England, but the laws of the colony must decide what rights & liabilities were attached to the status thus ascertained; (2) the admission by A. that he was a native of France & had come to the Mauritius long after its cession to Great Britain, & had never been naturalised as a subject of this country, at once established his status as an alien, which, by the law of England, would not be effected by any of the circumstances detailed in his petition.—*Re ADAM* (1837), 1 Moo. P. C. C. 460; 12 E. R. 889, P. C.

*Annotations*:—*Reid.* *Simon v. Phillips* (1916), 85 L. J. K. B. 656, D. C. *Mentd.* *A.-G. for Dominion of Canada v. Cain*, *A.-G. for Dominion of Canada v. Gilhula*, [1906] A. C. 542, P. C.

**14. Birth in British territory in hostile occupation—Enemy father.]**—Issue born in England to an enemy while in hostile occupation is no subject of the King, because he is not born under the King's allegiance or obedience.—*CALVIN'S CASE* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; 77 E. R. 377.

*Annotations*:—*Mentd.* *R. v. Hampden* (1637), 3 State Tr. 826; *Collingwood v. Pace* (1661), O. Bridg. 410; *Manby v. Scott* (1663), 1 Keb. 361; *Thomas v. Sorrell* (1672), 3 Keb. 143; *Anon.* (1678), *Freem. K. B.* 249; *R. v. Knowles* (1693), 12 Mod. Rep. 55; *R. v. Tucker* (1694), 1 Ld. Raym. 1; *Owen v. Saunders* (1696), 1 Ld. Raym. 158; *Clayton v. Kinaston* (1697), 1 Ld. Raym. 419; *Scot v. Schawrtz* (1739), 2 Com. 677; *Onychund v. Barker* (1745), 1 Atk. 21; *R. v. Cowle* (1759), 2 Burr. 834; *Campbell v. Hall* (1774), 1 Cowp. 204; *Queen Caroline's Claim to be Crowned* (1821), 1 State Tr. N. S. 949, P. C.; *Ruding v. Smith* (1821), 2 Hag. Con. 371; *Jephson v. Riera* (1835), 3 Knapp. 130; *Lane v. Bennett* (1836), 1 M. & W. 70; *Lyons Corpn. v. East India Co.* (1836), 1

**a. — Presumption of British citizenship from grant of land.]**—In 1821 S. & his children came from the United States, & settled in Canada, all being aliens. On Mar. 20, 1821, the Crown granted land to S. Neither S. nor his children ever took the oath of allegiance. S. died on May 17, 1828, & his son in 1842:—*Held*: under Alien Act, 1828, assented to on May 10, 1828, S. was a British subject, for it might be presumed that he took the oath when he got the patent.—*ILLER v. ELLIOTT* (1872), 32 U. C. R. 434.—CAN.

Moo. Ind. App. 175, P. C.; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895, H. L.; Brunswick v. Hanover (1844), 6 Beav. 1; Taylor v. Best (1854), 14 C. B. 487; Rittson v. Stordy (1855), 3 Eq. Rep. 1039; *Ex p.* Anderson (1861), 3 E. & E. 487; *Ex p.* Brown (1864), 5 B. & S. 280; Low v. Routledge (1865), 1 Ch. App. 42, L.J.J.; The Franconia (1876), 2 Ex. D. 63, C. C. R.; De Geer v. Stone (1882), 22 Ch. D. 243; *Re* Stepney Petn., Isaacson v. Durant (1886), 17 Q. B. D. 54; *Re* Johnson, Roberts v. A.-G., [1903] 1 Ch. 821; Gibson v. Gibson, [1913] 3 K. B. 379; R. v. Speyer, [1916] 2 K. B. 858, C. A.; Bowman v. Secular Soc., [1917] A. C. 406, H. L.; Tingley v. Müller, [1917] 2 Ch. 144, C. A.; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.; R. v. Francis, [1918] 1 K. B. 617.

**15. Issue of British subjects—Residence abroad without licence.]**—Upon evidence:—*Held*: if baron & feme English go beyond sea without licence, or tarry there after the time limited by the licence, & have issue, the issue is an alien, & not inheritable.—HYDE v. HILL (1582), Cro. Eliz. 3; 78 E. R. 270.

*Annotations*:—*Appld.* Collingwood v. Pace (1864), O. Bridg. 410. *Refd.* R. v. Speyer, [1916] 2 K. B. 858, C. A.

**16. — Father living abroad as merchant.]**—Children born abroad of an English father living abroad as a merchant were considered as natural-born subjects; & this was so either by the common law or by 25 Edw. 3, stat. 1.

Although the civil law is that *partus sequitur ventrem*, yet it is not so in our law; the child shall be of the father's condition (BRAMPSTON, C.J.).—BACON v. BACON (1641), Cro. Car. 601; 79 E. R. 1117.

*Annotations*:—*Consd.* Doe d. Durore v. Jones (1791), 4 Term Rep. 300; De Geer v. Stone (1882), 22 Ch. D. 243. *Refd.* R. v. Albany St. Police Station Supt., [1915] 3 K. B. 716; R. v. Speyer, [1916] 2 K. B. 858.

**17. — — — — —.]**—25 Edw. 3, stat. 1, declares that the issue born beyond sea of an English man upon an English woman shall be a denizen, yet the construction has been, though an English merchant marries a foreigner, & has issue by her beyond the sea, that issue is a natural-born subject (HALE, C.B.).—COLLINGWOOD v. PACE (1864), 1 Vent. 413; O. Bridg. 410; 1 Sid. 193; 86 E. R. 262.

*Annotations*:—*Appld.* De Geer v. Stone (1882), 22 Ch. D. 243. *Refd.* Doe d. Durore v. Jones (1791), 4 Term Rep. 300; R. v. Speyer, [1916] 2 K. B. 858, C. A. *Mentd.* Blackborough v. Davis (1701), 1 P. Wms. 41; Thornby v. Fleetwood (1720), 1 Stra. 318; Cowper v. Cowper (1734), 2 P. Wms. 720; Scot v. Schawrtz (1739), 2 Com. 677; Evelyn v. Evelyn (1753), Amb. 191; Ferrer's Case (1760), 2 Eden. 373; Doe d. Winter v. Perratt (1826), 5 B. & C. 48; Lyons Corpn. v. East India Co. (1836), 1 Moo. Ind. App. 175, P. C.; Birtwhistle v. Vardill (1839-40), 7 Cl. & Fin. 895, H. L.; Doe d. Birtwhistle v. Vardill (1840), 6 Bing. N. C. 385; Doe d. Winter v. Perratt (1843), 9 Cl. & Fin. 606, H. L.; R. v. Manning (1849), 2 Car. & Kir. 887, C. C. R.; Rittson v. Stordy (1855), 3 Eq. Rep. 1039; Moggleton v. Barnett (1856), 1 H. & N. 282; Kynnaid v. Leslie (1866), L. R. 1 C. P. 389; *Re* Hawkins, *Ex p.* Official Receiver, [1892] 1 Q. B. 890, C. A.

**18. — Father natural-born subject — British Nationality Act, 1730 (c. 21).]**—By the Treaty of 1783 between Great Britain & the United States of America, Great Britain acknowledged the United States to be free, sovereign & independent States, & relinquished all claims to the Govt., proprietary

& territorial rights of same, & every part thereof. After ratification of the Treaty, A. was born in Rhode Island of parents who had been born respectively in New York & Rhode Island before the Treaty & were British born, but who had since the Treaty continued to reside in the United States as subjects thereof:—*Held*: (1) the inhabitants of the United States at the time of the Treaty of 1783 became inhabitants of an independent State, & aliens by British law; (2) A.'s parents having before her birth ceased, under the Treaty, to be subjects of Great Britain, were not at the time of her birth "natural-born subjects" of Great Britain within s. 1 of the above Act; (3) A. was not by that Act made a natural-born British subject or capable of inheriting lands in England.

Some question was raised as to the meaning of the words "fathers, natural-born subjects of the Crown of Great Britain, at the time of the birth of their children." We think the sense of these words is very plain; natural-born subjects are mentioned as distinguished from subjects by donation, or any other mode. A child born out of the allegiance of the Crown of England is not entitled to be deemed a natural-born subject, unless the father be, at the time of the birth of the child, not a subject only, but a subject by birth. The two characters of the subject & subject by birth must unite in the father (ABBOTT C.J.).—DOE d. THOMAS v. ACKLAM (1824), 2 B. & C. 779; 2 State Tr. N. S. 105; 4 Dow. & Ry. K. B. 391; 2 L. J. O. S. K. B. 129; 107 E. R. 572.

*Annotations*:—*Distd.* Doe d. Auchmutz v. Mulcaster (1826), 5 B. & C. 771. *Consd.* *Re* Stepney Petn., Isaacson v. Durant (1886), 17 Q. B. D. 54. *Refd.* Maltass v. Maltass (1844), 1 Rob. Eccl. 67; Rittson v. Stordy (1855), 3 Sm. & G. 230.

**19. — — — — — British Nationality Act, 1772 (c. 21).]**—A., the son of B., an English earl, who left England when James II. abdicated the crown, was born in Scotland in 1682, lived in France from his arrival in it till the day of his death, & married in 1707 a French lady, & by her had a son C., who was born in France in 1708 & married in 1755 a French lady, & by her had a son D., who was born in France. D., though for a short time & an occasional purpose in Scotland in 1783, was domiciled in France till he emigrated from it in 1792:—*Held*: although, according to the above Acts, D. was formerly & literally a British subject, he was not a British subject within the treaty between Gt. Britain and France giving compensation to British subjects for losses occasioned by illegal acts of the French Govt.—DRUMMOND'S CASE (1834), 2 Knapp, 295; 12 E. R. 492, P. C.

**20. — — — — — Illegitimate child.]**—The child of a natural-born subject, born out of allegiance to the Crown of Great Britain, must, in order to bring himself within British Nationality Act, 1730 (c. 21), make out that, at the time of his birth, his father was a natural-born subject. Hence the illegitimate child of a domiciled Scotsman born out of the

**15 i. Issue of British subjects—Residence abroad.]**—A party was born of British parents residing in the United States:—*Semble*: he was not an alien, but a British subject.—R. v. HAYES (1903), 23 C. L. T. 88; 5 O. L. R. 198; 2 O. W. R. 123; 6 Can. Crim. Cas. 357.—CAN.

**18 i. — Father natural-born subject.]**—The children & grandchildren of natural-born British subjects, though born in a foreign country, are not aliens, & are capable of transmitting real estate in Nova Scotia by descent, & otherwise.—SALTER v. HUGHES (1864), 1 Old. 409.—CAN.

**18 ii. — — — — —.]**—A voter born in the United States, his parents being

British-born subjects, his father & grandfather being Loyalists, & the voter residing nearly all his life in Canada:—*Held*: entitled to vote.—PLACE'S VOTE, STORMONT (PROV.) (1871), H. E. C. 21.—CAN.

**19 i. — British Nationality Act, 1730 (c. 21).]**—*British Nationality Act, 1772 (c. 21).]*—The nearest heirs, whose consent was required for a petition to dis entail, were born in the United States, & were the son & grandsons of a person who emigrated from Scotland subsequent to the Treaty of Independence, & whose allegiance to the sovereign of Scotland continued to his death:—*Held*: the consents were valid.—*Re* STEWART (1857), 29 J. 136;

19 Dunl. (Ct. of Sess.) 430 29 Sc. Jur. 136.—SCOT.

**19 ii. — — — — — Evidence.]**—Evidence that the parents of a voter had stated to such voter that he was born in the United States, but that his father was born in Canada:—*Held*: admissible, & his vote good.—WRIGHT'S VOTE, BROCKVILLE (PROV.) (1871), H. E. C. 129.—CAN.

**19 iii. — — — — —.]**—A voter swore he was born in the United States, but that his parents were British subjects:—*Held*: his statement amounted to this: "I was born in the United States of British parents."—MULRENNAN'S VOTE (1877), H. E. C. 500.—CAN.



Sect. 1.—Birth outside allegiance of Crown.]

allegiance, but whose parents afterwards marry & thereby, according to the law of Scotland, make him legitimate, is nevertheless an alien; for at the time of his birth he is *filius nullius*, & alienage attaches irreversibly.

A., who was born illegitimate in the United States of America, but whose father was alleged to be a domiciled Scotsman, & had married A.'s mother, filed a bill against B. B. had acted as solr. of A., when an infant, & had brought a suit in Scotland, in the name & on behalf of A. as such infant, for the purpose of trying the question whether A. was legitimate & entitled to succeed to his father's real estate in Scotland, in which suit the Ct. of Sess. made a decree declaring A. illegitimate, & the H.L. in 1808 affirmed that decree. The bill filed by A. charged that B. had conspired with others to defraud A. of the estate, had fraudulently concealed the fact that at the time of the death of A.'s father the domicil of such father was Scotch, & generally that B. knew or had reason to believe A. to be legitimate, & had obtained the decrees by fraud & collusion, & praying to be declared legitimate & the heir at-law, & to have possession of the estate delivered up:—*Held*: even assuming the domicil of A.'s father to be Scotch, A. was an alien, & not entitled to succeed to real estate in Scotland, & the bill must be dismissed.

As a general proposition all persons born abroad are aliens (LORD CRANWORTH, C.).—*SHEDDEN v. PATRICK* (1854), 1 Macq. 535; 23 L. T. O. S. 194; 1 Pater. App. 332 H.L.

*Annotations*:—*Consd.* Doe d. Birtwhistle v. Vardill (1835), 2 Cl. & Fin. 571. *Expld.* Doe d. Burtwhistle v. Vardill (1840), 6 Bing. N. C. 385. *Consd.* *Re Wright's Trust* (1856), 2 K. & J. 595. *Refd.* *Munro v. Munro* (1840), 7 Cl. & Fin. 842; *Re Goodman's Trust* (1881), 7 Ch. D. 266, C. A.; *Mentd.* *Munro v. Saunders* (1832), 6 Bli. N. S. 468; *Edwards v. Kilkenny & G. S. & W. Ry. Co.* (1857), 2 C. B. N. S. 397; *Shedden v. A.-G.* (1860), 2 Sw. & Tr. 170; *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404, H. L.; *Shedden & Patrick* (1869), L. R. 1 Sc. & D. 470, H. L.; *Re Grove-Voucher & Treasury Solicitor* (1888), 40 Ch. D. 216, C. A.

**21. Foreign Protestants (Naturalisation) Act, 1708 (c. 5)—British Nationality Act, 1730 (c. 21).**—The son of a British father, who had entered into the service of France & taken the oath of a Knight of the Order of St. Louis, is entitled to the character of a British subject, although he himself was born in France of a French mother, & had served in the French Army.—*WALL'S (COUNT) CASE* (1834), 3 Knapp, 13; 12 E. R. 551, P. C.

**22.** — — — — —.]—In 1784, after the recognition of the independence of the United States by the Treaty of 1783, A., a British-born subject, emigrated to Virginia, & in the same year took the oath of allegiance to the United States, & continued to reside there, exercising all the rights of an American citizen until his death in 1833. By the terms of the oath, he abjured allegiance to any other State, etc. In 1787 A. married the daughter of an American citizen, & had issue a son B., who never came to this country, & died abroad, leaving a son C., who, according to the pedigree, was heir of testatrix, who died in 1839. In a suit instituted to administer her estate, C., by his answer filed in 1840, claimed to be her heir. Upon exceptions to the master's report finding C. to be the heir:—*Held*: (1) the treaty of 1783 did not apply to A., who had emigrated subsequently to that treaty; (2) the subsequent treaty of 1794 was local, & A. did not reside within the locality; (3) A. by his own acts had not, at the time of the birth of his child, absolved himself from his allegiance, nor divested himself of the character of a natural-born subject; (4) the exception in the Act of 1730 as to the father's being liable to the penal-

ties of treason was referable to a well-known class of offences, & ought not to be extended, & C. under the above Acts and British Nationality Act, 1772 (c. 21), was entitled to all the rights & privileges of a natural-born subject, & capacitated thereby to take lands by descent.—*FITCH v. WEPER* (1847), 6 Hare, 51; 17 L. J. Ch. 73; 10 L. T. O. S. 284; 12 Jur. 76; 67 E. R. 1077.

*Annotation*:—*Refd.* *Re Bourgoise* (1889), 41 Ch. D. 310, C. A.

**23.** — — — — — **British Nationality Act, 1772 (c. 21)—Jurisdiction over infants.**—It being established by statute that children of a natural-born father born out of the King's allegiance are to all intents & purposes to be treated as British-born subjects, it follows that such children are entitled to the protection of the Crown as *parens patriæ*. The ct. has jurisdiction over them just as over children who are natural-born subjects & resident in England, though it may be that, as they are resident abroad & have no property in the country, the jurisdiction cannot be enforced (LORD CRANWORTH, C.).—*HOPE v. HOPE* (1854), 4 De G. M. & G. 328; 2 Eq. Rep. 1047; 23 L. J. Ch. 682; 23 L. T. O. S. 198; 2 W. R. 545; 43 E. R. 328, L. C.

*Annotations*:—*Consd.* *Brown v. Collins* (1883), 25 Ch. D. 56. *Fold.* *Re Willoughby* (1885), 30 Ch. D. 324. *Mentd.* *Kendall v. Wilkinson* (1855), 4 E. & B. 680; *Cookney v. Anderson* (1863), 1 De G. J. & Sm. 365; *Drummond v. Drummond* (1866), 2 Ch. App. 32, L.J.J.; *Re Slade, Slade v. Hulme* (1881), 30 W. R. 28.

**24.** — — — — —.]—An infant born & domiciled out of the jurisdiction, whose father was also born & domiciled out of the jurisdiction, but was the son of a natural-born British subject, has the status of a natural-born British subject under the above Act, & the ct. has jurisdiction to provide for its custody.

A female infant, aged twelve, was born & domiciled in France. Her father was also born & domiciled in France, but was the son of a natural-born British father. The mother was a natural-born French subject. In 1884 the father died intestate. The mother became entitled, by the law of France, to guardianship of the infant as surviving parent, but she was not a fit person to have the custody of children, & had been prohibited, by proceedings taken by the father, from visiting her daughter. Shortly after the father's death the mother instituted proceedings in France to obtain control of the infant, & about the same time an application was made by the infant in England by her next friend, in opposition to the mother, for appointment of guardians of the infant. The French cts. stayed proceedings in that country pending the application here. The infant was entitled to property in France, but not to any property in England:—*Held*: (1) the ct. ought to exercise its jurisdiction; (2) a reference must be made to chambers to inquire who were fit & proper persons to be appointed guardians.—*Re WILLUGHBY* (1885), 30 Ch. D. 324; 51 L. J. Ch. 1122; 53 L. T. 926; 33 W. R. 850; 1 T. L. R. 652, C. A.

**25.** — — — — — **Son & grandson of natural-born subject not great-grandson—Foreign Protestants (Naturalisation) Act, 1708 (c. 5)—British Nationality Act, 1730 (c. 21).**—The son & grandson born abroad of a natural-born British subject are, by force of the above Acts, themselves treated as natural-born subjects; but the nationality cannot be transmitted further, & the great-grandson born abroad is an alien. There is no foundation for the notion that by the common law of England the posterity of a natural-born British subject, though born abroad, must be treated as British subjects for ever.—*DE GEER v. STONE* (1882), 22 Ch. D. 243; 52 L. J. Ch. 57; 47 L. T. 434; 31 W. R. 241.

*Annotations*:—*Appld.* *Re Willoughby* (1885), 30 Ch. D. 324, C. A. *Apprvd.* *R. v. Albany St. Police Station Supt.*,



[1915] 3 K. B. 716. *Refd.* *R. v. Speyer*, [1916] 2 K. B. 858, C. A. *Mentd.* *R. v. Speyer*, *R. v. Cassel*, [1916] 1 K. B. 595.

**26. — Father naturalised British subject—Naturalisation Act, 1844 (c. 66)—Naturalisation Act, 1870 (c. 14).]**—A child born before Jan. 1, 1915—the date of commencement of British Nationality & Status of Aliens Act, 1914 (c. 17)—in a foreign State did not obtain the status of British nationality by the mere fact that his father was a naturalised British subject.

A. was by birth a German subject, but came to England & was denationalised, & in 1869 became a naturalised British subject, & again in 1877 under Naturalisation Act, 1870 (c. 14). Subsequently he lived in Germany & his son B. was born at Frankfurt-on-Main in 1884 :—*Held* : B. was not a British subject, as British Nationality Act, 1730 (c. 21), was confined to children born abroad of a natural-born British subject, & Naturalisation Acts, 1844 & 1870, did not place a naturalised subject on the same footing as a natural-born subject for this purpose.—*R. v. ALBANY STREET POLICE STATION SUPERINTENDENT*, *Ex p. CARLEBACH*, [1915] 3 K. B. 716 ; 84 L. J. K. B. 2121 ; 113 L. T. 777 ; 31 T. L. R. 634 ; 25 Cox, C. C. 108.

*Annotations* :—*Refd.* *Jaffé v. Keel*, [1916] 2 K. B. 476. *Mentd.* *R. v. Speyer*, *R. v. Cassel*, [1916] 1 K. B. 595.

**27. — — — — —.]**—Applt. was born in Germany, 1875. His parents were both aliens by birth, but after their marriage, & before the birth of applt., the father became a naturalised British subject under the above Act of 1844. Applt. continued to reside in Germany till the death of his father in 1887, but thereafter he came to England & he resided there during a portion of his infancy with his widowed mother, who, however, had not obtained a certificate of naturalisation in the United Kingdom :—*Held* : even assuming that applt.'s father, who was naturalised under the above Act of 1844, became entitled to the privileges conferred by the above Act of 1870, applt. did not obtain the status of British nationality under s. 10 (5) of the latter Act, for, although his mother, by virtue of her husband's naturalisation, became entitled to all the rights & privileges of a British subject, she had not obtained a certificate of naturalisation in the United Kingdom.—*JAFFÉ v. KEEL*, [1916] 2 K. B. 476 ; 85 L. J. K. B. 1473 ; 114 L. T. 1133 ; 80 J. P. 287 ; 32 T. L. R. 595 ; 60 Sol. Jo. 586 ; 25 Cox, C. C. 419 ; 14 L. G. R. 895.

**28. — — — Colonial naturalisation.]**—The father of applt., K., resided continuously in Berlin from an early age until July, 1914, a month before the outbreak of war between Great Britain & Germany, with the exception of a short period in 1884 & 1885, when he was in South Africa. In the latter years he obtained a certificate of naturalisation according to the laws then in force in Cape Colony. Applt. was born in Berlin in 1893, & came to reside in England in 1913, before he was

twenty-one years of age. In July, 1914, the whole of the family came to London & had resided there ever since. On an information preferred against applt. under Aliens Restriction (Consolidation) Ord., 1914, made in pursuance of Aliens Restriction Act, 1914 (c. 12) :—*Held* : upon the above evidence the nationality of applt.'s father (&, therefore, the nationality of applt. himself) was left in doubt, & applt. had not discharged the *onus* imposed upon him by the Act of proving that he was not an alien enemy, & applt. was rightly convicted.—*KOPPELOWITZ v. McLAUGHAN* (1916), 85 L. J. K. B. 1700 ; 114 L. T. 1037 ; 80 J. P. 263 ; 25 Cox, C. C. 384 ; 14 L. G. R. 1074.

**29. — Father subsequently ceasing to be British subject—British Nationality & Status of Aliens Act, 1914 (c. 17), s. 12 (1).]**—Applt. was born at Chicago in 1889, his father then being a British subject. In 1896 his father became a naturalised American, & in 1897 applt. came to this country & had resided here ever since. On a summons against applt. for failing to report himself for military service, he contended that he was an American citizen. By American law the naturalisation of the parents conferred American citizenship upon the minor children, & such citizenship should begin at the time such minor children began to reside permanently in the United States. The justices held applt. never began to reside permanently in the United States &, therefore, could not be an American subject, & they convicted him :—*Held* : (1) the permanent residence necessary to confer American citizenship on applt. could only begin at the date of the father's naturalisation, & applt.'s residence in the United States from the date of his birth down to the date of his father's naturalisation could not be taken into account ; (2) there was evidence to support the justices finding that applt. never began to reside permanently in the United States, & their decision must be affirmed.—*ATKINSON v. BURY ST. EDMUNDS DISTRICT RECRUITING OFFICER* (1916), 86 L. J. K. B. 415 ; 116 L. T. 305 ; 81 J. P. 74 ; 15 L. G. R. 315.

**30. Service on man-of-war—13 Geo. 2, c. 3.]**—An alien, who had served on board a British man-of-war for four years in time of war :—*Held* : a natural-born subject under 13 Geo. 2, c. 3 (repealed, S. L. R. Act, 1867 (c. 59)), although no proclamation had been made under s. 4, that sect. only applying to merchant ships.—*Re GIRAUD* (1861–3), 32 Beav. 385 ; 55 E. R. 151.

**31. Evidence of alienage—Passport.]**—A suggestion that a prisoner is an alien implies that he is not a natural-born subject of the King. The mere production of a passport found on a prisoner, issued by a foreign State & proved to be granted by the authorities of that State to its natural-born subjects only :—*Held* : not evidence of his being an alien.—*R. v. BURKE, CASEY & MULLADY* (1868), 32 J. P. 601 ; 11 Cox, C. C. 138.

**31 i. Evidence of alienage—Militia return.]**—The return made by a captain of a company to a quartermaster of militia, according to 6 Geo. 4, c. 18, stating a party to be an alien, is not sufficient evidence of that fact.—*BRANNEN v. LEAVITT* (1848), 1 All. 220.—CAN.

**31 ii. — Previous prosecution for militia tax.]**—The recovery of a judgment against a party for his tax as an alien, on the prosecution of a quartermaster of militia, without showing that it has been paid, is not sufficient evidence of his being an alien, in a prosecution for a subsequent year's tax.—*BRANNEN v. WILLIAMS* (1848), 1 All. 221.—CAN.

**31 iii. — Person suing presumed to be subject.]**—Every person who sues in the Queen's Cts., in the absence of

evidence to the contrary, is reasonably presumed to be her subject ; if born an alien, & neither naturalised nor become a denizen, yet if he owe local allegiance, he is a subject.—*HOLT v. ABBOTT* (1851), 1 Legge, 695.—AUS.

**31 iv. — Fact of alienage & consequences thereof determined by same law.]**—*Held* : notwithstanding the authority of *Donegani v. Donegani* (1835), 3 Knapp, 63, the questions who were aliens, & what were their rights as such, must be governed by the same law.—*CORSE v. CORSE* (1854), 4 L. C. R. 310.—CAN.

**31 v. — Presumption of continuance of original status of alienage.]**—Evidence was given of parol admissions made by voters that they had been born in a foreign country, & also evidence that since the parol admissions the voters

had voted at parliamentary elections, & had taken the voter's oath as to being British subjects by birth or naturalisation :—*Held* : (1) the oath at the polls could not be treated as testimony, not having been given in any judicial proceeding ; (2) there was no presumption of naturalisation sufficiently strong to rebut the presumption of the continuance of the original status of alienage.—*SHENCK'S VOTE, LINCOLN (PROV.)* (1877), H. E. C. 500.—CAN.

**31 vi. — Proof of residence alone insufficient.]**—Evidence that petitioner had lived in the United States, without showing that his parents were American citizens :—*Held* : not sufficient to establish alienage.—*PRESCOTT (PROV.)* (1871), H. E. C. 1.—CAN.

**31 vii. — Burden of proof on party objecting.]**—It was objected that

## SECT. 2.—BIRTH WITHIN ALLEGIANCE OF CROWN.

**32. Birth in England—Child of alien.]—**An alien's son born in England is English, & not an alien.—*ANON.* (1544), Bro. N. C. 57; 73 E. R. 872.

**33. ——— British Nationality & Status of Aliens Act, 1914 (c. 17).]**—Resp. was nineteen years of age, was born in London, & was ordinarily resident in Great Britain. His parents were Germans, & his father was ordinarily resident in Germany. The magistrate refused to convict resp. for failing to appear for military service under Military Service Act, 1916 (c. 104), on the ground that on coming of age he might make a declaration of alienage under the above Act of 1914, & that it would be contrary to the principles of law & equity to take advantage of his being a minor & of his consequent inability to make the above declaration of alienage & make him serve in the army:—*Held*: as resp. was at the time of the charge made against him a British subject, the fact that he might subsequently cease to be one was irrelevant, & he ought to be convicted.—*SAWYER v. KROPP* (1916), 85 L. J. K. B. 1446; 115 L. T. 232; 80 J. P. 327; 32 T. L. Q. 650; 60 Sol. Jo. 656; 25 Cox, C. C. 474; 14 L. G. R. 989.

**34. Birth in part of France belonging to English Crown—Natural child.]—**A bastard born of English parents at Tournay in France, at a time when it was, like Calais, parcel of the realm & dominion of England:—*Held*: an English subject.—*ANON.* (1562), 2 Dyer, 224a; 73 E. R. 496.

*Annotation* —*Consd.* Calvin's Case (1609), 7 Co. Rep. 1a.

**35. .]**—The ligeance of the King is not restricted to the Kingdom of England; & all countries which are under his actual ligeance & obedience are within the ligeance. Hence when parts of France, such as Normandy, Calais & Guienne, were under the ligeance & obedience of the Kings of England, the persons born there were not aliens in England & could inherit land in England.—*CALVIN'S CASE* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; 77 E. R. 377.

—*Consd.* Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895, H. L. *Appld.* *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821; Gibson v. Gibson, [1913] 3 K. B. 379. *Refd.* R. v. Cowle (1759), 2 Burr. 834; *Ex p.* Brown (1864), 5 B. & S. 289; De Geer v. Stone (1882), 22 Ch. D. 243. *Mentd.* R. v. Hampden (1637), 3 State Tr. 826; Collingwood v. Pace (1661), O. Bridg. 410; Manby v. Scott

(1663), 1 Keb. 361; Thomas v. Sorrell (1672), 3 Keb. 143; Anon. (1678), Freem. K. B. 249; R. v. Knowles (1693), 12 Mod. Rep. 55; R. v. Tucker (1694), 1 Ld. Raym. 1; Owen v. Saunders (1696), 1 Ld. Raym. 158; Clayton v. Kinaston (1697), 1 Ld. Raym. 419; Scot v. Schawrtz (1739), 2 Com. 677; Omychund v. Barker (1745), 1 Atk. 21; Campbell v. Hall (1774), 1 Cowp. 204; Queen Caroline's Claim to be Crowned (1821), 1 State Tr. N. S. 949, P. C.; Ruding v. Smith (1821), 2 Hag. Con. 371; Jephson v. Riera (1836), 3 Knapp. 130; Lane v. Bennett (1836), 1 M. & W. 70; Lyons Corp'n. v. East India Co. (1836), 1 Moo. Ind. App. 175, P. C.; Brunswick v. Hanover (1844), 6 Beav. 1; Taylor v. Best (1854), 14 C. B. 487; Rittson v. Stordy (1855), 3 Eq. Rep. 1039; *Ex p.* Anderson (1861), 3 E. & E. 487; Low v. Routledge (1865), 1 Ch. App. 42; The Franconia (1876), 2 Ex. D. 63, C. C. R.; *Re Stepney Petn.*, Isaacson v. Durant (1886), 17 Q. B. D. 54; R. v. Speyer, [1916] 2 K. B. 858, C. A.; Bowman v. Secular Soc., [1917] A. C. 406, H. L.; Tingley v. Müller, [1917] 2 Ch. 144, C. A.; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.; R. v. Francis, [1918] 1 K. B. 617.

**36. Birth in ambassador's house - Exterritoriality.]—**If any of the King's ambassadors in foreign nations have children there of their wives, being English women, by the common law of England they are natural-born subjects, although born out of the King's dominions.—*CALVIN'S CASE* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; 77 E. R. 377.

*Annotations*:—*Consd.* De Geer v. Stone (1882), 22 Ch. D. 243. *Refd.* Rittson v. Stordy (1855), 3 Eq. Rep. 1039. *Mentd.* R. v. Hampden (1637), 3 State Tr. 826; Collingwood v. Pace (1661), O. Bridg. 410; Manby v. Scott (1663), 1 Keb. 361; Thomas v. Sorrell (1672), 3 Keb. 143; Anon. (1678), Freem. K. B. 249; R. v. Knowles (1693), 12 Mod. Rep. 55; R. v. Tucker (1694), 1 Ld. Raym. 1; Owen v. Saunders (1696), 1 Ld. Raym. 158; Clayton v. Kinaston (1697), 1 Ld. Raym. 419; Scot v. Schawrtz (1739), 2 Com. 677; Omychund v. Barker (1745), 1 Atk. 21; R. v. Cowle (1759), 2 Burr. 834; Campbell v. Hall (1774), 1 Cowp. 204; Queen Caroline's Claim to be Crowned (1821), 1 St. Tr. N. S. 949, P. C.; Ruding v. Smith (1821), 2 Hag. Con. 371; Jephson v. Riera (1835), 3 Knapp. 130; Lane v. Bennett (1836), 1 M. & W. 70; Lyons Corp'n. v. East India Co. (1836), 1 Moo. Ind. App. 175, P. C.; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895, H. L.; Brunswick v. Hanover (1844), 6 Beav. 1; Taylor v. Best (1854), 14 C. B. 487; *Ex p.* Anderson (1861), 3 E. & E. 487; *Ex p.* Brown (1864), 5 B. & S. 280; Low v. Routledge (1865), 1 Ch. App. 42; The Franconia (1876), 2 Ex. D. 63, C. C. R.; *Re Stepney Petn.*, Isaacson v. Durant (1886), 17 Q. B. D. 54; *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821; Gibson v. Gibson, [1913] 3 K. B. 379; R. v. Speyer, [1916] 2 K. B. 858, C. A.; Bowman v. Secular Soc., [1917] A. C. 406, H. L.; Tingley v. Müller, [1917] 2 Ch. 144, C. A.; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.; R. v. Francis, [1918] 1 K. B. 617.

**37. ———** It was pleaded in abatement that it was alien *nee apud Roan in regno*

five persons, whose names appeared in the list of electors & who signed a petition for repealing a bye-law, were aliens:—*Held*: (1) it was for the opponents of the petition to show affirmatively that the five men were disqualified by reason of being aliens, & it was to be presumed that the names were properly on the list, until the contrary was shown; (2) in the case of persons born in the United States, who had lived for thirteen years in Canada, but had not been naturalised, it was necessary in order to disqualify them to show that their parents were not British subjects.—*R. EX REL. SOVEREIGN v. EDWARD* (1912), 22 W. L. R. 723; 8 D. L. R. 450.

**31 viii. ——— Burgher's roll of foreign State.]—**Resp.'s parents, British subjects, went to reside in the Orange Free State, where resp. was born. Subsequently resp. went to the Cape Colony, became domiciled there, & was elected a councillor of the local municipality. On an application to unseat him, on the ground that he was an alien:—*Held*: in the absence of the best evidence, in the shape of the burghers' roll of the above State, the application should be refused.—*BLIGNANT v. DEVIILERS* (1900), 17 S. C. 378; 10 C. T. R. 47.—*S. AF.*

**31 ix. ——— Question for jury to determine British citizenship.]—**Whether a

person is in fact a British subject may be decided by a jury on the facts of the case, in accordance with the law determining the acquisition of British nationality.—*R. v. OMA* (1915), 32 W. L. R. 958; 9 W. W. R. 584; 25 D. L. R. 670; 8 Sask. L. R. 395.—*CAN.*

### PART I. SECT. 2.

**b. Evidence of alienage—Statements of person charged.]—**Statements by prisoner indicted under C. S. U. C., c. 98, that he was born in Ireland & was a citizen of the United States:—*Held*: though prisoner's duty as a subject remained, he might become liable as a citizen of the United States by being naturalised, of which his own declaration was evidence.—*R. v. McMAHON* (1866), 26 U. C. R. 195.—*CAN.*

**c. ——— .]**—Statements by prisoner, indicted under C. S. U. C. c. 98, that he was an American citizen, & had been in the American army:—*Held*: evidence against him of the country to which he belonged.—*R. v. SLAVIN* (1866), 17 C. P. 205.—*CAN.*

**d. ——— .]**—Statements by prisoner, born within the Queen's allegiance, indicted under C. S. U. C., c. 98, that he was an American citizen:—*Held*: the Crown might waive the right of allegiance, & try him as an American

citizen, which he claimed to be.—*R. v. LYNCH* (1866), 26 U. C. R. 208.—*CAN.*

**e. ——— Copy of Secretary of State's certificate readmitting party to British nationality.]—**O. was charged with having, in June, 1913, acted as member of a county council, when disqualified by reason of his being an alien. He was a natural-born British subject, who had been in America for a number of years, & it was alleged that while there he had become a naturalised citizen of the United States. The evidence given on behalf of complainant was: (a) the statement of a witness that O. had some years previously told him he was a naturalised American citizen; (b) a copy of a certificate by the Home Secretary readmitting O. to the status of a British subject as from Sept. 10, 1913, which certificate recited that O. had presented a memorial alleging that he had become a naturalised American citizen & praying to be readmitted to the status of a British subject. The copy purported to be certified by an under-secretary of State, but no evidence was given of his signature or authority to issue a certified copy:—*Held*: even assuming that the copy of the certificate was admissible, the justices were not bound to convict on the evidence.—*R. (MURPHY) v. JUSTICES OF CORK* [1914] 2 I. R. 219.—*IR.*



*Franciæ infra ligeantiam Regis Francorum.* Pltff. replied that he was alien *amie nee al Hamborough infra ligeanc'* of the emperor, & traversed that he was born at Roan *modo et forma*, etc.:—*Held*: an ill traverse.

He might have been born at Roan, & yet *infra ligeantiam Angliæ*, as if attending on an ambassador, & therefore, he should have pleaded alien enemy *nee* (HOLT, C.J.).—ANON. (1693). Comb. 212; 90 E. R. 435.

**38. ——— Not extended to military officer.]**—Though children born abroad of ambassadors on foreign service are treated as natural-born British subjects, they are so because an ambassador's house is considered part of the British kingdom; the rule does not extend to children of officers in military service of the Crown in foreign parts.—DE GEER v. STONE (1882), 22 Ch. D. 243; 52 L. J. Ch. 57; 47 L. T. 134; 31 W. R. 211.

*Annotations*:—**Mentd.** *Re Willoughby* (1885), 30 Ch. D. 324; *R. v. Albany St. Police Station Supt.*, [1915] 3 K. B. 716; *R. v. Speyer*, *R. v. Cassel*, [1916] 1 K. B. 595; *R. v. Speyer*, [1916] 2 K. B. 858.

**39. Birth in Scotland after union.]**—*Postnati*, i.e., persons born in Scotland after the union of the Crown in James I., being born under ligeance to our Sovereign, were natural-born subjects in England, & could hold lands there.—CALVIN'S CASE (1608), 7 Co. Rep. 1a; 2 State Tr. 559; Moore, K. B. 790; Jenk. 306; 77 E. R. 377.

*Annotations*:—**Distd.** *Re Stepney Petn.*, *Isaacson v. Durant* (1886), 17 Q. B. D. 54. **Apld.** *Gibson v. Gibson*, [1913] 3 K. B. 379. **Refd.** *R. v. Cowle* (1759), 2 Burr. 834; *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895, H. L. **Mentd.** *R. v. Hampden* (1637), 3 State Tr. 825; *Collingwood v. Pace* (1661), O. Bridg. 410; *Manby v. Scott* (1663), 1 Keb. 361; *Thomas v. Sorrell* (1672), 3 Keb. 143; *Anon.* (1678), *Freem. K. B.* 249; *R. v. Knowles* (1693), 12 Mod. Rep. 55; *R. v. Tucker* (1694), 1 Ld. Raym. 1; *Owen v. Saunders* (1696), 1 Ld. Raym. 158; *Clayton v. Kinaston* (1697), 1 Ld. Raym. 419; *Scot v. Schawrtz* (1739), 2 Com. 677; *Omychund v. Barker* (1745), 1 Atk. 21; *Campbell v. Hall* (1774), 1 Cowp. 204; *Queen Caroline's Claim to be Crowned* (1821), 1 St. Tr. N. S. 949, P. C.; *Ruding v. Smith* (1821), 2 Hag. Con. 371; *Jephson v. Riera* (1835), 3 Knapp, 130; *Lane v. Bennett* (1836), 1 M. & W. 70; *Lyons Corpn. v. East India Co.* (1836), 1 Moo. Ind. App. 175, P. C.; *Brunswick v. Hanover* (1844), 6 Beav. 1; *Taylor v. Best* (1854), 14 C. B. 487; *Rittson v. Stordy* (1855), 3 Eq. Rep. 1039; *Ex p. Anderson* (1861), 3 E. & E. 487; *Ex p. Brown* (1864), 5 B. & S. 280; *Low v. Routledge* (1865), 1 Ch. App. 42; *The Franconia* (1876), 2 Ex. D. 63, C. C. R.; *De Geer v. Stone* (1882), 22 Ch. D. 243; *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821; *Gibson v. Gibson*, [1913] 2 K. B. 379; *R. v. Speyer*, [1916] 2 K. B. 858, C. A.; *Bowman v. Secular Soc.*, [1917] A. C. 406, H. L.; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.; *R. v. Francis*, [1918] 1 K. B. 617.

**40. ———.]**—The Duke of Hamilton, a Scotch nobleman, who had been created Earl of Cambridge, was charged with having "traitorously invaded this nation in a hostile manner, levied war to assist the King against the kingdom & people of England, & committed sundry murders, outrages, rapines, wastes, & spoils upon the said people." His defence was (*inter alia*) that he was a Scotch subject, born before his father's naturalisation in England, & did the acts charged as part of his duty in obedience to the Parliament of Scotland apparently on the ground that he was *postnatus*:—*Held*: (1) accused not lawfully in arms against this country; (2) he was guilty.—HAMILTON (DUKE) & CAMBRIDGE'S (EARL) CASE (1649), 4 State Tr. 1155.

**41. Birth in Ireland.]**—Irishmen have, ever since the conquest of Ireland, been natural-born subjects & capable of inheriting lands in England.—CALVIN'S CASE (1608), 7 Co. Rep. 1a; 2 State Tr. 559; 77 E. R. 377.

*Annotations*:—**Refd.** *R. v. Hampden* (1637), 3 State Tr. 825; *Re Stepney Petn.*, *Isaacson v. Durant* (1886), 17 Q. B. D. 54. **Mentd.** *Collingwood v. Pace* (1661), O. Bridg. 410; *Manby v. Scott* (1663), 1 Keb. 361; *Thomas v. Sorrell* (1672), 3 Keb. 143; *Anon.* (1678), *Freem. K. B.* 249; *R. v. Knowles* (1693), 12 Mod. Rep. 55; *R. v. Tucker* (1694), 1 Ld. Raym. 1; *Owen v. Saunders* (1696), 1 Ld. Raym. 158; *Clayton v. Kinaston* (1697), 1 Ld. Raym.

419; *Scot v. Schawrtz* (1739), 2 Com. 677; *Omychund v. Barker* (1745), 1 Atk. 21; *R. v. Cowle* (1759), 2 Burr. 834; *Campbell v. Hall* (1774), 1 Cowp. 204; *Queen Caroline's Claim to be Crowned* (1821), 1 State Tr. N. S. 949, P. C.; *Ruding v. Smith* (1821), 2 Hag. Con. 371; *Jephson v. Riera* (1835), 3 Knapp, 130; *Lane v. Bennett* (1836), 1 M. & W. 70; *Lyons Corpn. v. East India Co.* (1836), 1 Moo. Ind. App. 175, P. C.; *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895, H. L.; *Brunswick v. Hanover* (1844), 6 Beav. 1; *Taylor v. Best* (1854), 14 C. B. 487; *Rittson v. Stordy* (1855), 3 Eq. Rep. 1039; *Ex p. Anderson* (1861), 3 E. & E. 487; *Ex p. Brown* (1864), 5 B. & S. 280; *Low v. Routledge* (1865), 1 Ch. App. 42; *The Franconia* (1876), 2 Ex. D. 63, C. C. R.; *De Geer v. Stone* (1882), 22 Ch. D. 243; *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821; *Gibson v. Gibson*, [1913] 2 K. B. 379; *R. v. Speyer*, [1916] 2 K. B. 858, C. A.; *Bowman v. Secular Soc.*, [1917] A. C. 406, H. L.; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.; *R. v. Francis*, [1918] 1 K. B. 617.

**42. Birth in hostile territory in occupation of English troops—Father English subject.]**—There are subjects of England, who are born subjects to a prince holding his kingdom as homager & liegeman to the King of England, during the time of his being homager. Hence in the Middle Ages, while the homage of the Kings of Scotland to the Kings of England was regarded as continuing, a Scotchman was not an alien in England. If the King of England enter with his army, as an enemy, the territories of another prince, & any be born of English subjects within the places possessed by the King's army, & within his protection, such person is a subject born of England.—CRAW (CROW) v. RAMSEY (1670), Vaugh. 274; 2 Vent. 1; Cart. 185; 2 Keb. 601; T. Jo. 10; 124 E. R. 1072.

*Annotation*:—**Mentd.** *Otway v. Ramsay* (1737), 3 L. J. O. S. K. B. 210, n.

**43. Birth in British Dominions—Naturalisation Act, 1870 (c. 14).]**—One who is born within any part of the King's dominions is a natural-born subject of the Crown, & since the Crown is one & indivisible, he cannot claim to belong to a separate part of the King's dominions or to a separate nationality. To do so would be to deny allegiance to the King as supreme over the whole Empire as one Empire.—*Re JOHNSON, ROBERTS v. A.-G.*, [1903] 1 Ch. 821; 72 L. J. Ch. 682; 88 L. T. 161; 51 W. R. 441; 19 T. L. R. 309.

*Annotations*:—**Consd.** *Gibson v. Gibson*, [1913] 3 K. B. 379. **Refd.** *Re Bowes* (1906), 22 T. L. R. 711. **Mentd.** *Casdagli v. Casdagli*, [1918] P. 89, C. A.

**44. ——— Not "subject" of colony.]**—The fact that a person is born in a British colony does not make him a "subject" of that colony, so as to make a judgment recovered against him in his absence in the colonial ct. enforceable in this country.

Deft. was born in the colony of Victoria, Australia, & resided twenty-six years there, until 1890, when he came to live in England. Neither of his parents was born in Victoria. Since 1890 he visited Victoria on several occasions, the last being in 1906. In 1911 pltffs. issued a writ against him in the Supreme Ct. of Victoria to recover a sum of money due on accounts stated. The writ was served on deft. in England; he did not appear, & pltffs. signed judgment in the Victorian ct. against him in default of appearance. In an action in England upon the judgment, pltffs. contended that, as deft. was born in Victoria, he was a "subject" of that colony, & the judgment was enforceable here:—*Held*: (1) deft. was a subject of the King, not a "subject" of Victoria so as to render the judgment recovered against him in his absence binding upon him in this country; (2) the judgment was not enforceable here.—GIBSON (GAVIN) & Co., LTD. v. GIBSON, [1913] 3 K. B. 379; 82 L. J. K. B. 1315; 109 L. T. 445; 29 T. L. R. 665.

**45. ——— British Nationality Act, 1730 (c. 21).]**—A., born in America & residing there at the time of the War of Independence, bore arms on the British side, & on conclusion of peace returned to



*Sect. 2.—Birth within allegiance of Crown. Sect. 3. Sect. 1.]*

England with the British troops. After two years he went to New York in the employment of the British Govt., & on the termination of his employment settled in the United States of America, married there a British-born subject, & had children, & continued there till his death in 1812:—*Held*: (1) since he did not put off his allegiance at the time of the treaty, he could not do so afterwards; (2) he remained a British subject, & his children were entitled to take land in England by descent under the above Act.—*DOE v. AUCHMUTY v. MULCASTER* (1826), 5 B. & C. 771; 2 State Tr. N. S. 245; 8 Dow. & Ry. K. B. 593; 4 L. J. O. S. K. B. 311; 108 E. R. 287.

*Annotations*:—*Appld.* *Fitch v. Weber* (1847), 6 Hare, 51. *Consd.* *Rittson v. Stordy* (1855), 3 Sm. & G. 230; *R. v. Stepney Petn.*, *Isaacson v. Durant* (1886), 17 Q. B. D. 54. *Refd.* *Maltass v. Maltass* (1844), 1 Rob. Eccl. 67.

**46. ——— Dominion thereafter severed from Crown.]**—An inhabitant of an island, ceded by Great Britain, immediately after its cession came to England, & finding the climate did not agree with his health, returned to the ceded island, in which he had left his family, & resided with them there for upwards of six years, & then emigrated with them to another country under the British Govt.:—*Held*: (1) he retained the character of a British subject; (2) one of his children, born after the capitulation of the island, & before its final cession by treaty, was not an alien.—*JEPHSON v. RIERA* (1835), 3 Knapp, 130; 3 State Tr. N. S. 591; 12 E. R. 598, P. C.

*Annotations*:—*Refd.* *Re Stepney Petn.*, *Isaacson v. Durant* (1886), 17 Q. B. D. 54; *A.-G. for Dominion of Canada v. Cain*, *A.-G. for Dominion of Canada v. Gilhula*, [1906] A. C. 542, P. C. *Mentd.* *Cameron v. Kyte* (1835), 3 Knapp, 332, P. C.

**47. Birth on high seas on English ship.]**—According to the rule that a ship on the high seas is part of the territory of the State to which she belongs, a bastard child of which a woman has been delivered on board an English ship is to be deemed born in England, & the mother is entitled to an order of affiliation against the putative father resident in England under Poor Law Amendment Act, 1844 (c. 101).—*MARSHALL v. MURGATROYD* (1870), 1 L. R. 6 Q. B. 31; 40 L. J. M. C. 7; 23 L. T. 393; 35 J. P. 153; 19 W. R. 72.

### SECT. 3.—OTHER CASES.

**48. Company trading under British charter—Some members foreigners.]**—A co. was incorporated by charter for the purpose of providing vessels & employing them in the Pacific Ocean. Some of the members of the corp. were foreigners:

—*Held*: (1) the corp. was a British subject within 8 & 9 Vict. c. 89, s. 5, so far as such a term could be applicable to a corp., notwithstanding some foreigners might individually have shares in the co.; (2) the co. was entitled to have the ships registered.—*R. v. ARNAUD* (1846), 9 Q. B. 806; 16 L. J. Q. B. 50; 8 L. T. O. S. 212; 10 J. P. 821; 11 Jur. 279; 115 E. R. 1485.

*Annotation*:—*Consd.* *Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co.*, *Same v. Tilling*, [1915] 1 K. B. 893, C. A.

**49. Company registered under foreign law.]**—A gold mining co. registered under the law of the South African Republic had a London office, but its head office was at Johannesburg. Most of its shareholders were resident outside the Republic & were not subjects thereof. Gold, on which the co. had effected an insurance against "arrests of princes," was seized by the Govt. of the Republic on Oct. 2, 1899, in immediate contemplation of war with Great Britain. War broke out on Oct. 11, & an action on the policy was brought by the co. during the war. The parties, being desirous of obtaining a decision on the merits, waived the objection that the remedy was suspended:—*Held*: the underwriters were liable.

I assume that the corp. was to all intents & purposes in the position of a natural-born subject of the late South African Republic. I do not think it can be entitled to any exceptional favour or to any peculiar indulgence by reason of the fact that the bulk of its shareholders were of European nationality. If all its members had been subjects of the British Crown the corp. itself would have been none the less a foreign corp. & none the less in regard to Great Britain an alien (*LORD MACNAGHTEN*).—*JANSON v. DRIEFONTEIN CONSOLIDATED MINES, LTD.*, [1902] A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 18 T. L. R. 796; 7 Com. Cas. 268, H. L.

*Annotations*:—*Consd.* *Amorduct Manufacturing Co. v. Defries* (1914), 84 L. J. K. B. 586; *Re Sutherland, Bechoff, David v. Bubna* (1915), 31 T. L. R. 248; *Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co.*, [1915] 1 K. B. 893, C. A. *Expld.* *Arnhold, Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1915] 2 K. B. 379; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A. *Consd.* *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307, H. L. *Refd.* *Ingle v. Mannheim Insee.*, [1915] 1 K. B. 227; *Robinson v. Continental Insee. of Mannheim*, [1915] 1 K. B. 155; *Arnhold, Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1916] 1 K. B. 495, C. A.; *Stevenson v. Akt. für Cartonnagen Industrie* (1916), 115 L. T. 594, C. A.; *Zinc Corp. v. Hirsch*, [1916] 1 K. B. 541, C. A. *Mentd.* *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44; *Eitel Bieher v. Rio Tinto*, [1918] A. C. 260; *Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331; *Montefiore v. Menday, etc., Co.*, [1918] 2 K. B. 241; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1918), 87 L. J. Ch. 313, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

## Part II.—Rights, Liabilities, and Disabilities of Aliens in Time of Peace.

### SECT. 1.—GENERAL POSITION IN REGARD TO BRITISH LAW.

**50. Power of legislature to bind foreigners.]**—In endeavouring to put a construction on a stat., it must be borne in mind how far the power of the British legislature extends, for unless the words

are so clear that a contrary construction can in way be avoided, I must presume that the legislature did not intend to go beyond this power. The laws of Great Britain affect her own subjects everywhere—foreigners only when within her own jurisdiction. Attempts have been made, as in

#### PART I. SECT. 3.

*f. North American Indians.]*—Subject to special statutory limitations, Indians are British subjects, enjoying

full civil rights as such.—*PRINCE v. TRACEY* (1913), 25 W. L. R. 412.—*CAN.*

*Rights* *liabilities of &*  
*statutory restrictions imposed on.]*—*See*

DEPENDENCIES, COLONIES & BRITISH POSSESSIONS, & particular titles *passim*.

#### PART II. SECT. 1.

50 *i. Power of legislature to bind*

trying to enforce custom's laws, to bind foreigners out of our own jurisdiction, & great inconvenience has resulted therefrom (DR. LUSHINGTON).—THE ZOLLVEREIN (1856), Sw. 96; 27 L. T. O. S. 160; 2 Jur. N. S. 429; 4 W. R. 555.

**Annotations:**—**Appld.** Cope v. Doherty (1858), 4 K. & J. 367. **Apprvd.** General Iron Screw Colliery Co. v. Schurmanns (1860), 1 John. & H. 180. **Appld.** The Amalia (1863), Brown. & Lush. 151, P. C.; Adam v. British & Foreign S.S. Co., [1898] 2 Q. B. 430. **Consd.** Davidsson v. Hill, [1901] 2 K. B. 606. **Reid.** The Johannes (1860), Lush. 182; The Wild Ranger (1862), Lush. 553; R. v. Keyn (1876), 2 Ex. D. 63, C. C. R.; Poll v. Dambe, [1901] 2 K. B. 579. **Mentd.** The Halley (1867), L. R. 2 A. & E. 3; The Leon (1881), 6 P. D. 148.

51. —.]—The Instance Ct. of Admiralty is a municipal ct., & it is bound to obey the stats. of the realm in all matters. Whatever may be my opinion as to the absence of power in the British legislature to bind foreigners in transactions out of the realm, yet if Parliament chose to make a clear enactment that foreigners should be bound in cases where, in my opinion, it had no such power, I should be bound to obey the Act of Parliament. But if the expressions used be doubtful as to the operation upon foreigners, the doubt ought to be solved by holding that the enactment does not operate upon them (DR. LUSHINGTON).—THE JOHANNES (1860), 1 Lush. 182; 30 L. J. P. M. & A. 91; 3 L. T. 757; 1 Mar. L. C. 24.

**Annotations:**—**Mentd.** The Willem III. (1871), L. R. 3 A. & E. 487; The Renpor (1883), 8 P. D. 115, C. A.; The Gas Float Whitton No. 2, [1895] P. 301; The Pacific, [1898] P. 170.

52. **Subject to law—Tacit submission thereto.**—Aliens living in England tacitly submit themselves to our laws & forms of law-making, so their grant & consent is involved in the consent of Parliament.—COURTEEN'S CASE (1618), Hob. 270; 80 E. R. 416.

**Annotations:**—**Mentd.** R. v. Tucker (1693), 12 Mod. Rep. 51; Scott v. Schawrtz (1739), 2 Com. 677.

53. — **Foreign law adopted if applicable.**—Foreigners are in all cases subject to the laws of the country in which they may happen to be; if in any case when they are out of their own country their rights are regulated or governed by their own laws, it is not by force of those laws themselves, but by the laws of the country in which they may be, adopting their law as part of their own for the purpose of determining their rights (TURNER, V.-C.)—CALDWELL v. VANVLISSENGEN (1851), 9 Hare, 415; 21 L. J. Ch. 97; 18 L. T. O. S. 192; 16 Jur. 115; 68 E. R. 571.

**Annotations:**—**Reid.** Nobel's Explosive Co. v. Jones (1881), 17 Ch. D. 721. **Mentd.** Betts v. Neilson (1868), 3 Ch. App. 429, L. C.; Betts v. Willmott (1871), 6 Ch. App. 239, L. C.; Adair v. Young (1879), 12 Ch. D. 13, C. A.; Jackson v. Needle (1884), Griffin, Patent Cases (1887), 132; United Telephone Co. v. Sharples (1885), 29 Ch. D. 164; North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439, C. A.

54. — **Expatriation as British merchant.**—If a merchant expatriates himself as a merchant to carry on the trade of another country, exporting its produce, paying its taxes & employing its people, & expending his spirit, industry, & capital in its ser-

vice, he is to be deemed a merchant of that country, notwithstanding he may in some respects be less favoured in that country than one of its native subjects. A British subject resident in a foreign country is entitled to all the privileges of the neutral nation whilst he resides in it. Persons residing in England must, for the purposes of trade, be considered as belonging to it. A British merchant resident in a foreign country must part with some commercial privileges which he would preserve if resident at home, whilst he acquires others by residence abroad.

Goods had been shipped from an American port to Halifax & transhipped from there to Newfoundland by A., an English merchant, who resided in America & had expatriated himself. The goods were condemned for a breach of 12 Car. 2, c. 18, which provided that no "alien" should exercise the trade or occupation of a factor or merchant in the plantations, etc.:—**Held:** (1) A. must be regarded as an American, not as a British, merchant; (2) the importation to Newfoundland was illegal.—THE MATCHLESS (1822), 1 Hag. Adm. 97.

**Annotation:**—**Mentd.** The Eliza Ann (1824), 1 Hag. Adm. 257.

55. — **Alien in British colony.**—Every alien coming into a British colony becomes temporarily a subject of the Crown—bound by, subject to, & entitled to the benefit of the laws which affect all British subjects (TURNER, L.J.).—LOW v. ROUTLEDGE (1865), 1 Ch. App. 42; 35 L. J. Ch. 114; 13 L. T. 421; 30 J. P. 4; 14 W. R. 90, C.A.; *affd.* (1868), L. R. 3 H. L. 100, H. L.

**Annotations:**—**Mentd.** Low v. Ward (1868), L. R. 6 Eq. 415; Mathieson v. Harrod (1868), L. R. 7 Eq. 270; Grave's Case (1869), L. R. 4 Q. B. 715; Reid v. Maxwell (1886), 2 T. L. R. 790, C. A.; Collingridge v. Emmott (1887), 57 L. T. 864; Davidsson v. Hill, [1901] 2 K. B. 606.

56. — **Writ of ne exeat regno.**—A writ *ne exeat regno* may be obtained against an alien resident in England; but it is very delicate to interfere against foreigners, whose occasions or misfortunes have brought them here, by an application of this writ to them; it is a necessary term that it shall be simply a case of equity, affording no ground to sue at law.—DE CARRIERE v. DE CALONNE (1799), 4 Ves. 577; 31 E. R. 297.

57. — **Poor law settlement.**—A foreigner may gain a settlement here for the purpose of the poor laws, by complying with the statutory provisions as to occupation of a tenement of £10 a year & otherwise.—R. v. EASTBOURNE (INHABITANTS) (1803), 4 East, 103; 102 E. R. 769.

**Annotation:**—**Mentd.** R. v. Blanc (1849), 13 Q. B. 769.

58. — **Habeas corpus.**—The writ of *habeas corpus* lies, though the person who claims it is a foreigner, & is charged with a crime, & though that crime be not triable in this country.—RE BESSET (1844), 1 New Sess. Cas. 337; 14 L. J. M. C. 17; 8 J. P. 743.

59. — **Company—Shareholders & directors aliens—Winding up.**—A co., having many of its shares transferable by delivery, but having also many "nominative shares," i.e., shares which were

foreigner.]—Deft., not being a subject of the king, was convicted for being found on board a smuggling vessel within one league of the dominions of the king, he not being a passenger.—R. v. DEMOOLANAAR (1825), Sm. & Bat. 438.—IR.

52 i. **Subject to law—Knowledge of law presumed.**—A foreigner contracting in Scotland is presumed to know the laws in the same manner as one of the lieges, & cannot resile an alleged ignorance.—CLOUP & PELLISSIE v. ALEXANDER (1831), 9 Sh. (Ct. of Sess.) 418.—SCOT.

h. — **Arrest on civil process.**—An alien passing through British

Columbia may be arrested on a cause of action which has arisen in a foreign country.—MACAULAY v. O'BRIEN (1897), 5 B. C. R. 510.—CAN.

*See, further, EXECUTION.*

k. — **Arrest under Absconding Debtors Act.**—It is of no consequence where the domicile of a person may be, or to what country he is bound by allegiance as a subject or citizen if he come to Ontario, & reside there, & contract debts, & is about to quit the country (i.e., in fact, to change his residence to a foreign country, even though that country be his place of domicile) with

the intent to defraud his creditors, he is subject to arrest as it prevails in Ontario.—KERSTERMAN v. McLELLAN (1883), 10 P. R. 122.—CAN.

*See, further, BANKRUPTCY & INSOLVENCY.*

l. — **Attachment for contempt.**—An order for attachment, for non-compliance with a direction of a master, can be properly made against a party resident out of the jurisdiction of the ct.—BLOOMFIELD v. BROOKE (1875), 6 P. R. 264.—CAN.

*See, further, CONTEMPT OF COURT, ATTACHMENT & COMMITTAL.*



**Sect. 1.—General position in regard to British law.****Sect. 2: Sub-sect. 1.]**

the same as the ordinary joint stock shares in cos. in England, applied for registration. The seven shareholders who made the application were all resident abroad, & the first directors nominated were foreigners, & only one of them appeared to have even a temporary residence in England. The articles of assocn. referred in several places to the English law, & especially to Cos. Act, 1862 (c. 89). There was an office of the co. in Westminster, but it was doubtful whether any general meeting was intended to be held in London, or other place in England. The registrar granted its registration:—*Held*: (1) he was lawfully entitled so to do, but he was not bound to refuse registration, & the registration having been thus actually made, the usual legal consequences of registration arose; (2) if the circumstances occurred which, by s. 79 of the above Act, were such as, in the opinion of the ct., made it "just & equitable" that the co. should be wound up, the ct. might lawfully & properly issue the order for winding it up.—*REUSS (PRINCESS) v. BOS* (1871), L. R. 5 H. L. 176; 40 L. J. Ch. 655; 24 L. T. 641, H. L.; *affg.* 5 Ch. App. 363, L.JJ.

*Annotations*:—*Consd.* *Re Tumacacori Mining Co.* (1874), L. R. 17 Eq. 531; *Re Capital Fire Insce. Assocn.* (1882), 21 Ch. D. 209. *Mentd.* *Matthaei v. Galitzan* (1874), 22 W. R. 700; *Re Nassau Phosphate Co.* (1876), 2 Ch. D. 610.

— **Attachment for contempt.**—*See* CONTEMPT OF COURT, ATTACHMENT & COMMITTAL.

**60. — Bankruptcy laws.**—A debtor's summons may be taken out by a foreign creditor against a foreign debtor, who is at the time in England in respect of a debt contracted abroad.—*Re MYER, Ex p. PASCAL* (1876), 1 Ch. D. 509; 45 L. J. Bcy. 81; 34 L. T. 10; 24 W. R. 263, C. A.

*Annotation*:—*Refd.* *Cooke v. Vogeler Co.*, [1901] A. C. 102, H. L.

*See, further*, BANKRUPTCY & INSOLVENCY.

— **Criminal law.**—*See* CRIMINAL LAW & PROCEDURE.

**Execution.**—*See* EXECUTION.

**Garnishee proceedings.**—*See* EXECUTION.

**Interpleader.**—*See* INTERPLEADER.

**SECT. 2.—RIGHT TO SUE AND LIABILITY TO BE SUED.****SUB-SECT. 1.—RIGHT TO SUE.**

**61. General principle.**—Alien *amy*, or enemy living here under protection, may bring action, be-

**60 i. — Bankruptcy laws.**—*Qu.*: whether a foreigner is liable to the insolvent laws, being neither resident nor domiciled in Canada.—*MELLON v. NICHOLLS* (1868), 27 U. C. R. 167.—**CAN.**

**m. — Garnishee proceedings — Foreign corporation not subject to.**—*CANADA COTTON CO. v. PARMALEE* (1889), 13 P. R. 308.—**CAN.**

**n. S. P. PARKER v. ODETTE** (1894), 16 P. R. 69.—**CAN.**

*See, further*, EXECUTION.

**o. — Interpleader.**—On an application to rescind or vary an interpleader order:—*Held*: claimant, a resident of the United States, having placed the goods in Canada, would have been personally liable to the jurisdiction of the ct. in any question concerning them, even if he had not employed an attorney & made an affidavit to support his claim.—**BUFFALO &**

**LAKE HURON R. W. CO. v. HEMMINGWAY** (1863), 22 U. C. R. 562.—**CAN.**

*See, further*, INTERPLEADER.

— **Liability for alien tax.**—*See* REVENUE; TAXATION.

**PART II. SECT. 2, SUB-SECT. 1.**

**p. Court no power to compel aliens to litigate.**—Under an agreement with respect to a mining property in Ontario, payment was to be made in a foreign country to foreigners residing therein, by a person also residing therein, of a sum of money for each ton of ore mined by him:—*Held*: the ct. had no jurisdiction to compel foreigners to come to the Province with their claim & litigate it, the debt in question having no existence there.—*Re BENFIELD & STEVENS* (1897), 17 P. R. 339.—**CAN.**

**63 i. Personal action — Action by foreign bank on notes.**—*Money had & received.*—A foreign bank cannot sue upon notes received by them in the conduct of banking business in Ontario,

cause suing is a consequence of protection. If an alien enemy comes hither *sub salvo conductu*, he may maintain an action; if an alien *amy* comes hither in time of peace by the King's licence, & lives here under his protection, & a war afterwards begins between the two nations, he may maintain an action; as suing is but a consequential right of protection, & wars at this day are not so implacable as heretofore.—*WELLS v. WILLIAMS* (1697), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E. R. 18.

*Annotations*:—*Consd.* *Usparicha v. Noble* (1811), 13 East, 332. *Refd.* *Omychund v. Barker* (1745), 1 Atk. 21; *Casseres v. Bell* (1799), 8 Term Rep. 166; *Maria v. Hall* (1807), 1 Taunt. 33; *Mennett v. Bonham* (1812), 15 East, 477; *Janson v. Driefontein Consolidated Gold Mines* [1902] A. C. 484, H. L.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**62. —**—Alien friends have a right to institute suits in the cts. for recovery of their rights; they come into England either, as formerly, with a letter of safe conduct, or under a tacit permission which presumes that authority. If they continue to reside here after war breaks out between the two countries, they remain under that protection & are impliedly temporary subjects of this kingdom. If the right of suing for redress of injuries were not allowed them, the protection would be incomplete & merely nominal. This claim to the protection of our cts. does not apply to aliens who adhere to the King's enemies. They are incapacitated from suing either at law or in equity.—*DAUBIGNY v. DAVALLON* (1794), 2 Anst. 462; 145 E. R. 936.

*Annotation*:—*Refd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**63. Personal action—Debt.**—An alien living in France brought a writ of debt in the Common Pleas. Objection was taken that being an alien he could not sue in England:—*Held*: an alien, unless the subject of a State at war with England, could maintain a personal action in the English cts., but in real actions the plea of alienage was good, for no alien could have land within the realm unless a denizen.—*ANON.* (1514), 1 Dyer, 2b; 73 E. R. 6.

*Annotations*:—*Consd.* *Boosey v. Jefferys* (1851), 6 Exch. 580. *Refd.* *Daubigny v. Davallon* (1794), 2 Anst. 462. *Mentd.* *Calvin's Case* (1609), 7 Co. Rep. 1a.

**64. —**—An alien can maintain an action of debt or for other personal thing.—*ANON.* (1553), 1 And. 25; 123 E. R. 334.

**65. — Account.**—A bill was brought for an account against the representatives of an East India governor, who pleaded that pltf. was an alien born, an alien infidel, & could have no suit here. The plea was overruled, for being a mere personal demand, pltf. might bring in a bill in the Eq. Ct.—*RAMKISSENSEAT v. BARKER* (1737), 1 Atk. 51; 26 E. R. 34.

*Annotation*:—*Refd.* *Rafael v. Verelst* (1776), 2 Wm. Bl. 1055.

although they may sue, for money had & received, the person for whom such notes were discounted, & to whom money was advanced on them.—*BANK OF MONTREAL v. BETHUNE* (1836), 4 O. S. 341.—**CAN.**

**q. Action for goods bargained & sold—Action for goods sold & delivered.**—Although a foreign corpn., incorporated in the United States, may not sue residents of Upper Canada for goods bargained & sold on a contract made wholly in Upper Canada, they can for goods sold & delivered.—*UNION INDIA RUBBER CO. v. HIBBARD* (1856), 6 C. P. 77.—**CAN.**

**r. Ejectment.**—Aliens, not coming within 17 Vict. c. 19, s. 3, can maintain ejectment, so long as a sufficient estate remains vested in the alien, e.g., until office found, he may maintain ejectment. *A fortiori* he may maintain it *en autre droit*, as exor., administrator, head of a corpn., or the like. *Qu.*: as to alien devisee in trust to sell.—*WILLIAMS v. MYERS* (1871), 2 N. S. D. 161.—**CAN.**



— **Actions for wages by foreign seamen.]—See** ADMIRALTY, Vol. I., pp. 137—139.

**Administration action—Claims by foreign creditors.]—See** EXECUTORS & ADMINISTRATORS.

**66. Defamation.]—**An alien friend may maintain an action for slander; personal actions by alien friends are not restricted to actions by a merchant alien for his merchandise or his house.—**TIRLOT (TUERLOOTE) v. MORRIS (MORRISON)** (1611), 1 Bulst. 134; Yelv. 198; 80 E. R. 828.

**Annotations:—**Folld. *Pisani v. Lawson* (1839), 6 Bing. N. C. 90; *Refd. Jefferys v. Boosey* (1854), 4 H. L. Cas. 817 H. L.

**67. —.]—**An alien friend is entitled to sue in England for a libel published concerning him in England, & it is immaterial whether he has been within the realm or not.—**PISANI v. LAWSON** (1839), 6 Bing. N. C. 90; 8 Dowl. 57; 8 Scott, 182; 9 L. J. C. P. 12; 3 Jur. 1153; 133 E. R. 35.

**Annotations:—***Refd. Cocks v. Purday* (1848), 5 C. B. 860; *Boosey v. Jefferys* (1851), 6 Exch. 580; *Jefferys v. Boosey* (1854), 4 H. L. Cas. 819, H. L.; *Collins Co. v. Cohen* (1857), 5 W. R. 676.

**68. —.]—****JEFFERYS v. BOOSEY**, No. 94, *post*.

**69. — Criminal information.]—**The extraordinary remedy of a criminal information for a libel will not, as a rule, be granted to a foreigner residing abroad, the libel in such cases not tending to provoke breach of the peace.—**R. v. LABOUCHERE** (1884), 12 Q. B. D. 320; 53 L. J. Q. B. 362; 50 L. T. 177; 48 J. P. 165; 32 W. R. 861; 12 Cox, C. C. 415.

**Annotations:—***Mentd. R. v. Ensor* (1887), 3 T. L. R. 366; *R. v. Masters* (1889), 6 T. L. R. 44; *Ex p. Freeman-Mitford* (1914), 30 T. L. R. 693.

**70. Trespass to person.]—**An alien friend may maintain an action for trespass to the person.—**TIRLOT (TUERLOOTE) v. MORRIS (MORRISON)** (1611), 1 Bulst. 134; Yelv. 198; 80 E. R. 828.

**Annotations:—**Folld. *Pisani v. Lawson* (1839), 6 Bing. N. C. 90; *Refd. Jefferys v. Boosey* (1854), 4 H. L. Cas. 819, H. L.

**71. —.]—**Pltf., an Armenian merchant residing in the Province of Owd, was imprisoned, as he alleged, by the procurement of deft., Governor of Bengal under the East India Co. In an action of trespass:—**Held**: the finding in the special verdict of the jury that pltf. was an alien was one which could not be insisted on as material in excuse of deft., for this was no objection in personal actions, & deft. was liable.—**RAFAEL v. VERELST** (1776), 2 Bl. Com. 1055; 96 E. R. 621.

**Annotations:—***Refd. West v. Smallwood* (1838), 3 M. & W. 418; *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358, C. A. *Mentd. Jones v. Spencer* (1897), 77 L. T. 536.

**72. Negligence—Fatal Accidents Acts, 1846 (c. 93) & 1864 (c. 95).]**—The provisions of the above Acts, by which damages can be recovered for death caused by negligence, do not apply for the benefit of aliens abroad, & the representative of an alien, whose death has been caused by the negligence of a British subject outside the jurisdiction of the ct., cannot maintain an action to

recover damages in respect of the death.—**ADAM v. BRITISH & FOREIGN S.S. CO., LTD.**, [1898] 2 Q. B. 430; 67 L. J. Q. B. 844; 79 L. T. 3; 14 T. L. R. 540; 8 Asp. M. L. C. 420.

**Annotation:—***N.F. Davidson v. Hill*, [1901] 2 K. B. 606.

**73. —.]—**The above Acts apply as well for the benefit of the representatives of a deceased foreigner as for those of a British subject, at all events as against an English wrong-doer.

A collision occurred upon the high seas between a British & a foreign ship owing to the negligence of those in charge of the former. As a result of the collision a foreign seaman on board the foreign ship was drowned:—**Held**: the personal representative of the deceased seaman had a right of action by the above Acts against the owners of the British ship.—**DAVIDSSON (DAVIDSON) v. HILL**, [1901] 2 K. B. 606; 70 L. J. K. B. 788; 85 L. T. 118; 49 W. R. 630; 17 T. L. R. 614; 45 Sol. Jo. 619; 9 Asp. M. L. C. 223.

**Annotation:—***Distd. Tomalin v. Pearson* (1909), 78 L. J. K. B. 863, C. A.

**74. Trade mark—Alien resident abroad—Goods not usually sold here.]—**A foreign manufacturer has a remedy by suit in England for an injunction & account of profits against a manufacturer here, who has committed a fraud upon him by using his trade mark for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner. This relief is founded upon the personal injury caused to pltf. by deft.'s fraud, & exists, although pltf. resides & carries on his business in another country, & has no establishment here, & does not even sell his goods in this country.—**COLLINS CO. v. BROWN** (1857), 3 K. & J. 423; 30 L. T. O. S. 62; 3 Jur. N. S. 929; 69 E. R. 1174.

**Annotations:—**Folld. *Collins Co. v. Reeves* (1859), 28 L. J. Ch. 56; *La Soc. Anon. des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513. *Mentd. Prioleau v. United States & Johnson* (1866), L. R. 2 Eq. 659; *United States v. Wagner* (1867), L. R. 3 Eq. 724.

**75. —.]—****COLLINS CO. v. COHEN** (1857), 3 K. & J. 428; 29 L. T. O. S. 245; 3 Jur. N. S. 929; 69 E. R. 1177.

**Annotation:—***Refd. Singer Manufacturing Co. v. Wilson* (1876), 2 Ch. D. 434, C. A.

**76. —.]—**An alien can sue in the cts. of England to restrain fraudulent appropriation of his trade mark, although the goods on which such is affixed are not usually sold by him in England.—**COLLINS CO. v. REEVES** (1858), 28 L. J. Ch. 56; 33 L. T. O. S. 101; 4 Jur. N. S. 865; 6 W. R. 717.

**77. Trade name—Alien trading here.]—**A foreign co. trading in England is entitled to restrain the use of a name so similar as to be calculated to deceive customers.—**NATIONAL FOLDING BOX & PAPER CO. v. NATIONAL FOLDING BOX CO., LTD.** (1894), 43 W. R. 156; 13 R. 60.

**78. — Goods used here.]—**A foreign trader whose goods are in fact imported into England, although he has no English agency, has a sufficient

**72 i. Negligence—Fatal Accidents Acts.]—**The administrator within Ontario of a foreigner, killed in an accident there through his employer's negligence, is entitled, under the above Acts, as amended by R. S. O., 1897 (c. 166), s. 2, to maintain an action on behalf of deceased's family, foreigners residing out of Canada, for the recovery of damages sustained by reason of his death.—**GYORGY v. DAWSON** (1906), 8 O. W. R. 784; 13 O. L. R. 381.—**CAN.**

**72 ii. — Workmen's Compensation Act, 1902.]—***Semble*: the principle

governing Fatal Accidents Act, 1846 (c. 93), governs Workmen's Comp. Act, 1902, viz., given the wrongful act, in respect of which deceased, had he lived, would have had a right of action, the stat. intends, in case of death, to make the wrongdoer liable in damages to those who, irrespective of race or residence, stood to deceased in any of the relationships mentioned in the Act.—**VARESICK v. BRITISH COLUMBIA COPPER CO.** (1906), 12 B. C. R. 286; 5 W. L. R. 56; 1 B. W. C. C. 446.—**CAN.**

**72 iii. —.]—**Under the above Act of 1902 the widow of an

alien workman, who lost his life by an accident in the course of his employment, is entitled to compensation as a dependant of deceased, notwithstanding that she was residing in a foreign country at the dates both of the accident & the death, & the legal personal representative of deceased is entitled to payment thereof in trust for her.—**KRZUS v. CROW'S NEST PASS COAL CO.**, [1912] A. C. 590; 81 L. J. P. C. 227; 107 L. T. 77; 28 T. L. R. 488; 56 Sol. Jo. 632; 6 B. W. C. C. 270; 16 B. C. R. 120, P. C.—**CAN.**

*See, further, MASTER & SERVANT.*

**Sect. 2.—Right to sue & liability to be sued:**  
**Sub-sects. 1 & 2. Sects. 3, 4, 5 & 6.]**

English market to entitle him to an injunction restraining the piracy of his trade name & reputation.—*SOCIÉTÉ ANONYME DES ANCIENS ETABLISSEMENTS PANHARD ET LEVASSOR v. PANHARD LEVASSOR MOTOR CO., LTD.*, [1901] 2 Ch. 513; 70 L. J. Ch. 738; 85 L. T. 20; 50 W. R. 74; 17 T. L. R. 680; 45 Sol. Jo. 671; 18 R. P. C. 405.

**79. — Copyright—Infringement.]**—A friendly alien can maintain an action for infringement of copyright, to which he is entitled under the Copyright Acts for the time being in force.—*ROUTLEDGE v. LOW* (1868), L. R. 3 H. L. 100; 37 L. J. Ch. 454; 18 L. T. 874; 16 W. R. 1081, H. L.

**Annotations:—***Folld. Low v. Ward* (1868), 37 L. J. Ch. 841. *Reid. Reid v. Maxwell* (1886), 2 T. L. R. 790, C. A.; *Davidsson v. Hill*, [1901] 2 K. B. 606. *Mentd. Mathieson v. Harrod* (1868), L. R. 7 Eq. 270; *Re Graves, Ex p. Walker* (1869), 10 B. & S. 680; *Collingridge v. Emmott* (1887), 57 L. T. 864.

*See, now, Copyright Act, 1911 (c. 46).*

**80. Patent—Scire facias to repeal—Information of alien.]**—A writ of *sci. fa.* to repeal a patent might be prosecuted by the A.-G. on the information of an alien.—*R. v. PROSSER* (1848), 11 Beav. 306; 18 L. J. Ch. 35; 12 L. T. O. S. 509; 13 Jur. 71; 50 E. R. 834.

**81. — Opposition to extension of term.]**—An alien resident abroad was interested in an English patent by a foreign inventor, & had also had considerable dealings in England in respect of sales of the patented machine, & in granting licences for the use of such patent:—*Held*: in the circumstances, he had a *locus standi* to entitle him to petition the Crown to revoke an Ord. in Council for granting an extended term of an English patent, & to recall the warrant for sealing such patent. *Qu.*: whether an alien living abroad, without such interest, could inform the Crown by petition as to any matters touching letters patent.—*Re SCHLUMBERGER, Re GIBSON'S PATENT* (1853), 9 Moo. P. C. C. 1; 2 Eq. Rep. 1; 14 E. R. 197, P. C.

*See, now, Patents & Designs Act, 1907 (c. 29), s. 18; PATENTS & DESIGNS.*

**SUB-SECT. 2.—LIABILITY TO BE SUED.**

**82. Specific performance.]**—The ct. will specifically enforce against a foreigner a contract of sale

**80 i. Patent — Infringement.]**—An English co. brought a suspension & interdict against another English co., craving interdict against resps. infringing within Scotland certain patent rights. No arrestments had been used to found jurisdiction, nor had personal service been made in Scotland upon resps., who denied that they had any place of business in Scotland:—*Held*: (1) in an action *ratione delicti* the ct. had jurisdiction to prevent repetition by a foreigner of alleged wrongful acts by him within Scotland; (2) the ct. was the appropriate forum, before which to bring an application for interdict against the continuance of the alleged wrongdoing within Scotland.—*TONI TYRES, LTD. v. PALMER TYRE, LTD.* (1905), 7 F. (Ct. of Sess.) 477; 42 Sc. L. R. 352; 12 S. L. T. 707.—**SCOT.**

**s. Qui tam action.]**—An alien has no right to institute a *qui tam* action in his own name & in the name of His Majesty to recover a penalty.—*BAUER v. DINNING* (1906), 9 Q. P. R. 335.—**CAN.**

**t. Specific performance — Naturalisation after action brought.]**—An objection taken to an alien's title to sue for implement of an alleged contract for the

sale of heritage is obviated by a letter of naturalisation obtained by him after the action was raised.—*GOLDSTON v. YOUNG* (1868), 7 Macph. (Ct. of Sess.) 188.—**SCOT.**

**u. Right to execution.]**—Alien friends residing in their proper country cannot, upon a summary application to the ct., be deprived, under 5 Geo. 2, c. 7, of the right to an execution against the lands of their debtor. *Seemle*: the alienage should be pleaded in bar of execution.—*WOOD v. CAMPBELL* (1847), 3 U. C. R. 269.—**CAN.**

**PART II. SECT. 2, SUB-SECT. 2.**

**v. Action of account.]**—Circumstances in which Quebec cts. have jurisdiction in an action for an account against an alien.—*DE BIGARE v. DE BIGARE* (1905), Q. R. 14 K. B. 26.—**CAN.**

**w. In representative capacity.]**—A foreigner cited in an action of transference as the representative of deceased defender:—*Held*: not liable to the jurisdiction of the Scottish cts.—*REOCH v. ROBB* (1831), 9 Sh. (Ct. of Sess.) 588.—**SCOT.**

*See, further, EXECUTORS & ADMINISTRATORS.*

made abroad, if the subject-matter of the contract is within its jurisdiction.

Where a contract was made abroad for sale of a foreign vessel to be delivered in England, the ct. granted an interim injunction to restrain the removal of the ship from an English port, allowing substituted service of the notice of motion on the captain.—*HART v. HERWIG* (1873), 8 Ch. App. 860; 42 L. J. Ch. 457; 29 L. T. 47; 21 W. R. 663; 2 Asp. M. L. C. 63, L.J.J.

**Annotation:—***Mentd. The Faust* (1887), 56 L. T. 722, C. A. **Service of writ.]**—*See PRACTICE & PROCEDURE.*

**SECT. 3.—EXPULSION**

*See Part VIII.,*

**SECT. 4.—IMMIGRATION.**

*See Part VIII., post.*

**SECT. 5.—MILITARY SERVICE.**

*See ROYAL FORCES.*

**SECT. 6.—PERSONAL PROPERTY.**

**83. Right to acquire & hold—Goods.]**—An alien, unless an enemy, can have goods in England.—*ANON.* (1552), 1 And. 25; Benl. 10; 123 E. R. 334.

**84. — — —.]**—Deft. desired to buy certain furs, but, being a foreigner, could not buy without peril of forfeiture. Hence, in consideration that pltf. promised that when he had bought the furs deft. should have such a quantity of them as he pleased upon equal price, deft. undertook not to speak again with the merchants for the buying of the furs, yet he proceeded in the bargain & offered the merchants £60 more than any other, & pltf. could not have them for such reasonable price as

**x. Foreigner resident in Scotland—Owner of heritage in Scotland.]**—Jurisdiction constituted over a foreigner by his residence in Scotland for over forty days ceases when he leaves Scotland; it does not continue for forty days after he has left.

A foreigner, the proprietor of a house in Scotland, conveyed it to his daughter by an absolute disposition, recorded a few days before a Ct. of Session summons in a petitory action was served upon him:—*Held*: the ct. had not jurisdiction over him by reason of the ownership of Scots heritage.—*BUCHAN v. GRIMALDI* (1905), 7 F. (Ct. of Sess.) 917; 42 Sc. L. R. 706; 13 S. L. T. 229.—**SCOT.**

**PART II. SECT. 6.**

**83 i. Right to acquire & hold.]—Held**: (1) pltf., a foreign corpn., could hold personal property in Ontario; (2) the Act as to banks & banking & warehouse receipts did not apply to pltf.—*COMMERCIAL NATIONAL BANK OF CHICAGO v. CORCORAN* (1884), 6 O. R. 527.—**CAN.**

**y. Trade-mark.]**—The right at common law of an alien friend, in respect to trade marks, stands on the same ground as that of a subject.—*DAVIS v. KENNEDY* (1867), 13 Gr. 523.—**CAN.**

he might have had them for before:—*Held*: the declaration was insufficient (*qu.* because there was in fact no risk of forfeiture), upon which *deft.* might have well demurred (WRAY, C.J.).—*HERNE & CROWE'S CASE* (1584), 4 Leon. 122; 74 E. R. 771.

85. ———.]—An alien friend may by the common law have, acquire, & get within the realm of England, by gift, trade, or other lawful means, any treasure of goods personal whatsoever, as well as an Englishman, & may maintain an action for same.—*CALVIN'S CASE* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; Moore, K. B. 790; Jenk. 306; 77 E. R. 377.

*Annotations*:—*Apld.* Low v. Routledge (1865), 1 Ch. App. 42. *Consd.* Rodriguez v. Speyer (1918), 119 L. T. 409, H. L. *Mentd.* Parliament in Ireland, Case of (1613), 12 Co. Rep. 110; R. v. Hampden (1637), 3 State Tr. 826; Collingwood v. Pace (1661), O. Bridg. 410; Manby v. Scot (1663), 1 Keb. 361; Thomas v. Sorrel (1672), 3 Keb. 143; Anon. (1678), Freem. K. B. 249; R. v. Tucker (1692), 1 Ld. Raym. 1; R. v. Knowles (1693), 12 Mod. Rep. 55; Loddington v. Kime (1695), 3 Lev. 431; Owen v. Saunders (1696), 1 Ld. Raym. 158; Clayton v. Kinaston (1697), 1 Ld. Raym. 419; Scot v. Schwartz (1739), 2 Com. 677; Omychund v. Barker (1744), 1 Atk. 21; R. v. Cowle (1759), 2 Burr. 834; Campbell v. Hall (1774), 1 Cowp. 204, P. C.; Queen Caroline's Claim to be Crowned (1821), 1 St. Tr. N. S. 949, P. C.; Ruding v. Smith (1821), 2 Hag. Con. 371; Jephson v. Riera (1835), 3 Knapp. 130, P. C.; Lane v. Bennett (1836), 1 M. & W. 70; Lyons Corp'n. v. East India Co. (1836), 1 Moo. Ind. App. 175; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895, H. L.; Brunswick v. Hanover (1844), 6 Beav. 1; Taylor v. Best (1854), 14 C. B. 487; Rittson v. Stordy (1855), 3 Eq. Rep. 1039; R. v. Lopez, R. v. Sattler (1858), Dears. & B. 525, C. C. R.; *Ex p.* Anderson (1861), 3 E. & E. 487; *Ex p.* Brown (1864), 5 B. & S. 280; The Franconia (1876), 2 Ex. D. 63, C. C. R.; De Geer v. Stone (1882), 22 Ch. D. 243; *Re* Stepmey Petn., Isaacson v. Durant (1886), 17 Q. B. D. 54; *Re* Johnson, Roberts v. A.-G., [1903] 1 Ch. 821; Gibson v. Gibson, [1913] 3 K. B. 379; R. v. Speyer, [1916] 2 K. B. 858, C. A.; Bowinan v. Secular Soc., [1917] A. C. 406, H. L.; Tingley v. Müller, [1917] 2 Ch. 144, C. A.; R. v. Francis, [1918] 1 K. B. 617.

——— *Ship*.]—*See* SHIPPING & NAVIGATION.

86. *Right to bequeath*.]—An alien, unless an enemy, can make a will of goods & leases in England as though he were a denizen.—*ANON.* (1552), 1 And. 25; Benl. 10; 123 E. R. 334.

87. *Right to receive legacy*.]—A testator by his will directed all his property to be sold & converted into money, & after charging this mixed fund with his debts & legacies, gave the residue to aliens resident abroad:—*Held*: the residue of the pure personal estate belonged to the aliens.—*FOURDRIN v. GOWDEY* (1834), 3 My. & K. 383; 3 L. J. Ch. 171; 40 E. R. 146.

*Annotations*:—*Reid.* Du Hourmelin v. Sheldon (1839), 1 Beav. 79; Barrow v. Wadkin (1857), 24 Beav. 1. *Mentd.* A.-G. v. Southgate (1842), 12 L. J. Ch. 147; Boughton v. Boughton, Boughton v. James (1848), 1 H. L. Cas. 406, H. L.; Fairer v. Park (1876), 3 Ch. D. 309.

88. *Property in funds—Alien resident abroad—Control of court*.]—Foreigners are subject to the authority of the ct. only while in England; but though their persons are out of the reach of the ct., the property they have there in the funds is under its control.—*ANON.* (1737), 1 Atk. 19; 26 E. R. 13.

89. *Money & securities in hands of English broker—Alien wife of attainted person*.]—A broker had in his hands money & securities of a foreign marchioness. Hearing she was married to an English subject attainted of treason, he declined to pay unless indemnified by a decree of the ct. It appeared from her affidavit she was not so married, & this was not contradicted:—*Held*: the money & securities should be paid & transferred to her, but the broker to have his costs, having only done what he ought, for it was not prudent for him to pay the money till he was secured. *Qu.*: whether, if she had been so married, since she was a foreigner, the property would have been forfeited.—*DRUMMOND v. DECKER* (1724), 2 Eq. Cas. Abr. 477; 9 Mod. Rep. 100; 22 E. R. 405.

90. *Patent—Grant at Crown's discretion*.]—A foreigner may have a patent if the Crown chooses

to grant him one.—*CHAPPELL (CHAPPLE) v. PURDAY* (1845), 14 M. & W. 303; 14 L. J. Ex. 258; 5 L. T. O. S. 266; 9 Jur. 495.

*Annotations*:—*Apld.* Beard v. Egerton (1846), 3 C. B. 97. *Mentd.* Cocks v. Purday (1848), 5 C. B. 860; Boosey v. Purday (1849), 18 L. J. Ex. 378; Boosey v. Jefferys (1851), 6 Exch. 580; Jefferys v. Boosey (1854), 4 H. L. Cas. 819, H. L.

91. ———.]—There is nothing to prevent an alien from receiving a grant of patent if the Crown thinks proper, either in his own name or that of another.—*BEARD v. EGERTON* (1846), 3 C. B. 97; 15 L. J. C. P. 270; 7 L. T. O. S. 228; 10 Jur. 643; 136 E. R. 39.

*Annotation*:—*Mentd.* *Re* Avery's Patent (1887), 36 Ch. D. 307, C. A.

92. ———.]—Letters patent may be granted to an alien resident abroad for an invention communicated to him by another alien also resident abroad.

W., an alien resident abroad, acted as agent of M. & Co., & applied for letters patent in England for an invention of the latter. He made the usual statutory declaration, which was filed with his petition. In it W. was described as an alien resident abroad, & it was declared before H.B.M.'s consul at Frankfort:—*Held*: objection founded on these facts was bad.—*Re WIRTH'S PATENT* (1879), 12 Ch. D. 303; 28 W. R. 329, C. A.

93. *Copyright—Copyright Act, 1709 (c. 21) —*

54 Geo. 3, c. 156.]—A foreign author, residing abroad, who composes & publishes his work abroad, has not, at common law, or under the above Acts, any copyright in England. Therefore, a person to whom he transfers abroad, by an instrument not under seal, but which is valid according to the law of that country, the copyright of the work in England, has no right of action against a British subject who afterwards publishes the work in England.—*CHAPPELL (CHAPPLE) v. PURDAY* (1845), 14 M. & W. 303; 14 L. J. Ex. 258; 5 L. T. O. S. 266; 9 Jur. 495.

*Annotations*:—*Consd.* Cocks v. Purday (1848), 5 C. B. 860. *N.F.* Boosey v. Jefferys (1851), 6 Exch. 580. *Reid.* Boosey v. Purday (1849), 18 L. J. Ex. 378; Jefferys v. Boosey (1854), 4 H. L. Cas. 819, H. L. *Mentd.* Beard v. Egerton (1846), 3 C. B. 97.

94. ———.]—The above Act of 1709 (as to copyright) must be construed as referring to British authors only. A British stat. must *prima facie* be understood to legislate for British subjects only, & there are no special circumstances in the Act relating to authors leading to the notion that a more extended range was meant to be given to its enactments. When I say that the Legislature must *prima facie* be taken to legislate only for its own subjects, I must be taken to include under the word "subjects" all persons who are within the Queen's dominions & who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here & composing & publishing a book here is an author within the Act; he is within its words & spirit. I go further; I think that if a foreigner, having composed but not having published a work abroad, were to come to this country & the week or day after his arrival were to print & publish it here, he would be within the protection of the Act. But if at the time when copyright commences by publication the foreign author is not in this country, he is not a person whose interests the stat. meant to protect (LORD CRANWORTH, C.).

An alien friend may possess any description of personal property in England, & maintain any action in respect of it applicable to the nature of the wrong. He may have a property in its nature incorporeal in his character & reputation & may maintain an action for verbal or written slander (WIGHTMAN, J.).—*JEFFERYS v. BOOSEY* (1854), 4



**Sect. 6.—Personal property. Sect. 7: Sub-sect. 1.]**

H. L. Cas. 815; 3 C. L. R. 625; 24 L. J. Ex. 81; 23 L. T. O. S. 273; 1 Jur. N. S. 615; 10 E. R. 681, H. L.

**Annotations:—****Consd.** Low v. Routledge (1864), 4 New Rep. 491; Routledge v. Low (1868), L. R. 3 H. L. 100, H. L.; Davidson v. Hill, [1901] 2 K. B. 606. **Distd.** Krzus v. Crow's Nest Pass Coal Co., [1912] A. C. 590, P. C. **Refd.** Boucicault v. Delafield (1863), 1 Hem. & M. 597; Low v. Routledge (1865), 1 Ch. App. 42, L.J.J.; Macleod v. A.-G. for New South Wales, [1891] A. C. 455, P. C.; Adam v. British & Foreign S.S. Co., [1898] 2 Q. B. 430; Varesick v. British Columbia Copper Co. (1906), 1 B. W. C. C. 446. **Mentd.** Buxton v. James (1851), 18 L. T. O. S. 134; Novello v. Sudlow (1852), 12 C. B. 177; Novello v. James (1854), 5 De G. M. & G. 876, L.J.J.; Shepherd v. Conquest (1856), 17 C. B. 427; Walton v. Lavater (1860), 8 C. B. N. S. 162; Roade v. Conquest (1861), 9 C. B. N. S. 755; Austria v. Day (1861), 3 De G. F. & J. 217; Roade v. Conquest (1861), 9 C. B. N. S. 755; Cumberland v. Copeland (1861), 7 H. & N. 118; Cumberland v. Copeland (1862), 1 H. & C. 194, Ex. Ch.; Gambart v. Ball (1863), 8 L. T. 426; Morris v. Wright (1870), 5 Ch. App. 279, L. J.; Boucicault v. Chatterton (1876), 5 Ch. D. 267, C. A.; Layland v. Stewart (1876), 46 L. J. Ch. 103; Taylor v. Neville (1878), 47 L. J. Q. B. 254, C. A.; Fairlie v. Roosey (1879), 41 L. T. 73, H. L.; Caird v. Sime (1887), 12 App. Cas. 326, H. L.; Tuck v. Priester (1887), 19 Q. B. D. 629, C. A.; Tuck v. Continental Printing Co. (1887), 3 T. L. R. 661; Trade Auxillary Co. v. Middlesborough & District Tradesmen's Protection Assocn. (1889), 40 Ch. D. 425, C. A.; Labouchere v. Hess (1897), 77 L. T. 559; Walter v. Lane (1900), 69 L. J. Ch. 699, H. L.; Mansell v. Valley Printing Co., [1908] 1 Ch. 567; Monckton v. Gramophone Co. (1912), 106 L. T. 84, C. A.

**95. — Copyright Act, 1842 (c. 45).]**—A foreigner resident abroad may acquire copyright in England in a work that is first published by him as author, or as author's assignee, in England, which has not been made *publici juris* by a previous publication elsewhere. A contemporaneous publication abroad does not defeat such right.

By the law of Austria, which prevailed where A., the author of a musical composition, & B., his assignee, were respectively domiciled, the author had a copyright, & such copyright might be assigned by word of mouth. A. assigned his right to B., & B., before publication of the work, sold his copyright to C.:—**Held:** there being a sale valid by the law of Austria, the country in which the sale took place, the interest of the author became vested in C. before publication, so as to make him an assignee within s. 3 of the above Act, & to confer upon him a good derivative title.—**COCKS v. PURDAY** (1848), 5 C. B. 860; 17 L. J. C. P. 273; 11 L. T. O. S. 241; 12 Jur. 677; 36 E. R. 1118.

**Annotations:—****Folld.** Boosey v. Davidson (1849), 13 Q. B. 257. **Dbtd. & Distd.** Boosey v. Purday (1849), 4 Exch. 145. **Apld.** Ollendorff v. Black (1850), 4 De G. & Sm. 209. **Consd.** Jefferys v. Boosey (1854), 4 H. L. Cas. 819, H. L. **Refd.** Boosey v. Jefferys (1851), 6 Exch. 580.

**96. — —.]**—An alien author of a serial tale, in course of publication in a foreign periodical magazine, by residing in British territory at the date of the publication in England of the last few chapters of the tale, which were first published there, acquires all the rights of a British subject in respect of the copyright of such chapters.—**Low v. WARD** (1868), L. R. 6 Eq. 415; 37 L. J. Ch. 841.

*See, now, Copyright Act, 1911 (c. 46).*

**Payments to alien executors, guardians, trustees.]**  
—**See EXECUTORS & ADMINISTRATORS; INFANTS & CHILDREN; TRUSTS & TRUSTEES.**

## SECT. 7.—REAL PROPERTY AND CHATTELS REAL.

### SUB-SECT. 1.—AT COMMON LAW.

**97. Right to acquire, or get — Houses for necessary occupation—Maintenance of action.]—Lands**

within the realm of England or houses (but for their necessary habitation only) alien friends cannot acquire or get, nor maintain any action, real or personal, for any land or house, unless the house be for their necessary habitation.—**CALVIN'S CASE** (1608), 7 Co. Rep. 1a; 2 State Tr. 559; Moore, K. B. 790; Jenk. 306; 77 E. R. 377.

**Annotations:—****Refd.** Collingwood v. Pace (1661), O. Bridg. 410. **Mentd.** Parliament in Ireland, Case of (1613), 12 Co. Rep. 110; R. v. Hampden (1637), 3 State Tr. 826; Manby v. Scot (1663), 1 Keb. 361; Thomas v. Sorrel (1672), 3 Keb. 143; Anon. (1678), Freem. K. B. 249; R. v. Knowles (1693), 12 Mod. Rep. 55; R. v. Tucker (1694), 1 Ld. Raym. 1; Loddington v. Kime (1695), 3 Lev. 431; Owen v. Saunders (1696), 1 Ld. Raym. 158; Clayton v. Kinaston (1697), 1 Ld. Raym. 419; Scot v. Schawrtz (1739), 2 Com. 677; Omychund v. Barker (1744), 1 Atk. 21; R. v. Cowlo (1759), 2 Burr. 834; Campbell v. Hall (1774), 1 Cowp. 204; Queen Caroline's Claim to be Crowned (1821), 1 St. Tr. N. S. 949, P. C.; Ruding v. Smith (1821), 2 Hag. Con. 371; Jephson v. Riera (1835), 3 Knapp, 130, P. C.; Lane v. Bennett (1836), 1 M. & W. 70; Lyons Corpn. v. East India Co. (1836), 1 Moo. Ind. App. 175, P. C.; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895, H. L.; Brunswick v. Hanover (1844), 6 Beav. 1; Taylor v. Best (1854), 14 C. B. 487; Rittson v. Stordy (1855), 3 Eq. Rep. 1039; R. v. Lopez, R. v. Sattler (1858), Dears. & B. 525, C. C. R.; *Ex p.* Anderson (1861), 3 E. & E. 487; *Ex p.* Brown (1864), 5 B. & S. 280; Low v. Routledge (1865), 1 Ch. App. 42, L.J.J.; The Franconia (1876), 2 Ex. D. 63, C. C. R.; De Geer v. Stone (1882), 22 Ch. D. 243; *Re* Stepney Petn., Isaacson v. Durant (1886), 17 Q. B. D. 54; *Re* Johnson, Roberts v. A.-G., [1903] 1 Ch. 821; Gibson v. Gibson, [1913] 3 K. B. 379; R. v. Speyer, [1916] 2 K. B. 858, C. A.; Bowman v. Secular Soc., [1917] A. C. 406, H. L.; Tingley v. Müller, [1917] 2 Ch. 144, C. A.; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.; R. v. Francis, [1918] 1 K. B. 617.

**98. Right to purchase—For benefit of Crown.]**—Where the *cestui que trust* of an estate is an alien, the trust belongs to the King, for an alien has no capacity to purchase but for the King's use.—**A.-G. v. SANDS** (1669), 3 Rep. Ch. 33; Hard. 488; Nels. 130; Freem. Ch. 129; 21 E. R. 720.

**Annotations:—****Apld.** A.-G. v. Duplessis (1752), Park. 144. **Consd.** Burgess v. Wheate (1757-59), 1 Eden, 177. **Dbtd.** Rittson v. Stordy (1855), 3 Sm. & G. 230. **Consd.** Barrow v. Wadkin (1857), 24 Beav. 1. **Refd.** Sharp v. St. Sauveur (1871), 7 Ch. App. 343, L.C. **Mentd.** Downes v. Morris (1844), 13 L. J. Ch. 337.

**99. — —.]**—An alien is capable of taking by purchase; by that is meant a conveyance at common law, or any other kind of purchase, but it is for the benefit of the Crown (**LORD HARDWICKE, C.**).—**BURK v. BROWN** (1742), 2 Atk. 397; 26 E. R. 640.

**Annotation:—****Apld.** Barrow v. Wadkin (1857), 24 Beav. 1.

**100. — Not for own benefit.]**—An alien can take land whether by grant, conveyance or devise, but he cannot hold it for his own benefit.—**KNIGHT v. DUPLESSIS** (1751), 2 Ves. Sen. 360; 28 E. R. 230.

**Annotations:—****Mentd.** Burges v. Lamb (1809), 16 Ves. 174; Dashwood v. Magniac, [1891] 3 Ch. 306, C. A.

**101. Right to take by descent.]**—R., an *antenatus* of Scotland, had issue four sons—Robert, Nicholas, John, George, who were also *antenati*, being born in Scotland in the time of Queen Elizabeth. Robert had issue three daughters; Nicholas had issue two sons, Patrick & William, born in England; John had no issue; George had issue a son, John. John became Earl of Holderness, & both he & George were naturalised by Acts of Parliament, which gave them the right of inheritance to ancestors lineal & collateral as fully as if they had been natural-born subjects in England, George being naturalised before he had issue. John by his will devised lands in England to the heir of Nicholas. John & George died, Nicholas dying after the making of John's will. Patrick entered as the heir of Nicholas, & John claimed the lands

### PART II. SECT. 7, SUB-SECT. 1.

**101 i. Right to take by descent—Or courtesy.]**—An alien cannot take by act of law, *e.g.*, by descent or courtesy.—**DUMONCEL v. DUMONCEL** (1849), 13 L. Eq. R. 92.—**IR.**

against him:—*Held*: (1) the devise was void because Nicholas was alive & none could be heir to a living person; (2) Nicholas being an alien could not have an heir in England, & hence Patrick had no title; (3) the naturalisation of Nicholas in Ireland by enactment of the Parliament holden 10 Car. 1, in Ireland, that all persons of the Scottish nation should be reputed the King's natural subjects to all intents, constructions, & purposes of that his realm of Ireland as if born there, did not naturalise him in England so as to make him inheritable to lands in England; (4) (in Ex. Ch.) by virtue of the Acts of Naturalisation John & George were inheritable to one another, notwithstanding they traced descent from their father who was an alien, & the lands did not extend; (5) John, the son of George, took by descent.—*COLLINGWOOD v. PACE* (1664), 1 Vent. 413; O. Bridg. 410; 1 Sid. 193; 1 Lev. 59; 86 E. R. 262.

*Annotations*:—*Consd.* Kynnauld v. Leslie (1866), L. R. 1 C. P. 389. *Refd.* Thornby v. Fleetwood (1720), 1 Stra. 318; Scot v. Schwartz (1739), 2 Com. 677; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895, H. L.; De Geer v. Stone (1882), 22 Ch. D. 243. *Mentd.* Blackborough v. Davies (1700), 1 Ld. Raym. 684; Cowper v. Cowper (1734), 2 P. Wms. 720; Evelyn v. Evelyn (1753), Amb. 191; Ferrer's Case (1760), 1 Bro. C. C. 373; Doe d. Duroure v. Jones (1791), 4 Term Rep. 300; Doe d. Winter v. Perratt (1826), 5 B. & C. 48; Lyons Corpn. v. East India Co. (1836), 1 Moo. Ind. App. 175, P. C.; Doe d. Winter v. Perratt (1843), 9 Cl. & Fin. 606, H. L.; Taylors v. Carpenter (1847), 9 L. T. O. S. 514; R. v. Manning (1849), 2 Car. & Kir. 887, C. C. R.; Rittson v. Stordy (1855), 3 Eq. Rep. 1039; Muggleton v. Barnett (1856), 1 H. & N. 282; Re Hawkins, *Ex p.* Official Receiver, [1892] 1 Q. B. 890, C. A.; R. v. Speyer, [1916] 2 K. B. 858, C. A.

**102. — Alien son of alien disentitled—English son of denizen entitled.**—If an alien has issue an alien son, & the father be denizen in England, & after has a son born in England, the youngest son shall inherit the father's land.—*CRAW (CROW) v. RAMSEY* (1670), Vaugh. 274; 2 Vent. 1; Cart. 185; 2 Keb. 601; T. Jo. 10; 124 E. R. 1072.

*Annotation*:—*Mentd.* Otway v. Ramsay (1825), 3 L. J. O. S. K. B. 210, n.

**103.** —The law will not enable an alien by act of his own, either first to transfer by hereditary descent, for the alien dying, having since a denizen born, the land will not descend, or secondly to take by an act in law, for the law *quæi nihil frustra facit* will not give him an inheritance or freehold by act in law, for he cannot keep it. If the eldest son be an alien, the law takes no notice of him, & therefore, as he shall not take by descent so he shall not impede the descent to his younger brother. . . . Sir Edward Coke is of opinion that if an alien have two sons born in England & one die without issue, the other shall not inherit him. But I take the law to be the contrary (HALE, C.B.).—*COLLINGWOOD v. PACE* (1664), 1 Vent. 413; 1 Sid. 193; 1 Lev. 59; 86 E. R. 262.

*Annotations*:—*Refd.* Thornby v. Fleetwood (1720), 1 Stra. 318; Scot v. Schwartz (1739), 2 Com. 677; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895, H. L.; De Geer v. Stone (1882), 22 Ch. D. 243. *Mentd.* Blackborough v. Davies (1700), 1 Ld. Raym. 684; Cowper v. Cowper (1734), 2 P. Wms. 720; Evelyn v. Evelyn (1754), 3 Atk. 762; Ferrer's Case (1760), 1 Bro. C. C. 373; Doe d. Duroure v. Jones (1791), 4 Term Rep. 300; Doe d. Winter v. Perratt (1826), 5 B. & C. 48; Lyons Corpn. v. East India Co. (1836), 1 Moo. Ind. App. 175, P. C.; Doe d. Winter v. Perratt (1843), 9 Cl. & Fin. 606, H. L.; Taylors v. Carpenter (1847), 9 L. T. O. S. 514; R. v. Manning (1849), 2 Car. & Kir. 887, C. C. R.; Rittson v. Stordy (1855), 3 Eq. Rep. 1039; Muggleton v. Barnett (1856), 1 H. & N. 282; Kynnauld v. Leslie (1866), L. R. 1 C. P. 389; Re Hawkins, *Ex p.* Official Receiver, [1892] 1 Q. B. 890, C. A.; R. v. Speyer, [1916] 2 K. B. 858, C. A.

**104.** —If a man has issue two sons & the eldest be an alien, the law takes no

notice of him, & as he shall not take by descent himself, so he shall not impede the descent to his younger brother on supposition that he may have issue a natural born subject (FORTESCUE, J.).

Suppose a man has two sons, the eldest an alien & the other a denizen, in that case the estate shall go to the youngest, because the other is disabled (PRATT, C.J.).—*THORNBURY v. FLEETWOOD* (1720), as reported in 1 Stra. 318; 93 E. R. 544; *affd.* 5 Bro. Parl. Cas. 374.

*Annotations*:—*Mentd.* Ratcliffe's Case (1719), 1 Stra. 267; Mallom v. Bringlee (1738), Willes, 75; Jones v. Meredith (1739), 2 Com. 661; Shrewsbury v. Scott (1859), 6 C. B. N. S. 1.

**105. Discovery to ascertain fact of alienage.**—When Papists were disabled from acquiring land, discovery would not lie to ascertain the fact of a landowner being a Papist, for there was no rule better established in the Ch. Ct. than that a man should not be obliged to answer what might subject him to the penalty of an Act of Parliament. It was otherwise with the case of an alien or bastard, both of whom were incapable, by the general laws of the realm, to inherit.—*SMITH v. READ* (1737), West temp. Hard. 16; 2 Eq. Cas. Abr. 378; 1 Atk. 526; 22 E. R. 322.

*Annotations*:—*Apld.* A.-G. v. Duplessis (1752), Park. 144. *Refd.* Jones v. Meredith (1739), 2 Com. 661; Sloman v. Kelly (1840), 4 Y. & C. Ex. 169; Adams v. Batley (1887), 35 W. R. 437. *Mentd.* Harrison v. Southcote (1751), 1 Atk. 528.

**106. — Son of English mother & alien father excluded.**—The son of an alien father & English mother, born out of the King's allegiance, cannot inherit to his mother in England.—*DOE d. DUROURE v. JONES* (1791), 4 Term Rep. 300; 100 E. R. 1031.

*Annotations*:—*Refd.* De Geer v. Stone (1882), 22 Ch. D. 243. *Mentd.* Cotterell v. Dutton (1813), 4 Taunt. 826; Tolson v. Kaye (1822), 6 Moore, C. P. 542; Rhodes v. Smethurst (1840), 6 M. & W. 351; R. v. Speyer (1916), 85 L. J. K. B. 1626, C. A.

**107. Real property descending on English wife of alien—Settlement on husband.**—On the marriage of S., an English lady, with C., a foreigner, certain reversionary stock to which the wife was entitled was settled in trust for the husband & wife for life, then for their children, with trusts over, & certain reversionary real estates of the wife were conveyed to trustees to sell, & the proceeds were settled in the same way as the reversionary stock. The settlement contained a declaration by the parties that all real & personal estate which should come to the wife during coverture should be settled on the same trusts as were declared of the reversionary stock, & the husband covenanted to do all acts, either alone or with the concurrence of the wife, necessary for so settling such property. He continued an alien, & two of the children of the marriage were aliens born, the others English-born. Certain real estates came to the wife during coverture by descent:—*Held*: (1) they were bound by the trusts of the settlement declared concerning the reversionary stock; (2) as a settlement in specie would defeat the common object of the parties by giving interests to the husband & foreign-born children in land which they could not hold, the property ought first to be sold & the purchase-money settled.—*MASTERS v. DE CROISMAR (MARQUIS)* (1848), 11 Beav. 184; 17 L. J. Ch. 466; 11 L. T. O. S. 530; 12 Jur. 762; 50 E. R. 787.

**108. Right to take dower—Alien wife of English husband.**—A Frenchwoman marrying an Englishman continues an alien & is not entitled to dower.—*DU BOUCHET (MARQUIS) v. CLAIMS ON FRANCE*

**108 i. Right to take dower—Wife of naturalised alien entitled to dower.**—*WHITE v. LAING* (1852), 2 C. P. 186.—*CAN.*

**108 ii. —**—The widow of an alien is entitled to dower in land, of which her husband has been seised during his lifetime.—*DAVENPORT v. DAVENPORT* (1858), 7 C. P. 401.—*CAN.*

**108 iii. — Plea of alien nê—How replication pleaded.**—*ROBINET v. LEWIS* (1829), Dra. 44.—*CAN.*



**Sect. 7.—Real property & chattels real: Subsects. 1 & 2.]**

COMRS., DE CONWAY'S (COUNTESS) CASE (1834), 2 Knapp, 364; 12 E. R. 522, P. C.

*Annotation*.—**Folld.** De Wall's Case (1848), 6 Moo. P. C. C. 216, P. C.

**109.** ———.]—At common law an alien woman married to an Englishman is incapable of taking dower.—**DE WALL'S (COUNT) CASE** (1848), 6 Moo. P. C. C. 216; 12 Jur. 145; 13 E. R. 666, P. C.

**110. Right to take by devise.]**—Devise to an heir of an alien is void.—**COLLINGWOOD v. PACE** (1664), 1 Vent. 413; 1 Lev. 59; O. Bridg. 410; 1 Sid. 193; 86 E. R. 262.

*Annotations*.—**Apprvd.** Doe d. Duroure v. Jones (1791), 4 Term Rep. 300. **Refd.** Thornby v. Fleetwood (1720), 1 Stra. 318; Scot v. Schawrtz (1739), 2 Com. 677; Lyons Corp'n. v. East India Co. (1836), 1 Moo. Ind. App. 175, P. C.; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895, H. L.; De Geer v. Stone (1882), 22 Ch. D. 243. **Mentd.** Blackborough v. Davis (1701), 1 P. Wms. 41; Cowper v. Cowper (1734), 2 P. Wms. 720; Evelyn v. Evelyn (1753), Amb. 191; Ferrer's Case (1760), 2 Eden, 373; Doe d. Winter v. Perratt (1826), 5 B. & C. 48; (1843), 9 Cl. & Fin. 606, H. L.; R. v. Manning (1849), 2 Car. & Kir. 887; Rittson v. Stordy (1855), 3 Eq. Rep. 1039; Muggleton v. Barnett (1856), 1 H. & N. 282; Kynnaid v. Leslie (1866), L. R. 1 C. P. 389; *Re* Hawkins, *Ex p.* Official Receiver, [1892] 1 Q. B. 890, C. A.; R. v. Speyer, [1916] 2 K. B. 858, C. A.

**111. ——— Licence.]**—An alien had enjoyed a pension in Holland, but fell into disgrace, & it was withdrawn, whereupon he sought refuge in England. By grant from the King he was enabled to take land. A devise was made to him "during his exile from his own native country" with a limitation over if he was restored to his country or died. War broke out between England & Holland, but peace was afterwards concluded. The alien continued to reside in this country, although there was no impediment to his return to Holland, save that there was no offer of kindness to him & his pension was disposed of to another:—**Held**: no such alteration in his condition as to amount to a restoration to his country & determine the devise.—**PAGET (PAGIT) v. VOSSIUS** (1677), 2 Mod. Rep. 223; 2 Lev. 191; 1 Vent. 325; T. Jo. 73; 3 Keb. 749, 779, 842; 1 Eq. Cas. Abr. 195; 86 E. R. 1039.

**112. ——— Not for own benefit.]**—**KNIGHT v. DUPLESSIS**, No. 100, *ante*.

**113. ——— Mixed fund.]**—A testator by his will directed all his property to be sold & converted into money, & after charging this mixed fund with his debts & legacies, gave the residue to aliens resident abroad, one of whom was his heir-at-law:—**Held**: (1) the interest in land & the pure personal estate must respectively be valued & bear their proportions of the debts & legacies; (2) the residue of the interest in land belonged to the Crown, the devisees being aliens & incapable of holding the lands devised to them.—**FOURDRIN v. GOWDEY** (1834), 3 My. & K. 383; 3 L. J. Ch. 171; 40 E. R. 146.

*Annotations*.—**Distd.** & **N.F.** De Hourmelin v. Sheldon (1838), 1 Beav. 79. In *Fourdrin v. Gowdey* there was no

**110 i. Right to take by devise.]**—Testator devised his property generally to his wife, an alien, for life, remainder to his children, who filed a bill to set aside the sale:—**Held**: the A.-G. was properly made a deft. in respect of the wife's interest, though no office was found.—**MURPHY v. O'SHEA** (1845), 8 I. Eq. R. 329; 2 Jo. & Lat. 422.—**IR.**

**115 i. Right to hold land—English rule excluded.]**—The English law incapacitating aliens from holding real property to their own use, & transmitting it by descent or devise, has never been introduced into the East Indies so as to create a forfeiture of lands held in Calcutta or the Mofussil by an alien, & devised by a will executed according to Stat. Frauds for charitable purposes.—**LYONS CORPN. v. EAST INDIA CO.** (1837),

1 Moo. Ind. App. 175 1 Moo. P. C. C. 175; 3 State Tr. N. S. 647; 18 E. R. 66, P. C.—**IND.**

**119. ——— Alien cestui que trust—Enforcement of trust for benefit of Crown.]**—A conveyance to an alien vests a legal estate in him until office found, & a conveyance in trust for him vests in him an equitable estate, until the Crown establishes its right by information in equity.—**DUMONCEL v. D.** (1848), 13 I. Eq. R. 92.—**IR.**

**a. Onus on party setting up alienage.]**—The law requires strict proof from the parties who set up an alienage as against title. *Semble*: it is not competent to a party, who goes in under a contract to purchase, to avail himself of the defence of alienage.—**WILLIAMS v. MYERS** (1871), 2 N. S. D. 157.—**CAN.**

estate devised to trustees for the purpose of enabling them to sell & convey, but only a direction to the exors. to sell; & the circumstances afforded a ground for the decision which does not exist in the present case (**LORD LANGDALE, M.R.**). **Distd.** Du Hourmelin v. Sheldon (1839), 4 My. & Cr. 525. The principles upon which Sir J. Leach proceeded, assuming them to be well founded, cannot govern the present case (**LORD COTTENHAM, C.**). **Refd.** Barrow v. Wadkin (1857), 24 Beav. 1. **Mentd.** A.-G. v. Southgate (1842), 12 L. J. Ch. 147; Boughton v. Boughton, Boughton v. James (1848), 1 H. L. Cas. 406, H. L.; Fairer v. Park (1876), 3 Ch. D. 309.

**114. ———.]**—A testatrix devised a real estate to trustees upon trust to sell, & to divide the produce of the sale amongst certain persons, some of whom were aliens. The estate was sold under a decree of the ct.:—**Held**: the Crown was not entitled to those shares of the produce of the sale which were payable to the aliens.—**DU HOURMELIN v. SHELDON** (1839), 4 My. & Cr. 525; 9 L. J. Ch. 25; 4 Jur. 116; 41 E. R. 203; *affg.* 1 Beav. 79.

*Annotations*.—**Consd.** Barrow v. Wadkin (1857), 24 Beav. 1. **Refd.** Talbot v. Jevers (1917), 117 L. T. 430, C. A. **Mentd.** Green v. Pulsford (1839), 2 Beav. 70.

**115. Right to hold land—Selsin of alien to uses.]**—**Held**: a feoffee, who was an alien, could not be seised to a use, since he was not compellable to perform the confidence.—**DILLON v. FRAINE** (1595), as reported in Poph. 70; 79 E. R. 1185.

**116. ——— Alien cestui que use—No distinction between copyhold & freehold.]**—**Held**: (1) an alien *cestui que use* could not at common law compel the feoffees to execute the use, & though the King was entitled to the use, he could not seize the land itself at law, but might have a decree in equity; (2) it was immaterial that the land was copyhold.—**R. v. HOLLAND** (1647), Aleyn, 14; 82 E. R. 889.

**117. ——— Discovery to ascertain fact of alienage.]**—By the known law of the land no alien born can take by grant, devise, or other purchase, any freehold or chattels real for his own benefit, but can & does, in such cases, take for the benefit of the Crown; yet, this disability being neither a penalty nor forfeiture, the alien cannot demur to an information filed for discovering the place of his birth in order to establish the fact of alienage.—**DUPLESSIS v. A.-G.** (1753), 1 Bro. Parl. Cas. 415; 1 E. R. 658; *affg.* A.-G. v. DUPLESSIS (1752), Park. 144.

*Annotations*.—**Consd.** Barrow v. Wadkin (1857), 24 Beav. 1. **Refd.** Rittson v. Stordy (1855), 3 Eq. Rep. 1039. **Mentd.** Finch v. Finch (1752), 2 Ves. Sen. 491; Muckleston v. Brown (1801), 6 Ves. 52; Stickland v. Aldridge (1804), 9 Ves. 516; Podmore v. Gunning (1836), 7 Sim. 644; Wallgrave v. Tebbs (1855), 2 K. & J. 313.

**118. ——— Alien husband—Selsin in right of wife.]**—In ejectment on the demise of G. M. & S. his wife, J. C., A. S. & E. his wife, S. B. & A. his wife, the female lessors of pltf. made out their title as co-heiresses of J. C. E.'s husband was an Egyptian, but no evidence could be given that his first name was A. The judge, at the trial, having allowed the record to be amended by striking out the name of A.:—**Held**: the fact that A. S. was an

**b. Right to hold & dispose.]**—Instrument of trust by D., an alien, to hold land unto trustees & their heirs, to the use of his wife for her life, remainder to the use of the trustees, their heirs & assigns, to the use of the lawful children of D., of the body of his wife begotten, & the heirs of their respective bodies, in equal shares as tenants in common:—**Held**: the conveyance, being made by an alien, was of no effect.—*Re* DOUYERE, *Ex p.* BELL (1853), 1 Q. S. C. R. 91.—**AUS.**

**c. ——— By will.]**—An alien's wife can, by will, dispose of her chattels real, situated in the United Kingdom, as a *femme sole*.—*In the Goods of* CHATEAUVILLARD (1863), 8 Ir. Jur. 197.—**IR.**



alien would not prevent the lessors of pltf. from recovering in the ejectment, as he was at the most only seised in right of his wife, a British subject.—*DOE v. MILLER v. ROGERS* (1844), 1 Car. & Kir. 390.

**119. — Alien cestui que trust—Enforcement of trust for benefit of Crown.]—***Semble*: where a *cestui que trust* of land was an alien, the Crown was not entitled to the benefit of the trust.—*BURNEY v. MACDONALD* (1845), 15 Sim. 6; 6 L. T. O. S. 1; 9 Jur. 588; 60 E. R. 518.

*Annotations*:—*Reid. Barrow v. Wadkin* (1857), 24 Beav. 1. *Mentd. Sharp v. St. Sauveur* (1871), 7 Ch. App. 343, L. C.; *Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237.

**120. Intestacy on failure of trust.]—**A testator, who died in 1827, by will made in 1826, devised real estate to trustees, in trust to convey it “to the heir-at-law of my heir-at-law now in America.” Testator had a nephew living in America, who was an alien, & who, but for being an alien, would at the date of the will have been testator’s heir presumptive, & would on his death have been his heir-at-law. This nephew died in 1833, leaving a son, also an alien:—*Held* (STUART, V.-C.): (1) the great-nephew was the person designated by the will, but being an alien, he could not take under the trust; (2) the Crown had no equity to take the benefit of a trust in favour of an alien; (3) the trustees could not hold for their own benefit, & the person who would have been entitled in case of an intestacy was entitled; (4) (on appeal) there was an intestacy as to the equitable interest in the devised real estate, & the decree must be affirmed on this ground, without any reference to the question whether the Crown could claim the benefit of a trust declared in favour of an alien.—*RITSON v. STORDY* (1856), 2 Jur. N. S. 410; 4 W. R. 438, L.J.J.; *affg.* (1855) 3 Sm. & G. 230.

*Annotations*:—*N.F. Barrow v. Wadkin* (1857), 24 Beav. 1; *Sharp v. St. Sauveur* (1871), 7 Ch. App. 343, L. C.

**121. —.]—***Held*: the ct. would enforce for the benefit of the Crown a trust of real estate created in favour of an alien, & the devise being valid, & there being a *cestui que trust*, who could take but not hold, the Crown became entitled beneficially, & not the trustee or heir-at-law.—*BARROW v. WADKIN* (1857), 24 Beav. 1; 27 L. J. Ch. 129; 29 L. T. O. S. 320; 3 Jur. N. S. 679; 5 W. R. 695; 53 E. R. 257.

*Annotation*:—*Folld. Sharp v. St. Sauveur* (1871), 7 Ch. App. 343, L. C.

**122. —.]—**Lands were conveyed in Mar., 1862, by two tenants in common, L. & S., to a trustee upon trust to sell & to hold the proceeds in trust for L. & S. in equal shares, & as to the share of S. for her separate use. The indenture contained powers of exchange & partition; & it was declared that until the sale the trustee should hold the lands upon trust as to one moiety for L., & as to the other moiety for S. for her separate use. In Apr., 1862, it was agreed that the trustee should allot the lands described in the first schedule to L., & those described in the second schedule to S., & should stand possessed of the allotments upon the same trusts as were by the deed of Mar., 1862, declared of the respective moieties, but without prejudice to the powers vested in the trustee by that indenture. S. was a married woman, & her husband was an alien. By her will, made in Aug.,

1862, she gave all her landed property situated at E., being her allotment under the agreement of Apr., 1862, which still remained unsold, to her husband for life, with remainder over:—*Held*: (1) the trust for sale had been put an end to by the agreement of Apr., 1862, & the property passed as real estate under the will of S.; (2) the Ct. of Ch. would enforce in favour of the Crown a trust of land for an alien created before Naturalisation Act, 1870 (c. 14).

The law does not recognise the possibility of an alien acquiring real estate by act of law; for instance, an alien cannot take as heir or as dowress, the reason assigned being that the law would not do so useless a thing as to cast that on a person which he cannot hold; but at the same time it is undisputed law that gifts may be made to aliens by will, or feoffment, use, covenant to stand seised, or the like, so that a purchase may undoubtedly be made by an alien in his own name, or may be made in trust for him. In that state of things the law says that the title or interest so acquired shall be held, not for his own use, but for the use of the Crown; so that if it be a legal estate he holds it until office found for the Crown, & when office is found that act relates back to the time when the estate vested in the alien, & then it becomes vested in the Crown (LORD HATHERLEY, C.).—*SHARP v. ST. SAUVEUR* (1871), 7 Ch. App. 343; 41 L. J. Ch. 576; 26 L. T. 142; 20 W. R. 269, L. C.

*Annotations*:—*Apld. De Geer v. Stone* (1882), 22 Ch. D. 243. *Mentd. Perry v. Eames, Salaman v. Eames, Mercers' Co. v. Eames*, [1891] 1 Ch. 658; *Re Grimthorpe, Beckett v. Grimthorpe*, [1908] 1 Ch. 666.

**123. Vesting order—Correction of mistake in.]—**By an order made under Trustee Act, 1850 (c. 50), real estate was inadvertently vested in an alien. The ct. declined varying the order, by inserting the name of a natural-born subject, without the consent of the Crown, but the order was made upon a re-hearing.—*Re GIRAUD* (1861-3), 32 Beav. 385; 9 Jur. N. S. 862; 11 W. R. 607; 55 E. R. 151.

—**Effect of Naturalisation Act, 1870 (c. 14).]**  
—*See* No. 129, *post*.

## SUB-SECT. 2.—UNDER STATUTE.

*See* note, p. 121, *ante*.

**124. Right to take by descent—Children of natural-born subjects—British Nationality Act, 1730 (c. 21)—British Nationality Act, 1772 (c. 21).]**  
—A., by birth an Englishman, emigrated to the United States of America in 1784, after the recognition of their independence by the Treaty of 1783, & took the oaths of obedience to the American Govt. & of abjuration of all other allegiance. In 1787 he married an American woman, & a son of that marriage, B., was born in the United States of America. B. had a son, C., also born in America, out of the Queen’s dominions:—*Held*: (1) C. was capable of inheriting real estate as a British subject within the above Acts; (2) under the above Act of 1772 a party would be allowed a reasonable time after his title had accrued to do the acts required by the Act; (3) the privileges which the above Acts conferred were privileges of the children, & not of the father, & acts intended by a British-born subject to have the effect of acts of abandonment or

## PART II. SECT. 7, SUB-SECT. 2.

**124 i. Right to take by descent—Children of natural-born subjects—British Nationality Act, 1730 (c. 21)—British Nationality Act, 1772 (c. 21).]**  
A domiciled citizen of the United States, who had been born in America after the Treaty of Independence, was an

heir-substitute of entail to a Scotch estate. His father was born in the British dominions in America before the war, & his grandfather was born in Scotland, having subsequently established himself in America. Both the father & grandfather adhered to the United States as their country after the Treaty, & lived & died citizens of the

States. The succession to the Scotch estate having opened to the heir-substitute:—*Held*: (1) he was incapable from alienage of inheriting; (2) his incapacity as an alien was not removed by the above Acts or by the American Treaty of 1794.—*DUNDAS v. DUNDAS* (1839), 2 Dunl. (Ct. of Sess.) 31.—**SCOT.**

**Sect. 7.—Real property & chattels real: Sub-  
8. Part III. Sect. 1: Sub-sect 1.]**

abjuration of his rights in that character did not deprive his children of the benefit of the above Acts, unless such acts brought them within the disqualifying provisions of those statutes.—*FITCH v. WEBER* (1847), 6 Hare, 51; 17 L. J. Ch. 73; 10 L. T. O. S. 284; 12 Jur. 76; 67 E. R. 1077.

*Annotation:—Reid. Re Bourgoise* (1889), 41 Ch. D. 310, C. A.

**125. ——— British Nationality Act, 1772 (c. 21).]**—The words in s. 3 of the above Act are to be read "aliens' duties, customs & impositions," not "aliens, duties, customs, & impositions." The grandchild of a natural-born subject, born out of the Queen's allegiance, is entitled to the benefit of that stat. in regard to holding lands as a natural-born subject, although he has not complied with the formalities specified in the above sect.—*BARROW v. WADKIN* (1857), 24 Beav. 327; 27 L. J. Ch. 129; 53 E. R. 384.

*Annotation:—Mentd. Sharp v. St. Sauveur* (1871), 7 Ch. App. 343, L. C.

**126. ——— American citizens—37 Geo. 3, c. 97—Treaty of 1794.]**—Under a treaty of 1794 between Gt. Britain & America & 37 Geo. 3, c. 97, American citizens, who held lands in Gt. Britain on Oct. 28, 1795, & their heirs & assigns, are at all times to be considered, so far as regards these lands, not as aliens, but as native subjects of Gt. Britain.—*SUTTON v. SUTTON* (1830), 1 Russ. & M. 663; 8 L. J. O. S. Ch. 161; 39 E. R. 255.

Other cases under the Treaty of 1794, see Nos. 22, 124, 124 i., ante.

**127. Right to take leases—Alien artificers—32 Hen. 8, c. 16.]**—If an alien artificer takes possession of a dwelling-house under an agreement in writing, which provides for the granting of a future lease, the instrument being illegal under the above Act, the lessor may enter at any time & eject the tenant, although the instrument do not amount to a lease.—*LAPIERRE v. M'INTOSH* (1839), 9 Ad. & El. 857; 1 Per. & Dav. 629; 8 L. J. Q. B. 112; 3 Jur. 123; 112 E. R. 1439.

**128. ———.]**—The above Act does not make void an assignment of a lease to an alien artificer, for if the Act were extended to the case of an assignment of a lease, then the lessor, without any fault of his, would lose his remedy against the assignee.—*WOOTTON v. STEFFENONI* (1843), 12 M. & W. 129; 13 L. J. Ex. 72; 2 L. T. O. S. 151; 152 E. R. 1139.

**129. Right to hold & dispose—Naturalisation Act, 1870 (c. 14).]**—The object of the above Act was only to remove the disabilities of alienage as regards the holding & disposing of property. According to the common law aliens could acquire real property in England by purchase, but could not hold it against the Crown. The Act enabled them to hold it against the Crown & to dispose of it. But, notwithstanding the words "in the same

**125 i. ——— British Nationality Act, 1772 (c. 21).]**—*DAVIES v. LYNCH* (1868), 4 I. R. C. L. 570.—IR.

**d. Right to take by devise—Children of natural-born subjects—British Nationality Act, 1772 (c. 21).]**—A., who was born in Ireland, emigrated to Spain, where he married a Spanish woman, by whom he had several children, the eldest of whom was born in 1808 & died in 1845, leaving three sons. A. died in 1847 intestate, leaving the three sons of J. (the eldest of whom, R., was his heir-at-law), his second son, F., & several other children & grandchildren him surviving. A. had been in possession, by receipt of rent, of certain lands in Ireland up to the time of his death. In 1864, F. died, having made a will, whereby he devised the lands to a

daughter of A., & two children of another daughter of A. by a Spanish husband. In ejectment by the devisees of F. for the recovery of the possession of the lands, none of plffs. having complied with the above Act, s. 3:—*Held*: (1) plffs. were entitled to recover; (2) the Act of Union had extended to Ireland 7 Anne, c. 5, & British Nationality Acts, 1730 (c. 21) & 1772 (c. 21), & the right of the Irish alien-born grandchild to hold lands in Ireland was subject to the condition of the Act of 1772, s. 4.—*DAVIES v. LYNCH* (1868), 4 I. R. C. L. 570; *affd.* (1871), 19 W. R. 606.—IR.

## PART II. SECT. 8.

**134 i. Parliamentary franchise.]**—An alien, whose father had taken the oath

manner in all respects as by a natural-born British subject," it did not confer upon aliens particular privileges given by a former Act to British subjects. Hence a will made according to English law by an alien domiciled abroad, but whose domicile of origin was English, was not entitled to the protection given by Wills Act, 1861 (c. 114), to such a will when made by a British subject.—*BLOXAM v. FAVRE* (1884), 9 P. D. 130; 53 L. J. P. 26; 50 L. T. 766; 32 W. R. 673, C. A.

*Annotations:—Reid. In the Goods of Huber*, [1896] P. 209.  
*Mentd. In the Goods of Groos*, [1904] P. 269.

## SECT. 8.—RIGHT TO HOLD OFFICE AND FRANCHISE.

**130. Benefice—Entitled at common law.]**—By the common law an alien was capable of a benefice in England, for the church is one throughout the whole world; but at this day that cannot be without the King's licence.—*ANON.* (1469), Jenk. 130; 145 E. R. 91.

**131. ——— Contrary to statute.]**—If the King present a Frenchman or a Spaniard, they shall not hold the benefice within this realm, for that is contrary to a special Act of Parliament (*COOK, C.J.*).—*WALLER'S CASE* (1610), Godb. 179; 78 E. R. 109.

**132. Civil office of trust—Constable of London ward.]**—A foreigner was naturalised by an Act of Parliament, which provided he should not thereby be enabled to take any office or place of trust, either civil or military:—*Held*: the office of constable of a ward in London was a civil office of trust, & a foreigner so naturalised was incapable of holding it.—*R. v. DE MIERRE* (1771), 5 Burr. 2787; 98 E. R. 463.

*Annotations:—Consd. Drevon v. Drevon* (1864), 34 L. J. Ch. 129. *Reid. R. v. Manning* (1849), 2 Car. & Kir. 887. C. C. R.

**133. Churchwarden.]**—An alien is disqualified from being elected to the office of churchwarden.—*ANTHONY v. SEGER* (1789), 1 Hag. Con. 9.

*Annotations:—Apld. Adey v. Theobald* (1836), 1 Curt. 417. *Consd. R. v. Sarum*, [1916] 1 K. B. 466. *Reid. Harrison v. Barrett* (1876), Trist. 43. *Mentd. Campbell v. Maund* (1836), 2 Har. & W. 457, Ex. Ch.; *Story v. Cork* (1848), 6 Notes of Cases, Supp. 33; *Westerton v. Davidson* (1854), 1 Ecc. & Ad. 385; *St. Michael, Oxford (Churchwardens) v. Luff* (1858), 7 W. R. 20; *Tear v. Freebody* (1858), 4 C. B. N. S. 228; *R. v. St. Matthew's, Bethnal Green Vestry* (1875), 32 L. T. 558; *R. v. Wimbledon L. B.* (1882), 8 Q. B. D. 459, C. A.

**Executor.]**—See EXECUTORS & ADMINISTRATORS.  
**Guardian.]**—See INFANTS & CHILDREN.

**134. Parliamentary franchise.]**—In absence of evidence of naturalisation an alien is not entitled to vote.—*MIDDLESEX ELECTION CASE (BARBRE'S CASE)* (1804), 2 Peck. 118.

**135. ——— Denizen—Freehold acquired before grant.]**—A foreigner to whom letters of denization had been granted:—*Held*: entitled to vote in

of allegiance on obtaining the patent for his land under 9 Geo. 4, c. 21:—*Held*: not qualified to vote.—*HEALEY'S VOTE* (1871), H. E. C. 129.—CAN.

**134 ii. ———.]**—Naturalised subjects are not required to procure certificates of naturalisation in order to entitle them to vote.—*WEST ELLEN (U. C.)*, 9 L. C. L. J. 330.—CAN.

**e. Licence.]**—A Japanese is entitled to a liquor licence under Vancouver Incorporation Act, 1900.—*Re KANAMURA* (1904), 10 B. C. R. 354.—CAN.

**f. Restrictions on Chinese & Japanese—Right of provincial legislatures to impose.]**—See DEPENDENCIES, COLONIES & BRITISH POSSESSIONS: TRADE & TRADE UNIONS.



respect of a freehold, although acquired before the grant.—**MIDDLESEX ELECTION CASE (SOLOMONS' CASE)** (1804), 2 Peck. 117.

**136.** —.]—It was alleged at the trial of a petition that a voter was an alien. Although no objection had been taken to his registration, the committee decided to inquire whether he was an alien or not.—**READING ELECTION CASE (DE BARTHES CASE)** (1838), Falc. & Fitz. 553.

**137. Member of House of Commons—Denizen.**—]—An alien made a denizen of England by letters patent, but not naturalised by Act of Parliament, is not eligible for election to Parliament.—**MONMOUTH ELECTION CASE** (1624), Glanv. El. Cas. 120.

**138.** — **Necessity of proving British Nationality—Jew—Evidence.**—]—Where it was sought to establish the right of a person born abroad of Jewish parents to sit in Parliament:—*Held*: (1) proof must be given that either his father or his grandfather was born within the legiance & dominions of the Crown; (2) in absence of a higher class of testimony, the records in a family Bible could be received in evidence of date & place of birth.—**BANBURY BOROUGH CASE** (1806), 14 L. T. 308.

**139.** —.]—An alien is ineligible to become a member of the House of Commons.—**TIPPERARY CASE** (1875), 3 O'M. & H. 19.

**140.** — **Act of Settlement, 1700 (c. 2)—Effect of private Act.**—]—A private Act of 1807 for the naturalisation of F. recited in the preamble that F. had already had granted to him all rights & capacities of a natural-born British subject, except that of being a member of the Privy Council, or of Parliament. . . . that it was highly desirable & of great importance he should hold & enjoy all rights, privileges, & capacities of a natural-born subject of Her Majesty, & went on to enact that F. "shall be naturalised, & shall have, hold, & enjoy all rights, privileges, & capacities, whatsoever, which he could, would, or might have had, held, or enjoyed, if he had been born within the United Kingdom, & had

been a natural-born subject of Her Majesty":—*Held*: the private Act conferred on F. those rights, privileges, & capacities from which he had been excluded before, & notwithstanding s. 3 of the above Act of 1700, F. was capable of being a member of Parliament.—**CHELTEMHAM BOROUGH CASE** (1880), 3 O'M. & H. 86.

**141. House of Lords—Writ of summons dormant pending removal of alienage.**—]—When the heir to a peerage is an alien, the right to a writ of summons does not descend, but remains dormant until such time as the disqualification is removed.—**NEWBURGH PEERAGE CASE** (1858), 90 Lords Journal, 491.

**Jury—Right to sit on.**—]—*See* CRIMINAL LAW & PROCEDURE; JURIES.

**142. Privy councillor—Act of Settlement, 1700 (c. 2)—Naturalisation Act, 1870 (c. 14)—British Nationality & Status of Aliens Act, 1914 (c. 17).**—]—Resp., who was born abroad of foreign parents, became a naturalized British subject in 1892, & was made a member of the Privy Council in 1909:—*Held*: the effect of s. 7 of the above Act of 1870 was impliedly to repeal s. 3 of the above Act of 1700, & to render resp., after his naturalisation, capable of being a member of the Privy Council, & s. 3 (2) of the above Act of 1914 had not revived in the case of a naturalised alien the disqualification for membership of the Privy Council contained in s. 3 of the above Act of 1700.—*R. v. SPEYER*, [1916] 2 K. B. 858; 85 L. J. K. B. 1626; 115 L. T. 89; 32 T. L. R. 686; 60 Sol. Jo. 707, C. A.

**143. Trustee.**—]—Although no instance was known to the ct. of an appointment of an alien trustee, yet, since all the parties were living in France, & it was naturally very difficult to find Englishmen to undertake the office, it appeared to be a matter of necessity, & the ct. made the appointment.—*Re HILL'S TRUSTS*, [1874] W. N. 228.

*See, further, TRUSTS & TRUSTEES.*

## Part III.—Aliens in Time of War.

### SECT. 1.—WHO IS AN ALIEN ENEMY.

#### SUB-SECT. 1.—DEFINITIONS AND GENERAL RULES.

**144. Definition of "alien enemy."**—]—An alien enemy is a subject of a State at war with Great Britain.—**SYLVESTER'S CASE** (1703), 7 Mod. Rep. 150; 87 E. R. 1157.

*Annotations*:—*Reid*. Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, *Re Merton's Patents*, [1915] 1 K. B. 857, C. A.; *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. *But see* Nos. 154, 155, 157, *post*.

**145. Enemy distinguished from traitor.**—]—The King's lieges cannot be styled the King's enemies, but traitors; for enemies are those who are outside the allegiance.

If a liegeman of the King unites himself beyond sea with the King's enemies & afterwards comes to England & sets a house on fire, he would not be regarded in England as a prisoner, nor would he be held to ransom as an enemy would be; but he would be regarded as a traitor to the King.—**THE MARSHALL OF THE KING'S BENCH (CASE OF)** (1455), Y. B., 33 Hen. VI., fo. 1, pl. 3.

*Annotation*:—*Reid*. Calvin's Case (1609), 7 Co. Rep. 1a.

**146. Proof required to establish enemy status.**—]—To prove a person was an alien enemy at the time of action brought, it is not enough to show that he was some time before domiciled in a territory which has become hostile, without showing that

he was a native of that territory, or had continued to reside there until the time of action brought.—**HARMAN v. KINGSTON** (1811), 3 Camp. 150.

*Annotations*:—*Mentd.* Gledstones v. Royal Exchange Assce. Corpn. (1864), 5 B. & S. 797; *Ionides & Chapeaurouge v. Pacific Insce.* (1871), L. R. 6 Q. B. 674.

**147. Factors determining status—Religion—Infidels.**—]—All infidels are in law *perpetui inimici* (for the law presumes not that they will be converted, that being *remota potentia*), for between them, as with devils, whose subjects they be, & the Christian, there is perpetual hostility & can be no peace.—**CALVIN'S CASE** (1608), 7 Co. Rep. 1a; 2 State Tr. 559; Moore, K. B. 790; Jenk. 306; 77 E. R. 377.

*Annotations*:—*Consd.* Omychund v. Barker (1744), 1 Atk. 21. *Reid*. Lyons Corpn. v. East India Co. (1836), 1 Moo. Ind. App. 175, P. C. *Mentd.* Parliament in Ireland, Case of (1613), 12 Co. Rep. 350; *R. v. Hampden* (1637), 3 State Tr. 826; *Collingwood v. Pace* (1661), O. Bridg. 410; *Manby v. Scot* (1663), 1 Keb. 361; *Thomas v. Sorrell* (1672), 3 Keb. 143; *Anon.* (1678), Freem. K. B. 249; *R. v. Tucker* (1692), 4 Mod. Rep. 162; *R. v. Knowles* (1693), 12 Mod. Rep. 55; *Loddington v. Kime* (1695), 3 Lev. 431; *Owen v. Saunders* (1696), 1 Ld. Raym. 158; *Scot v. Schawrtz* (1739), 2 Com. 677; *R. v. Cowle* (1759), 2 Burr. 834; *Campbell v. Hall* (1774), 1 Cowp. 204; *Queen Caroline's Claim to be Crowned* (1821), 1 St. Tr. N. S. 949, P. C.; *Ruding v. Smith* (1821), 2 Hag. Con. 371; *Jephson v. Riera* (1835), 3 Knapp, 130, P. C.; *Lane v. Bennett* (1836), 1 M. & W. 70; *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895, H. L.; *Brunswick v. Hanover* (1844), 6 Beav. 1; *Taylor v. Best* (1854), 14 C. B. 487; *Rittson v. Stordy* (1855), 1 Jur. N. S. 770; *R. v. Lopez*, *R. v. Sattler* (1858), Dears. & B. 525, C. C. R.; *Ex p. Anderson* (1861), 3 E. & E.



**Sect. 1.—Who is an alien enemy: Sub-sects. 1 & 2.]**

487; *Ex p. Brown* (1864), 5 B. & S. 280; *Low v. Routledge* (1865), 1 Ch. App. 42; *The Franconia* (1876), 2 Ex. D. 63, C. C. R.; *De Geer v. Stone* (1882), 22 Ch. D. 243; *Re Stepney Petn., Isaacson v. Durant* (1886), 17 Q. B. D. 54; *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821; *Gibson v. Gibson*, [1913] 3 K. B. 379; *R. v. Speyer*, [1916] 2 K. B. 858, C. A.; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Bowman v. Secular Soc.*, [1917] A. C. 406, H. L.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.; *R. v. Francis*, [1918] 1 K. B. 617.

**148.** —.—.—.]—Turks & infidels are not *perpetui inimici*, nor is there a particular enmity between them & us; but this is a common error founded on a groundless opinion of Brooke, J.; for though there is a difference between our religion & theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, & of the same kind as we are, & it would be a sin in us to hurt their persons.—*ANON.* (1697), 1 Salk. 46; 91 E. R. 46.

*Annotation* :—*Refd.* *Omychund v. Barker* (1744), 1 Atk. 21.

**149.** —.—.—.]—The notion that infidels are perpetual enemies, though advanced by so great a man as Sir Edward Coke, is contrary to religion, common sense, & common humanity, & I think the devils themselves, to whom he has delivered them, could not have suggested anything worse (*WILLES, J.*).—*OMYCHUND v. BARKER* (1744), 1 Atk. 21; *Willes*, 538; 2 Eq. Cas. Abr. 397, pl. 15; *Ridg. temp. H.* 285; 1 Wils. 84; 26 E. R. 15.

*Annotations* :—*Mentd.* *East India Co. v. Campbell* (1749), 1 Ves. Sen. 246; *Atcheson v. Everitt* (1775), 1 Cowp. 382; *R. v. Gilham* (1795), 1 Esp. 285; *Spain v. Hullett* (1833), 7 Bli. N. S. 359; *Boelen v. Melladew* (1851), 10 C. B. 898; *Miller v. Salomons* (1852), 7 Exch. 475; *Parkes v. Parkes* (1852), 2 Rob. Eccl. 518; *Salomons v. Miller* (1853), 8 Exch. 778, Ex. Ch.; *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19; *Maden v. Catanach* (1861), 5 L. T. 288; *A.-G. v. Bradlaugh* (1884), Cab. & El. 440.

**150.** —.—.—.]—**Time & occupation.**—Time is the grand ingredient in constituting domicile (*i.e.*, commercial domicile for purposes of prize law & trading with the enemy); in most cases it is unavoidably conclusive. Even residence in a country for a special purpose—such as to carry on a lawsuit—may, if prolonged, become a general residence. Suppose a man comes into a belligerent country at or before the beginning of a war, it is reasonable not to bind him too soon to an acquired character, & to allow him a fair time to disengage himself; if he continues to reside during a good part of the war, contributing, by payment of taxes, etc., to the strength of that country, he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against fraud & abuses of masked, pretended, original & sole purposes of a long-continued residence. Time is the great agent in this matter; it is to be taken in a compound ratio of time & occupation, with a great preponderance on the article of time. It cannot happen, but with few exceptions, that length of time shall not constitute a domicile.

If a house of trade sends a partner to France, although with an intention of not mixing in any other trade than the business of that house, such a circumstance, connected with a permanent residence in France, would impress a national character upon him.—*THE HARMONY* (1800), 2 Ch. Rob. 322.

*Annotations* :—*Refd.* *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730; *A.-G. v. Kent* (1862), 1 H. & C. 12; *Re Grove, Vaucher v. Treasury Solicitor* (1888), 40 Ch. D. 216, C. A.

**151.** —.—.—.]—**Place of residence & carrying on trade.**—Persons resident in a country carrying on trade,

by which both they & the country are benefited, are to be considered as subjects of that country, & are considered so by the law of nations, at least so far as by that law to subject their property to capture by a country at war with that in which they live.

An American, who resides with his family in England, is so far considered as a British subject that if on an insurance a ship of his is warranted to be American property, there is a breach of warranty, & on capture the loss cannot be recovered on the policy.—*TABBS v. BENDELACK* (1801), 3 Bos. & P. 207, n.; 4 Esp. 108; 127 E. R. 114, n.

*Annotation* :—*Mentd.* *R. v. Bjornsen* (1865), 13 W. R. 664.

**152.** —.—.—.]—Mere residence of a British subject in an enemy country at the outbreak of war, & his remaining there subsequently, is not sufficient to affect him with the disabilities attaching to an enemy. There must be, in addition, either a trading in the enemy country, or evidence of adhering to the enemy.

A debt due to two partners:—*Held*: good to support a commission of bkpcy., notwithstanding one of the partners was resident in an enemy country, such residence not being shown to be an adherence to the enemy.—*ROBERTS v. HARDY* (1815), 3 M. & S. 533; 2 Rose, 457; 105 E. R. 710.

*Annotations* :—*Consd.* *Willison v. Patteson* (1817), 1 Moore, C. P. 133; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**153.** —.—.—.]—In time of war a person is considered as belonging to that country where he is resident & carries on his trade.

A Russian vessel sailed from Cadiz on Feb. 27 bound to Abo with a cargo of salt, olive oil, etc. On Mar. 2 the shipper, a British subject, resident at Cadiz, made an affidavit before the British consul that the olive oil was his property. The vessel was captured on Apr. 15. A claim was made on behalf of the shipper for this olive oil. Further proof allowed.—*THE ABO* (1854), 1 Ecc. & Ad. 347; *Spinks*, 42; 24 L. T. O. S. 5; 18 Jur. 965.

*Annotation* :—*Mentd.* *The Miramichi*, [1915] P. 71.

**154.** —.—.—.]—At common law the question whether a man is to be treated as an alien enemy for the purpose of his contracts, rights of suit, & the like, does not depend upon his nationality, or even upon his true domicile, but upon whether he carries on business in England or not; if he does, it is not illegal, even during war, to have business dealings with him in England in respect of the business which he carries on there. The same thing is true of a co. which has a head office in an enemy country, but a branch office in England, in respect of business transactions with such branch office.—*INGLE (W. L.), LTD. v. MANNHEIM CONTINENTAL INSURANCE CO.*, [1915] 1 K. B. 227; 84 L. J. K. B. 491; 112 L. T. 510; 31 T. L. R. 41; 59 Sol. Jo. 59.

**155.** —.—.—.]—The test of a person being an alien enemy is not his nationality, but the place in which he resides or carries on business. A person voluntarily resident in, or who is carrying on business in, an enemy's country is an alien enemy.—*PORTER v. FREUDENBERG, KREGLINGER v. SAMUEL (S.) & ROSENFELD, Re MERTEN'S PATENTS*, [1915] 1 K. B. 857; 84 L. J. K. B. 1001; 112 L. T. 313; 31 T. L. R. 162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R. P. C. 109, C. A.

*Annotations* :—*Consd.* *Schaffenius v. Goldberg*, [1916] 1 K. B. 284, C. A. *Refd.* *R. v. Kupfer*, [1915] 2 K. B. 321, C. C. A.; *Re Sutherland, Bechoff, David v. Bubna* (1915), 31 T. L. R.

**PART III. SECT. 1, SUB-SECT. 1.**

**151 i. Factors determining status—Place of residence.**—A foreigner living in Quebec is not necessarily an enemy because he was born in a country at war with Great Britain.—*VIOLA v. MACKENZIE, MANN & Co.* (1915), Q. R. 24 K. B. 31; 24 D. L. R. 208.—*CAN.*

248; *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268; *Scotland v. South African Territories* (1917), 33 T. L. R. 255; *Tingley v. Müller*, [1917] 2 Ch. 144. **Mentd.** *Act. fur Anilin v. Levinstein* (1915), 84 L. J. Ch. 842, C. A.; *Rombach Baden Clock Co. v. Gent* (1915), 84 L. J. K. B. 1558; *Re Wilson, Ex p. Marum* (1915), 113 L. T. 1116; *Zinc Corpn. v. Hirsch* (1915), 85 L. J. K. B. 565, C. A.; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *Uhlig v. Uhlig* (1916), 33 T. L. R. 63; *Re Hilckes*, [1917] 1 K. B. 48; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260.

**156. Not necessarily his own business.**—Pltf. had been employed by defts. as manager of their business in German South-West Africa before the European War, & when it broke out he was interned by the Germans, & he was kept in internment until the territory was conquered by the British. In an action by pltf. to recover from defts. his salary for the period of his internment:—**Held**: pltf. during his residence in an enemy State was in law an alien enemy, & he could not recover.

Any one who voluntarily resides in a hostile State, or who carries on business in a hostile State, is an alien enemy with regard to the State whose subject he was when war broke out. There is no authority to show that a man must be carrying on his own business & not that of another. If the residence is for carrying on business, that is enough (*DARLING, J.*).—*SCOTLAND v. SOUTH AFRICAN TERRITORIES, LTD.* (1917), 33 T. L. R. 255.

#### SUB-SECT. 2.—ENEMY SUBJECTS.

**157. Subject of enemy country treated as subject of Crown.**—A person may be treated as a subject of the Crown, although he is in fact the subject of an enemy State.—*PORTER v. FREUDENBERG, KREGLINGER v. SAMUEL (S.) & ROSENFELD, Re MERTEN'S PATENTS*, [1915] 1 K. B. 857; 84 L. J. K. B. 1001; 112 L. T. 313; 31 T. L. R. 162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R. P. C. 109, C. A.

**Annotations**:—**Refd.** *Re Wilson, Ex p. Marum* (1915), 113 L. T. 1116; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268; *Schaffinius v. Goldberg*, [1916] 1 K. B. 248; *Tingley v. Müller*, [1917] 2 Ch. 144. **Mentd.** *Re Sutherland, Beehoff, David v. Bubna* (1915), 31 T. L. R. 248; *Act. fur Anilin v. Levinstein* (1915), 84 L. J. Ch. 842, C. A.; *Zinc Corpn. v. Hirsch* (1915), 85 L. J. K. B. 565; *Rombach Baden Clock Co. v. Gent* (1915), 84 L. J. K. B. 1558; *R. v. Kupfer*, [1915] 2 K. B. 321; *Halsey v. Lowenfeld*, [1916] 1 K. B. 143; *Uhlig v. Uhlig* (1916), 33 T. L. R. 63; *Re Hilckes*, [1917] 1 K. B. 48; *Scotland v. South African Territories* (1917), 33 T. L. R. 255; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260.

**158. Taking oath of allegiance to neutral—Obtaining burgher's certificate.**—Change of nationality of a man is established in the Prize Cts. of belligerent nations, if he has abandoned his previous national character & taken up his abode with the intention of remaining in the country of which he claims to be a subject. But an enemy does not lose his enemy character by merely taking the oath of allegiance to a neutral sovereign, & obtaining a burgher's certificate.—*THE JOHANN CHRISTOPH* (1854), 2 Ecc. & Ad. 2; Spinks, 60; 24 L. T. O. S. 52.

**Annotation**:—**Mentd.** *The Soglasie* (1854), Spinks, 104.

**159. Mere formalities under neutral law—No real change of national character.**—A vessel captured on a voyage from Cronstadt to Leith carried at the time the Danish flag, but it was admitted that a short time previously she sailed under the Russian flag & was the property of a Russian merchant. She had in the meantime been sold by the master under a power of attorney from the owner to a merchant residing at Messina, alleged to be a Danish subject:—**Held**: (1) the new owner as a

merchant resident at Messina was not entitled to a Danish character, & as a trader he was a subject of the King of the Two Sicilies; (2) he having re-sold the vessel to the master, a Prussian by birth & a Russian by national character, who within the space of two or three days became transformed into a Danish subject, the latter could not claim restitution of the vessel; (3) by the law of nations it was not competent to any State by its own particular regulations at once to change a national character to the detriment of other States; (4) there had been no change of residence, nothing to alter the national character, except some formal documents which, according to the promulgation of the law of Denmark by its constituted authorities, would be ineffectual to confer a national character upon the ship & consequently upon the master.—*THE SOGLASIE* (1854), 2 Ecc. & Ad. 101; Spinks, 104; 1 Jur. N. S. 47.

**Annotations**:—**Consd.** *The Odessa* (1855), Spinks, 208. **Expld.** *The Otto & Olaf* (1855), Spinks, 257.

**160. Residing in England—Subsequent admission as burgher of neutral country.**—A's son, B., was born at Libau, but went to England & carried on business there. He wound up his affairs in England, & took a country house at Altona, where he was admitted a burgher, & resided at Hamburg:—**Held**: (1) until B. acquired another mercantile national character he had, being resident at Libau, inherited that of his father, & remained a Russian until he came to England; (2) the residence at Hamburg was equivalent to a residence at Altona, & though while in England B. was British, he had acquired a Danish character.—*THE BALTICA* (1855), Spinks, 264; 1 Jur. N. S. 1025; *reversd.* on another point (1857), 11 Moo. P. C. C. 141, P. C.

**Annotations**:—**Expld.** *The Benedict* (1855), Spinks, 314. **Consd.** *The Tommi, The Rothersand*, [1914] P. 251, C. A.; *The Southfield* (1915), 85 L. J. P. 78. **Mentd.** *The Ariel* (1857), 29 L. T. O. S. 133, P. C.; *The United States* (1916), 13 Asp. M. L. C. 568; *The Kronprinsessan Margareta* (1917), 14 Asp. M. L. C. 31.

— **Formal discharge from enemy nationality—No naturalisation—Habeas corpus.**—Applt. was born in Germany in 1883, & in 1898 went to South America. After two or three years he came to England, & resided there till the outbreak of war with Germany. Owing to the war, he was interned as an alien enemy, whereupon he moved for a writ of *habeas corpus* on the ground that he was not an alien enemy & had no nationality. By North German Nationality Law of 1870, as extended by a stat. of 1873 to the whole German Empire, Germans who remained abroad for an uninterrupted period of ten years thereby lost their nationality. By a German military stat. of 1874, Germans, who had lost their nationality & had not acquired any other, were bound on returning to Germany, in order to take up permanent residence there, to present themselves for military service, provided they were not bound to serve in time of peace after the completion of their thirty-first year, & by a stat. of 1913 a person who had lost his nationality might recover it:—**Held**: (1) applt. had not so completely lost his nationality that he could be treated for the purposes of the application as having ceased to be a German citizen; (2) the application failed. **Qu.** whether the cts. will recognise a person as having no nationality.—*Ex p. WEBER*, [1916] A. C. 421; 85 L. J. K. B. 944; 114 L. T. 214; 80 J. P. 249; 32 T. L. R. 312; 60 Sol. Jo. 306; 25 Cox, C. C. 258, H. L.

**Annotation**:—**Folld.** *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268. **Consd.** *R. v. Knockaloe Camp Commandant* (1917), 87 L. J. K. B. 43.

**162.** ———— **Applt.** was born at Mannheim, in Germany, in 1868, his parents being German subjects. He resided in Germany until 1889, serving a year in the German army. In 1889 he came to England & resided & carried on busi-



**Sect. 1.—Who is an alien enemy: Sub-sects. 2 & 3.]**

ness there till the outbreak of war with Germany in 1914. In 1890 he obtained a formal discharge from German nationality, but he never became naturalised as a British subject. After the outbreak of war he was interned as an alien enemy. By German Imperial & State Nationality Law of 1913, s. 13, a former German could recover full German nationality without going back to Germany. On an application for a writ of *habeas corpus*:—*Held*: (1) applt. had not become entirely divested of the rights belonging to a natural-born German, notwithstanding his formal discharge from German nationality; (2) he was an alien enemy & not entitled to a writ of *habeas corpus*.—*R. v. VINE STREET POLICE STATION SUPERINTENDENT, Ex p. LIEBMANN*, [1916] 1 K. B. 268; 85 L. J. K. B. 210; 113 L. T. 971; 80 J. P. 49; 32 T. L. R. 3; 25 Cox, C. C. 179.

*Annotations*:—*Expld. Schaffenius v. Goldberg*, [1916] 1 K. B. 284, C. A. *Folld. R. v. Knockaloe Camp Commandant* (1917), 87 L. J. K. B. 43.

**163. — Not naturalised—Departure for enemy country—Arrival presumed.]**—Deft., a German by birth, but for many years resident in England, although never naturalised, obtained a Govt. permit from the police to travel to Tilbury in order to embark for Germany, & started on May 26. On June 2, 1915, his leasehold premises were sold under a power of attorney to pltf. by public auction. There was no evidence as to the date when deft. reached Germany, but it was some time between May 26 & June 11, 1915. In an action for a declaration that the agreement for sale had been dissolved by the act of deft. in becoming an alien enemy, the trial judge held pltf. had failed to prove that at the date of the sale deft. was an alien enemy, & the action failed:—*Held*: the proper inference to be drawn from the facts was that at the date of the sale deft. had arrived & was resident in Germany & was an alien enemy, but in the circumstances pltf. was not entitled to have the agreement rescinded.—*TINGLEY v. MÜLLER*, [1917] 2 Ch. 144; 86 L. J. Ch. 625; 116 L. T. 482; 33 T. L. R. 369; 61 Sol. Jo. 478, C. A.

*Annotations*:—*Reid. Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**— Onus of negating alienage—Aliens Restriction (Consolidation) Orders, 1914 & 1916.]**—*See Nos. 555, 556, post.*

**164. Residing in neutral country—Trading personally in enemy colony.]**—A native Frenchman, an asserted American subject, but personally present in a French colony, shipped goods for France, being described in the evidence as a French merchant:—*Held*: he had returned to his native character of a French merchant.—*LA VIRGINIE* (1804), 5 Ch. Rob. 98.

*Annotations*:—*Reid. Alkman v. Alkman* (1861), 4 L. T. 374, H. L.; *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 441, H. L.

**165. Residing & trading in neutral country—Removal to another neutral country.]**—Two consignments of copper belonging to H., a German subject carrying on trade in Chile, were shipped from that country to Liverpool & were seized as prize. H. had left Chile before the seizure, & he appeared to have been in Switzerland not long after it:—*Held*: although the country to which H. appeared to have betaken himself was, equally with Chile, a neutral country, yet he had, by leaving Chile, lost the neutral trade domicile which he had acquired by residence there, & he had thereby re-vested himself with his original character as an enemy, & the goods were liable to condemnation.—*THE FLAMENCO, THE ORDUNA* (1915), 32 T. L. R. 53; 60 Sol. Jo. 107.

**166. Residing in neutral or allied country—**

**Trading through partners in latter country.]**—An action can be maintained by a person of enemy nationality, who is neither residing nor carrying on business in an enemy country, but is residing either in an allied or a neutral country & is carrying on business through his partners in that allied country.—*Re SUTHERLAND (DUCHESS), BECHOFF, DAVID & Co. v. BUBNA* (1915), 31 T. L. R. 248; subsequent proceedings, 31 T. L. R. 394, C. A.

*Annotation*:—*Reid. Schaffenius v. Goldberg*, [1916] 1 K. B. 284, C. A.

**167. Trading in neutral country—Residence there essential to acquire national character.]**—After the outbreak of war with Germany certain goods belonging to a partnership firm at Buenos Aires, & shipped before the war on a British ship, were seized as prize. All the partners of the firm were Germans resident at Antwerp, who had been expelled from Belgium as enemy subjects shortly after the outbreak of war:—*Held*: although a subject of a belligerent State could acquire a commercial domicile in a neutral State which would protect his goods captured at sea from condemnation, residence in the neutral State was an essential condition of such domicile, & as none of the enemy partners of the firm were resident in the Argentine Republic at the time of seizure, the goods must be regarded as enemy property & subject to condemnation.—*THE HYPATIA*, [1917] P. 36; 86 L. J. P. 44; 116 L. T. 25.

**168. — Firm registered as enemy firm at enemy consulate.]**—A firm consisting of two British & two German subjects, carrying on business at Shanghai, was registered at the German Consulate as a German firm in accordance with the regulations whereby the European communities, to which China had granted extraterritorial privileges, were governed by the laws of their respective countries. The two British partners, who resided in Shanghai, were also registered as British subjects at the British Consulate. Neither of the German partners resided at Shanghai. Goods belonging to the firm having been seized as prize, they were claimed as being the property of the firm as neutrals, & alternatively as the individual property of the partners as neutral & British subjects:—*Held*: (1) the firm could not be treated as a neutral house of trade, & for all purposes of prize it must be regarded as a German firm carrying on business in a German colony; (2) in the circumstances, none of the partners had acquired, or could acquire, a neutral commercial domicile, & the shares in the proceeds of the goods attributable to the German partners must be condemned.—*THE EUMAEUS* (1915), 85 L. J. P. 130; 114 L. T. 190; 32 T. L. R. 125; 60 Sol. Jo. 122; 13 Asp. M. L. C. 228.

*Annotation*:—*Mentd. Casdagli v. Casdagli* (1917), 87 L. J. P. 73, C. A.

**169. Residing in enemy country—Trading in British or neutral territory.]**—The fact that an enemy subject resident in an enemy country, has a house of trade in a neutral country, or in British territory, will not enable him to avoid the disability of being disentitled in the Prize Ct. to succeed in a claim with respect to goods seized as prize. Although a person carrying on business in an enemy country has his commercial domicile there, the converse of the rule does not extend to the case of a merchant residing in a hostile country & having his house of trade in a neutral country.—*THE CLAN GRANT (PART CARGO EX)* (1915), 31 T. L. R. 321; 59 Sol. Jo. 430.

**SUB-SECT. 3.—NEUTRALS.**

**170. Dying in own country—Country subsequently becoming enemy country—No proof that death not before war.]**—Action on the case by an



exor. for work done by testator. Testator & exor. were father & son & were French. At the time of action there was war with France. It not being shown that testator did not die before the war:—*Held*: (1) he was to be treated as an alien friend & could have an exor.; (2) the exor., though an alien enemy, could sue, the action being *en autre droit*.—*VILLA v. DIMOCK* (1894), *Skin.* 370; 90 E. R. 164.

**171. Serving on enemy ship—Involuntarily—Becoming prisoner of war—Habeas corpus.**—A subject of a neutral Power was forced against his will to serve on an enemy ship. The ship was captured & he was detained as a prisoner of war:—*Held*: he was not entitled to a writ of *habeas corpus*.—*R. v. SCHIEVER* (1759), 2 Burr. 765; 97 E. R. 551.

*Annotations*:—*Apld.* *R. v. Vine St. Police Station Supt., Ex p. Liebmann*, [1916] 1 K. B. 268. *Refd.* *Hobhouse's Case* (1820), 3 B. & Ald. 420; *Schaffenius v. Goldberg* (1915), 85 L. J. K. B. 374, C. A.

**172. — Captured & thereafter serving on British ship—Action for wages.**—When Holland was a belligerent & Germany a neutral country as regarded Great Britain, S., who was German-born, but was serving as a sailor in the Dutch fleet, was taken prisoner by the British & sent to St. Helena as prisoner of war. There he was put on board a British merchantman, then in great want of hands, & served as one of the crew on the voyage to London. On arrival he was placed in custody as prisoner of war, & while in custody brought an action for wages, & was met by the plea of an alien enemy:—*Held*: (1) although neutral, he had made himself an alien enemy by engaging in hostilities with Great Britain; (2) this state of enmity was not permanent for the whole period of the war, as with an alien enemy born, but ceased when by capture his service to the enemy came to an end; (3) though a prisoner of war, he was under the King's protection & entitled to sue.—*SPARENBURGH v. BANNATYNE* (1797), 1 Bos. & P. 163; 126 E. R. 837.

*Annotations*:—*Apld.* *Maria v. Hall* (1807), 1 Taunt. 33. *Consd.* *Schaffenius v. Goldberg*, [1916] 1 K. B. 284, C. A. *Refd.* *Maria v. Hall* (1800), 2 Bos. & P. 236; *Taylor v. Carpenter* (1847), 9 L. T. O. S. 514; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**173. In enemy trade.**—During war between Great Britain & Holland, a merchant ship was taken on a voyage from Narva to Dort in Holland. The course of trade was from a Dutch port & back again to Holland; the crew whether Dutch or not were all picked up in a Dutch port; the master was by birth a Dane, with a wife & family resident in a neutral country, but his own personal occupation had always been in Dutch trade. Under the general rule that mariners were to be characterised by the country in whose service they were employed:—*Held*: (1) the master was a Dutchman; (2) the ship should be condemned as Dutch property.—*THE ENDRAUGHT* (1798), 1 Ch. Rob. 22.

**174. Enjoying special trading privileges—Granted by enemy.**—In general a neutral merchant trading in the ordinary manner, to the country of a belligerent, does not contract the character of a person, domiciled there, by the mere residence of a stationed agent, because the effect of such residence is counteracted by the nature of the trade, & the neutral character of the merchant himself. But where the principal is not trading on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy, the nature of his trade does not protect him. On the contrary, the trade itself is the privileged trade of the enemy, putting him on the same footing as their own subjects, & even above it.

In 1799, during a war in which both Holland & Spain were enemies of Great Britain, a contract was made between A., an American merchant with a

trade domicil at Curacao (Dutch), & the Govt. of the Caracas (then Spanish) for the purchase of all the Spanish Govt. tobacco, payment to be made in flour, & other dry goods & specie. In Oct., 1801, a Danish ship carrying goods from Hamburg to the Caracas under this contract was captured by the British. A claim was given for the cargo on behalf of B. of Hamburg. Prior to the claim Curacao had been ceded to Great Britain, & A. thereby became, for trading purposes, British, & the further carrying out of his contract was illegal. The shipment by B. was made under a transfer to him of part of the contract:—*Held*: since the contract gave A. a special privilege as regards Spanish trade, it clothed him with the character of a Spanish merchant, & B., in accepting the contract & participating in the transaction, became clothed with the like character, & the cargo must be condemned.—*THE ANNA CATHARINA* (1802), 4 Ch. Rob. 107.

**175. With house of trade in enemy & neutral countries—Transactions severable.**—A., a native of Germany, had carried on business in partnership at Ostend, but in 1794, on the French taking Ostend, he dissolved the partnership, & went to reside at Blankanese. He commenced business in Altona & Hamburg, which were neutral. There was no connection between the businesses at Ostend & Hamburg:—*Held*: a man having a house of trade in the enemy country, as well as in a neutral country, was not to be considered in all his transactions as an enemy merchant, but the consequences of a transaction concerning his house in the enemy country must be limited to that transaction & his other trade exonerated.—*THE PORTLAND* (1800), 3 Ch. Rob. 41.

*Annotation*:—*Refd.* *Janson v. Driefonteln Consolidated Mines*, [1902] A. C. 484, H. L.; *The Lutzow*, [1918] A. C. 435, P. C.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**176. Residing & trading in own country—While in enemy occupation.**—Though a State may be in the military possession of one or two belligerents, that will not constitute her subjects enemies to the other belligerent, if the Sovereign Power of the latter chuses to permit a continuance of commerce with them.

Where an insurance was effected on property, shipped in England on account of persons domiciled at Hamburg, at a time when that country was in possession of French troops, the Senate continuing to exercise the powers of civil govt. in the same manner as before:—*Held*: the assured entitled to recover for a loss which happened in the course of a voyage permitted by His Majesty's Ords. in Council.—*HAGEDORN v. BELL* (1813), 1 M. & S. 450; 105 E. R. 168.

*Annotations*:—*Refd.* *The Gerasimo* (1857), 11 Moo. P. C. C. 88, P. C. *Mentd.* *The Leonora*, [1918] P. 182.

**177. — — —**—The temporary occupation of a friendly country by an enemy's force does not convert the territory so occupied into hostile territory, when it is not brought under the dominion of the enemy, & its national character remains unchanged. A merchant residing in a country so occupied is not an alien enemy, & has a *persona standi* in the Admty. Prize Ct. as a claimant for restitution.—*THE GERASIMO, THE ASPASIA, THE ACHILLES* (1857), 11 Moo. P. C. C. 88; 29 L. T. O. S. 269; 5 W. R. 450, P. C.

*Annotation*:—*Refd.* *The Anglo-Mexican*, [1918] A. C. 422, P. C.

**178. Residing & trading in enemy country.**—A vessel built in Hanover in 1853, owned by a Hanoverian domiciled in Riga, sailed in ballast to Riga, with a crew of Hanoverians. She then sailed under Russian colours to Havre, thence to Newcastle, thence to Lisbon. There she took in a cargo & sailed for London on Apr. 4 under Hanoverian colours. Shortly after her arrival in the London

**Sect. 1.—Who is an alien enemy: Sub-sects. 3, 4 & 5.]**

docks she was seized by a Custom House officer. She was claimed on the ground that while lying at Newcastle she had been, under a power of attorney given by the owner to the master, sold & transferred to a Hanoverian:—*Held*: the owner & alleged transferor was to be treated as a Russian.—*THE JOHANNA EMILIE* (1854), 1 Ecc. & Ad. 317; Spinks, 12; 23 L. T. O. S. 322; 18 Jur. 703.

*Annotations*:—*Refd.* *The Aldworth* (Cargo ex) (1914), 31 T. L. R. 36. *Mentd.* *The Miramichi* (Cargo ex) (1914), 31 T. L. R. 72; *The Ophelia*, [1915] P. 129.

**179. — Acting as consul for neutral country.]**

—An alien, carrying on trade in an enemy's country, though resident there also in the character of consul of a neutral State, is considered an alien enemy, & as such is disabled to sue, & liable to confiscation.—*ALBRECHT v. SUSSMANN* (1813), 2 Ves. & B. 323; 35 E. R. 342.

*Annotations*:—*Refd.* *Barrick v. Buba* (1855), 16 C. B. 492; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**180. — — — — —.]**—A citizen of Lübeck was resident at Helsingfors, in Finland, as consul for the Netherlands:—*Held*: he thereby acquired an enemy character, Russia being at war with Great Britain, & was debarred from claiming against a captured ship.—*THE AINA* (1854), 1 Ecc. & Ad. 313; Spinks, 8; 23 L. T. O. S. 211.

*Annotations*:—*Consd.* *The Marie Glaeser*, [1914] P. 218, C. A. *Refd.* *The Odessa*, *The Woolston*, [1916] 1 A. C. 145, P. C.

**181. — — — — —.]**—A neutral residing in an enemy country, as consul of a neutral State, & who also trades there as a merchant, is to be regarded as an alien enemy.—*THE BALTIKA* (1857), 11 Moo. P. C. C. 141; 14 E. R. 648, P. C.

*Annotations*:—*Expld.* *The Benedict* (1855), Spinks, 314. *Consd.* *The Tomini*, *The Rothersand*, [1914] P. 251; *The Southfield* (1915), 85 L. J. P. 78. *Mentd.* *The Ariel* (1857), 29 L. T. O. S. 133, P. C.; *The United States* (1916), 13 Asp. M. L. C. 568; *The Kronprinsessan Margareta* (1917), 14 Asp. M. L. C. 31.

**182. — Company with branch in enemy country.]**

—Applts., a co. registered in the United States & having its head office there, had branches at Hamburg & in Japan. In pursuance of instructions from the Japanese branch the Hamburg branch bought for them aniline dyes from named German manufacturers, & shortly before the outbreak of the European war shipped the goods to Japan in a German ship. The Hamburg branch paid for the goods with the proceeds of a draft upon the Japanese branch, the draft being negotiated with bankers upon the security of the bills of lading. They invoiced the goods at cost price, the profits upon the transaction being divisible between the branches according to arrangements made by the applts. The ship & goods were captured at sea:—*Held*: the goods were not so connected with the Hamburg branch of applts.' business as to render them liable to condemnation as enemy property.—*THE LUTZOW*, [1918] A. C. 435; 87 L. J. P. C. 52; 118 L. T. 265; 34 T. L. R. 147; 14 Asp. M. L. C. 187, P. C.

*Annotations*:—*Consd.* *The Anglo-Mexican*, [1918] A. C. 422, P. C. *Mentd.* *Casdagli v. Casdagli*, [1918] P. 89, C. A.

Further cases in regard to enemy branches, see Nos. 392, 395, 396, 397.

**183. Interested in business in enemy country.]**

A neutral, with a personal domicile in a neutral country, owning or being a partner in a business in an enemy country, has a commercial domicile in that business, unless he takes steps to discontinue or dissociate himself from the business in question within a reasonable interval after the outbreak of

war, & there is no exception in respect of goods shipped by him before the war & assigned to the firm in the enemy country, if he still retains his commercial domicile in the enemy country.—*THE ANGLO-MEXICAN*, [1918] A. C. 422; 87 L. J. P. 33; 118 L. T. 260; 34 T. L. R. 149; 14 Asp. M. L. C. 227, P. C.

**SUB-SECT. 4.—BRITISH SUBJECTS.**

**184. Trading with enemy.]**—Property of a British subject, taken trading with the enemy, is forfeited as prize, as it is taken adhering to the enemy, & the proprietor is *pro hac vice* to be considered an enemy.—*THE NELLY* (1800), 1 Ch. Rob. 219, n.

*Annotation*:—*Refd.* *The Ionian Ships*, *The Leucade* (1855), 2 Ecc. & Ad. 212.

**185. Residence & trading in enemy country.]**—An Englishman residing & trading in Holland is just as much a Dutch merchant as a Swede or a Dane would be. The property of an English merchant, resident in Holland on a Danish ship, taken on a voyage from a Spanish port to Guernsey during war between Great Britain & Holland, was condemned.—*THE CITTO* (1800), 3 Ch. Rob. 38.

**186. — — — — —.]**—A. was born in England, but went to America in 1784 at an early age to settle there, thus acquiring an American character. He became a partner in a firm carrying on business in America, & his wife & child lived there. In 1794 he went to France on the firm's business. He resided there, but not continuously, for six years for the purpose of that business, & apparently the residence was intended to be permanent. Property of the partnership was captured at sea by the British, then at war with France, & the firm claimed restitution:—*Held*: A. had acquired a French character & was not entitled to restitution of his share of the partnership property.—*THE HARMONY* (1800), 2 Ch. Rob. 322.

*Annotations*:—*Refd.* *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730; *A.-G. v. Kent* (1862), 1 H. & C. 12; *Re Grove*, *Vaucher v. Treasury Solicitor* (1888), 40 Ch. D. 216, C. A.

**187. — — — — —.]**—A British subject who lives in a hostile State, & carries on trade under its protection & for its benefit, is to be treated as an alien enemy & is disabled from suing in an English ct. The reason of the disability of a person residing in an enemy's country is, that the fruits of the action may not be remitted to the hostile country, & so furnish resources against England.—*M'CONNELL v. HECTOR* (1802), 3 Bos. & P. 113; 127 E. R. 61.

*Annotations*:—*Consd.* *Roberts v. Hardy* (1815), 3 M. & S. 533; *Willison v. Patteson* (1817), 7 Taunt. 439. *Distd.* *Jager v. Tolme & Runge* (1915), 31 T. L. R. 381. *Refd.* *The Matchless* (1822), 1 Hag. Adm. 97; *Janson v. Drie-fontein Consolidated Mines*, [1902] A. C. 484, H. L.; *Mitsui v. Mumford*, [1915] 2 K. B. 27; *Porter v. Freudenberg*, *Kreglinger v. Samuel & Rosenfeld*, *Re Merten's Patents*, [1915] 1 K. B. 857, C. A.; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307, H. L.

**188. — — — — —.]**—A British subject adhering with the King's enemies, either by voluntarily residing in or trading in the enemy's country, is in the same position as the enemy, & not entitled to sue.—*NETHERLANDS SOUTH AFRICAN RY. CO., LTD., v. FISHER* (1901), 18 T. L. R. 116.

*Annotation*:—*Refd.* *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307, H. L.

**189. — — — — —.]**—An Englishman carrying on business in an enemy country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts.—*JANSON v. DRIE-FONTEIN CONSOLIDATED MINES, LTD.*, [1902]

**PART III. SECT. 1, SUB-SECT. 3.**

**183 i. Interested in business in enemy country.]**—In an action by a Dutch firm carrying on business in Holland,

the sole partners of which were also individually interested in, though not the sole partners of, a firm carrying on business in Germany:—*Held*: pursuers were alien enemies within Trading

with the Enemy Acts & Proclamations, & action sisted until termination of the war.—*VAN UDEN v. BURRILL*, [1916] S. C. 391; 53 Sc. L. R. 400; 1 S. L. T. 117.—*SCOT*.



A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 18 T. L. R. 796; 7 Com. Cas. 268, H. L.

**Annotations:—***Consol. Amorduct Manufacturing Co. v. Defries* (1914), 84 L. J. K. B. 586; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A.; *Zinc Corpn. v. Hirsch* (1915), 21 Com. Cas. 273, H. L.; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307, H. L. **Refd.** *Ingle v. Mannheim Insce.*, [1915] 1 K. B. 227; *Re Sutherland, Bechoff, David v. Bubna* (1915), 31 T. L. R. 248; *Arnhold Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1916] 1 K. B. 495, C. A.; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44; *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541, C. A. **Mentd.** *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937; *Robinson v. Continental Insce. of Mannheim*, [1915] 1 K. B. 155; *Stevenson v. Akt. für Cartonnagen Industrie* (1916), 115 L. T. 594, C. A.; *Ertel Blober v. Rio Tinto*, [1918] A. C. 260; *Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331; *Montefiore v. Menday, etc., Co.*, [1918] 2 K. B. 241; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1918), 87 L. J. Ch. 313, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**190. — Purposes of trading material.]—**G., a British subject, went to France in 1800, for the purpose of recovering payment of debts. He continued in France from Feb. till July, & having succeeded in recovering some part of his money, which he had no opportunity of remitting directly, he invested it in the purchase of several prize vessels, which he sent to England, some in ballast, others loaded with provisions:—**Held:** such a transaction conducted *bonâ fide* with that view, & directed only to removal of property which accidents of war might have lodged in the belligerent country, was entitled to be treated with some indulgence.

In the following year he went again to France to collect outstanding debts. Part of the money he received was invested in a speculation of sending a cargo of butter to Lisbon, because that port afforded a favourable market:—**Held:** this was a voluntary mercantile speculation in the enemy's trade, & was not the case of a man withdrawing his property to England, but engaging in new speculations, & standing on the same footing as any other merchant in the enemy's country.—**THE DREE GEBROEDERS** (1802), 4 Ch. Rob. 232.

**Annotations:—****Refd.** *Forbes v. Forbes* (1854), Kay, 341; *Jopp v. Wood* (1864), 11 L. T. 406.

**Trade dissolved before war—Residence continued under compulsion.]—**A., a British-born subject, had been settled as a merchant in Flushing, but, on the appearance of approaching hostilities, had taken means to return to England. He had dissolved his partnership, & had continued to reside in Holland after the war, only under the detention so unwarrantably applied to all Englishmen resident in the country of the enemy at the breaking out of hostilities:—**Held:** he retained his British character & was entitled to restitution of property which had been seized.—**THE OCEAN** (1804), 5 Ch. Rob. 90.

**192. — Naturalisation in neutral State.]—**If a British subject voluntarily resides in an enemy country & carries on commerce there, he is disqualified, as an alien enemy, to sue in English cts., although naturalised by a neutral State, & recognised as a citizen of that State, both by its diplomatic agents & by the enemy's Govt. If a person

voluntarily resides & carries on a commerce in an enemy's country, he is an alien enemy for all civil purposes.—**O'MEALEY v. WILSON** (1808), 1 Camp. 482.

**Annotation:—****Refd.** *Esposito v. Bowden* (1857), 7 E. & B. 763.

**193. Residence in enemy country.]—**The ct. refused to allow judgment to be entered on an old warrant of attorney, it appearing that pltf. was resident in an enemy's country.—**DE LUNEVILLE v. PHILLIPS** (1806), 2 Bos. & P. N. R. 97; 127 E. R. 560.

#### SUB-SECT. 5.—COMPANIES.

**194. Registered in England—Shares held by alien enemies.]—**An action was brought by a co. to recover the price of goods sold & delivered. The co. was registered in England under Cos. Acts about eight years before, having its office in London & its factory in Birmingham. Of its shares two hundred & eighty were held by a naturalised German living in England, & one thousand four hundred & thirty-five, being practically the whole of the remaining shares, were held by Germans resident in Germany. It was not disputed at the trial that the sum claimed was owing by debts., but the ct. judge decided that owing to the composition of pltf. co. it was not entitled, during the continuance of a state of war between England & Germany, to sue in respect of the debt:—**Held:** when once the co. was registered according to English law, it became resident in England, & was entitled to judgment for the sum claimed.—**AMORDUCT MANUFACTURING CO. v. DEFRIES & CO.** (1914), 84 L. J. K. B. 586; 112 L. T. 131; 31 T. L. R. 69; 59 Sol. Jo. 91.

**Annotation:—****Refd.** *Continental Tyre & Rubber Co. (Gt. Britain) v. Daimler Co., Same v. Tilling* (1915), 84 L. J. K. B. 926.

**195. — — —.]—**(1) A co. incorporated in the United Kingdom can only act through agents properly authorised, & so long as it is carrying on business in the United Kingdom through agents so authorised & residing in that or a friendly country, it is *primâ facie* to be regarded as a friend, & all His Majesty's lieges may deal with it as such. Such a co. assumes an enemy character if its agents, or the persons in *de facto* control of its affairs authorised or not, are resident in an enemy country, or, wherever resident, are adhering to, taking instructions from, or acting under the control of, enemies; & a person knowingly dealing with the co. in such a case is trading with the enemy. (2) Although the character of individual shareholders cannot of itself affect the character of the co., the enemy character of individual shareholders & their conduct may be very material on the question whether the co.'s agents, or the persons in *de facto* control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of, enemies, & this materiality varies with the number of shareholders who are enemies & the value of their holdings. (3) A co. registered in the United Kingdom, but carrying on business in a neutral country through agents

#### PART III. SECT. 1, SUB-SECT. 4.

**193 I. Residence in enemy country.]—**A natural-born subject of Scotland does not lose his title to pursue in the cts. there, by residing in a foreign country at war with Great Britain.—**AITKIN & AITKIN v. CRAWFORD, MARTIN & TRAIL** (1813), June 10, F. C.—**SCOT.**

**193 II. — — —.]—**British subjects, who had not lost their nationality, & were

voluntarily resident in an enemy's country:—**Held:** enemies within Trading with the Enemy Amendment Act, 1914 (c. 12).—**Re FITZGERALD** (1915), 49 L. L. T. 119.—**IR.**

#### PART III. SECT. 1, SUB-SECT. 5.

**g. Carrying on business in British possession—Shares held by alien enemy.]—**The mere fact that one shareholder in a joint-stock bank is a public enemy would not of itself make the bank a

hostile co. — **GOLDMAN v. NATIONAL BANK OF SOUTH AFRICAN REPUBLIC** (1900), 17 S. C. 165; 1 C. T. R. 234.—**S. AF.**

**h. Registered in neutral country—Directors & shareholders alien enemies.]—**A co. incorporated in a neutral State is not an enemy within Trading with the Enemy Act, 1914 (c. 87), although all its directors & shareholders are enemy subjects.—**Re DUERKOP** (1915) 34 N. Z. L. R. 474.—**N.Z.**



**Sect. 1.—Who is an alien enemy: Sub-sect. 5.**  
**Sect. 2: Sub-sects. 1 & 2, A.]**

properly authorised & resident in the United Kingdom or in the neutral country, is *prima facie* to be regarded as a friend, but may, through its agents, or persons in *de facto* control of its affairs, assume an enemy character. (4) A co. registered in the United Kingdom, but carrying on business in an enemy country, is to be regarded as an enemy. (5) A co. is not precluded from trading merely because alien enemy shareholders may after the war become entitled to their proper share of the profits (LORDS PARKER OF WADDINGTON, MERSEY, KINNEAR, & SUMNER).

A co. was incorporated in England with a capital of £25,000 in £1 shares for the purpose of selling in England tyres made in Germany by a German co., which held the bulk of the shares in the English co. The holders of the remaining shares (save one) & all the directors were Germans resident in Germany. The one share was registered in the name of the secretary, who was born in Germany, but resided in England & was a naturalised British subject. After the outbreak of the European war an action was begun in the name of the English co. by specially indorsed writ, issued by the co.'s solrs. on the instructions of the secretary, for payment of a trade debt. In answer to a summons for judgment under R. S. C., Ord. 14, defts. alleged (1) the co. was an alien enemy co., & payment of the debt would be a trading with the enemy: (2) the action was commenced without the co.'s authority. The master gave leave to the co. to sign final judgment, & his order was affirmed by the judge in chambers & by the C. A.:—**Held:** (1) the action was commenced without authority & ought to be struck out as irregular; (2) leave to defend the action ought to have been granted, as the circumstances required investigation in reference to the control & management of the co.; (3) the co. was in substance a hostile partnership incapable of suing, & any payment to it would be illegal as a trading with the enemy (EARL OF HALSBURY).—**DAIMLER CO., LTD. v. CONTINENTAL TYRE & RUBBER CO. (GT. BRITAIN), LTD.**, [1916] 2 A. C. 307; 85 L. J. K. B. 1333; 114 L. T. 1049; 32 T. L. R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H. L.

**Annotations:—Consd.** The Poona (1915), 84 L. J. P. 150; The St. Tudno, [1916] P. 291; Continho Caro v. Vermont, [1917] 2 K. B. 587; *Re Hilckes*, [1917] 1 K. B. 48; Rio Tinto v. Ertel Bieber (1917), 116 L. T. 810, C. A.; Tingley v. Müller, [1917] 2 Ch. 144, C. A.; Severson v. Akt. für Cartonnagen Industrie, [1918] A. C. 239. **Refd.** R. v. L. C. C., *Ex p.* London & Provincial Electric Theatres, [1915] 2 K. B. 466; *Re Aramayo Francke Mines*, [1917] 1 Ch. 451; Clapham S.S. Co. v. Handels-en-Transport-Maatschappij Vulcaan of Rotterdam, [1917] 2 K. B. 639; Naylor, Benzon v. Krainische Industrie, [1918] 1 K. B. 331; Elders & Fyffes v. Hamburg-Amerikanische Packetfahrt Act. (1918), 34 T. L. R. 275, C. A.; Ertel Bieber v. Rio Tinto, [1918] A. C. 260; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.

**196. Claim by company in Prize Court.]—**Goods belonging to an English co., of which all the directors were enemy subjects resident in an enemy country, & of which all the shareholders were either enemy subjects or resident in an enemy country, were seized as prize & claimed by the co., & not by the individual shareholders:—**Held:** the goods were not enemy property, & not liable to condemnation, there being nothing in the claim depending upon the bearing of the law of nations upon the municipal law of England.—**THE POONA** (1915), 84 L. J. P. 150; 112 L. T. 782; 31 T. L. R. 411; 59 Sol. Jo. 13; 13 Asp. M. L. C. 57.

*See, further, PRIZE LAW & JURISDICTION.*

—— **Company owning British ship.] —**

*See PRIZE LAW & JURISDICTION; SHIPPING & NAVIGATION.*

**197. — Doing business in enemy country through resident agent there.]—**In 1910 a co. was incorporated in England to acquire from the debtor, a German subject resident in England, a rubber estate in a German colony. The estate was transferred to, & registered in the colony in the names of, trustees for the co., & the debtor was appointed the commercial agent of the co. in the colony. The registered offices of the co. were in London. All the directors & the secretary were English, as also were the majority of the shareholders, but a considerable number of shares were held by Germans. In 1911 the co. dismissed the debtor on the ground of alleged defalcation. He then commenced an action in the High Ct. in Berlin against the co. & the trustees to recover possession of the estate. This action was dismissed with costs, which were fixed at a sum which was equivalent to £398 in English money. In 1913 the co. sued the debtor in the K. B. Div. to recover that amount. This action was pending in Aug., 1914, when war was declared between Great Britain & Germany, & the debtor was interned in England as an alien enemy & was subsequently adjudicated a bkpt. The co. claimed to prove in his bkpey. for £398. The proof was disallowed on the ground that the co. was carrying on business in an enemy country & must, therefore, be regarded as an alien enemy:—**Held:** (1) the mere fact that a British co. did business in an enemy country through a properly appointed agent there did not constitute it an enemy co.; (2) the co. was not an alien enemy, & was entitled to prove.—*Re HILCKES, Ex p. MUHESA RUBBER PLANTATIONS, LTD.*, [1917] 1 K. B. 48; 86 L. J. K. B. 204; 115 L. T. 490; 33 T. L. R. 28; [1916] H. B. R. 160, C. A.

—— **Controlled in enemy country — Owning British ship.]—***See PRIZE LAW & JURISDICTION; SHIPPING & NAVIGATION.*

**198. Registered in allied country in enemy occupation.]—**Pltf. co. was incorporated under the laws of Belgium & had its registered office at Antwerp. After the outbreak of war between Great Britain & her Allies (including Belgium) & Germany, a large portion of Belgium, including Antwerp, being in the effective military occupation of Germany, the co.'s business at Antwerp was closed & the books removed to London, where the business was wholly carried on, but the chairman of the co. was still in Antwerp:—**Held:** the co. being incorporated not in Antwerp, but in Belgium, was not incorporated in an enemy country, for although a large portion of that country was in the effective military occupation of an enemy, yet the country as a whole was not territory in hostile occupation.—**SOCIÉTÉ ANONYME BELGE DES MINES D'AJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LTD.**, [1915] 2 Ch. 409; 84 L. J. Ch. 854; 113 L. T. 583; 31 T. L. R. 624; 59 Sol. Jo. 679, C. A.

**199. Registered in enemy country—Shares held by subjects of neutral or allied states.]—****Held:** a co. registered & having its place of business in Germany (an enemy country) must be treated, for prize purposes, as an enemy, although the co. might include, to the extent of 90 per cent. of the shares, Rumanian, Russian & other cos. neutral or allied.—**THE ROUMANIAN**, [1915] P. 26; 84 L. J. P. 65; 112 L. T. 464; 31 T. L. R. 111; 59 Sol. Jo. 206; 13 Asp. M. L. C. 8; *affd.*, [1916] 1 A. C. 124, P. C.

**Annotations:—Consd.** Continental Tyre & Rubber Co. (Gt. Britain) v. Daimler Co., [1915] 1 K. B. 893, C. A. **Distd.** The Poona (1915), 84 L. J. P. 150; Daimler Co. v. Continental Tyre & Rubber Co. (Gt. Britain), [1916] 2 A. C. 307, H. L. **Mentd.** The Eden Hall, [1916] P. 78; The Schlesien, [1916] P. 225; The Odessa, The Woolston, [1916] 1 A. C. 145, P. C.; The Achilles, [1917] P. 218; The Batavier II., [1918] P. 66, n.

## SECT. 2.—POSITION OF ALIEN ENEMY.

## SUB-SECT.—1. IN GENERAL.

**200. Alien enemy in kingdom without safe conduct—Seizure of person & goods.]**—After war is declared, any subject may seize persons & goods of alien enemies who come into the kingdom without safe conduct, wherever he can find them.—ANON. (1467), Y. B., 7 Edw. 4, fo. 13, pl. 5, as cited in *EAST INDIA CO. v. SANDYS* (1684), 10 State Tr., at p. 487.

**201. ——— No rights in law.]**—If an alien enemy come into England without the Queen's protection, he shall be seized & imprisoned by the law of England, & he shall have no advantage of the law of England, nor for any wrong done to him there.—*SYLVESTER'S CASE* (1703), 7 Mod. Rep. 150; 87 E. R. 1157.

*Annotations:*—**Expld.** *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A. **Consd.** *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. **Mentd.** *R. v. Vine St. Police Station Supt.*, *Ex p. Liebmann*, [1916] 1 K. B. 268.

**202. ——— Not civiliter mortuus—Under disability.]**—Where a *feme covert* sued alone on a contract, her husband being an alien enemy:—*Held*: (1) all the rights of an alien enemy were forfeited to the Crown, & the proper course of proceeding was for the Crown to entitle itself to those rights by having an inquisition, & then, after enforcing that right of action against deft., to deal justly, by giving the wife the benefit of it, taking care that the husband got nothing which he could employ adversely to the State.

There is no authority for saying that an alien enemy is *civiliter mortuus*; he is alive, but under disability.—*DE WAHL v. BRAUNE* (1856), 1 H. & N. 178; 25 L. J. Ex. 313; 27 L. T. O. S. 188; 4 W. R. 646; 156 E. R. 1166.

## SUB-SECT. 2.—AS REGARDS GOODS AND PROPERTY, BUSINESS ASSETS, GOODWILL, ETC.

## A. In General.

**203. Right of seizure—After restoration of peace—Alien enemy meantime deceased.]**—A Dutch

merchant, after trading in England for many years, became an alien enemy in consequence of a war with the Dutch, & died:—*Qu.*: whether the King could recover his goods after restoration of peace.—*R. v. WILLIAMSON* (1672), 1 Freem. K. B. 39; 89 E. R. 31.

**204. ——— Commission & inquisition necessary—Effect of peace before requisition.]**—Choses in action belonging to an alien enemy are forfeited to the Crown; but there must be a commission & inquisition to intitle the King, & a peace before inquisition discharges the cause of forfeiture.—*A.-G. v. WEEDEN & SHALES* (1699), Park. 267; 145 E. R. 776.

*Annotations:*—**Mentd.** *De Wahl v. Branne* (1856), 1 H. & N. 178; *Porter v. Freudenberg*, *Kreglinger v. Samuel & Rosenfeld*, *Re Merton's Patents*, [1915] 1 K. B. 857, C. A.

**205. Goods coming into country.]**—Enemies' goods coming into England may be seized for the use of the Crown.—*LAND v. NORTH (LORD)* (1785), 1 Doug. K. B. 266; 99 E. R. 873.

**206. ——— In modern times—Unusual but competent.]**—It has not been much the practice, in modern times, to proceed against property of enemies found in England; but it is nowhere laid down as law that an inquest of office might not now be had, & the property confiscated.—*THE CHARLOTTE* (1813), 1 Dods. 212.

**207. ——— ———.]**—Of late years it has not been usual in war to seize on land any property belonging to subjects of the enemy.—*THE JOHANNA EMILIE* (1854), 1 Ecc. & Ad. 317; Spinks. 12; 23 L. T. O. S. 322; 18 Jur. 703.

*Annotations:*—**Mentd.** *The Aldworth (Cargo ex)* (1914), 31 T. L. R. 36; *The Miramichi (Cargo ex)* (1914), 31 T. L. R. 72; *The Ophelia*, [1915] P. 129.

**208. ———.]**—According to the practice of former times, & according to the views held by some of the most revered & authoritative international jurists, all enemy property on land as well as on sea & in ports, creeks, & rivers could be captured & confiscated. But from time to time, by

## PART III. SECT. 2, SUB-SECT. 1.

**j. Not incapacitated as witness.]**—The ct. repelled an objection to the admissibility of a witness, in a charge of theft, that he was the subject of a nation with which Great Britain was at war.—*M'GUIRE* (1857), 2 Irv. 620.—SCOT.

**k. Liability to capture as prisoner of war.]**—To constitute persons prisoners of war it must be shown that there was a state of war between Great Britain & the tribe or nation to which they belonged, & that they were aliens captured during the continuance of the war.—*Re KOK* (1879), Buch. 45.—S. AF.

## PART III. SECT. 2, SUB-SECT. 2.—A.

**206 i. Right of seizure—In modern times—Unusual but competent.]**—On the occupation of a town in the Transvaal by the British forces during the South African War, deft., a British subject, was granted the use of a house & furniture belonging to pltf., a burgher of the late Republic. Thereafter deft. was allowed to remove the furniture, & a district comr. told him that he could keep the furniture, as it had been confiscated:—*Held*: the furniture not having been confiscated for military purposes, nor having been taken as booty during hostile operations, & there being no proof that the British authorities had departed from the general rule that private property of belligerents on land was not to be confiscated, pltf. was entitled to recover.—*ACHTERBERG v. GILNISTER* (1903), S. C. 326.—S. AF.

**206 ii. ———.]**—During the occupation of Colesburg by the Republican forces, Z., a British subject, obtained a horse by barter from K., a hostile invader. On the re-occupation of Colesburg by the British, the horse was seized by the military authorities & sold:—*Seemle*: as the horse was the property of an enemy, the military authorities were justified in seizing it.—*VAN ZYH v. PIENMAN* (1906), 23 S. C. 469; 16 C. T. R. 730.—S. AF.

**206 iii. ——— Rights after annexation.]**—A subject of a State, which has been conquered & annexed, has no legal claim against the conquering State for goods requisitioned by such State from him during hostilities, nor can he set off the value of the goods so requisitioned against a debt due by him to the conquering State.—*SUPREME COURT (MASTER) v. ROTH* (1905), S. C. —S. AF.

**a. Resident under licence—Rights preserved during good behaviour.]**—*Held*: (1) the Proclamation of Aug. 15, 1914, assuring Germans & Austro-Hungarians residing in Canada the enjoyment of all the rights, which the law conferred upon them in the past, during good behaviour, was in conformity with the Hague Conference, 1907, art. 23b; (2) Germans & Austro-Hungarians living in Canada during the European war preserved their civil rights.—*Re HERZFELD* (1914), Q. R. 46 S. C. 281.—CAN.

**b. Right to acquire real or personal property.]**—Testator by his will gave his real & personal estate to trustees on trust that his daughter should take the whole beneficial interest therein.

The daughter, who was born in Victoria & had always lived there, after the outbreak of war with Germany married an unnaturalised German resident in Victoria. By a condition indorsed on the probate of the will, the exors. were, in effect, forbidden, during the war, to distribute or pay any portion of the assets of the estate to any beneficiary who was a "German subject," without the express sanction of the Crown:—*Held*: (1) the daughter was entitled to both the real & personal estate of testator, subject to the right of the Crown to intervene; (2) she was a "German subject" within the conditions indorsed on the probate, & no payment out of the estate should be made to her without the sanction of the Crown.—*Re DOIG, CARTER v. GRAMSCH*, [1916] V. L. R. 698.—AUS.

**c. Right to acquire land by devise or purchase.]**—Testatrix devised land to a German, who had resided in New Zealand for nearly fifty years, & she made him exor. of the will. Germany being at war with Great Britain, probate was refused to him as an alien enemy, administration with the will annexed was granted to the Public Trustee, & the Crown claimed the land:—*Held*: the devisee, being an alien enemy, could not hold the land devised to him, & the Crown entitled to intervene & claim the land.

Though an alien enemy at common law has no rights at all, a resident alien enemy of good behaviour has by custom the same rights to take lands by purchase or devise as an alien friend has at common law (*SIM & STRINGER, J.J.*).—*PUBLIC TRUSTEE v. HEIDEMANN & A.-G.* (1917), N. Z. L. R. 633.—N.Z.



**Sect. 2.—Position of alien enemy: Sub-sect. 2, A. &**

special treaties, & subsequently by the mitigation of rules considered to operate harshly on enemy owners of private properties, capture of such properties on land has been avoided & has fallen into desuetude. But it ought to be borne in mind—what, indeed, is often forgotten—that a potent factor, & a beneficent object, in the mitigation of the severity of seizure on land was the desirability of saving from confiscation the property of citizens of an enemy State which was already in the belligerent country at the outbreak of war. A beginning was made by exempting moneys lent by individuals of an enemy State to a belligerent State. Then real & immovable property was made an exception, at first from absolute confiscation, & later from sequestration of its income. Then came treaties allowing time for the withdrawal of mercantile property from a belligerent country at the outbreak of war (EVANS, PRES.).—THE ROUMANIAN, [1915] P. 26; 84 L. J. P. 65; 112 L. T. 464; 31 T. L. R. 111; 59 Sol. Jo. 206; 13 Asp. M. L. C. 8; *affd.*, [1916] 1 A. C. 124, P. C.

**Annotations:—***Reid.* The Poona (1915), 84 L. J. P. 150; Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain), [1916] 2 A. C. 307, H. L.; The Eden Hall, [1916] P. 78; The Schloesen, [1916] P. 225; The Achilles, [1917] P. 218. *Mentd.* The Odessa, The Woolston, [1916] 1 A. C. 145, P. C.

**209. — Property in name of trustee—Bill of exchange.**—It is no defence to an action on a bill of exchange that pltf. sued in trust for an alien enemy; but the ct. did not pronounce on what would become of the money when recovered, & whether the Crown might or might not lay hands on it.—DAUBUZ v. MORSHEAD (1815), 6 Taunt. 332; 128 E. R. 1062.

**Annotation:—***Apld.* Schmitz v. Van der Veen (1915), 84 L. J. K. B. 861.

**210. — Not where property of enemy domiciled in neutral territory.**—Where the King's declaration treats the goods of persons inhabiting enemy territory as enemy's goods, the same equity operates the other way & the goods of an enemy domiciled in neutral territory are to be regarded as neutral.—THE POSTILION (1779), Marr. 245.

— **On sea.**—See PRIZE LAW & JURISDICTION.

**211. Patent taken & held by British subject—In trust for alien enemy.**—*Qu.*: whether a patent taken out by a British subject, & held by him in trust for an alien enemy, is *ipso facto* void without its being necessary to obtain its repeal by *sci. fa.*—BLOXAM v. ELSEE (1827), 9 Dow. & Ry. K. B. 215.

**Annotations:—***Mentd.* Beard v. Egerton (1846), 7 L. T. O. S. 228; Ward v. Hill (1903), 20 R. P. C. 189, C. A.

**212. Patent in name of alien enemy—Onus of proof of British partner's interest therein—Powers of Board of Trade—Patents, Designs & Trade Marks (Temporary Rules) Act, 1914 (c. 27).**—On the hearing of an application by an English co. to a committee of the Board of Trade under the above Act to avoid or suspend two patents granted to a German subject resident in Germany, A. B., a British subject, appeared & put in a statutory declaration that he & the patentee & a third party, a German subject resident in Great Britain, were jointly entitled to the benefit of the patents by virtue of a partnership agreement & the transactions consequent thereon, but he declined to give evidence of the contents of the agreement. No

evidence contrary to the statutory declaration was put forward, & A. B. contended that in these circumstances the committee were bound to accept his statement & that they had no jurisdiction to deal with the patents. The committee held that there was no evidence that A. B. had any beneficial interest in the patents & proceeded to adjudicate upon the matter. A. B. then obtained a rule *nisi* for a prohibition to the Board:—*Held*: as his claim rested on the partnership agreement, which could not be proved without giving evidence of its contents, & as no evidence of its contents had been given, the committee had jurisdiction to adjudicate, & the rule must be discharged.—R. v. BOARD OF TRADE, *Ex p.* DERRY (1917), 33 T. L. R. 316; 34 R. P. C. 241.

**213. Company with enemy shareholders—Right to hold music & cinematograph licences.**—A licensing authority, under Disorderly Houses Act, 1751 (c. 36), & Cinematograph Act, 1909 (c. 30), refused to grant the renewal of music & cinematograph licences to a limited co. registered in England, on the ground that the large majority of its shares were held by alien enemies:—*Held*: apart altogether from the question whether or not the alien enemy shareholders were entitled to vote, the authority could in the exercise of their discretion refuse to grant licences to a co., the majority of whose shareholders were alien enemies.—R. v. LONDON COUNTY COUNCIL, *Ex p.* LONDON & PROVINCIAL ELECTRIC THEATRES, LTD., [1915] 2 K. B. 466; 84 L. J. K. B. 1787; 113 L. T. 118; 79 J. P. 417; 31 T. L. R. 329; 59 Sol. Jo. 382; 13 L. G. R. 849, C. A.

**Annotations:—***Reid.* Robson v. Premier Oil & Pipe Line Co. (1915), 113 L. T. 523, C. A. *Mentd.* R. v. Brighton Corp., *Ex p.* Tilling (1916), 85 L. J. K. B. 1552; R. v. Burnley JJ., *Ex p.* Longmore (1916), 85 L. J. K. B. 1565.

**214. Representation of deceased alien enemy's interest in administration action—R. S. C., Ord. 16, r. 46.**—Where, on a summons to construe a will, a question was raised as to who was entitled to the residue, & it was sought to appoint some one to represent the estate of a deceased alien enemy claimant, who might have been entitled, & the Public Trustee had refused to be so appointed, on the ground that he had no power to act in such capacity, the ct., applying the above rule, appointed first deft. on the summons to represent the estate of the deceased alien enemy, who had died in 1915, leaving a will, of which no probate had been granted in England.—*Re* RAPHAEL, WARBURG v. RAPHAEL (1916), 61 Sol. Jo. 99.

**215. Licensed to trade for limited purposes—Banking transactions.**—For some years before July, 1914, arrangements were in force between pltf., who were bankers incorporated in the German Empire & having their head office in Berlin & a branch office in London, & the B. bank at Rio de Janeiro, under which bills drawn by the B. bank or their customers were accepted by pltf., payable in London. In the majority of the transactions between the B. bank & pltf., bills were dealt with in London, but in some cases the bills were negotiated in Berlin. In order to put pltf. in funds to meet bills so accepted which were running at the outbreak of the European war, the B. bank made remittances to pltf., including a bill (which was drawn in a set of three), payable to the order of the B. bank ninety days after sight upon defts., who were merchants in London, & bought by the B.

**2151. Licensed to trade—Contract entered into before licence.**—M. S. & Co., who had entered into a contract before outbreak of war with deft. in Calcutta, had a house in Hamburg, & one of their partners was not a British subject, but was domiciled in Germany. Subsequent

to the contract & to the outbreak of war, but before the time for delivery by M. S. & Co. under the contract, S., a member of the firm, obtained a licence from the Govt. of Bengal to trade as, & act on behalf of, M. S. & Co.:—*Held*: the licence was only intended to

apply to future business & to permit the firm name of M. S. & Co. to be used by S., & S. could not sue without joining his late partner as co-pltf.—STOLL (TRADING AS MOLL, SCHULTE & CO.) v. PATERSON & CO., LTD. (1915), 18 W. A. R. 42.—AUS.



bank. On July 13 the B. bank sent the first of exchange unendorsed & marked "for acceptance only" to pltfs. in London to obtain acceptance, & the second of exchange duly endorsed to pltfs. in Berlin, who received it on Aug. 8, & on July 16 the third of exchange duly endorsed to pltfs. in London, who did not receive it until after the outbreak of the war. On July 31 defts. accepted the first of exchange payable in London. On Sept. 19 the Home Secretary, acting under Aliens Restriction (No. 2) Order, 1914, which was made in pursuance of Aliens Restriction Act, 1914 (c. 12), granted to pltfs. & two other German banks a licence to carry on banking business in the United Kingdom subject as follows: "(1) The permission shall extend only to the completion of the transactions of a banking character entered into before Aug. 5, 1914, so far as those transactions would, in ordinary course, have been carried out through or with the London establishments. The permission does not extend to any operations for the purposes of making available assets which would ordinarily be collected by, or of discharging liabilities which would ordinarily be discharged by, establishments of the banks other than the London establishments. No new transactions of any kind, save such as may be necessary or desirable for the purpose of the completion of the first-mentioned transactions, shall be entered into by or on behalf of the London establishments of the banks. (2) The business to be transacted under this permission shall be limited to such operations as may be necessary for making the realisable assets of the banks available for meeting their liabilities, & for discharging their liabilities as far as may be practicable." On Oct. 31, 1914, the first & third of exchange were, with the approval of the official controller appointed by the Treasury, presented to defts. for payment & were dishonoured. On Jan. 8, 1915, pltfs. in Berlin sent the second of exchange to pltfs. in London with instructions to credit the proceeds of collection to the Berlin office. Pltfs. in London had obtained advances from the Bank of England to enable them to pay the bills which they accepted for the B. bank, & were under obligation to collect from their clients all the funds due to them as soon as possible & apply those funds to the repayment of the Bank of England's advances with interest. Pltfs. brought an action on the bill against defts., who pleaded that pltfs. were alien enemies, & that the licence did not authorise pltfs. in London to present & receive payment of the bill:—*Held*: (1) the transactions permitted by the licence were not limited to transactions with the London establishment, but included all transactions made with pltfs., whether made or negotiated in London or in Berlin; (2) the transaction of the bill was a banking transaction & would in ordinary course have been carried out in London, & presentation for payment & collection were carrying out the transaction & were not a new transaction; (3) pltfs. were entitled to recover.—*DIRECTION DER DISCONTO GESELLSCHAFT v. BRANDT (A. H.) & Co.* (1915), 31 T. L. R. 586.

**B. Control and Management of Enemy Property, Assets, Goodwill, etc.**

**(a) Appointment and Powers of Controller.**

**NOTE.**—The Acts referred to in the following cases are *Trading with the Enemy Act, 1914 (c. 87)*, *Trading with the Enemy Amendment Act, 1914 (c. 12)*, *Trading with the Enemy Amendment Act, 1916*

(c. 105), & are herein referred to as *Act of 1914*, *Amending Act of 1914*, *Amending Act of 1916*, respectively.

**216. Act of 1914, s. 3—Manner of appointment—Company—Evidence—Security—Accounts.]**—A limited co. carrying on trade in England, of which the great majority of the shares were held by enemies resident in Germany, suspended business after outbreak of the European war. The Board of Trade petitioned the ct. to appoint a controller of the business of the co. during continuance of the war:—*Held*: (1) such an application might be made by originating motion; (2) the controller might be appointed on evidence that the information of the Board of Trade had reasonable foundation; (3) the controller must give the security required to be given by a receiver; (4) the ct. would reserve to itself power to require the controller to render & vouch his own accounts, but would not direct him, as a matter of course, so to do.—*Re MEISTER LUCIUS & BRUNING, LTD.* (1914), 31 T. L. R. 28; 59 Sol. Jo. 25.

**217. — — — Adapted to partnership.]**—The partners in a firm known as K. & B. Co. were a German subject resident in Germany & an English co., K. & Co. The partners in K. & Co. were a natural-born British subject & a registered German subject, resident in England for twenty years, whose application for naturalisation had not yet been granted. Before the war between Great Britain & Germany K. & B. Co. were carrying on work in connection with English collieries & iron-works. An application by K. & Co. for the appointment of S. as receiver & manager of K. & B. Co. had been refused by the judge, who intimated that an application should be made by the Board of Trade for the appointment of a controller under the above sect. On motion by the Board of Trade:—*Held*: an order appointing S. controller should be made in the form settled in *Re Meister Lucius & Bruning, Ltd.* (No. 216, ante) adapted to a partnership business.—*Re KOPPER'S COKE OVEN & BYE-PRODUCT CO.* (1914), 49 L. Jo. 690; 138 L. T. Jo. 106.

**218. Amending Act of 1914, s. 11—When appointed—Proposal to transfer business to neutral country—Application to English company.]**—A co. was incorporated in England to acquire & take over a business of mine-owners & smelters carried on in Bolivia. At the outbreak of the European war the greater number of the shares in the co. were held by Bolivians. The directors of the co. had spared no efforts to utilise for the benefit of the Allied Powers the mineral products of the co.'s mines & works. In order to escape the increasing burden of the British income tax the foreign shareholders resident abroad had become desirous that the business of the co. should be transferred to some other country. The directors accordingly issued a circular to the shareholders, stating that they proposed to recommend to them that the place of business of the co. should in future be in Switzerland, & that for that purpose the undertaking should be invested in a co. incorporated in that country. At a meeting of shareholders this proposal was sanctioned, & a provisional agreement for giving effect to it had been executed by the directors. In order to prevent the completion of the agreement & the transfer of the business under it, the Board of Trade applied to the ct., under s. 11 (1) of the above Act, for the appointment of a controller, & the judge held an order appointing

**PART III. SECT. 2, SUB-SECT. 2.—**  
**B (a).**

**216 i. Act of 1914, s. 8 (3)—Manner of appointment—Evidence.]**—The Minister for Trade & Customs having under the

above sect. appointed an *interim* controller of the business of a firm, on the ground that he believed that the firm would endeavour to transmit money from Australia to Germany for the benefit of enemy subjects:—*Held*: on

a motion to the High Ct. to appoint a controller, it was sufficient that there should be some evidence that there was a reasonable foundation for the Minister's belief.—*Re ALEXANDER & Co.* (1915), 19 C. L. R. 533.—AUS.

*Sect. 2.—Position of alien enemy: Sub-sect. 2, B.*

a controller ought to be made, but limiting his powers to preventing the agreement for the transfer of the business from being carried into effect:—*Held*: there was ample jurisdiction under the above sub-sect. in the public interest to make the order & to prevent the English co. becoming a Swiss co., whose shareholders would presumably be able to transfer their shares to alien enemies.—*Re ARAMAYO FRANCKE MINES, LTD.*, [1917] 1 Ch. 451; 86 L. J. Ch. 225; 116 L. T. 54; 33 T. L. R. 176; 61 Sol. Jo. 232, C. A.

**219. Amending Act of 1916, s. 1—Enemy business with English branch—Rights of creditors.**—A co. of printers & art publishers, incorporated in the German Empire & having its principal place of business in Berlin, established a branch in London, which carried on business there on its behalf for some years before the outbreak of the European war. The principal business of the London branch was to sell to English firms goods printed by the co. in Germany & to obtain orders from English firms for printing. The London business had its own capital account & made its own profit, which was the difference between the prices obtained for the goods & those at which they were invoiced by the co. in Berlin, any net profits made by the London business, after providing for payment of expenses, being accounted for to the co. in Berlin. For the purpose of the London business a banking account was opened with a bank in London, & this account was used rarely, if at all, by the Berlin house. The co. had no other business in the United Kingdom. In Apr., 1916, the London business was ordered to be wound up, & a controller was appointed:—*Held*: the creditors referred to but not specified in s. 1 (3) of the above Act were the creditors of the business as mentioned in s. 1 (4), & not the creditors of the co., as mentioned in s. 1 (7), & the creditors of the enemy co. who were not enemies, but whose debts did not arise out of transactions or dealings in relation to the London business, were not entitled to share *pari passu* with the creditors, whose debts had arisen by reason of transactions or dealings in relation to that business in the distribution of any sums or other property resulting from the realisation of any assets of that business.—*Re HEGELBERG (W.) AKT.*, [1916] 2 Ch. 503; 86 L. J. Ch. 18; 115 L. T. 444; [1917] H. B. R. 7.

*Annotations*:—*Apld. Re Goldschmidt*, [1917] 2 Ch. 194. *Mentd. Re Kastner*, [1917] 1 Ch. 390.

**220. — Position of debenture-holders.**—Where a co. has issued debentures which are secured by a floating charge on its undertaking & assets, & subsequently an order is made by the Board of Trade, under the above sect., to wind up the business of the co., the order enables the controller to deal with the whole of the assets of the business, notwithstanding the debenture-holders' charge & the appointment of a receiver & manager in their action.

On an application for the appointment of a receiver & manager in a debenture-holders' action the ct. ought to be informed whether any proceedings before the Board of Trade for the winding up of the business of the co. under the above sect. are pending or threatened, & any order made will be at the risk of the parties to it, if it is obtained without such information having been supplied.—*Re KASTNER & CO., AUTO-PIANO CO. v. KASTNER & CO.*, [1917] 1 Ch. 390; 86 L. J. Ch. 235; 116 L. T. 62; 33 T. L. R. 149; [1917] H. B. R. 43.

*Annotations*:—*Mentd. Re Goldschmidt*, [1917] 2 Ch. 194; *Re Meyers (Fr.) Sohn*, [1917] 2 Ch. 201; *Holt v. A. E. G. Electric*, [1918] 1 Ch. 320; *Re Dieckmann*, [1918] 1 Ch. 331.

**221. Assets of business—Power to make calls.**—The words "assets of the business" in s. 1 (3) of the above Act do not include a co.'s uncalled capital.

A controller appointed by the Board of Trade under the above Act, to conduct the winding up of a co.'s business in the United Kingdom directed by the Board to be wound up under that Act, cannot be invested by the Board with the power to make a call upon the shareholders of the co. for the purpose of putting himself in funds to discharge the debts of the business & the costs, charges, & expenses of & incidental to its winding up.—*Re GOLDSCHMIDT (JUL.) LTD.*, [1917] 2 Ch. 194; 86 L. J. Ch. 521; 117 L. T. 23; 61 Sol. Jo. 546; [1917] H. B. R. 193.

*Annotation*:—*Apld. Re Meyers (Fr.) Sohn*, [1917] 2 Ch. 201.

**222. Distribution of assets among shareholders.**—Where under the above Act the Board of Trade orders the winding-up of a co.'s business & appoints a controller, & the co. is not in liquidation, the controller cannot be empowered by the Board to distribute assets in his hands, so far as they are not required for payment of the debts of the business & the costs of the winding-up, among the shareholders of the co.—*Re MEYERS (FR.) SOHN, LTD.*, [1918] 1 Ch. 169; 87 L. J. Ch. 103; 117 L. T. 690; 62 Sol. Jo. 120, C. A.

*Annotation*:—*Mentd. Re Dieckmann*, [1918] 1 Ch. 331.

**223. — Business ordered to be wound up—Power to sue.**—Where under the above sect. the Board of Trade makes an order requiring that the business carried on in the United Kingdom by a firm of enemy nationality shall be wound up, & appointing a controller, the Board may by that order confer on the controller power to sue in the name & on behalf of the firm for debts which became due before the outbreak of the war, without being liable to be met by the defence that pl'tfs. are an enemy firm.—*CONTINHO CARO & CO. v. VERMONT & CO.*, [1917] 2 K. B. 587; 86 L. J. K. B. 1532; 116 L. T. 686; 33 T. L. R. 461.

**224. — Distinction between winding up & bankruptcy—Liability for rent.**—Where a business is wound up under the above Act, & a lease of the business premises remains unexpired when the winding up is complete, the lessor being paid all rent due to date, & the covenants having been performed, has no right against the controller or the balance of assets in his hands in respect of future rent or performance of covenants. They are not present debts or liabilities within s. 1 (3), for which alone the controller is responsible. There is no analogy in this connection between the winding up of the business of a person or co. under the above Act & the bkpcy. of an individual or the liquidation of a co., as the winding up of a business under the Act effects no change in the liability of the lessee under the covenants of the lease. If a lease is beneficial, it is a controller's duty to realise it. If it is onerous, it may be his duty to realise it. If realisation is impossible, it is ordinarily proper for him to offer the lessor fair terms (which, normally, will not exceed bkpcy. terms) for surrender of the lease. If the lessor refuses to accept a surrender, it is, in an ordinary case, the controller's duty to leave the lessor to whatever rights & remedies he may have against the lessee under the ordinary law.—*Re DIECKMANN*, [1918] 1 Ch. 331; 87 L. J. Ch. 138; 34 T. L. R. 169; 62 Sol. Jo. 270.

*Annotation*:—*Mentd. Re Francke & Rasch*, [1918] 1 Ch. 470.

**225. — Bills of exchange accepted by enemies—Claim against assets of business of enemy drawer.**—A German firm trading in London drew bills on customers in Germany pay-



able in Germany, which were accepted by these customers & discounted with a bank in London. On Aug. 4, 1914, the date of outbreak of war, the bills had not become due, & owing to the war, they had not yet been presented for payment. By German war legislation (i.) no person residing outside Germany, whether enemy or not, could at that time enforce in German cts. any pecuniary claim arising before July 31, 1914, but would be entitled to interest; (ii.) the date of payment of all bills of exchange drawn outside, but payable in, Germany was postponed for nine months from July 31, 1914, interest till payment being payable at the rate of 6 per cent. per annum; (iii.) by an Ordinance of Sept. 30, 1914, the maturity of all pecuniary claims of persons residing in British territories was postponed until further notice, & no interest could be claimed for the period of postponement, & the time for presenting & protesting bills of exchange held by such persons was postponed until the Ordinance had ceased to be in force, which date was to be determined by the Imperial Chancellor. The firm's business was ordered to be wound up by the Board of Trade. The bank claimed as holders of the bills they should be paid, or have provided for, out of the assets the amounts of the bills at the rate of exchange notionally current either at their respective dates of payment or on Apr. 30, 1915, with interest at 6 per cent. until payment:—*Held*: (1) even if the Ordinance of Sept. 30, 1914, was penal & to be disregarded in English cts., the other Ordinances were valid emergency legislation & binding on the acceptors in Germany, & payment of the bills was not yet enforceable; (2) under Bills of Exchange Act, 1882 (c. 61), s. 72 (5), the holders had no right of recourse to the drawers; (3) there was no present debt or liability of the business to the bank which could be paid under s. 1 (3) of the above Act of 1916, & the claim failed.—*Re FRANK & RASCHKE*, [1918] 1 Ch. 470; 87 L. J. Ch. 273; 118 L. T. 211; 34 T. L. R. 287; 62 Sol. Jo. 438.

**226. — — — After winding up order on creditor's petition — Procedure & form of order.]** — Form of order where, after a winding up order has been made by the ct. on a creditor's petition against a co. registered in England but controlled by alien enemy shareholders, the Board of Trade have under the above sect. made an order to wind up the business of the co., the Board being substituted for petitioning creditors in the pending petition, & those proceedings being stayed until the Board of Trade order has been worked out, so that the Board may then proceed under the pending petition to obtain the final dissolution of the co.—*Re CEDDES ELECTRIC TRACTION, LTD.*, [1918] 1 Ch. 18; 87 L. J. Ch. 9; 117 L. T. 696; 62 Sol. Jo. 70.

**227. — — — Company to be represented.]** — On the hearing of a petition by the Board of Trade to wind up a co. under s. 1 (7) of the above Act, where the Board of Trade have previously made an order under s. 1 (1), & appointed a controller, it is very desirable that the co. should be represented.—*Re POLACK TYRE & RUBBER CO., LTD.* (1918), 62 Sol. Jo. 268.

**228. — — — Jurisdiction of court.]** — *Held*: where under s. 1 (7) of the above Act an order had been made for the winding up of a co., not only the winding up petition, but also all proceedings in the winding up, ought to be before the judge to whom the jurisdiction under Trading with the Enemy Acts was assigned, & not before

the judge to whom the ordinary winding up of cos. jurisdiction was assigned.—*Re HEYL BROTHERS, LTD.* (1918), 144 L. T. Jo. 237.

**229. — — — To extend time.]**—A co. was wound up on the application of the Board of Trade under s. 1 (7) of the above Act on account of its enemy nature, & no liquidator was appointed. A large proportion of the shares was held by alien enemies in Germany, & the co.'s liabilities were largely to alien enemies. On a summons by the official receiver for leave to extend the time for all matters for which a time was fixed by Cos. (Consolidation) Act, 1908 (c. 69), or the rules thereunder, except certain specified matters:—*Held*: (1) the proper course was to specify in the summons the particular matters for which the time was to be extended, & to take liberty to apply to extend the time for other matters; (2) under s. 152 of the above Act of 1908, & Cos.' Winding up Rules, 1909, r. 15, the ct. had power to extend the time for holding the meetings with creditors & contributories, & in the circumstances the time for the meetings should be extended indefinitely.—*Re SCHLIEMANN'S OIL & CERESINE CO. LTD.* (1918), 144 L. T. Jo. 216.

*(b) Appointment and Powers of Custodian.*

**NOTE.**—*The Acts & Orders referred to in the following cases are Trading with the Enemy Amendment Act, 1914 (c. 12), Trading with the Enemy Amendment Act, 1915 (c. 79), Trading with the Enemy Amendment Act, 1916 (c. 105), Trading with the Enemy (Vesting & Application of Property) Rules, 1915, & are herein referred to as Amending Act of 1914, Amending Act of 1915, Amending Act of 1916, Rules of 1915, respectively.*

**230. Amending Act of 1914—What property can be vested—Enemy lien on insurance policies.]** —An English firm had deposited with R., who afterwards became an alien enemy, policies of assurance on the lives of the partners as security for bills which he had accepted on their behalf. The firm became bkpt. One of the partners died & two of the policies became payable. The trustee in bkpcy. applied for an order under s. 4 of the above Act, vesting in the custodian the policies or the right to receive the policy moneys. He did not admit R.'s lien:—*Held*: (1) under the above Act the only property which could be vested in the custodian was enemy property; (2) the charge on the policies, if existing, was enemy property; (3) the trustee was not interested in it & not entitled to make the application.—*Re RUBEN*, [1915] 2 Ch. 313; 84 L. J. Ch. 789; 113 L. T. 647; 31 T. L. R. 563; 59 Sol. Jo. 704; [1915] H. B. R. 235.

**231. — — — Unadmitted credit balance at bank—Position of debtor to enemy.]**—The provisions of s. 4 (1) of the above Act only enable a vesting order to be made as to specific property which can be definitely pointed out, & do not apply to an alleged credit balance on a running account between the alien enemy & a bank, the existence of which balance is denied by the bank. A vesting order should not place the custodian in the position of an assignee of a disputed debt. A debtor to an alien enemy is not a "person who holds or manages for or on behalf of an enemy any property" within s. 3 (1) of the Act & ought not, under r. 2 (4) of the Rules of 1915, to be named as resp. to an originating summons for a vesting order under the above sect., unless it is clear he admits the debt. Appls. were ordered to pay the costs of resps. improperly joined.—*Re BANK FÜR HANDEL UND*

**PART III. SECT. 2, SUB-SECT. 2.—**  
**B (b).**

**230 i. Amending Act of 1914—What property can be vested—Land held in un-**

*divided shares by alien enemies & British subjects.]*—The ct. has jurisdiction to vest lands in the custodian, where the lands are held in undivided

shares by persons, some of whom are enemies & some British subjects domiciled within the jurisdiction.—*Re FITZGERALD* (1915), 49 L. T. 119.—*IR.*



*Sect. 2.—Position of alien enemy: Sub-sect. 2, B.*

INDUSTRIE, [1915] 1 Ch. 848; 84 L. J. Ch. 435; 113 L. T. 228; 31 T. L. R. 311.

**232. ——— Ship seized as prize—Subsequently requisitioned by Crown.]—**Where a German ship was seized as a prize by the Crown after the declaration of war with Germany, & was subsequently requisitioned by the Crown & was in the possession of the Admty.:—*Held*: s. 4 of the above Act was inapplicable, & it was not expedient for the purposes of that Act in the circumstances of the case to make an order vesting property of such a nature as a ship in the custodian trustee.—*Re HEMSOOTH (WILHELM), LTD., Ex p. VILLE S.S., LTD.* (1915), 85 L. J. Ch. 104; 113 L. T. 260; 13 Asp. M. L. C. 115.

**233. ——— Circumstances where appointment refused—Application by manager of branch.]—**The London manager of an alien enemy firm, which had its head office at Leipzig & carried on business in various parts of the world, applied, with that firm's consent, that a receiver & manager of the London branch of the business should be appointed:—*Held*: (1) there was no jurisdiction to appoint a receiver & manager of a business at the instance of the existing manager; (2) if the ct. had a discretionary jurisdiction, it would not interfere, because it was not the function of the ct. to appoint its own officer to protect the property of an alien enemy: (3) s. 4 of the above Act did not authorise the ct. to vest a business in the custodian for the purpose of his managing it, the effect of which would be to bring in new property.—*Re GAUDIG & BLUM, SPALDING v. LODDE* (1915), 31 T. L. R. 153.

**234. ——— Powers & duties of custodian—Application to court—Right of company to appear.]—**Shares in an English co. belonging to an alien enemy were vested in the custodian under s. 4 (1) of the above Act:—*Held*: (1) the custodian was entitled to do all the acts he could do in his character of shareholder in the co.; (2) although it might be wise for him to apply to the ct. for directions in particular cases, yet he had full power to do what might be necessary without such application, & an order made by the ct. sanctioning a particular exercise of his rights in no way modified those rights. *Seemle*: where in such a case the custodian applies to the ct. for directions, the co. has no *locus standi* to appear & be heard on the application.—*Re PHARAON ET FILS.* [1916] 1 Ch. 1; 85 L. J. Ch. 68; 113 L. T. 1138; 32 T. L. R. 47; [1915] H. B. R. 232, C. A.

**235. ——— For declaration that contract subsisting.]—**Under the above Act the ct. has no power to make a declaration, at the instance of the custodian, that a contract between an English co. & an enemy co., whose property has been vested in the custodian, is a subsisting contract, & that the rights & obligations thereunder are enforceable as between him & the English co.; but the proper course is for the English co. to begin an action against the enemy co. under Legal Proceedings against Enemies Act, 1915 (c. 36), to have the effect of the European war on the rights & liabilities of the parties under the contract determined, the custodian being joined as a deft. in such action, & to apply to the judge to whom actions under the latter Act are assigned to direct that the action should be heard by the judge to whom applications under the Act of 1914 are assigned.—*Re FRIED KRUPP AKT.* (1916), 32 T. L. R. 695.

**234 i. ——— Powers & duties of custodian—Payment of debts.]—**It is a matter for the discretion of the custodian whether or not he will pay a debt due by the enemy subject to a creditor in Scotland, & he is not bound to do so. Circumstances in which the custodian was

authorised to make payment. Interest on the debt can be claimed from the custodian only if legally due by the enemy debtor. It is a matter for the custodian's discretion what advertisement, if any, shall be made for claims against the enemy property.—

**236.**

**Payment of debts.]—**Where the property of an enemy in England is vested in the custodian & an English creditor applies for payment of his debt out of the vested property, the ct., before admitting the claim, requires to be satisfied with the most reasonable certainty that payment of the debt has not already been made in Germany either under the contract or under German emergency legislation.

The above Act is not primarily an Act for the benefit of creditors, but for the preservation of enemy property to be dealt with after the war.

Where application is made to vest in the custodian a debt owing to an enemy by an English debtor who has property in Germany, out of which the debt may have been satisfied, the ct. in ordering the vesting directs that payment shall not be made out of the vested property except after notice to debtor.

Form of orders known respectively as "Freudenberg Ord." & "Blydenstein Ord.," commonly made upon the vesting of a debt in the custodian, where English debtor has property in Germany, or claims a lien on enemy property.—*Re LING & DÜHR,* [1918] 2 Ch. 298; 87 L. J. Ch. 500; 118 L. T. 623.

**237. ——— Payment of interest & commission—Acceptance of bills drawn by enemy—Advance to accepting house.]—**An accepting house provided credit facilities for a foreign client before the outbreak of war by accepting bills against merchandise or securities. Upon the outbreak of war the client became an alien enemy. The bills thereafter matured, & the client could not remit funds to meet them, & the accepting house, in order to meet the bills, obtained from the Bank of England an advance at 2 per cent. above the current bank rate. The accepting house afterwards paid off the bank with the agreed interest. An order having been made vesting the property of the alien enemy in the custodian under Trading with the Enemy Acts:—*Held*: the accepting house was entitled to charge against the alien enemy what it had actually paid to the Bank of England, but after the Bank was paid off only simple interest at 5 per cent. without any charge or commission.—*Re TILMAN* (1918), 34 T. L. R. 322.

**238. ——— Rules of 1915—Procedure—Alien enemy interned.]—**Where notice of motion had been served before the above Rules under the above Act were promulgated in the *London Gazette*:—*Held*: an originating summons must be issued, in pursuance of the rules, & the matter must come on first in chambers, leave being given to use the affidavit evidence filed on the motion.

Where the alien enemy is interned in an internment camp, a letter should be sent to him enclosing a copy of the originating summons.—*Re A COMPANY* (1915), 59 Sol. Jo. 217.

**239. Amending Act of 1916—Powers & duties of custodian—Payment of debts & interest.]—**Where the ct. has made an order, to which the custodian was a consenting party, under s. 5 (2) of the amending Act of 1914, directing the custodian out of money in his hands to make a distribution in respect of debts due by the enemy, the creditors on establishing their debts in chambers are not entitled to interest at 4 per cent. per annum under R. S. C., Ord. 55, r. 63, on debts which do not carry interest. The provisions of r. 4 (4) of the Rules of 1915, made under s. 5 (5) of the Act, do not incorporate R. S. C., Ord. 55, r. 63, for this purpose, or if they do, the rule so far is *ultra vires*.

While by s. 5 (2) of the amending Act of 1914, as

ROWAN (DAVID) & Co. (1916), 2 S. L. T. 165.—SCOT.

**d. ——— Appointment of custodian—No bar to subsequent appointment of judicial factor.]—***Re SMITH, LAING & Co.* (1914), 2 S. L. T. 462.—SCOT.

amended by s. 12 of the amending Act of 1916, the custodian is not empowered to pay out of the property paid to him in respect of an enemy the whole or any part of any debt due by that enemy, unless so authorised by an order of the High Ct. or a judge thereof, the ct. cannot require the custodian to make any such payment against his will. The decision whether payment shall or shall not be made rests ultimately with the custodian, subject only to the proviso that before paying any debt he must satisfy himself that he retains property paid to or vested in him in respect of the enemy in question sufficient to satisfy that debt & any other claims against that enemy, of which notice verified by statutory declaration may have been served upon him.

Whatever be the ultimate destination of the funds in the hands of the custodian under the Ord. in Council hereafter to be made under s. 5 (1) of the amending Act of 1914, no payment out of enemy money should be authorised by the ct. which could not by law be justified as against the enemy himself. The fund should be kept intact for restoration, if need be, at the end of the war, less only such payments out of it for administration or otherwise as the enemy could not himself validly or reasonably object to, if he were here to oppose them.—*Re FRIED KRUPP ACT.*, [1916] 2 Ch. 194; 85 L. J. Ch. 634; 114 L. T. 1026; 32 T. L. R. 553.

*Annotations:—Refd. Re Hagelberg Akt.*, [1916] 2 Ch. 503; *Holt v. A. E. G. Electric*, [1918] 1 Ch. 320.

#### 240. "Claims of creditors" defined.]

—The above Act, s. 1 (7), restricts, *i.e.*, prevents without the leave of the Board of Trade, only the enforcement of admitted claims of creditors by way of execution or other form of process, & does not interfere with the ordinary course up to judgment of actions or other form of proceeding for the purpose of ascertaining or establishing disputed claims.

An action was brought by a British subject to recover from a British co., which had an enemy proprietary & a business in England which was being wound up under the above Act, a sum for salary alleged to be payable under an agreement of service, or, alternatively, damages for breach of the agreement. The co. denied that pltf. was entitled to anything:—*Held*: the action was maintainable without the consent of the Board of Trade. *Seem*: pltf. was not a "creditor" within s. 1 (7).

Principles of administration of Trading with the Enemy Acts stated.—*HOLT v. A. E. G. ELECTRIC CO., LTD.*, [1918] 1 Ch. 320; 87 L. J. Ch. 152; 34 T. L. R. 136; 62 Sol. Jo. 212.

**241. Amending Act of 1915, s. 2—Right of alleged alien company to restrain debtor from making return to custodian.**—Pltf. co. was incorporated under the laws of Belgium & had its registered office at Antwerp. After the outbreak of war between Great Britain & her Allies (including Belgium) & Germany, a large portion of Belgium (including Antwerp) being in the effective military occupation of Germany, the co.'s business at Antwerp was closed, & the books were removed to London, where the business was then wholly carried on, but the chairman of the co. was still in Antwerp. Defts., who acted as bankers for the co., had declined to pay a cheque drawn upon them by the co., on the ground that the co. was "technically an enemy," & they proposed to make return to the custodian trustee of the moneys held by them on the co.'s behalf. In an action by the co. for a declaration that it was not an enemy within the Trading with the Enemy Acts & Proclamations relating to trading with the enemy, & an injunction to restrain defts. from making any return to the custodian trustee of any property in their

possession or under their control to which the co. was entitled:—*Held*: the co. being incorporated in Belgium was not incorporated in an enemy country, for although a large portion of that country was in the effective military occupation of an enemy, yet the country as a whole was not territory in hostile occupation, & the co. was not an "enemy" within any of the Acts or Proclamations.—*SOCIÉTÉ ANONYME BELGE DES MINES D'AJUSTREL (PORTUGAL) v. ANGLO-BELGIAN AGENCY, LTD.*, [1915] 2 Ch. 409; 84 L. J. Ch. 849; 113 L. T. 581; 31 T. L. R. 624; 59 Sol. Jo. 679, C. A.

#### (c) Appointment and Powers of Receiver or Inspector.

**NOTE.**—The Acts referred to in the following cases are *Trading with the Enemy Act, 1914 (c. 87)*, *Trading with the Enemy Amendment Act, 1914 (c. 12)*, & are herein referred to as *Act of 1914, Amending Act of 1914 respectively*.

#### 242. Apart from statute—Application by agent.]

—An Austrian subject carrying on business in England, upon declaration of war between Austria & Russia, gave his manager a power of attorney to carry on the business, & left England for the front. Shortly afterwards, on declaration of war by Great Britain against Austria, he became an alien enemy. The manager, for that reason being unable to collect debts due to his principal, commenced an action against him for the appointment of a receiver of the assets, with liberty to pay the debts:—*Held*: the agent could have no greater right than his principal, who, being an alien enemy, could not sue, & there was no jurisdiction to appoint a receiver.—*MAXWELL v. GRUNHUT (1914)*, 31 T. L. R. 79; 59 Sol. Jo. 104, C. A.

*Annotation:—Folld. Re Gaudig & Blum, Spalding v. Lodde (1915)*, 31 T. L. R. 153.

#### 243. — Appointment of branch manager—Subject to special undertaking—Conditional on application for licence.]

—Where a large alien enemy firm had a London branch, employing a hundred British workmen, the ct. appointed the English assistant manager of that branch to be receiver & manager, on his undertaking not to remit goods or money forming assets of the firm's business to any hostile country, & to endeavour to obtain a licence from the Crown to trade.—*Re BECHSTEIN, BERRIDGE v. BECHSTEIN, LONDON COUNTY & WESTMINSTER BANK v. BECHSTEIN (1914)*, 58 Sol. Jo. 863.

**244. — Power to prevent trade interference from rival.]**—The English assistant manager of the London branch of an alien enemy firm was appointed receiver & manager of the branch business, on his undertaking, *inter alia*, to endeavour to obtain a licence from the Crown for continuance of the business. Before this licence, which was subsequently granted, was obtained, the president of a rival English trade assocn. wrote a letter describing it as an unpatriotic act to do business with the firm. On motion to commit the president for interference with the receiver:—*Held*: the president must give an undertaking not to circulate in future any such letters during continuance of the licence.—*Re BECHSTEIN, BERRIDGE v. BECHSTEIN, LONDON COUNTY & WESTMINSTER BANK v. BECHSTEIN (1914)*, 58 Sol. Jo. 864.

**245. — Partnership—Accession deed entered into after outbreak of war.]**—A firm consisted of English & German partners. There was a clause in the partnership deed making provision for what was to be done in the event of the two German partners in the business or either of them being called out to serve in the German army. The partners were in fact called out, & before the outbreak of war between England & Germany, & before such partners departed for Germany, all the



**Sect. 2.—Position of alien enemy: Sub-sect. 2, B. & (d); sub-sect. 3, A.]**

partners entered into a deed of accession purporting to carry out the clause & substitute other partners. On an *ex p.* motion the ct. appointed a receiver & manager of the business, not for the purpose of winding-up the business, but for the purpose of continuing it.—*ARMITAGE v. BORGMANN* (1914), 84 L. J. Ch. 784; 112 L. T. 819; 59 Sol. Jo. 219.

**246. Act of 1914, s. 3—Partnership—Appointment on ex parte application—One partner alien enemy.]—**A partnership consisted of three partners, one a naturalised British subject, another a German subject resident in London, & the third a German subject resident in Germany. On the outbreak of war between England & Germany the partners were carrying on business in London. There was a large sum due to the partnership from customers in England & the colonies. Part had been received, but there was a difficulty in collecting the rest owing to the fact of one partner being an alien enemy:—*Held*: the business being an ordinary commercial business, & not within the above sect., a receiver would be appointed on an *ex p.* application.—*ROMBACH v. ROMBACH* (1914), 59 Sol. Jo. 90.

**247. ——— Power of receiver to sue.]—**A partnership firm consisting of three partners, of whom one was an alien enemy resident in Germany, sold goods to debtors. One of the other partners afterwards brought an action for dissolution of partnership, & the ct. appointed him receiver of the business:—*Held*: an action was maintainable by the receiver to recover the price of the goods sold by the partnership.—*ROMBACH BADEN CLOCK CO. v. GENT & SON* (1915), 84 L. J. K. B. 1558; 31 T. L. R. 492.

*Annotations*:—**Consd.** *Speyer v. Rodriguez* (1917), 87 L. J. K. B. 171, C. A. **Dbtd.** *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**248. Amending Act of 1914, s. 12—Partnership—Inspector appointed—Dissolution—Date of accounting.]—**Three brothers of American origin, but naturalised British subjects, traded in partnership at Frankfurt-on-Main, London, & elsewhere. Pltf. resided & carried on business in London & debtors at Frankfurt. On the outbreak of war with Germany debtors were interned in Germany. In Nov., 1914, pltf. commenced an action for dissolution of partnership as from Aug. 4, 1914, the date of the declaration of war, on the ground that debtors were alien enemies. The Board of Trade under the powers conferred on them by the above sect. appointed an inspector to supervise the business of the firm, & he employed pltf. as manager.—*Held*: (1) the partnership must be dissolved & the usual partnership accounts taken; (2) the ct. declined to decree a dissolution either from the date of declaration of war or from the date of the writ, as it might occasion difficulties when the accounts were taken, & directed that the accounts should not be proceeded with until three months after declaration of peace.—*KUPFER v. KUPFER* (1915), 60 Sol. Jo. 221.

### PART III. SECT. 2, SUB-SECT. 3.—A.

**250 i. No right to sue.]—**An alien enemy cannot require the assistance of the Crown, with which he is at war, to secure recognition of a right he claims & be assured of its performance.—*CANADIAN STEWART CO. v. PERIH* (1915), 17 Q. P. R. 291; Q. R. 25 K. B. 108.—**CAN.**

**250 ii. ———.]—***MYERS v. TELLER* (1915), 7 O. W. N. 834.—**CAN.**

**250 iii. ———.]—***Action pending at outbreak of war.]* A subject of a foreign Power at war with England, & residing in

his own country, cannot continue proceedings in Canada, even in a case which was instituted before declaration of hostilities.—*DE KORALLISUK v. ASBESTOS B. & A. CO.* (1914), 21 R. de J. 35; 16 Q. P. R. 213.—**CAN.**

**250 iv. S. P. LUCZYCKI v. SPANISH RIVER PULP CO.** (1915), 9 O. W. N. 136; 34 O. L. R. 519.—**CAN.**

**250 v. ———.]—***Held*: pltf., Austrian subjects residing in Austria, having become alien enemies, ought to be barred from further prosecution of an action commenced before the outbreak of war. *Seemle*: the dismissal of

(d) *Appointment and Powers of Administrateur-séquestre.*

**249. Authority to receive & give discharge for dividends of English company.]—**A person, who has been appointed by the French Cts. administrateur-séquestre of all the property & rights possessed in France by a German resident in that country, is entitled to receive dividends payable by an English co. to such German resident in France.—*LEPAGE v. SAN PAULO COPPER ESTATES, LTD.* (1917), 33 T. L. R. 457; 61 Sol. Jo. 612.

### SUB-SECT. 3.—AS REGARDS ENGLISH COURTS.

*A. Right to sue or otherwise initiate Proceedings on his own Behalf.*

**250. No right to sue.]—**An alien born who becomes an enemy, as all alien friends may, is utterly disabled to maintain any action, or get anything within the realm of England.—*CAVIN'S CASE* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; Moore, K. B. 790; Jenk. 306; 77 E. R. 377.

*Annotations*:—**Refd.** *Brunswick v. Hanover* (1844), 6 Beav. 1; *Bowman v. Secular Soc.*, [1917] A. C. 406, H. L.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. **Mentd.** *Parliament in Ireland, Case of* (1613), 12 Co. Rep. 110; *R. v. Hampden* (1637), 3 State Tr. 826; *Collingwood v. Pace* (1661), O. Bridg. 410; *Manby v. Scot* (1663), 1 Keb. 361; *Thomas v. Sorrel* (1672), 3 Keb. 143; *Anon.* (1678), *Freem. K. B.* 249; *R. v. Tucker* (1692), 4 Mod. Rep. 162; *R. v. Knowles* (1693), 12 Mod. Rep. 55; *Loddington v. Kime* (1695), 3 Lev. 431; *Owen v. Saunders* (1698), 1 Ld. Raym. 158; *Clayton v. Kinaston* (1697), 1 Ld. Raym. 419; *Scot v. Schwartz* (1739), 2 Com. 677; *Omychund v. Barker* (1744), 1 Atk. 21; *R. v. Cowle* (1759), 2 Burr. 834; *Campbell v. Hall* (1774), 1 Cowp. 204; *Queen Caroline's Claim to be Crowned* (1821), 1 St. Tr. N. S. 949, P. C.; *Ruding v. Smith* (1821), 2 Hag. Con. 371; *Jephson v. Hiera* (1835), 3 Knapp 130; *Lane v. Bennett* (1836), 1 M. & W. 70; *Lyons Corp'n. v. East India Co.* (1836), 1 Moo. Ind. App. 175, P. C.; *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895, H. L.; *Taylor v. Best* (1854), 14 C. B. 487; *Rittson v. Stordy* (1855), 1 Jur. N. S. 771; *R. v. Lopez, R. v. Sattler* (1858), *Dears. & B.* 525, C. C. R.; *Ex p. Anderson*, (1861) 3 E. & E. 487; *Ex p. Brown* (1864), 5 B. & S. 280; *Low v. Routledge* (1865), 1 Ch. App. 42, L. J. J.; *The Franconia* (1876), 2 Ex. D. 63, C. C. R.; *De Geer v. Stone* (1882), 22 Ch. D. 243; *Re Stepney Petn.*, *Isaacson v. Durant* (1886), 17 Q. B. D. 54; *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821; *Gibson v. Gibson*, [1913] 3 K. B. 379; *R. v. Speyer*, [1916] 2 K. B. 858, C. A.; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *R. v. Francis*, [1918] 1 K. B. 617.

**251. ——— Suit in equity.]—**A suit was brought in equity for discovery of goods received by debtors as agents for pltf., stating such discovery to be necessary for supporting actions at law intended by pltf. to be brought for recovering the value of the goods. Debtors pleaded that pltf. were alien enemies:—*Held*: (1) suits for discovery were not an exception to the general rule of the disability of an alien enemy to sue, since the disability to sue is personal & takes away from the King's enemies the benefit of his cts., whether for the purpose of immediate relief or to give assistance in obtaining that relief

the action would not be a bar to a subsequent action after the termination of the war.—*DUMENKO v. SWIFT CANADIAN CO.* (1915), 7 O. W. N. 155; 32 O. L. R. 87.—**CAN.**

**250 vi. ——— Practice.]—***Held*: (1) alien enemies resident in a neutral country could not sue in a Canadian ct.; (2) the proper procedure was to enlarge a motion to set aside a writ on such grounds to the trial, to which pltf. might proceed at their own risk.—*NEWMAN v. BRADSHAW* (1916), 33 W. L. R. 945; 10 W. W. R. 649.—**CAN.**



elsewhere; (2) the plea was good.—**DAUBIGNY v. DAVALLON** (1794), 2 Anst. 462; 145 E. R. 936.

*Anno'ation* :—**Refd.** *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**252. — Effect of Aliens Act, 1794 (c. 9).]**—*Held*: the above Act did not prevent the bringing of actions by aliens to recover money due to them, but only prevented its being sent out of the kingdom.—**MICHELOTTE v. DILLON** (1798), 2 Esp. 622, N. P.

**253. — Rule in general & in Prize Court.]**—In the law of almost every country the character of alien enemy carries with it disability to sue or to sustain a *persona standi in judicio*. The same principle is received in our Prize Cts., & no subject of the enemy can sue therein, unless in particular circumstances, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. Otherwise he is totally outside the law.—**THE HOOP** (1799), 1 Ch. Rob. 196.

*Annotations* :—**Apld.** *The Ionian Ships* (1855), 2 Ecc. & Ad. 212; *The Chilo* (1914), 84 L. J. P. 1; *The Marie Glaeser*, [1914] P. 218; *The Mowe*, [1915] P. 1. **Mentd.** *Potts v. Bell* (1800), 8 Term Rep. 548; *Willison v. Patteson* (1817), 1 Moore, C. P. 133; *The Leucade* (1855), 25 L. T. O. S. 312; *Esposito v. Bowden* (1857), 7 E. & B. 763; *Arnhold, Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1915] 2 K. B. 379; *Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co., Same v. Tilling* (1915), 84 L. J. K. B. 926, C. A.; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857, C. A.; *Robson v. Premier Oil & Pipe Line Co.*, [1915] 2 Ch. 124, C. A.; *The Panariellos* (1915), 84 L. J. P. 140; *British & Foreign Marine Insee. v. Sanday*, [1916] 1 A. C. 650, H. L.; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *Horlock v. Beal*, [1916] 1 A. C. 486, H. L.; *The Mannigtry*, [1916] P. 329; *Stevenson v. Akt. für Cartonnagen Industrie* (1916), 115 L. T. 594, C. A.; *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541, C. A.; *Continho Caro v. Vermont*, [1917] 2 K. B. 587; *Ertel Bieber v. Rio Tinto Co.*, [1918] A. C. 260, H. L.; *Naylor, Benzon v. Krainsche Industrie*, [1918] 1 K. B. 331; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

*See, further, PRIZE LAW & JURISDICTION.*

**254. — Effect of Hague Convention, 1917, No. 4.]**—The provisions of art. 23 (h) of the annex entitled "Laws & Customs of War on Land" to the above Convention have not abrogated the rule of English law so as to enable an alien enemy to sue.—**PORTER v. FREUDENBERG, KREGLINGER v. SAMUEL (S.) & ROSENFELD, Re MERTEN'S PATENTS**, [1915] 1 K. B. 857; 84 L. J. K. B. 1001; 112 L. T. 313; 31 T. L. R. 162; 20 Com. Cas. 189, C. A.

*Annotations* :—**Mentd.** *Act. für Anilin v. Levinstein* (1915), 84 L. J. Ch. 842, C. A.; *R. v. Kupfer*, [1915] 2 K. B. 321, C. A.; *Rombach Baden Clock Co. v. Gent* (1915), 84 L. J. K. B. 1558; *Re Sutherland, Bechoff v. Bubna* (1915), 31 T. L. R. 248; *Re Wilson, Ex p. Marum* (1915), 113 L. T. 1116; *Zinc Corpn. v. Hirsch* (1915), 85 L. J. K. B. 565, C. A.; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268; *Schaffenius v. Goldberg*, [1916] 1 K. B. 284, C. A.; *Re Hilckes*, [1917] 1 K. B. 48, C. A.; *Scotland v. South African Territories* (1917), 33 T. L. R. 255; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**255. — Effect of Trading with Enemy Proclamation, 1914, No. 2, pars. 5 & 6.]**—Pltfs. were a firm of cotton waste merchants, the partners being all German subjects resident & domiciled in Germany, & having their principal place of

business there with branches in England & elsewhere. During June & July, 1914, they sold certain bales of cotton waste to defts., cotton waste spinners at Haslingden. The goods were delivered but not paid for. In July other bales of cotton waste were invoiced by pltfs. to defts. After the outbreak of war between Great Britain & Germany defts. refused to accept or pay for the latter goods. The above Proclamation saved transactions with every branch locally situate in British territory. In an action by pltfs. for the price of the goods accepted but not paid for, & for damages for non-acceptance of the goods refused by defts. :—*Held* : (1) par. 6 of the above Proclamation did not enable an alien enemy to sue in respect of obligations entered into before the war, & pltfs. were not entitled to sue.—**WOLF (W.) & SONS v. CARR, PARKER & Co.** (1915), 31 T. L. R. 407, C. A.

*Annotations* :—**Folld.** *Kreglinger v. Cohen* (1915), 31 T. L. R. 592. **Expld.** *Schaffenius v. Goldberg*, [1916] 1 K. B. 284, C. A. **Refd.** *Re Coutinho Caro*, [1918] 2 Ch. 384. **Mentd.** *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541; *Continho Caro v. Vermont*, [1917] 2 K. B. 587.

**256. — Unless resident under licence.]**—An alien enemy residing in England by the licence & under the protection of the King can enter into contracts & sue upon them.—**WELLS v. WILLIAMS** (1697), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E. R. 18.

*Annotations* :—**Apld.** *Casseres v. Bell* (1799), 8 Term Rep. 166. **Consd.** *Maria v. Hall* (1807), 1 Taunt. 33. **Apld.** *Usparicha v. Noble* (1811), 13 East, 332. **Expld.** *Mennett v. Bonham* (1812), 15 East, 477; *Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co., Same v. Tilling* (1915), 84 L. J. K. B. 926, C. A. **Apld.** *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857, C. A.; *Thurn & Taxis v. Moffitt*, [1915] 1 Ch. 58. **Expld.** *Schaffenius v. Goldberg*, [1916] 1 K. B. 284, C. A. **Mentd.** *Omychund v. Barker* (1744), 1 Atk. 21; *Janson v. Driefontein Consolidated Gold Mines*, [1902] A. C. 484; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)* (1916), 32 T. L. R. 624, H. L.

**257. — Proof of licence.]**—To a plea that A., for whose benefit the action was brought, an alien enemy, the replication stated that he was resident in England by the King's licence :—*Held* : (1) to support an issue taken upon this fact, it was not enough for pltf. to prove that a licence was granted by the King to A., while an alien friend, to undertake a voyage to a foreign country & thence to England, which did not terminate till after commencement of hostilities between his country & Great Britain, & that after termination of the voyage he went about at large in England unmolested by the Govt., it not appearing the Govt. knew he was in the kingdom; (2) to support the replication, it was necessary either to produce a protection granted to A. as an alien enemy, or to show that his stay in England had been sanctioned by the King after commencement of hostilities.—**BOULTON v. DOBREE** (1808), 2 Camp. 163, N. P.

*Annotation* :—**Apld.** *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857, C. A.

**258. — — — — —.]**—Where to a plea of alien enemy pltf. replied that she was resident in England by the King's licence & permission :—*Held* : it was not enough to prove that a licence was granted

**256 i. — Unless resident under licence—Proclamation of August 13, 1914.]**—The ct. stayed an action by an alien enemy, with leave to apply to permit the action to proceed after it was duly proved that he was "quietly pursuing his ordinary avocation" under the above Proclamation.—**BASSI v. SULLIVAN** (1914), 26 O. W. R. 813; 7 O. W. N. 38; 18 D. L. R. 452; 32 O. L. R. 14.—**CAN.**

**256 ii. — — — — —.]**—An action under Fatal Accidents Act, 1846 (c. 93),

was begun by Austrian subjects before the outbreak of the European war. Thereafter pltfs. continued to reside in Canada under the above Proclamation :—*Held* : pltfs., although alien enemies, entitled to continue the action.—**OSKEY v. KINGSTON** (1914), 7 O. W. N. 251; 32 O. L. R. 190.

**256 iii. — — — — — Burden of proof under.]**—An action for damages for personal injuries was begun by an Austrian subject before the outbreak of the European war. Thereafter pltf.

continued to reside in Canada under the above Proclamation :—*Held* : (1) the action should not be stayed; (2) the Proclamation did not cast upon resident aliens the burden of establishing that they were not engaged in espionage, etc., before allowing them the protection of the law, but the burden of proving such disabilities rested on those who asserted them.—**PRESCOVITCH v. WESTERN CANADA FLOUR MILLS** (1914), 29 W. L. R. 900; 7 W. W. R. 454; D. L. R. 786; 24 Man. L. R. 783.—**CAN**

**Sect. 2.—Position of alien enemy: Sub-sect. 3, A.]**

to her under Aliens Act, 1797 (c. 77), which expired with that stat., & she had since continued to reside openly in England without molestation, there being no evidence that the Govt. knew of her being in the kingdom at the time of action brought.—*ALCIATOR v. SMITH* (1812), 3 Camp. 245.

**Annotation:—***Apld.* *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857, C. A.

Plea of alien enemy & replication thereto, *see* Nos. 311—329, *post*.

**259. — Unless registered under Aliens Restriction Act, 1914 (c. 12).]**—An alien enemy resident in England had registered under the above Act:—*Held*: she was resident there under the licence of the Crown & was entitled to sue.—*THURN & TAXIS (PRINCESS) v. MOFFITT*, [1915] 1 Ch. 58; 84 L. J. Ch. 220; 112 L. T. 114; 31 T. L. R. 24; 59 Sol. Jo. 26.

**Annotations:—***Apprvd.* *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857, C. A. *Apld.* *Schaffenus v. Goldberg* (1915), 85 L. J. K. B. 374, C. A. *Mentd.* *R. v. Vine St. Police Station Supt., Ex p. Liebmann*, [1916] 1 K. B. 268.

**260. —.]**—An alien enemy has no right to sue in the cts., unless resident in England by permission of the Crown. Alien enemies registered under the above Act can sue, being registered in England by tacit permission of the Crown.—*PORTER v. FREUDENBERG, KREGLINGER v. SAMUEL (S.) & ROSENFELD, Re MERTEN'S PATENTS*, [1915] 1 K. B. 857; 84 L. J. K. B. 1001; 112 L. T. 313; 31 T. L. R. 162; 20 Com. Cas. 189; 32 R. P. C. 109, C. A.

**Annotations:—***Folld.* *Act. für Anilin v. Levinstein* (1915), 84 L. J. Ch. 842, C. A. *Apld.* *Re Wilson, Ex p. Marum* (1915), 113 L. T. 1116. *Expld.* *Schaffenus v. Goldberg*, [1916] 1 K. B. 284, C. A. *Reid.* *Re Sutherland, Bechoff v. Bubna* (1915), 31 T. L. R. 248; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. *Mentd.* *R. v. Kupfer*, [1915] 2 K. B. 321, C. C. A.; *Rombach Baden Clock Co. v. Gent* (1915), 84 L. J. K. B. 1558; *Zinc Corpn. v. Hirsch* (1915), 85 L. J. K. B. 565, C. A.; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268; *Re Hilckes*, [1917] 1 K. B. 48, C. A.; *Scotland v. South African Territories* (1917), 33 T. L. R. 255; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Eriel Bieber v. Rio Tinto*, [1918] A. C. 260.

**261. — Effect of internment.]**—The internment of an alien enemy as a civilian prisoner of war does not operate as a revocation of the licence to remain commorant in the country implied by his registration under the above Act; but he remains "in protection" of the Crown, & retains the right to sue in the English Cts. for the purpose of enforcing his civil rights—as, for example, his rights under a contract entered into in England after the outbreak of war.—*SCHAFFENIUS v. GOLDBERG*, [1916] 1 K. B. 284; 85 L. J. K. B. 374; 113 L. T. 949; 32 T. L. R. 133; 60 Sol. Jo. 105, C. A. **Annotation:—***Apld.* *Nordman v. Rayner* (1916), 33 T. L. R. 87.

**259 i. — Unless registered under Aliens Restriction Act, 1914 (c. 12).]**—An alien enemy duly registered under the above Act & Ord. made thereunder, & residing in a prohibited area of the United Kingdom under a permit, may sue in the cts. in the United Kingdom, notwithstanding the existence of a state of war between the United Kingdom & the country of the alien.—*VOLKL v. ROTUNDA HOSPITAL*, [1914] 2 I. R. 549.—

**259 ii. —.]**—An action was raised in Scotland by an alien enemy, who had complied with the above Act:—*Held*: he had a good title to sue in the Scottish cts.—*SCHULZE, Gow & Co. v. BANK OF SCOTLAND* (1916), 2 S. L. T. 207.—**SCOT.**

**261 i. — Effect of internment.]**—*Held*: During the European war an

Austrian, an interned enemy in Canada, could not proceed with any action before the civil cts.—*GUSETU v. LAING* (1915), Q. R. 48 S. C. 427.—**CAN.**

**261 ii. —.]**—*Held*: an enemy subject, interned in Canada during the term of war, because he was out of employment, & would have been a charge upon the public, preserved the right to take legal proceedings to recover damages suffered by him through the death of his son.—*HARASSYMEZUK v. MONTREAL LIGHT, HEAT & POWER CO.* (1916), Q. R. 25 K. B. 252.—**CAN.**

**e. Action for personal injuries.]**—An alien enemy, resident in Canada, may maintain an action for personal injuries sustained while following his avocation by virtue of the Ords. in Council of Aug 7. & 15, 1914.—*TOPAY*

**262. Unless prisoner of war—Sult for wages.]**—A prisoner of war can enter into a contract—at any rate for service at wages, or for the supply of necessaries—& sue upon the contract.—*SPARENBURGH v. BANNATYNE* (1797), 1 Bos. & P. 103; 2 Esp. 580; 126 E. R. 837.

**Annotations:—***Apld.* *Maria v. Hall* (1800), 2 Bos. & P. 236; *Schaffenus v. Goldberg*, [1916] 1 K. B. 284, C. A. *Reid.* *Taylor v. Carpenter* (1847), 9 L. T. O. S. 514; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**263. —.]**—A prisoner of war may maintain an action on a contract for wages.—*MARIA v. HALL* (1807), 1 Taunt. 33; 127 E. R. 741.

**Annotations:—***Mentd.* *R. v. Depardo* (1807), 1 Taunt. 26; *Schaffenus v. Goldberg*, [1916] 1 K. B. 284, C. A.

**264. — Unless mariner on licensed voyage—Sult for wages.]**—Alien enemies are at liberty to sue in the English cts. for wages earned as mariners on a voyage to England under the protection of a licence, at any rate in a case where, if the ct. there should refuse its assistance, the seamen would be deprived of all remedy.—*THE MARIA THERESA* (1813), 1 Dods. 303.

**265. —.]**—Alien enemies may sue in the English cts. for wages earned on a voyage to England under the protection of a British licence, at any rate where they have performed services to the owner in such circumstances as to make it inequitable for him to aver their alien character.—*THE FREDERICK* (1813), 1 Dods. 266.

**266. Action on ransom bill.]**—*Held*: an action was maintainable by an alien enemy on a ransom bill.—*RICORD v. BETTENHAM* (1765), 3 Burr. 1734; 1 Wm. Bl. 564; 97 E. R. 1071.

**Annotations:—***Apld.* *Cornu v. Blackburne* (1781), 2 Doug. K. B. 641. *Distd.* *Anthon v. Fisher* (1782), 3 Doug. K. B. 166; *Brandon v. Nesbitt* (1794), 6 Term Rep. 23. *Consd.* *Furtado v. Rogers* (1802), 3 Bos. & P. 191. *Apld.* *Antoine v. Morshead* (1815), 1 Marsh. 558. *Reid.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**267. —.]**—An enemy's ship which has ransomed a British vessel being retaken with the hostage & ransom bill on board, but the bill secreted, & not delivered up to the recaptor, the first captor may recover upon the ransom bill.—*CORNU v. BLACKBURNE* (1781), 2 Doug. K. B. 641; 99 E. R. 406.

**Annotations:—***Mentd.* *Anthon v. Fisher* (1782), 3 Doug. K. B. 166; *Furtado v. Rogers* (1802), 3 Bos. & P. 191; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**268. —.]**—In an action upon a ransom bill sued upon after capture of the capturing ship:—*Held*: an alien enemy could not, by the municipal law of England, sue for recovery of a right claimed to be acquired by him in actual war.—*ANTHON v. FISHER* (1795), 3 Doug. K. B. 166; 99 E. R. 594.

**Annotations:—***Apld.* *Brandon v. Nesbitt* (1794), 6 Term Rep. 23; *Antoine v. Morshead* (1815), 1 Marsh. 558. *Consd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. *Mentd.* *Furtado v. Rogers* (1802), 3 Bos. & P. 191.

**269. Action for work & labour.]**—In an action for work & labour on a contract entered into by

*v. CROW'S NEST PASS COAL CO.* (1914), 20 B. C. R. 235; 29 W. L. R. 555; 7 W. W. R. 223.—**CAN.**

**f. Action under Fatal Accidents Act, 1846 (c. 93).]**—An action under the above Act on behalf of alien enemies, begun during war, was summarily dismissed.—*DANGLER v. HOLINGER GOLD MINES, LTD.* (1915), 8 O. W. N. 398; 34 O. L. R. 78; 23 D. L. R. 384.—**CAN.**

**g. Matrimonial suit.]**—The rule that an alien enemy has no right to sue at common law does not apply to a proceeding merely affecting the domestic relation, & the wife of an alien enemy, herself by reason of marriage also an enemy, is not debarred from seeking redress in the Divorce Ct.—*MASEMANN v. MASEMANN* (1917), N. Z. L. R. 769.—**N.Z.**



pltf., a Russian, before outbreak of war between Great Britain & Russia:—*Held*: pltf. could not sue on the contract during war, but his right to do so would revive on the restoration of peace.—*ALCINOUS v. NIGREU* (NYGREW, NYGREN) (1854), 4 E. & B. 217; 24 L. J. Q. B. 19; 24 L. T. O. S. 92; 1 Jur. N. S. 16; 3 W. R. 25; 119 E. R. 84.

*Annotations*:—*Apld.* Driefontein Consolidated Gold Mines v. Janson, West Rand Central Gold Mines Co. v. De Rougemont, [1900] 2 Q. B. 339; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A. *Refd.* Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.

**270. Claim in bankruptcy.**—A debt arising out of a contract, made with an alien enemy while such, is irrecoverable, for the contract is void; but if the contract is made during peace, it is originally good, & the remedy of the alien enemy on it is only suspended, & on the return of peace the right revives. Where debtor is bkpt., an alien enemy creditor's claim will be admitted to proof & the dividend reserved.—*Ex p. BOUSSMAKER* (1806), 13 Ves. 71; 33 E. R. 221.

*Annotations*:—*Distd.* Porter v. Freudenberg, [1915] 1 K. B. 857, C. A. *Apld.* Rombach Baden Clock Co. v. Gent (1915), 84 L. J. K. B. 1558. *Refd.* Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain), [1916] 2 A. C. 307, H. L.; Naylor, Benzon v. Krainsche Industrie, [1918] 1 K. B. 331; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L. *Mentd.* Willison v. Patteson (1817), 1 Moore, C. P. 133.

**271. Motion to reverse or vary decision of trustee in bankruptcy.**—An alien enemy (a German subject resident in Germany) cannot be heard during the war in support of a motion to revise or vary the decision of the trustee in bkpcy. rejecting his proof, & the motion must be dismissed.—*Re WILSON & WILSON, Ex p. MARUM* (1915), 84 L. J. K. B. 1893; 113 L. T. 1116; [1915] II. B. R. 189.

**272. Third party proceedings.**—An alien enemy deft. is not entitled to take third party proceedings, for in so doing he is not merely setting up matter of defence to pltf.'s claim. If an alien enemy lessee under a lease made before outbreak of war has assigned the lease with a covenant of indemnity against his liability for rent, his remedies are suspended whilst he is an alien enemy, & he cannot during war enforce his rights to indemnity either by a third party notice or otherwise.—*HALSEY v. LOWENFELD*, [1916] 2 K. B. 707; 85 L. J. K. B. 1498; 115 L. T. 617; 32 T. L. R. 709, C. A.

*Annotations*:—*Distd.* Seligman v. Eagle Insce., [1917] 1 Ch. 519; Tingley v. Müller, [1917] 2 Ch. 144, C. A.; Ertel Bleber v. Rio Tinto, [1918] A. C. 260; Orconera Iron Ore Co. v. Fried Krupp Act. (1918), 87 L. J. Ch. 313, C. A.; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.

**273. Application under Patents & Designs Act, 1907 (c. 29), s. 21.**—*Semle*: an alien enemy patentee cannot make an initiative application under the above sect. for leave to amend his specification.—*Re STAHLWERK BECKER AKTIENGESELLSCHAFT'S PATENT*, [1917] 2 Ch. 272; 86 L. J. Ch. 670; 117 L. T. 216; 33 T. L. R. 339; 61 Sol. Jo. 479.

**274. Habeas corpus—Prisoner of war.**—Three Spanish sailors were taken prisoners of war on board a Spanish privateer, & carried to Jamaica. There they were persuaded by the captain of a homeward bound English merchant ship in want of hands to sail on his ship on a promise of wages, & of an immediate exchange by cartel on their

arrival. They alleged that on arrival the captain refused to pay them wages & handed them over to a warship as prisoners of war:—*Held*: (1) since they were alien enemies & prisoners of war, they were not entitled to any privileges of Englishmen, much less to be set at liberty on a *habeas corpus*; (2) their proper course was to apply to the Board of Admty. for relief; (3) *habeas corpus* must be refused.—*THREE SPANISH SAILORS' CASE* (1779), 2 Wm. Bl. 1321; 96 E. R. 775.

*Annotations*:—*Folld.* R. v. Vine St. Police Station Supt., [1916] 1 K. B. 268. *Refd.* Schaffenius v. Goldberg (1915), 85 L. J. K. B. 374, C. A. *Mentd.* Hobhouse's Case (1820), 3 B. & Ald. 420.

**275. ———.**—The ct. will not grant a *habeas corpus* to bring up a prisoner of war.—*FURLY v. NEWNHAM* (1780), 2 Doug. K. B. 419; 99 E. R. 269.

*Annotations*:—*Folld.* R. v. Vine St. Police Station Supt., [1916] 1 K. B. 268. *Mentd.* Schaffenius v. Goldberg (1915), 85 L. J. K. B. 374, C. A.

**276. ——— Who included.**—An alien enemy resident in the United Kingdom, who, in the opinion of the Executive Govt., is a person hostile to the welfare of the country & is on that account interned, may properly be described as a prisoner of war although not a combatant or a spy; & an application by him for a writ of *habeas corpus* will be refused.—*R. v. VINE STREET POLICE SUPERINTENDENT, Ex p. LIEBMANN*, [1916] 1 K. B. 268; 85 L. J. K. B. 210; 113 L. T. 971; 80 J. P. 49; 32 T. L. R. 3; 25 Cox, C. C. 179.

*Annotations*:—*Expld.* Schaffenius v. Goldberg, [1916] 1 K. B. 284, C. A. *Apld.* R. v. Knockaloe Camp Commandant (1917), 87 L. J. K. B. 43.

**277. Judgment for alien enemy—Motion to stay execution.**—An action was referred to an arbitrator, & pltf.'s damages were assessed & a verdict entered for the sum awarded. After verdict pltf. became alien enemies, & deft. moved to have judgment & execution stayed on bringing the money into ct., if the ct. should think that necessary:—*Held*: (1) this relief would not be granted summarily; (2) if deft. had any relief at law, such as *audita querela*, he might avail himself of it.—*VANBRYNEN v. WILSON* (1808), 9 East, 321; 103 E. R. 596.

*Annotations*:—*Refd.* Rodriguez v. Speyer (1918) 119 L. T. 409 H. L.

**278. Collision damages apportioned equally—No payment till after war.**—In a collision action, where damage had been apportioned equally, the ct. ordered that, as one of the vessels was owned by alien enemies, no payment should be made under the judgment until the end of hostilities, or until further order.—*THE KAISER WILHELM II.* (1915), 31 T. L. R. 615, C. A.

**279. Appeal—Right to appeal when unsuccessful as plaintiff—Admiralty proceedings.**—On an appeal from a Vice-Admty. Ct. by a claimant, who had become an alien enemy since the judgment appealed from had been given:—*Held*: a party who, by intervention of hostilities, became an alien enemy, was not at liberty to prosecute an appeal in the cts. of England, nor could proceedings be suspended so that he could renew his claim on the return of peace.—*THE CHARLOTTE* (1813), 1 Dods. 212.

**280. ——— Generally.**—The right of appeal of

**274 i. Habeas corpus—Prisoner of war.**—An alien enemy, who is a prisoner of war, has no right to a writ of *habeas corpus* to have the causes of his detention investigated by the cts., particularly without the consent of the Minister of Justice.—*GUSETU v. DATE* (1915), 17 Q. P. R. 95.—CAN.

**274 ii. ——— Consent of Minister of Justice.**—An application for release by a prisoner, who was detained as an alien enemy, but claimed to be a British

subject by naturalisation, was refused on the ground that he had not obtained the consent of the Minister of Justice under Dominion War Measures Act, 1914, ss. 6, 11.—*Re BERANEK* (1915), 7 O. W. N. 719; 33 O. L. R. 139; 25 D. L. R. 564.—CAN.

**276 i. ——— Who included.**—*Held*: an alien enemy residing in Canada, arrested & detained by the military authorities upon the ground that there was reason to believe that

he was attempting to leave Canada to assist the enemies of Canada & Great Britain, had no right to the remedy of *habeas corpus*.—*Re CHANRYK* (1914), 29 W. L. R. 956; 25 Man. R. 50; 7 W. W. R. 548; 19 D. L. R. 236.—CAN.

**280 i. Appeal—Right to appeal when unsuccessful as plaintiff—Generally.**—In conjoined actions at the instances of A. against B. & of B. against A., C., an alien, was sisted as pursuer in the second action along with B. The Lord



*It. 2.—Position of alien enemy: Sub-sect. 3, A. B. & C.]*

an alien enemy pltf., against whom judgment has been given before war, is suspended by declaration of war.—*PORTER v. FREUDENBERG, KREGLINGER v. SAMUEL (S.) & ROSENFELD, Re MERTEN'S PATENTS*, [1915] 1 K. B. 857; 84 L. J. K. B. 1001; 112 L. T. 313; 31 T. L. R. 162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R. P. C. 109, C. A.

*Annotations:—Folld. Act. für Anilin v. Levinstein* (1915), 84 L. J. Ch. 842, C. A. *Appld. Halsey v. Lowenfeld*, [1916] 1 K. B. 143. *Mentd. R. v. Kupfer*, [1915] 2 K. B. 321; *Rombach Baden Clock Co. v. Gent* (1915), 84 L. J. K. B. 1558; *Re Sutherland, Bechoff v. Bubna* (1915), 31 T. L. R. 248; *Re Wilson, Ex p. Marum* (1915), 113 L. T. 1116; *Zinc Corpn. v. Hirsch* (1915), 85 L. J. K. B. 565; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268; *Schaffenius v. Goldberg*, [1916] 1 K. B. 284, C. A.; *Re Hilckes*, [1917] 1 K. B. 48; *Scotland v. South African Territories* (1917), 33 T. L. R. 255; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.; *Ertel Bleber v. Rio Tinto*, [1918] A. C. 260.

**Effect of peace.]—See Nos. 202, 269, 270, ante.**

*B. Appointment of Alien Enemies as Executors, etc., and their Rights to sue as such.*

**281. May be & sue as executor—Or administrator.]—**An alien enemy may be exor. or administrator of chattels real as well as personal; & if he sue *en autre droit*, his alienage cannot be pleaded in abatement.—*CARON'S CASE* (1625), Cro. Car. 8; 79 E. R. 612.

**282. ———.]—**An alien enemy may be & sue as exor.—*RICHEILD v. UDAL* (1667), Cart. 48, 191; 124 E. R. 817, 909.

*Annotation:—Refd. Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**283. Court of Probate Act, 1857 (c. 77), s. 73—Grant to attorney of executors—Restrictions as to distribution of estate.]—**Where the exors. & residuary legatees named in the will of a naturalised British subject were alien enemies, a general grant of administration, with the will annexed under the above sect., was made to the attorney appointed by the exors. before the outbreak of war, with directions not to distribute the estate without the leave of a registrar.—*In the Estate of KOENIGS* (1914), 59 Sol. Jo. 130.

*Annotation:—Consd. In the Estate of Grundt, In the Estate of Oetl* (1915), 59 Sol. Jo. 510.

**284. Trading with Enemy Amendment Act, 1914 (c. 12), s. 2—Grant to Public Trustee.]—**In cases where persons entitled to the assets of a deceased person are alien enemies, the Public Trustee, as custodian, shall take a grant of administration, by reason of the "special circumstances," under s. 73 of the above Act of 1857.—*In the Estate of SCHIFF*,

[1915] P. 86; 84 L. J. P. 79; 113 L. T. 189; 59 Sol. Jo. 303.

*Annotation:—Consd. In the Estate of Grundt, In the Estate of Oetl*, [1915] P. 126; *In the Estate of Woolf* (1918), 34 T. L. R. 477.

**285. ———.]—**Deceased was domiciled in Poland, & died leaving real & personal estate in England. The exors. & only relative were resident in Poland, occupied by the enemy. It was necessary to deal with the real estate. The ct. made a grant of letters of administration to the Public Trustee, under s. 73 of the above Act of 1857.—*In the Estate of STANYSIAW KREJEWSKY* (1918), 34 T. L. R. 184; 62 Sol. Jo. 269.

**286. ——— Grant to attorney of enemy next of kin—Special circumstances.]—**Limited grants to alien enemies domiciled abroad were in special circumstances allowed to pass, under s. 73 of the above Act of 1857, to a British subject, domiciled & resident in England, as attorney for next-of-kin resident abroad, subject to restrictions as to the disposal of the residue, but, as a general rule, the Public Trustee, as custodian, should take the grants in such cases.—*In the Estate of GRUNDT, In the Estate of OETL*, [1915] P. 126; 84 L. J. P. 175; 113 L. T. 189; 31 T. L. R. 437; 59 Sol. Jo. 510.

*Annotation:—Distd. In the Estate of Woolf* (1918), 34 T. L. R. 477.

**287. ——— Grant to British subject resident in England but domiciled in enemy country—Cobeneficiaries being alien enemies.]—**The ct. will make a grant of letters of administration to a next-of-kin who is a British subject resident in England, though domiciled in an enemy country, with enemy relatives in that country equally entitled to the grant, where no good cause is shown against the application.—*In the Estate of WOOLF* (1918), 34 T. L. R. 477; 62 Sol. Jo. 621.

**288. Right to sue—Qua executor.]—**Debt by an exor. Plea, pltf. was an alien enemy, being the King of Spain's subject:—*Held*: the plea was good.—*ANON.* (1589), Cro. Eliz. 142; Owen, 45; 78 E. R. 399.

**289. ———.]—**An alien enemy suing as exor. can have an action of debt on a bond or for personal things.—*WATFORD v. MASHAM* (1597), Moore, K. B. 431; 72 E. R. 676.

*Annotation:—Refd. Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**290. ———.]—***VILLA v. DIMOCK*, No. 170 *ante*.

**291. ——— Qua administrator.]—**Action by pltf. as administrator of B. on a bond. Plea, pltf. was an alien enemy, being a subject of the King of Spain:—*Held*: the plea was bad.—*BROCKS v. PHILLIPS* (1599), Cro. Eliz. 684; 78 E. R. 920.

*C. Position when Defendant.*

**292. Right to defend—No stay of proceedings.]—**There is no rule of common law which suspends an

Ordinary having after a proof decerned against B. in the first action & assolized A. in the counter-action, B. & C. reclaimed. War having subsequently broken out between the country of C. & Great Britain, A. moved the ct. to sustain the Lord Ordinary's interlocutor in the first action, and *quoad ultra* to sist procedure, in respect that true pursuer therein was an alien enemy. The ct. sistd both actions.—*CRAIG LINE S.S. Co., LTD. v. NORTH BRITISH STORAGE & TRANSIT Co.*, [1915] S. C. 113; 52 Sc. L. R. 65; [1914] 2 S. L. T. 326.—*SCOT.*

**280 ii. ——— Stay of proceedings on appeal—When successful as plaintiff.]—**Where an alien enemy, pltf. in the ct. below, is resp. in the Ct. of King's Bench, all proceedings on the appeal will be stayed until the end of hostilities.—*CANADIAN STEWART Co. v.*

*PERI* (1915), 17 Q. P. R. 291; Q. R. 25 K. B. 158.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 3.—B.**

**a. Beneficiaries being alien enemy & British subject—Grant to latter beneficiary.]—**Testator, formerly resident in New Zealand, made his will & died in Berlin, leaving two-thirds of his estate to his widow, a German subject in Berlin, & one-third to his sister, a British subject resident in New Zealand. He appointed his widow & D., a resident in New Zealand, to be the exors. & trustees of his will. On Mar. 11, 1914, limited administration was granted to D., who died intestate on Jan. 18, 1915. Testator's sister applied for limited administration *de bonis non*:—*Held*: (1) she was entitled to it, & it was not necessary to make the grant to the Public Trustee; (2) leave reserved to recall administration.—*Re HOLDER* (1915), 34 N. Z. L. R. 1002.—*N.Z.*

**b. Aliens Restriction Act, 1914 (c. 12)—Appointment as executor-dative.]—***Held*: an alien enemy, resident in Scotland & duly registered under the above Act & Ord. made thereunder, might be appointed an exor.-dative.—*Re SCHULZE*, [1917] S. C. 400; 54 Sc. L. R. 306; 1 S. L. T. 176.—*SCOT.*

**PART III. SECT. 2, SUB-SECT. 3.—C.**

**292 i. Right to defend—Cause of action arising before or after outbreak of war—Effect of internment.]—**Whether the cause of action arose before or after the outbreak of war, an alien enemy can be sued in British cts. & has every right to present his case before the cts. in accordance with the laws of procedure. The fact that debt. has been interned does not make any difference, as the object of the internment is to prevent him from doing mischief & not to cut

action in which an alien enemy is deft., nor any rule of common law which prevents him appearing & conducting his defence.

An action was brought by pl'tfs., British subjects, against defts., a German insurance co., to recover a loss under a policy of marine insurance. After the policy was effected, the loss occurred, & the pleadings were closed, war broke out between Great Britain & Germany. Defts. took out a summons asking that all proceedings should be stayed during the war:—*Held*: the application must be dismissed.—*ROBINSON & CO. v. CONTINENTAL INSURANCE CO. OF MANNHEIM*, [1915] 1 K. B. 155; 84 L. J. K. B. 238; 112 L. T. 125; 31 T. L. R. 20; 59 Sol. Jo. 7; 12 Asp. M. L. C. 574; 20 Com. Cas. 125.

*Annotations*:—*Apprvd.* *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A. *Refd.* *Ingle v. Mannheim Continental Insee.* (1914), 84 L. J. K. B. 491; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *Tingley v. Müller* (1917), 86 L. J. Ch. 625, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**293.** ———.]—An alien enemy is under the same liability of being sued as a British subject, & when sued may appear & be heard in his defence & take all steps deemed necessary for the proper presentment of his defence.—*PORTER v. FREUDENBERG, KREGLINGER v. SAMUEL (S.) & ROSENFELD, Re MERTEN'S PATENTS*, [1915] 1 K. B. 857; 84 L. J. K. B. 1001; 112 L. T. 313; 31 T. L. R. 162; 20 Com. Cas. 189, C. A.

*Annotations*:—*Distd.* *Halsey v. Lowenfeld*, [1916] 1 K. B. 143. *Consd.* *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A. *Mentd.* *Act. für Anilin v. Levinstein* (1915), 84 L. J. Ch. 842, C. A.; *R. v. Kupfer*, [1915] 2 K. B. 321, C. C. A.; *Rombach Baden Clock Co. v. Gent* (1915), 84 L. J. K. B. 1558; *Re Sutherland, Bechoff v. Bubna* (1915), 31 T. L. R. 248; *Re Wilson, Ex p. Marum* (1915), 113 L. T. 1116; *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268; *Schaffenus v. Goldberg*, [1916] 1 K. B. 284, C. A.; *Re Hilckes*, [1917] 1 K. B. 48, C. A.; *Scotland v. South African Territories* (1917), 33 T. L. R. 255; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**294. No right to counterclaim.**—An alien enemy deft. cannot prosecute a counterclaim during hostilities.—*ROBINSON & CO. v. CONTINENTAL INSURANCE CO. OF MANNHEIM*, No. 292, *ante*.

*Annotations*:—*Mentd.* *Ingle v. Mannheim Continental Insee.* (1914), 84 L. J. K. B. 491; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A.; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *Tingley v. Müller* (1917), 86 L. J. Ch. 625, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**295. Right to set up set-off, not counter-claim.**—An alien enemy can set up a set-off to a claim, but not to a counter-claim.—*Re STAHLWERK BECKER AKTIENG. AFT'S PATENT*, [1917] 2 Ch. 272; 86 L. J. Ch. 670; 117 L. T. 216; 33 T. L. R. 339; 61 Sol. Jo. 479; 34 R. P. C. 332.

**296. Patents & Designs Act, 1907 (c. 29), s. 22—Right to amend specification.**—Where there is a petition for revocation, an application by the alien enemy patentee to amend the specification by way of disclaimer under the above sect. is in the nature of a defence to an action, & he should be allowed to do so, subject to safeguards as to actions for infringements during the war or before its commencement.—*Re STAHLWERK BECKER AKTIENGESELLSCHAFT'S PATENT*, No. 295, *ante*.

**297. Right to appeal when unsuccessful.**—An alien enemy deft. may appeal against a judgment given against him, & resp. to an alien enemy deft.'s appeal can insist upon the appeal being heard in due course.—*PORTER v. FREUDENBERG, KREGLIN-*

*GER v. SAMUEL (S.) & ROSENFELD, Re MERTEN'S PATENTS*, No. 293, *ante*.

*Annotations*:—*Consd.* *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268. *Refd.* *Act. für Anilin v. Levinstein* (1915), 84 L. J. Ch. 842, C. A.; *Rombach Baden Clock Co. v. Gent* (1915), 84 L. J. K. B. 1558; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *Schaffenus v. Goldberg*, [1916] 1 K. B. 284, C. A.; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A. *Mentd.* *R. v. Kupfer*, [1915] 2 K. B. 321, C. C. A.; *Re Sutherland, Bechoff v. Bubna* (1915), 31 T. L. R. 248; *Re Wilson, Ex p. Marum* (1915), 113 L. T. 1116; *Zinc Corpn. v. Hirsch* (1915), 85 L. J. K. B. 565, C. A.; *Re Hilckes*, [1917] 1 K. B. 48; *Scotland v. South African Territories* (1917), 33 T. L. R. 255; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**298. Costs—Stay of execution for costs of successful defence.**—*Semble*: in the event of an alien enemy deft. succeeding in an action brought against him, his right to issue execution ought to be suspended until cessation of the state of hostilities which makes him an alien enemy.—*ROBINSON & CO. v. CONTINENTAL INSURANCE CO. OF MANNHEIM*, No. 292, *ante*.

*Annotations*:—*Mentd.* *Ingle v. Mannheim Continental Insee.* (1914), 84 L. J. K. B. 491; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857, C. A.; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**299. Branch trading under licence—Under Aliens Restriction Act, 1914 (c. 12), & Orders—Stay of execution granted.**—Pl'tfs. were a firm of English solrs. carrying on business in London with a branch office in Berlin. Defts. were a banking corpn., incorporated under German law, having their head office in Berlin with an office in London. Pl'tfs. before the outbreak of war between Great Britain & Germany on Aug. 4, 1914, had a current account at defts.' office in Berlin. After the outbreak of war the Secretary of State, acting under the above Act & an Ord. in Council, granted a licence to defts. to carry on business in the United Kingdom subject to certain limitations & conditions, the effect of which was that the permission was to extend only to the completion of transactions of a banking character entered into before the war, so far as those transactions would in the ordinary course have been carried out through or with the London establishment, but not to any operations for the purpose of making available assets which would ordinarily be collected by, or of discharging liabilities which would ordinarily be discharged by, establishments of the bank other than the London establishment; that all transactions carried out under the licence were to be subject to the supervision & control of a person to be appointed by the Treasury; & that any assets of the bank which might remain undisturbed after the liabilities had been discharged should be deposited with the Bank of England to the order of the Treasury. While defts. were carrying on business under the licence pl'tfs. brought an action in England against defts. to recover the amount due on their current account at the Berlin office & obtained judgment. Pl'tfs. issued a writ of *fi. fa.* in execution of the judgment, & the sheriff seized certain goods & chattels belonging to defts. at the London office:—*Held*: it was inconsistent with the conditions of the licence, which were within the powers conferred upon the Secretary of State by the above Act & the Ord. in Council, that pl'tfs. should be allowed to take in execution of their judgment the assets of the bank which were subject to the supervision & control of the person

down his liabilities.—*ABDUL QUADW v. FRITZ KAPP* (1916), 1 L. R. 43 Calc. 114; 20 C. W. N. 691.—*IND.*

*c. Costs—Right to.*—Alien enemies, who are successful defts., should not be deprived of their costs.—

*RYDSTROM v. KROM* (1915), 31 W. L. R. 7; 21 D. L. R. 118; 7 W. W. R. 1290.—*CAN.*



**Sect. 2.—Position of alien enemy: Sub-sect. 3, C. D. & E.]**

appointed for that purpose by the Treasury, & all proceedings under the writ of *fi. fa.*, so far as regarded those assets, should be stayed.—LEADER, PLUNKETT & LEADER v. DIRECTION DER DISCONTAGESELLSCHAFT (1914), 31 T. L. R. 83; 59 Sol. Jo. 147.

**Annotation:—Consd.** *Clare v. Dresdner Bank*, [1915] 2 K. B. 576.

**300. Courts (Emergency Powers) Act, 1914 (c. 78) —No leave required to issue execution against enemy defendant.]**

The above Act does not apply in the case of alien enemies, & if judgment has been obtained against an alien enemy, execution can be issued without leave of the ct.—LEADER, PLUNKETT & LEADER v. DIRECTION DER DISCONTAGESELLSCHAFT, No. 299, *ante*.

**Annotation:—Mentd.** *Clare v. Dresdner Bank*, [1915] 2 K. B. 576.

**301. ——— No application to alien enemy debtor.]**

The above Act, s. 1 (3), gives the ct. discretion to stay a bkpcy. petition where debtor is a British subject, but this power does not apply where debtor is an alien enemy. In such a case s. 1 (7) applies.—*Re RADEKE, Ex p. JACOBS* (1915), 84 L. J. K. B. 2111; 113 L. T. 1115; 31 T. L. R. 584; [1915] H. B. R. 185.

**302. Substituted service of writ—Alien enemy defendant carrying on branch business in England.]**

Where an action is brought against an alien enemy deft., who resides in the enemy country, but carries on a branch business in England by an agent, leave may be given to sue a concurrent writ, & for substituted service of the writ by service of notice of the writ on the agent.—PORTER v. FREUDENBERG, KREGLINGER v. SAMUEL (S.) & ROSENFELD, *Re MERTEN'S PATENTS*, [1915] 1 K. B. 857; 84 L. J. K. B. 1001; 112 L. T. 313; 31 T. L. R. 162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R. P. C. 109, C. A.

**Annotations:—Consd.** *Halsey v. Lowenfeld*, [1916] 1 K. B. 143. **Refd.** *Akt. für Anilin v. Levinsteln* (1915), 84 L. J. Ch. 842, C. A.; *Rombach Baden Clock Co. v. Gent* (1915), 84 L. J. K. B. 1558; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A. **Mentd.** *R. v. Kupfer*, [1915] 2 K. B. 321, C. C. A.; *Re Sutherland, Bechoff v. Bubna* (1915), 31 T. L. R. 248; *Re Wilson, Ex p. Marum* (1915), 113 L. T. 1116; *Zinc Corp. v. Hirsch* (1915), 85 L. J. K. B. 565, C. A.; *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268; *Schaffinius v. Goldberg*, [1916] 1 K. B. 284, C. A.; *Re Hilckes*, [1917] 1 K. B. 48; *Scotland v. South African Territories* (1917), 33 T. L. R. 255; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**303. Ordinance confiscating debts due to alien enemies—Void.]**—An ordinance was made by the Govt. of Denmark pending hostilities with Great Britain, whereby all ships, goods, money, & money's worth, of or belonging to English subjects, were declared to be sequestrated & detained, & all persons were commanded, within three days, to transmit an account of debts due to English subjects, in default of which they were to be proceeded against in the Exchequer. In consequence, a suit then depending in the Danish ct. for recovering a debt due from a Danish to a British subject was not further prosecuted, & the debt was afterwards paid by the Danish subject, at the rate specified

by the ordinance, to comrs. appointed in virtue of the ordinance to receive payment, upon production of whose receipt the Danish ct. quashed the suit:—**Held**: no answer to an action against the Danish subject to recover same debt in the cts. of England, for the ordinance not being conformable to the usage of nations was void.—WOLFF v. OXHOLM (1817), 6 M. & S. 92; 105 E. R. 1177.

**Annotations:—Apld.** *Re Fried Krupp Act.*, [1917] 2 Ch. 188. **Refd.** *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, Ex. Ch.; *Stevenson v. Akt. für Cartonnagen Industrie*, [1917] 1 K. B. 842, C. A. **Mentd.** *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents* [1915] 1 K. B. 857, C. A.

**D. Suits by British Subjects as representing or as jointly interested with Alien Enemies.**

**304. Proceedings by partnership—Enemy partners—Bankruptcy petition.]**—A commission of bkpcy. founded on the petition of A., a British subject resident in England, for a debt due to himself & his partners B. & C., also British subjects, but resident & carrying on trade in an enemy's country, cannot be supported.—M'CONNELL v. HECTOR (1802), 3 Bos. & P. 113; 127 E. R. 61.

**Annotations:—Consd. & Distd.** *Roberts v. Hardy* (1815), 3 M. & S. 533. **Consd.** *Willson v. Patteson* (1817), 7 Taunt. 439. **Refd.** *The Matchless* (1822), 1 Hag. Adm. 95; *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, H. L.; *Jager v. Tolme & Runge* (1915), 31 T. L. R. 381; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857, C. A.; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307, H. L. **Mentd.** *Mitsui v. Mumford*, [1915] 2 K. B. 27.

**305. ——— Stay of proceedings.]**—Pltfs., a Manchester firm consisting of three partners, of whom two were Turkish subjects resident in Turkey & one a British resident in Manchester, brought an action during war with Turkey for conversion, or for breach of contract. On an interlocutory application by defts. to have the action stayed on the ground that two of the partners were alien enemies:—**Held**: defts. entitled to an order for a stay of all further proceedings in the action.—CANDILIS & SONS v. VICTOR & Co. (1916), 33 T. L. R. 20, C. A.

**Annotations:—Consd.** *Speyer v. Rodriguez* (1917), 87 L. J. K. B. 171, C. A. **Refd.** *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**306. ——— ———.]**—Resps., bankers & financiers in London, had made applt., an Argentine subject, loans before the European war, which with interest became payable shortly after war was declared in 1914, & amounted to about £29,700. Resp. firm at that time consisted of six partners, four of whom were British subjects, one an American & one a German, who, however, had only one-fortieth share in the profits. When war was declared, the partnership was treated as at an end, & the assets were collected. A specially indorsed writ was served on applt., who, however, failed to enter an appearance, owing, as he alleged, to a *bond fide* mistake, & judgment was signed against him. He applied to have the judgment set aside on the ground that, one of the partners in resp. firm being an alien enemy, he could not during the war sue either singly or jointly. The judge having made an order setting aside the judgment:—**Held**: the ct. had a discretion in the circumstances to allow such an action to proceed, & the

**301 i. Courts (Emergency Powers) Act, 1914 (c. 78)—No application to alien enemy debtor.]**—The above Act as applied to Scotland enacted, s. 1 (1): "From & after the passing of this Act no person shall (a) proceed to [diligence] on, or otherwise to the enforcement of, any [decree] of any ct. (whether entered or made before or after the passing of this Act) for the payment or recovery

of a sum of money to which this sub-sect. applies, except after such application to such ct., & such notice as may be provided for by [Act of Sederunt] or directions under this Act." By s. 1 (7): "Nothing in this Act shall . . . give any power to stay [diligence] or defer the operation of any remedies of a creditor in the case of a sum of money payable by or recoverable from the

subject of a sovereign or State at war with his Majesty." In an action of furthcoming against British arrestees to recover out of the arrested funds payment upon a decree against German common debtors held by the arresters:—**Held**: leave to proceed with the action was not required.—FERGUSON (N. G.) & Co., LTD. v. BROWN & TAWSE (1917), 54 Sc. L. R. 309; 2 S. L. T. 2.—SCOT.



### PART III.—ALIENS IN TIME OF WAR.

case must be sent back to the master to be dealt with accordingly.—*RODRIGUEZ v. SPEYER BROTHERS* (1918), 119 L. T. 409; 34 T. L. R. 628; 62 Sol. Jo. 765, H. L.

**307. Action begun as agent of enemy—Continued in individual capacity—Proper course to adopt.]—**A bottomry bond was given by the master of an English vessel to G., a Marseilles merchant, in 1792 in time of peace, & proceedings on it were commenced by T., his English agent. In 1793, after war had broken out between England & France, deft. appeared under protest pleading alien enemy. This suspended the proceedings, but they were not revived on the return of peace. On the renewal of war, T. in 1803 claimed to continue the proceedings, stating that the bond had been transferred to him:—*Held*: (1) since G. was again incapacitated from suing, T. was not entitled to continue proceedings commenced in G.'s name; (2) the proper course was to dismiss the parties in the old proceedings, & institute fresh proceedings in his own name.—*THE REBECCA* (1804), 5 Ch. Rob. 102.

*Annotation*:—*Consd.* *The Royal Arch* (1857), Sw. 269.

**308. Action by consignee for sale—Consignor interested in price being alien enemy.]—**Pltf., a naturalised British subject resident in England, sued defts. for the price of goods sold & delivered before outbreak of war. The goods were in fact supplied to pltf. by A., who had become an alien enemy, on terms under which A. took a share of the price on such in excess of a certain minimum, but pltf. resold as principal:—*Held*: (1) pltf.'s claim in which an alien enemy was interested accrued before war, & so far as the common law rule went he was entitled to maintain the action. *Qu.*: whether in such circumstances it was the duty of the ct., in absence of pltf.'s consent, to order a stay of execution until a summons had been taken out & brought to a hearing under Trading with the Enemy Amendment Act, 1914 (c. 12), for the vesting in the custodian of the money recovered in the action.—*SCHMITZ v. VAN DER VEEN & Co.* (1915), 84 L. J. K. B. 861; 112 L. T. 991; 31 T. L. R. 211.

*Annotation*:—*Mentd.* *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.

**309. Appeal by British & enemy co-owners of patent.]—**A patent was assigned to a German co., which assigned the patent to a British co., & before the outbreak of war between England & Germany an action was brought by the two cos. as co-pltfs. for infringement of the patent, the claim of the German co. for damages during the period when the patent was vested in it, & the claim of the British co. for damages during the subsequent period being combined in the same action, & brought on at the same time. The action was dismissed & both cos. gave notice of appeal:—*Held*: the appeal must be suspended until after conclusion of war.—*ACT. FÜR ANILIN, LTD. v. LEVINSTEIN, LTD.* (1915), 84 L. J. Ch. 842; 112 L. T. 963; 31 T. L. R. 225; 32 R. P. C. 140, C. A.

*Annotations*:—*Consd.* *Candills v. Victor* (1916), 33 T. L. R. 20, C. A. *Refd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**310. Action on behalf of British & enemy co-owners of patent—Sole right of action vested in British owners.]—**A patent was registered in the joint names of a British co. & an alien enemy co., in pursuance of a deed which provided, *inter alia*, that the British co. should have the sole right of bringing actions or other proceedings to protect the patent, & that the British co., after giving to the other co. twenty-one days' notice of its intention to join that co. as co-pltfs. with the British co., should have sole conduct of any such action or proceedings. In an action for infringement brought by the two cos.:—*Held*: (1) as under

the deed the person to protect the patent was the British co., the rule that an alien enemy could not invoke the ct.'s assistance was not applicable; (2) the action ought not to be suspended.—*MERCEDES DAIMLER MOTOR CO., LTD. & DAIMLER MOTOREN GESELLSCHAFT v. MAUDSLAY MOTOR CO., LTD.* (1915), 31 T. L. R. 178; 32 R. P. C. 149.

*Annotation*:—*Consd.* *Rombach Baden Clock Co. v. Gent* (1915), 84 L. J. K. B. 1558. *Refd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

*E. Plea of Alien Enemy and Replication thereto.*

**311. Why plea allowed.]—**The ground upon which the plea of alien enemy has been allowed is, not that a benefit would result to the enemy from pltf. recovering; it is, that a man, professing himself hostile to England, & in a state of war with it, cannot be heard if he sue for the benefit & protection of our laws.—*SPARENBURGH v. BANNATYNE* (1797), 1 Bos. & P. 163; 2 Esp. 580; 126 E. R. 837.

*Annotation*:—*Consd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**312. When plea allowed—Bill in equity.]—**The plea of alien enemy was allowed to a bill in equity. *Qu.*: whether the plea would be allowed, where the bill was for discovery merely in order to obtain material for defence to an action at law.—*ALBRECHT v. SUSSMANN* (1813), 2 Ves. & B. 323; 35 E. R. 342.

*Annotation*:—*Refd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. *Mentd.* *Barrick v. Buba* (1855), 16 C. B. 492.

**313. — — Order to "plead issuably."]**—The plea of alien enemy does not at all affect the merits of the question between the parties, & it could not be pleaded under an order to "plead issuably."—*SIMEON v. THOMPSON* (1798), 8 Term Rep. 71; 101 E. R. 1272.

*Annotations*:—*Refd.* *Staples v. Holdsworth* (1837), 3 Hodg. 298; *Taylor v. Carpenter* (1847), 9 L. T. O. S. 514.

**314. — — Time for plea.]—***SHEPHERD DURANT* (1854), 14 C. B. 582; 23 L. J. C. P. 110; 2 W. R. 467; 2 C. L. R. 729; 159 E. R. 240; *sub nom.* *CHEPELIER v. DURANT*, 23 L. T. O. S. 79.

*s.*—*Consd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. *Refd.* *Speyer v. Rodriguez* (1917), 87 L. J. K. B. 171, C. A.

**315. — — Plaintiff resident by licence—Failure to plead same.]—**To an action brought by S., a French refugee, it was pleaded he was an alien enemy, born under the allegiance of the French King, then at war with the Queen:—*Held*: the plea was good, for though he were a refugee under the Queen's protection, which enabled him to sue, yet, whether the protection were special or general, as by proclamations, he ought to plead it.—*SYLVESTER'S CASE* (1703), 7 Mod. Rep. 150; 87 E. R. 1157.

*Annotations*:—*Consd.* *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A. *Refd.* *R. v. Vine St. Police Station Supt.*, [1916] 1 K. B. 268; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**316. Absence of plea—Action brought before enemy status acquired—Duty of court.]—**An alien friend brought an action, but before plea pleaded became an alien enemy:—*Held*: (1) a plea in bar of the action generally was wrong, for it should have been in bar of the further maintenance of the action; (2) as the ct. were *ex officio* bound to give such judgment as appeared upon the whole record to be proper without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side, & it appeared pltf. was an alien enemy, incapable of maintaining further his suit, judgment must be given that he be barred from further having or maintaining his action.—*LE BREYER v. PAPILLON* (1804), 4 East, 502; 102 E. R. 923.

*Annotations*:—*Consd.* *Allen v. Hopkins* (1844), 13 M. & W. 94. *Refd.* *R. v. Mitchel* (1848), 3 Cox, C. C. 93; *Janson v.*

**Sect. 2.—Position of alien enemy: Sub-sect. 3, E. Part IV. Sect. 1.]**

*Driefontein Consolidated Mines*, [1902] A. C. 484, H. L. *Mentd.* *Charnley v. Winstanley* (1804), 5 East, 286; *R. v. Taylor* (1824), 3 B. & C. 502; *Lee v. Levy* (1825), 4 B. & C. 390; *Rowles v. Lusty* (1827), 1 Moo. & P. 102; *Castle-dine v. Mundy* (1832), 4 B. & Ad. 90; *Head v. Baldrey* (1837), 6 Ad. & El. 459; *Corbett v. Swinburne* (1838), 8 Ad. & El. 673; *Henry v. Earl* (1841), 5 Jur. 828; *Pollitt v. Forrest* (1847), 11 Q. B. 962, Ex. Ch.

**317. — Cause of action accruing before enemy status acquired—Action brought afterwards.]—Pltf.,** a British subject, effected an insurance on cargo, one-sixth of which belonged to himself & five-sixths to a foreign firm. A loss covered by the policy occurred, & after the loss the foreign firm became alien enemies. Pltf., whose share of the policy moneys was brought into ct., sued the underwriter on behalf of himself & the foreign firm. Deft. pleaded the general issue. There was nothing on the record to show that the action was on behalf of alien enemies:—*Held*: (1) the general issue went to the contract & operated as a plea of a perpetual bar; (2) since the insurance, loss, & cause of action had arisen before the assured became alien enemies, there was only a temporary suspension of their right of suit here; (3) this temporary suspension could not be taken advantage of under a plea of a general bar, & in absence of a plea of alien enemy on the record, pltf. was entitled to recover.—*FLINDT v. WATERS* (1812), 15 East, 260; 104 E. R. 842.

*Annotations*:—*Consd.* *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, H. L.; *Schmitz v. Van der Veen* (1915), 84 L. J. K. B. 861. *Refd.* *Antoine v. Morshead* (1815), 1 Marsh. 558; *Driefontein Consolidated Gold Mines v. Janson, West Rand Central Gold Mines Co. v. De Rougemont*, [1900] 2 Q. B. 339; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**318. — — — — —.]—In an action on a policy of assurance, it is no defence under the general issue that the persons interested, who were neutrals when the policy was effected & the loss happened, had become alien enemies before action brought.** This circumstance only suspends the remedy, & should be pleaded in abatement.—*HARMAN v. KINGSTON* (1811), 3 Camp. 150.

*Annotations*:—*Mentd.* *Gledstones v. Royal Exchange Assee. Corp'n* (1864), 5 B. & S. 797; *Ionides & Chapeaurouge v. Pacific Insce.* (1871), L. R. 6 Q. B. 674.

**319. What must be averred—Enemy birth unnecessary.]—A plea of alien enemy is good, although it is not said *natus*, but *oriundus extra ligeantiam*.—*DERRIER v. ARNAUD* (1695), 4 Mod. Rep. 405; 87 E. R. 470.**

*Annotations*:—*Consd.* *Sparenburgh v. Bannatyne* (1797), 1 Bos. & P. 163; *Casseres v. Bell* (1799), 8 Term Rep. 166.

**320. — — — — —.]—In a plea of alien enemy it is not necessary to state that pltf. is alien enemy by birth, though originally that was the usual form of averment.**—*SPARENBURGH v. BANNATYNE* (1797), 1 Bos. & P. 163; 2 Esp. 580; 126 E. R. 837.

*Ann'd in*:—*Mentd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**321. — “Alien” insufficient.]—In a personal action, a plea merely that pltf. is an alien is bad, for an alien friend may bring such an action; the**

plea must state that he is an alien enemy.—*OPENHEIMER v. LEVY* (1737), 2 Stra. 1082; 93 E. R. 1045.

*Annotation*:—*Refd.* *Casseres v. Bell* (1799), 8 Term Rep. 166.

**322. — — — — — “Frenchmen, aliens & enemies to King.”]**—Bill for discovery of goods. Plea that pltf. were Frenchmen, aliens & enemies to the King. England was at war with France at the time:—*Held*: (1) the words “Frenchmen,” “aliens,” “enemies,” contained every material allegation necessary in the plea, although it would have been better if the plea had stated pltf. to have been born out of the allegiance of the King & within the allegiance of a State at war with England; (2) the plea was sufficient.—*DAUBIGNY v. DAVALLON* (1794), 2 Anst. 462; 145 E. R. 936.

*Annotation*:—*Mentd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**323. — — — — — All facts negating right to sue.]—In a plea of alienage deft. must state that pltf. was born in a foreign country at enmity with England, & came to England without letters of safe conduct from the King, since, the plea being an odious plea, deft. must set forth all facts in the plea that negative pltf.'s right of suing there.**—*CASSERES v. BELL* (1799), 8 Term Rep. 166; 101 E. R. 1325.

*Annotations*:—*Refd.* *Taylor v. Carpenter* (1847), 9 L. T. O. S. 514; *Schaffenus v. Goldberg*, [1916] 1 K. B. 284, C. A. *Mentd.* *Schepeler v. Durant* (1854), 2 W. R. 467.

**324. — — — — — & possession of naturalisation certificate.]—A plea alleging that pltf. was an alien born, to wit, in Russia, & an enemy of the Queen (the ct. having taken judicial notice that Russia was at war with Great Britain), born of alien parents, not a subject of the Queen by naturalisation, denization, or otherwise, & residing in England without the licence, permission, or safe conduct of the Queen:—*Held*: a good plea, & sufficiently negated pltf.'s possession of a certificate under Naturalisation Act, 1844 (c. 66), s. 8.**—*ALCINOUS v. NIGREU* (*NYGREW, NYGREN*) (1854), 4 E. & B. 217; 24 L. J. Q. B. 19; 24 L. T. O. S. 92; 1 Jur. N. S. 16; 3 W. R. 25; 119 E. R. 84.

*Annotations*:—*Consd.* *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A. *Refd.* *Driefontein Consolidated Mines v. Janson, West Rand Central Gold Mines Co. v. De Rougemont*, [1900] 2 Q. B. 339; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**325. Joinder with other pleas—Non assumpsit.]—FERON v. LADD** (1779), 2 Wm. Bl. 1326; 96 E. R. 777.

*Annotation*:—*Refd.* *Taylor v. Carpenter* (1847), 9 L. T. O. S. 514.

**326. — — — — —.]—THYATT v. YOUNG** (1800), 2 Bos. & P. 72; 126 E. R. 1163.

*Annotation*:—*Refd.* *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**327. — — — — — General issue.]—ANGERSTEIN v. VAUGHAN** (1798), 1 Bos. & P. 222, n.; 126 E. R. 871.

**328. — — — — —.]—TRUCKENBRODT v. PAYNE** (1810), 12 East, 206; 104 E. R. 81.

**329. — — — — — Tender.]—SHOMBECK v. DE LA COUR** (1808), 10 East, 326; 103 E. R. 799.

*Annotation*:—*Refd.* *Taylor v. Carpenter* (1847), 9 L. T. O. S. 514.

## Part IV.—Trading and Communicating with the Enemy.

Cases on Trading with the Enemy Acts, Proclamations & Orders, see Nos. 216—241, 246—248, *ante*, 379—400, *post*.

### SECT. 1.—IN GENERAL.

**330. General rules applicable to trading by British subjects & their allies with enemy.]—When war**

breaks out between States the following rules apply, according to international law, to trading:—(1) All commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, unless it is expressly allowed or licensed by the head of the State. (2) Where a belligerent State has allies, the citizens of all the allied States are under

the same obligations to each of the allied States as its own subjects would be to a single belligerent State as regards commercial intercourse with the enemy. (3) Where such illegal intercourse is proved between allied citizens & the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to capture by any allied belligerent, & is subject to condemnation in that belligerent's own Prize Cts. (4) When such intercourse in fact takes place, the property of the persons engaged in it is confiscable, whether they were acting honestly & with *bona fides* or not.

Before the outbreak of war between Great Britain & her allies & Germany & Austria, a French co. contracted to sell certain goods to a German firm. The goods were shipped from a neutral State in a neutral vessel. War broke out whilst the ship was being loaded. She afterwards sailed with the goods on board for Antwerp & Newcastle. The French co. later on directed her to Swansea, where the goods were seized & sold. At the time of seizure the property in the goods was still in the French co. :—*Held* : although the French co. had acted honestly & *bona fide*, what they had done constituted trading with the enemy, & as being citizens of a State in alliance with Great Britain the goods were confiscable in the same manner as those of a British citizen would have been in similar circumstances.—*THE PANARIELLOS* (1916), 85 L. J. P. 112; 114 L. T. 670; 32 T. L. R. 459; 60 Sol. Jo. 427; 13 Asp. M. L. C. 484, P. C.; *affg.* (1915), 84 L. J. P. 140.

*Annotations* :—*Reid*. Robson v. Premier Oil & Pipe Line Co., [1915] 2 Ch. 124, C. A.; Halsey v. Lowenfeld, [1916] 2 K. B. 707, C. A.; Tingley v. Müller, [1917] 2 Ch. 144, C. A.; Naylor, Benzon v. Krainsche Industrie, [1918] 1 K. B. 331; Ertel Bieber v. Rio Tinto, [1918] A. C. 260.

**331. When restrictions applied—Existence of hostilities.**—So far as making trade with the enemy illegal is concerned it is sufficient that hostilities actually exist. It is immaterial whether they were commenced after a formal declaration or not. It is a misdemeanour of a very high nature to carry on commerce with enemies of the Crown & king dom, & confiscation is one of the civil consequences.—*THE MARIA MAGDALENA* (1779), Morr. 247.

**332. — Declaration of war.**—The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by licence of the Crown. As an act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law (WILLES, J.).—*ESPOSITO v. BOWDEN* (1857), 7 E. & B. 763; 8 State Tr. N. S. 807; 27 L. J. Q. B. 17; 29 L. T. O. S. 295; 3 Jur. N. S. 1209; 5 W. R. 732; 119 E. R. 1430, Ex. Ch.

*Annotations* :—*Consd.* Arnhold, Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam, [1916] 1 K. B. 495, C. A. *Distd.* Halsey v. Lowenfeld, [1916] 1 K. B. 143; Blackburn Bobbin v. Allen, [1918] 1 K. B. 540. *Reid*. Barrick v. Buba (1857), 2 C. B. N. S. 563; Santos v. Illidge (1859), 6 C. B. N. S. 841; The Teutonia (1871), L. R. 3 A. & E. 394; Janson v. Driefontein Consolidated Mines, [1902] A. C. 484, H. L.; Porter v. Freudenberg, [1915] 1 K. B. 857, C. A.; Horlock v. Beal, [1916] 1 A. C. 486, H. L.; British & Foreign Marine Insco. v. Sanday, [1916] 1 A. C. 650, H. L.; Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain), [1916] 2 A. C. 307, H. L.; Halsey v. Lowenfeld, [1916] 2 K. B. 707, C. A.; Millar (Andrew) v. Taylor, [1916] 1 K. B. 402, C. A.; Stevenson v. Akt. für Cartonnagen Industrie, [1916] 1 K. B. 763; Zinc Corp'n. v. Hirsch, [1916] 1 K. B. 541, C. A. *Mentd.* Reid v. Hoskins (1855), 4 E. & B. 979; Tamvaco v. Lucas (1861), 1 B. & S. 185; Danube & Black Sea Ry. & Kustendje Harbour Co.

v. Xenos (1862), 31 L. J. O. P. 284; Jager v. Tolme & Runge (1915), 31 T. L. R. 381; Beal v. Horlock, [1916] 2 K. B. 627, C. A.; Leiston Gas Co. v. Leiston-Cum-Sizewell U. C., [1916] 1 K. B. 912; Metropolitan Water Board v. Dick, Kerr, [1917] 2 K. B. 639; Clapham S.S. v. Handels-en-Transport, etc. (1917), 14 Asp. M. L. C. 104; Ertel Bieber v. Rio Tinto, [1918] A. C. 260; Naylor, Benzon v. Krainsche Industrie, [1918] 1 K. B. 331.

**333.** —.]—In an action upon a charter-party between a subject of England & a Russian subject for loading a cargo at Odessa, a Russian port, deft. pleaded that, at the time of making the contract, pltf. was a subject of Great Britain, & the vessel a British vessel, & deft. a subject of Russia residing & carrying on trade there, & that, before the expiration of the time for deft. to load the vessel according to the charterparty, & before any breach thereof, a state of war existed, & had ever since continued, between the two countries :—*Held* : a good answer.—*BARRICK (BARWICK) v. BUBA* (1857), 2 C. B. N. S. 563; 26 L. J. C. P. 280; 29 L. T. O. S. 199; 5 W. R. 665; 140 E. R. 536.

*Annotations* :—*Mentd.* Frost v. Knight (1872), L. R. 7 Exch. 111, Ex. Ch.; Roper v. Johnson (1873), L. R. 8 C. P. 167; Johnstone v. Milling (1886), 16 Q. B. D. 460, C. A.; Veithardt & Hall v. Rylands (1917), 86 L. J. Ch. 604, C. A.

**334. By whom objection taken—Duty of court.**—Where a contract is illegal, because it involves trading with the enemy, the ct. will take the objection, although deft. does not, since the contract is one to defeat the laws of the country.—*EVANS v. RICHARDSON* (1817), 3 Mer. 469; 36 E. R. 181.

*Annotations* :—*Reid*. Re Oliver's Settlement, [1905] 1 Ch. 191; Griffiths v. Fleming, [1909] 1 K. B. 805, C. A.; North Western Salt Co. v. Electrolytic Alkali Co., [1913] 3 K. B. 422, C. A.; Montefiore v. Menday, etc., Co., [1918] 2 K. B. 241. *Mentd.* Stevenson v. Akt. für Cartonnagen Industrie (1916), 115 L. T. 594, C. A.

**335. To whom restrictions apply—Alien enemy residing in Britain under licence—Treason.**—An alien, whose sovereign is at war with England, living there under the King's protection, may be guilty of treason by holding a traitorous correspondence with his own country. *Seemle* : if, having a family & effects in England, he goes to his native country for a time & there adheres to the King's enemies for purposes of infidelity, he might be dealt with as a traitor.—*R. v. DE GUISCARD (MARQUIS)* (1710), Post. 185, n., 186, n., 271, 275.

**336.** —.]—Prisoner, a Frenchman resident in England, had, while England was at war with France, attempted to communicate to that country information regarding the state & disposition of the English fleets & armies :—*Held* : (1) having during his residence in England received the protection of the laws of the land, he owed a duty to those laws & an allegiance to the King; (2) he had been guilty of treason.—*DE LA MOTTE'S CASE* (1781), O. B. S. P.

**337. — British subject residing in neutral State.**—A person living *bona fide* in a neutral country is fully entitled to carry on a trade to the same extent as the native merchants of that country, provided it is not inconsistent with his native allegiance.—*THE EMANUEL* (1799), 1 Ch. Rob. 296.

**338.** —.]—A British-born subject resident in the English factory at Lisbon was allowed the benefit of a Portuguese character so far as to render his trade with Holland (at war with England, but not with Portugal) not impeachable as an

#### PART IV. SECT. 1.

**335 I. To whom restrictions apply—Alien enemy creditor residing in debtor's country—Right to interest as damages suspended.**—The existence of a state of war between the respective countries of debtor & creditor suspends the accrual

of interest, when it would ordinarily be recoverable as damages & not as a substantive part of the debt, the reason being that a party should not be called upon to pay damages for retaining money which it was his duty to withhold. The accrual of interest is equally suspended, even when the alien enemy

creditor remains in the country of debtor, until debtor has actual notice that the principal can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities.—*PANGETT v. JAMSHETJI HORMUSJI* (1917), 1 L. R. 41 Bom. 390.—*IND.*



**Sect. 1.—In general. Sect. 2.]**

illegal trade.—**THE DANOUS** (1802), 4 Ch. Rob. 255, n.

**Annotations** :—**Consd.** *The San Spiridione* (1856), 28 L. T. O. S. 205. **Refd.** *The Nayaide* (1802), 4 Ch. Rob. 251.

**339.** ———.]—A natural-born subject of England, domiciled in a foreign country in amity with England, may lawfully exercise privileges of a subject of the country where he is domiciled to trade with another country in hostility with England.

Where plff., a British-born subject domiciled in America, effected a policy of assurance on ship, freight, & goods, at & from Virginia to any ports in the Baltic, & the ship was captured on her way to Elsinore, in Denmark, Denmark being in amity with America, but at war with England :—**Held** : (1) trading with the enemy by a British subject domiciled abroad was innocent ; (2) plff. was entitled to recover.—**BELL v. REID, BELL v. BULLER** (1813), 1 M. & S. 726 ; 105 E. R. 270.

**340.** ———. **Supply of contraband.**]—Though a British subject resident abroad may engage generally in trade with the enemy, he cannot carry on such trade in articles of a contraband nature. The duties of allegiance travel with him, so as to restrain him from supplying articles of that kind to the enemy.—**THE NEPTUNUS** (1807), 6 Ch. Rob. 403.

**Annotation** :—**Mentd.** *The Panariellos* (1915), 84 L. J. P. 140.

*See, further, PRIZE LAW & JURISDICTION.*

**341.** ———. **Effect of abandoning residence there.**]—A., a native of Great Britain, had settled in America, where he resided & carried on an extensive trade till 1798, when he came to Europe, to England & France, to look after his debts, & to reclaim some property captured by the French, & with an intention of carrying back with him his wife & family, who had been residing in England for the education of his children. He had disposed of his house in America, & had nothing left there but his landed estate :—**Held** : (1) that alone was not sufficient to constitute domicile or fix the national character of the possessor not personally resident upon it ; (2) whether A.'s character was that of a French or a British merchant, he did not stand in the character of a neutral American merchant ; (3) he was not entitled to restitution of cargo seized by Great Britain while on a trading adventure between France, with which Great Britain was then at war, & Lisbon.—**THE DREE GEBROEDERS** (1802), 4 Ch. Rob. 232.

**Annotations** :—**Consd.** *Forbes v. Forbes* (1854), Kay, 341. **Refd.** *Jopp v. Wood* (1864), 11 L. T. 406.

**342.** **Neutral trading in own country—Also partner in English firm—Transaction solely in neutral capacity.**]—A merchant of Emden, domiciled there & clothed with the character of British consul, was partner in a firm in London. A cargo of cheeses was sent from an enemy country at the order of the merchant given from Emden, & was consigned to the London firm. It appeared this was done for the separate account of the Emden business (Emden being in a neutral country), & the London firm had no interest in the transaction :—**Held** : this was to be treated as neutral business, & the goods were not liable to condemnation for trading with the enemy.—**THE HERMAN** (1802), 4 Ch. Rob. 228.

**343.** ———. **Neutral trading in allied country.**]—During war between Great Britain & Portugal as allies & France a cargo of cotton & sugar was captured on a voyage from Lisbon to Bordeaux, & was claimed by B., a Prussian merchant resident in Lisbon. In absence of proof that there was a

Prussian factory at Lisbon, which enabled B. to retain his national character for trading purposes :—**Held** : he must be treated as Portuguese, & his claim, as being that of the subject of an allied State having traded with the enemy, must be rejected.—**THE NAYADE** (1802), 4 Ch. Rob. 251.

**Annotations** :—**Consd.** *The San Spiridione* (1856), 28 L. T. O. S. 205. **Mentd.** *The Teutonia* (1871), L. R. 3 A. & E. 394.

**344.** ———. **Subjects of allied country.**]—During a conjoint war no subject of one belligerent can trade with the enemy without being liable to a forfeiture of his property engaged in such a trade in the cts. of the ally. The ct. is competent to take cognisance of the fact of a subject of an allied power trading with the common enemy.—**THE NAYADE** (1802), 4 Ch. Rob. 251.

**Annotations** :—**Consd.** *The San Spiridione* (1856), 28 L. T. O. S. 205. **Mentd.** *The Teutonia* (1871), L. R. 3 A. & E. 394.

**345.** ———. **Subjects of State under British protection—On whose behalf no war declared.**]—The status of the Ionian Islands & their relation to Great Britain were formerly regulated by the Treaty of Paris of Nov. 5, 1815. That constituted them a free & independent State, under the exclusive protection of Great Britain. The protecting sovereign had the right of making peace or war for them, but intention to place them in a state of war must be clearly expressed, & they did not necessarily become so from Great Britain being at war. In the Crimean war Great Britain did not declare war for them against Russia :—**Held** : their trade with Russia was not illegal, as they were neither British subjects, allies in the war, nor enemies of Russia.—**THE IONIAN SHIPS, THE LEUCADE** (1855), 2 Ecc. & Ad. 212 ; Spinks, 193 ; 8 State Tr. N. S. 433.

**Annotation** :—**Refd.** *R. v. Crewe, Ex p. Sekgome*, [1910] 2 K. B. 576, C. A.

**346.** ———. **S. P.**—**THE LEUCADE** (1855), 2 Ecc. & Ad. 228 ; Spinks, 217 ; 8 State Tr. N. S. 433 ; 25 L. T. O. S. 312 ; 1 Jur. N. S. 549.

**Annotations** :—**Refd.** *The San Spiridione* (1856), 5 W. R. 102. **Mentd.** *The Fortuna* (1855), Spinks, 307 ; *The Aline & The Fanny* (1856), Spinks, 322 ; *Re The Stephen Hart* (1864), 11 L. T. 52.

**347.** **Persons owing allegiance to Crown Though duty only temporary.**]—It is illegal in any person, owing an allegiance, though temporary, to the Crown, to trade with the public enemy ; the property of a British merchant taken in such trade is liable to confiscation.—**THE INDIAN CHIEF** (1801), 3 Ch. Rob. 12.

**Annotations** :—**Refd.** *R. v. Bjornsen* (1865), 10 Cox, C. C. 74, C. C. R. ; *The Eumaeus* (1915), 85 L. J. P. 130. **Mentd.** *The San Spiridione* (1856), 28 L. T. O. S. 205 ; *Advocate-General of Bengal v. Rance Surnomoye Dossee* (1863), 2 Moo. P. C. C. N. S. 22, P. C. ; *The Laconia, The Colchide* (1863), Brown. & Lush, 117, P. C. ; *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 441, H. L. ; *Re Tootal's Trusts* (1883), 23 Ch. D. 532 ; *Companhia de Mocambique v. British South Africa Co.*, [1892] 2 Q. B. 358, C. A. ; *The Klamenco, The Orduna* (1915), 32 T. L. R. 53 ; *The Hypatia* (1916), 13 Asp. M. L. C. 574 ; *Casdagli v. Casdagli*, [1918] P. 89, C. A. ; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

Effect of peace on trading with the enemy restrictions, *see* Nos. 202, 269, 270, *ante*.

## SECT. 2.—WHAT CONSTITUTES TRADING OR COMMUNICATING APART FROM WAR LEGISLATION, 1914–18.

**348.** **Act of trade essential—Intention to trade insufficient.**]—A British ship was fitted out for a voyage to Africa, there to barter her cargo for

slaves, & then carry them to the island of Demerara, at that time a Dutch colony. The vessel sailed on Sept. 11, 1795. A declaration of war against Holland was issued on the 16th. The vessel sailed from the coast of Africa in May, 1796, & was taken off the island of Demerara, after surrender of that island to the British forces, & carried to Martinique:—*Held*: (1) there must be an act of trading with the enemy as well as the intention; (2) since Demerara had ceased to be an enemy there was no such act; (3) where a country was known to be hostile, commencement of a voyage to that country might be a sufficient act of illegality, but where the voyage was undertaken without that knowledge, the subsequent event of hostility would have no such effect.—*THE ABBY* (1804), 5 Ch. Rob. 251.

**349. Bill of exchange transactions—Drawer & acceptor British prisoner of war—Payee British prisoner of war—Consideration illegal under 45 Geo. 3, c. 72.**—Pltf. & deft., being taken prisoners in Portugal, jointly solicited & obtained the liberation of themselves & the ransom of deft.'s ship, contrary to the above Act, to effect which pltf. lent money to deft., who afterwards gave him a bill for the amount:—*Held*: pltf. could not recover on the bill.

It would be singular, where two are equally interested in wishing & effecting a ransom, if, because it happens that one advances the money, & takes the bill of the other for the repayment, that shall be good; while if the bill were given to the captor only, it would be void (LORD MANSFIELD, C.J.).—*WEBB v. BROOKE* (1810), 3 Taunt. 6; 128 E. R. 3.

*Annotation*:—*Distd.* Pidgeon v. Burslem (1849), 3 Exch. 465.

**350. — Drawer British subject in enemy country—Payee neutral in neutral country.**—An action may be maintained in England by a neutral (Swiss) on a promissory note given to him by a British subject in an enemy's country (France) for goods sold there.

The contracting parties were not alien enemies, & the contract was not necessarily void, though made in an enemy's country. Pltf. might lawfully sell their goods in Paris, it did not appear that deft. purchased them for any illegal purpose (LORD ELLENBOROUGH, C.J.).—*HOURIET v. MORRIS* (1812), 3 Camp. 303.

**351. — Drawer British prisoner of war—Payee British prisoner of war—Acceptor British subject in Britain—Indorsee enemy banker.**—Five bills of exchange were drawn by M., a British subject detained as prisoner of war in France, payable some to T. & some to E., also British subjects detained as prisoners of war, & indorsed to A., pltf., a French subject & banker at Verdun. They were accepted by deft., M.'s son, who was resident in England:—*Held*: (1) a contract made with an alien enemy in time of war, of such a nature that it endangered the security or was against the policy of England, was void.—*ANTOINE v. MORSHEAD* (1815), 6 Taunt. 237; 1 Marsh. 558; 128 E. R. 1025.

*Annotations*:—*Consd.* & *Distd.* Willison v. Patteson (1817), 1 Moore, C. P. 133; Ogden v. Peele (1826), 8 Dow. & Ry. K. B. 1. *Refd.* Porter v. Freudenberg, [1915] 1 K. B. 857, C. A.; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.

**352. — Payee alien enemy—Subsequent promise after war.**—Although a bill drawn by a prisoner of war in France in 1795, upon a person resident in England in favour of an alien enemy, could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace to pay principal & interest.—*DUHAMMEL (ADMINISTRATOR OF TAILLEUE) v. PICKERING* (1817), 2 Stark. 90.

*Annotation*:—*Expld.* Ogden v. Peele (1826), 8 Dow. & Ry. K. B. 1.

**353. — Drawer alien enemy in hostile country—Drawee British subject in Britain—Indorsee British subject in enemy country.**—If cambric of French manufacture be assigned to merchants in England for sale, & bills of exchange be drawn on them by an alien enemy, resident in France, during war, which they accept, the drawer having indorsed those bills to a British subject residing in France does not enable such British subject to recover on the bills against the acceptors after the restoration of peace.—*WILLISON v. PATTESON* (1817), 1 Moore, C. P. 133; 7 Taunt. 439; 129 E. R. 176.

*Sec. also*, Nos. 266–268, *ante*.

**354. Insurance transactions—Insurance of enemy ships & property.**—No determination has been that insurance on enemies' ships during war is unlawful. It might be going too far to say all trading with the enemy is unlawful; for that general doctrine would go a great way, even where only English goods are exported, & none of the enemies' imported, which may be very beneficial (LORD HARDWICKE, C.).—*HENKLE v. ROYAL EXCHANGE ASSURANCE CO.* (1719), 1 Ves. Sen. 317; 27 E. R. 1055.

*Annotations*:—*Consd.* Townshend v. Stangroom (1801), 6 Ves. 328; Furtado v. Rogers (1802), 3 Bos. & P. 191. *Mentd.* Wharram v. Wharram (1864), 3 Sw. & Tr. 301.

**355. — Action in name of English agent—Plea & replication.**—No action can be maintained either by, or in favour of, an alien enemy. A plea of alienage, to an action on a policy of insurance brought in the name of an English agent for his principal, an alien, such interest appearing on the record, is a good plea; & a replication to such a plea that the alien is indebted to the agent (pltf.) in more money than the value of the property insured cannot be supported; but the return of peace gets rid of the objection.—*BRANDON v. NESBITT* (1794), 6 Term Rep. 23; 101 E. R. 415.

*Annotations*:—*Distd.* Rotch v. Edie (1795), 6 Term Rep. 413. *Expld.* Furtado v. Rogers (1802), 3 Bos. & P. 191; Flindt v. Waters (1812), 15 East, 260. *Refd.* Kellner v. Le Mesurier (1803), 4 East, 396; Kensington v. Inglis (1807), 8 East, 273; Porter v. Freudenberg, [1915] 1 K. B. 857, C. A.; Schmitz v. Van der Veen (1915), 84 L. J. K. B. 861; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L. *Mentd.* Simeon v. Thompson (1798), 8 Term Rep. 71.

**356. — The insurance of an enemy's property is illegal, & no action can be sustained thereon.**—*BRISTOW v. TOWERS* (1794), 6 Term Rep. 35; 101 E. R. 422.

*Annotations*:—*Distd.* Rotch v. Edie (1795), 6 Term Rep. 413. *Expld.* Furtado v. Rogers (1802), 3 Bos. & P. 191. *Consd.* Schmitz v. Van der Veen (1915), 112 L. T. 991. *Refd.* Kensington v. Inglis (1807), 8 East, 273; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.

**357. — An insurance effected in Great Britain on a French ship previous to hostilities between Great Britain & France does not cover a loss by British capture.**

To insure enemies' property was at common law illegal. If this be so, a contract of this kind entered into previous to hostilities must be equally unavailable in a ct. of law, since it is equally injurious to the interests of the country; for if such a contract could be supported, a foreigner might insure previous to the war against all the evils incident to war. The ground on which we decide this case is that when a British subject insures against captures, the law infers that the contract contains an exception of captures made by the Govt. of his own country, & that if he had expressly insured against British capture, such a contract would be abrogated by the law of England (LORD ALVANLEY, C.J.).—*FURTADO v. ROGERS* (1802), 3 Bos. & P. 191; 127 E. R. 105.

*Annotations*:—*Consd.* Kellner v. Le Mesurier (1803), 4 East, 396; Esposito v. Bowden (1857), 7 E. & B. 763. Ex.



**Sect. 2.—What constitutes trading or communicating apart from war legislation, 1914-18.]**

Ch. *Reid*. *Felze v. Thompson* (1808), 1 Taunt. 121; *Oom v. Bruce* (1810), 12 East, 225; *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, H. L.; *Zinc Corp'n. v. Hirsch*, [1916] 1 K. B. 541, C. A.; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)* (1916), 32 T. L. R. 624, H. L.; *Ertel Bleher v. Rio Tinto*, [1918] A. C. 260.

**358. Against British capture.]—**A policy containing an insurance against British capture *eo nomine* would be illegal & void upon the face of it, as being directly & obviously repugnant to the interest of the State, having an immediate tendency to render ineffectual to the extent of the indemnity created thereby all offensive operations by sea adopted on the part of His Majesty & his subjects for the purpose of weakening the strength & diminishing the resources of the enemy. Whatever opinions may heretofore have obtained in favour of the expediency of allowing insurance to be made upon enemies' property against capture, & whatever attempts may have been made to procure any legislative declaration or provisions in support of them, neither those opinions nor any degree of weight, authority, & zeal with which they were attended, have gone the length of producing one single judicial determination in favour of the legality of such a practice (LORD ELLENBOROUGH, C.J.).—*KELNER v. LE MESURIER* (1803), 4 East, 396; 102 E. R. 883.

**Annotations:—***Distd.* *Visger v. Prescott* (1804), 5 Esp. 184. *Expld.* *Lubbock v. Potts* (1806), 7 East, 449. *Consd.* *Driefontein Consolidated Gold Mines v. Janson*, [1901] 2 K. B. 419, C. A. *Reid.* *Gamba v. Le Mesurier* (1803), 4 East, 407; *Brandon v. Curling* (1803), 4 East, 410; *Driefontein Consolidated Gold Mines v. Janson*, [1900] 2 Q. B. 339. *Mentd.* *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, H. L.

**359. ——— Carrying goods under licence.]—**Where a certain trading with an alien enemy for specie & goods to be brought from the enemy's country in his ships into our colonial ports was licensed by the King's authority:—*Held*: an insurance on the enemy's ship, as well as on the goods & specie put on board for the benefit of the British subjects, was incidentally legalised, & it was competent for the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war, the trust not contravening any rule of law or of public policy, & there being no personal disability in pltf. on the record to sue.—*KENSINGTON v. INGLIS* (1807), 8 East, 273; 103 E. R. 346.

**Annotations:—***Distd.* *Flindt v. Waters* (1812), 15 East, 260. *Reid.* *De Tastet v. Taylor* (1812), 4 Taunt. 233; *Willison v. Patteson* (1817), 1 Moore, C. P. 133; *Schmitz v. Van der Veen* (1915), 84 L. J. K. B. 861. *Mentd.* *Hubbard v. Jackson* (1811), 4 Taunt. 169; *Weir v. Aberdeen* (1819), 2 B. & Ald. 320; *Bacon v. Simpson* (1837), 3 M. & W. 78; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**360. Risk underwritten & loss occurring before declaration of war.]—**Where a subject of a foreign Govt. insures treasure with British underwriters against capture during its transit from the foreign State to England, & the foreign Govt. seizes the treasure during transit, & war is afterwards declared between the foreign & the British Govts., the insurance is valid, & an action may be maintained in England against the underwriters after the restoration of peace, though the seizure is made in contemplation of war, & in order to use the treasure in support of the war. The important date is the seizure before the declaration of war. Such an insurance is not against public policy, which is not a safe or trustworthy ground for legal decision.

It is not difficult to solve the question whether a contract of insurance made before the war &

sought to be enforced in respect of a loss incurred before the war is illegal, either in its inception or at the date when the loss was incurred. However stated, it amounts to this—that the thing done must be in its nature an assistance to the public enemy, & if there be no public enemy, there can be no aid given to him. Trading with the King's enemies is, of course, illegal. Undertaking by contract to indemnify the King's enemies against loss inflicted by the King's forces is also illegal. Such things are manifestly unlawful, but the words "King's enemies" are a necessary feature of the last proposition. It would be to introduce a new principle into our law to hold that the probability of a war should have the same operations as war itself. It is war & war alone that makes trading illegal (EARL OF HALSBURY, C.).

The law recognises a state of peace & a state of war, but it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war (LORD MACNAGHTEN).

There are three rules which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy, i.e., a person owing allegiance to a Govt. at war with the King, without the King's licence. The second principle is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Govt. One of the most effectual instruments of war is the crippling of the enemy's commerce, & to permit such an insurance would be to relieve enemies from the loss they incur by the action of British arms, & would be detrimental to the interests of the insurer's own country. The principle equally applies where the insurance is made previous to the commencement of hostilities, & was legal in its inception, & whether the person claiming on the policy be a neutral or even a British subject, if the insurance be effected on behalf of an alien enemy. The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war & revives on the restoration of peace (LORD DAVEY).—*JANSON v. DRIEFONTEIN CONSOLIDATED MINES, LTD.*, [1902] A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 18 T. L. R. 796; 7 Com. Cas. 268, H. L.

**Annotations:—***Reid.* *Robinson Gold Mining Co. v. Alliance Insee.*, [1901] 2 K. B. 919; *Ertel Bleher v. Rio Tinto*, [1918] A. C. 260; *Monette v. Menday, etc., Co.*, [1918] 2 K. B. 241; *Naylor, Benzou v. Krainische Industrie*, [1918] 1 K. B. 331; *Oreocra Iron Ore Co. v. Fried Krupp Akt.* (1918), 87 L. J. Ch. 313, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**361. ——— Neutral property bound to enemy port.]—**It is nowhere laid down that policies on neutral property, though bound to an enemy's port, are void. Indeed I know no cases that prohibit even a subject trading with the enemy except two; one of which is a short note in 2 Roll. Abr. 173, where trading with Scotland, then in a state of general enmity with this kingdom, was held to be illegal, & the other is a note, which was given to me by Lord Hardwicke, of a reference in King William's time to all the judges, whether it were a crime at common law to carry corn to the enemy in time of war, who were of opinion that it was a misdemeanour (LORD MANSFIELD, C.J.).—*GIST v. MASON* (1786), 1 Term Rep. 88; 99 E. R. 987.

**Annotations:—***Expld.* *Bell v. Jilson* (1798), 1 Bos. & P. 345. When the case of *Gist v. Mason* came on, I more than once conversed with Lord Mansfield, being desirous to obtain his opinion on the legality of such insurances; on the legality, however, I never could get him to reason; he often said that in former times it was considered for the interest of the country to insure enemy's property, & on the persuasion of its being for the interest of the country he always discountenanced any



objection on that head, but he never went beyond the ground of expedience; at present such insurances are not expedient, the state of the countries at war being such as to make them otherwise (BULLER, J.). *Dbtd.* The Hoop (1799), 1 Ch. Rob. 196. In *Gist v. Mason* Lord Mansfield is reported to have said, "By the maritime law, trading with an enemy is cause of confiscation in a subject, provided he is taken in the act; but this does not extend to a neutral vessel." What is meant by the addition, "but this does not extend to a neutral vessel," it is extremely difficult to conjecture, because no man was more perfectly apprised that the neutral bottom gives in no case any sort of protection to a cargo that is otherwise liable to confiscation, unless under the express stipulations of particular treaties; & I cannot but conclude that the words of that great person must have been received with some slight degree of misapprehension (LORD STOWELL). *Reid.* *Esposito v. Bowden* (1857), 7 E. & B. 763; *Tingley v. Müller*, [1917] 2 Ch. 1, C. A.

**362. Neutral property in enemy port.]**—In an action by a native of America, resident in England:—*Held*: (1) a policy of assurance on a ship & stores "at & from a port" in a foreign country, in the common form against arrests of princes, people, etc., extended to an embargo laid on by the Govt. of that country in the loading port, & if the embargo continued, the assured might abandon & recover as for a total loss; (2) *pltf.* was not under any disability to sue in an English ct. of justice, he not being an alien enemy.

As to the objection, that it will be impolitic to enforce this contract because by this means we shall be indemnifying the subjects of France, for that this must be considered equal to an insurance on enemy's property, it must be remembered that this action is brought by a neutral, not by a Frenchman. The consequences of allowing this objection would be that it would be illegal to insure the property of a neutral in a foreign port (LAWRENCE, J.).—*ROTCH v. EDIE* (1795), 6 Term Rep. 413; 101 E. R. 623.

*Annotations*:—*Consd.* *Touteng v. Hubbard* (1802), 3 Bos. & P. 291. *Mentd.* *Rodocanachi v. Elliott* (1873), L. R. 8 C. P. 649.

**363. — British property shipped from enemy port—Bought by British agent in enemy country.]**—Goods, the produce of Holland, purchased in that country during hostilities between Holland & Great Britain, by a British agent resident there, & shipped for British subjects, were insured by them in England:—*Held*: a legal insurance.—*BELL v. GILSON* (1798), 1 Bos. & P. 345; 126 E. R. 942.

*Annotations*:—*Overd.* (by implication) *Potts v. Bell* (1800), 8 Term Rep. 548. *Dbtd.* *Esposito v. Bowden* (1857), 7 E. & B. 763, Ex. Ch. *Reid.* *Tingley v. Müller*, [1917] 2 Ch. 144, C. A. *Mentd.* *Browning v. Provincial Insee. Co. of Canada* (1873), 28 L. T. 853, P. C.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**364. — British property "to any port in Baltic"—Some Baltic ports hostile.]**—A policy "to any port or ports in the Baltic" is legal, although some of those ports were then in a state of war with England & no licence has been obtained, provided the ship was not sailing to such hostile port.—*WRIGHT v. WELBIE* (1819), 1 Chit. 49.

**365. Purchase from enemy—British ship taken as prize.]**—His Majesty's subjects cannot buy ships captured; it is founded in his allegiance not to aid his enemy; it is to aid the enemy to buy captured property; notwithstanding the French condemnation, a person of England cannot purchase such property, which belonged to a fellow-subject; the property, therefore, still remains in the original owner from whom it was captured (LORD ELDON).—*WOODWARD v. LARKING* (1801), 3 Esp. 286.

#### PART IV. SECT. 2.

**365 i. Purchase from enemy—Enemy recovering property confiscated.]**—During the occupation of Colesburg by the Republican forces, Z., a British subject, obtained a horse by barter from K., a hostile invader. On the

re-occupation of Colesburg by the British, the military authorities seized the horse & subsequently sold it with the result that it ultimately came into the possession by purchase of P. Z. obtained possession of the animal from P. in pursuance of a contract of sale, but refused to pay the purchase price, on the

ground that he was the true owner:—*Held*: inasmuch as traffic with enemies during time of war was illegal, Z. could not acquire ownership by virtue of the exchange with K.—*VAN ZYL v. PIENAAR* (1906), 23 S. C. 469; 16 C. T. R. 730.—S. AF.

**366. Enemy ship in British port.]**—All trading whatsoever between the subjects of the country declaring war & the country against which it is declared is wholly prohibited, & is totally & entirely illegal. The Crown alone can alter or relax that law, & it is not competent to any authority, save that by implication derived from the Crown, to relax the general prize law of the land.

During war between Great Britain & Russia a Russian ship, coming into a British port under the protection of the Ords. in Council & discharging her cargo, instead of departing forthwith, was sold to a British subject & remained in a British port. Permission for the purchase had been given by the Comrs. of Customs:—*Held*: purchase of the ship by a British subject was a trading with the enemy not specially permitted by the Ords. in Council, & illegal.—*THE NEPTUNE* (1855), Spinks, 281; 26 L. T. O. S. 110; 4 W. R. 162.

**367. — Goods bought before war & subsequently withdrawn.]**—The British consul at Barcelona before the breaking out of hostilities between England & Spain purchased wines to supply the British fleet in the Mediterranean; he was not a merchant in Spain & had not before purchased any other wines, or for any other purposes. On being expelled from Spain he made application to get the surplus wines consigned to the original purpose, but without effect. Three years later his brother went to Spain in a public character to manage the concerns of British prisoners in that country; the brother, on his arrival in Spain, sent off the wines to Leghorn, but finding they had turned so pale as not to be saleable without a mixture of newer wines, some new wine was purchased & mixed with the old stock:—*Held*: by restoring the property, the ct. did not break in upon any one of the principles the ct. was bound to sustain, as against subjects of the Govt. trading with the enemy.—*THE MADONNA DELLE GRACIE* (1802), 4 Ch. Rob. 195.

*Annotations*:—*Consd.* *Esposito v. Bowden* (1857), 7 E. & B. 763, Ex. Ch. *Reid.* *Jager v. Tolme & Runge* (1915), 31 T. L. R. 381.

**368. —.]**—A., a native of America, & B., a native of England, had dealings by mutual consignments previous to 1812. In June, 1812, war was declared between the two countries, & on Dec. 24, 1814, preliminaries of peace were signed at Ghent. A cargo of goods consigned on account by A. to B. arrived in England in Nov., 1814, & were sent by B. to France & there sold, & he received bills for the amount, which he got discounted. Another cargo, so consigned, arrived in England in Jan., 1815, & was sold by B. before Feb. 15. In Mar., 1815, B. became bkpt., & was appointed by his assignees their agent to wind up his affairs, in the course of which employment he received the proceeds of the second cargo & transmitted accounts to A., in which he admitted A. to be his creditor for a balance in respect of the proceeds of both cargoes. In an action by A. against the assignees of B. to recover such balances:—*Held*: A. was entitled to prove under B.'s commission for the balances due to him upon the second cargo only.—*OGDEN v. PEEK* (1825), 8 Dow. & Ry. K. B. 1; 3 L. J. O. S. K. B. 100.

**369. Importation of enemy goods—Purchase by agent in enemy country without notice of enemy ownership.]**—Trading with an enemy without the King's licence is illegal. It is illegal for a subject in time of war, without the King's licence, to bring,

**Sect. 2.—What constitutes trading or communicating apart from war legislation, 1914-18. Sect. 3: Sub-sect. 1.]**

even in a neutral ship, goods from an enemy's port which were purchased by his agent resident in the enemy's country after commencement of hostilities, although it may not appear they were purchased of an enemy.—*POTTS v. BELL* (1800), 8 Term Rep. 548; 101 E. R. 1540.

**Annotations:—***Apld.* *Furtado v. Rogers* (1802), 3 Bos. & P. 191. *Consd.* *Willison v. Patteson* (1817), 7 Taunt. 439; *Esposito v. Bowden* (1857), 7 E. & B. 763, Ex. Ch. *Refd.* *Jager v. Tolme & Runge* (1915), 31 T. L. R. 381; *Arnhold Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1915] 2 K. B. 379; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A.; *Stevenson v. Akt. für Cartonnagen Industrie* (1916), 115 L. T. 594, C. A.; *Horlock v. Beal*, [1916] 1 A. C. 486; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260.

**370. — From enemy port—Interposition of neutral port.**—It is illegal in any person owing an allegiance, though temporary, to trade with the public enemy, & the mere prior interposition of a neutral port will not alter the nature of the offence, which consists in that the cargo was taken in at the enemy's port.—*THE INDIAN CHIEF* (1801), 3 Ch. Rob. 12.

**Annotations:—***Refd.* *R. v. Bjornsen* (1865), 10 Cox, C. C. 74, C. C. R.; *The Eumaeus* (1915), 85 L. J. P. 130. *Mentd.* *The San Spiridione* (1856), 28 L. T. O. S. 205; *Advocate-General of Bengal v. Rancee Sur Momoye Dossee* (1863), 2 Moo. P. C. C. N. S. 22, P. C.; *The Laconia, The Colchide* (1863), Brown. & Lush. 117, P. C.; *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 441, H. L.; *Re Tootal's Trusts* (1883), 23 Ch. D. 532; *Companhia de Morcambique v. British South Africa Co.*, [1892] 2 Q. B. 358, C. A.; *The Flamenco, The Orduna* (1915), 32 T. L. R. 53; *The Hypatia* (1916), 13 Asp. M. L. C. 574; *Casdagli v. Casdagli*, [1918] P. 89, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**371. — In neutral ship—Trading with inhabitants of enemy country.**—It is illegal for a subject in time of war, without licence, to bring from an enemy's port, even in a neutral ship, goods purchased in the enemy's country after commencement of hostilities, although not appearing to have been purchased from an enemy: in effect, that trading with inhabitants of an enemy's country is trading with the enemy.—*ESPOSITO v. BOWDEN* (1857), 7 E. & B. 763; 8 State Tr. N. S. 807; 27 L. J. Q. B. 17; 29 L. T. O. S. 295; 3 Jur. N. S. 1209; 5 W. R. 732; 119 E. R. 1130 Ex. Ch.

**Annotations:—***Refd.* *The Teutonia* (1871), L. R. 3 A. & E. 394; *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484, H. L.; *Arnhold Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1915] 2 K. B. 379; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A.; *Sanday v. British & Foreign Marine Insce.*, [1915] 2 K. B. 781, C. A.; *Millar (Andrew) v. Taylor*, [1916] 1 K. B. 402, C. A.; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Blackburn Bobbin v. Allen*, [1918] 1 K. B. 510; *Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331. *Mentd.* *Reid v. Hoskins* (1855), 4 E. & B. 979; *Barrick v. Buba* (1857), 2 C. B. N. S. 563; *Santos v. Illidge* (1859), 6 C. B. N. S. 841; *Tamvaco v. Lucas* (1861), 1 B. & S. 185; *Danube Black Sea Ry. & Kustendjie Harbour Co. v. Xenos* (1862), 31 L. J. C. P. 284; *Beal v. Horlock*, [1915] 3 K. B. 627, C. A.; *Jager v. Tolme & Runge* (1915), 31 T. L. R. 381; *British & Foreign Marine Insce. v. Sanday*, [1916] 1 A. C. 650, H. L.; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307, H. L.; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *Horlock v. Beal*, [1916] 1 A. C. 486, H. L.; *Arnhold Karberg v. Blythe, Green, Jourdain*,

*Schneider v. Burgett & Newsam*, [1916] 1 K. B. 495, C. A.; *Leiston Gas Co. v. Leiston Cum-Sizewell U. C.*, [1916] 1 K. B. 912; *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541, C. A.; *Stevenson v. Akt. für Cartonnagen Industrie*, [1917] 1 K. B. 842, C. A.; *Clapham S.S. Co. v. Handels-en-Transport, etc.*, [1917] 2 K. B. 639; *Metropolitan Water Board v. Dick, Kerr*, [1917] 2 K. B. 1, C. A.; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260.

**372. Shipping goods to enemy—Through neutral country.**—Articles were purchased in England by A. & Co. & shipped by them for Emden, with directions that they should be sent on to Amsterdam, then a blockaded port. The goods were claimed as the property of C., a merchant in America, & it was said the transaction was conducted by A. & Co. in London, as agents for C. in America:—*Held*: in the case of a British subject shipping goods to go to the enemy through a neutral country the penalty would be incurred, & in the circumstances, & having regard to the tenor & form of power of attorney given by C., A. & Co. were not acting as agents, but were owners of the goods.—*THE JONGE PIETER* (1801), 4 Ch. Rob. 79.

**Annotations:—***Apld.* *Re The Stephen Hart* (1864), 11 L. T. 52. *Refd.* *The Panariellos* (1915), 84 L. J. P. 140.

**373. In ship apparently neutral—Sham sale by British to neutral shipowner.**—No subject of the King can trade directly with the public enemy, except under a licence authorising him so to do, & if he presumes to trade otherwise, his property so employed is liable to confiscation.

A ship purporting to be Danish was seized with a cargo destined for an enemy. The ship was alleged to have been recently sold by its English owners to the purported Danish owner. The papers were in order, but it appeared that the new Danish master was only a figurehead, & that the old English master was really in command & was in communication with the old English owners:—*Held*: (1) the sale was a sham; (2) the owners were the old British owners; (3) as they had been trading with an enemy, the ship & cargo must be condemned as lawful prize.—*THE ODIN* (1799), 1 Ch. Rob. 248.

**Annotations:—***Refd.* *The Sorfareren* (1915), 85 L. J. P. 121. *Mentd.* *The Odin* (1803), 4 Ch. Rob. 319.

**374. — From foreign port—According to directions of enemy firm.**—Despatch of goods from a foreign port after the outbreak of war, & with knowledge of it, by a British subject or the subject of an allied State, for delivery as directed by an enemy firm & for their benefit, constitutes a trading with the enemy which makes the goods liable to forfeiture: & the position is not affected by the fact that the property in the goods remains in the consignors, that they were shipped for discharge at an English port, & that the enemy buyer selected as the actual recipient a firm carrying on business in London.—*THE PANARIELLOS* (1916), 85 L. J. P. 112; 114 L. T. 670; 32 T. L. R. 459; 60 Sol. Jo. 427, P. C.

**Annotations:—***Refd.* *Robson v. Premier Oil & Pipe Line Co.* [1915] 2 Ch. 124, C. A.; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260.

**372 i. Shipping goods to enemy—Through neutral country.**—The *M.*, a British ship, had, in a neutral port, taken on board some cargo consigned to another neutral port, but ultimately destined for the enemy's country. The vessel was first to call at Colonial ports, where the customs authorities, on instructions from the Secretary of State, through the High Comr., had established the practice that all cargo consigned to the enemy's country should, if so directed, be landed in the Colony. These instructions had been communicated to the agents of the *M.*, & had

been obeyed in the cases of other ships belonging to the same owners which had arrived at Colonial ports before & after the *M.* The *M.* was seized by a man-of-war immediately after her arrival at a Colonial port. The *bona fides* of the owners being clear, & it being established that there had been no intention to take goods beyond Colonial ports except with permission of the authorities, the vessel was decreed to be restored on payment of the captors' costs.—*Re MASHONA* (1900), 17 S. C. 135; 10 C. T. R. 163.—**S. AF.**

**d. Bank holding concession from enemy State—Effect of licence to trade.**—Where a bank, holding a concession from the Govt. of an enemy's country, but licensed by both the Imperial & Colonial authorities to carry on business in the Cape Colony, sues a debtor, it is no ground of defence that dealings with the bank are prohibited as constituting trading with the enemy.—*GOLDMAN v. NATIONAL BANK OF SOUTH AFRICAN REPUBLIC* (1900), 17 S. C. 165; 10 C. T. R. 234.—**S. AF.**



**375. Delivering goods to British subject—Agent in Britain of enemy firm.]—**S., who carried on business at Odessa, ordered goods of pltf., an earthenware manufacturer in England, to be delivered to a carrier. Defts., merchants at Liverpool, were S.'s agents. In consideration of the order being executed, they undertook to accept pltf.'s draft for the invoice price on pltf. delivering to them the carrier's receipt. In an action by pltf. he alleged that, although he had performed all the conditions precedent, defts. refused to accept his draft. Defts. pleaded that S. had become an alien enemy, & pltf. could not lawfully despatch the goods to him in execution of the order. Pltf. replied that in the declaration of war made Mar. 28, 1854, by Great Britain against Russia, Great Britain waived the right of seizing enemies' property on neutral vessels, except contraband of war, & by an Ord. in Council of Mar. 29, 1854, Russian vessels in British ports were allowed six weeks, namely, till May 10, for loading & departing, & should be permitted to make their voyages, & that the goods were delivered to the carrier long before expiration of the six weeks & might have been shipped under the Ord. in Council:—*Held*: pltf. was entitled to judgment, for, assuming the declaration of war would of itself have made it illegal for pltf. to send goods to an enemy, they might have been lawfully shipped within the period allowed by the Ord. in Council. *Seem*: even if there had been no Ord. in Council, pltf. might have lawfully shipped the goods, as the contract was legal in its inception, & nothing but an Act of Parliament could render it illegal; & the property in the goods would vest in the alien enemy subject to forfeiture to the Crown, & there would have been nothing illegal in performing it, unless in the course of the voyage pltf. dealt with the alien enemy (MARTIN, B.).—CLEMENTSON (CLEMENTSON) v. BLESSIG (1855), 11 Exch. 135; 25 L. T. O. S. 186; 3 W. R. 510; 156 E. R. 775.

*Annotations*:—Distd. Esposito v. Bowden (1857), 7 E. & B. 763. *Reid*. De Wahl v. Braune (1856), 1 H. & N. 178.

**376. Piloting neutral ship to enemy port—With goods for enemy.]—**In a suit for wages on the part of a British pilot for conducting an American vessel from the Downs to Flushing:—*Held*: (1) no suit could be maintained on behalf of a British subject for services performed in aiding commerce & importation of the enemy; (2) this was a contribution of his skill & experience to assist & promote navigation of the enemy's ports; (3) a ct. of justice would give no support to demands arising out of a course of navigation illegal to a British subject.—THE BENJAMIN FRANKLIN (1806), 6 Ch. Rob. 350.

**377. Examining witnesses in enemy country.]—**In an action on a charterparty for not loading at Odessa:—*Held*: a commission would not be granted at the instance of defts., who were enemies, to examine witnesses at Odessa, as the grant of the commission would be sanctioning an unlawful communication with the Queen's enemies.—BARRICK (BARWICK) v. BUBA (1855), 16 C. B. 492; 25 L. T. O. S. 164; 19 J. P. 391; 1 Jur. N. S. 1020; 3 W. R. 524; 3 C. L. R. 921; 139 E. R. 851.

#### PART IV. SECT. 3, SUB-SECT. 1.

**379 i. Acts not exhaustive—Common law offences still punishable.]—**The law with the enemy is a common law offence both in England & in India (COURTS TROTTER, J.).—HOOPER v. KING EMPEROR (1917), 1 L. P. 40 Mad. 34.—IND.

**379 ii. ———.]—**The term "trading with the enemy" at common law, & as used in Trading with the Enemy Acts, 1914 (Nos. 9 & 17), includes all commercial intercourse with the enemy.—R. v. SNOW (1917), 23 C. L. R. 256.—AUS.

**e. Draft drawn by neutral firm in respect of goods paid for before outbreak of war by subsequent enemy.]—**The law prohibiting trading with an enemy does not apply to a draft drawn by a New York firm under contract with a German manufacturer of goods, for which the draft was given, who paid for the goods before the declaration of war between Great Britain & Germany.—RADLEY v. GABBER (1916), Q. R. 50 S. C. 261.—CAN.

**f. Adjustment of price with agent of enemy of goods supplied before war.]—**The judgment of the English Ct. of Appeal in Zinc Corpn., Ltd. v. Hirsch,

**378. Sending children resident in England to enemy parent in enemy country.]—**A German resident in England, but not naturalised, married a Dutch lady in 1898, two children being born of the marriage. In 1915 a decree for dissolution of the marriage on the ground of the wife's adultery was made on the husband's petition, he being then interned. Subsequently resp. married co-resp., & the husband was repatriated. Resp. & petitioner having both applied for the custody of the children, an order was made in the Divorce Division that they should be sent back to Germany, subject to their father giving an undertaking that they should go to live at Geneva:—*Held*: the order must be discharged, it being contrary to public policy that any British subjects should be sent during war to the enemy country, & the proposed undertaking was valueless as being unenforceable.—UHLIG v. UHLIG (1916), 86 L. J. P. 90; 115 L. T. 647; 33 T. L. R. 63; 61 Sol. Jo. 70, C. A.

#### SECT. 3.—UNDER WAR LEGISLATION, 1914–18.

*NOTE.*—The Acts, Proclamations & Orders cited in the following cases are as undermentioned & for brevity are referred to in this section as follows:—

Trading with the Enemy Act, 1914 (c. 87), referred to as "Act A."

Trading with the Enemy Amendment Act, 1914 (c. 13), referred to as "Act B."

Trading with the Enemy Amendment Act, 1916 (c. 105), referred to as "Act C."

Defence of the Realm Consolidation Act, 1914 (c. 8), referred to as "Act D."

British Nationality & Status of Aliens Act, 1914 (c. 17), referred to as "Act E."

Trading with the Enemy Proclamation, No. 2, Sept. 9, 1914, referred to as "Proc. A."

Trading with the Enemy Proclamation, Oct. 8, 1914, referred to as "Proc. B."

Defence of the Realm Consolidation Regulations, 1914, referred to as "Reg. A."

#### SUB-SECT. 1. — WHAT TRADING WITH THE ENEMY.

**379. Acts not exhaustive—Common law offences still punishable.]—**"Act A." & "Proc. A." are not exhaustive in the sense that anything not expressly prohibited by them must be taken as permitted. Inquiry must still be made whether acts not therein mentioned are prohibited by the common law or by stat., & by common law not only commercial intercourse but all intercourse with an alien enemy is prohibited.—ROBSON v. PREMIER OIL & PIPE LINE Co., Ltd. [1915] 2 Ch. 124; 81 L. J. Ch. 629; 113

No. 402, post, was declared to be without prejudice to the rights of either party in respect of concentrates supplied before war. In an action for payment of the balance of the price of concentrates delivered before war, it appeared that genuine quotations of the kind mentioned in the contract were still obtainable in London, although these did not represent the world's prices:—*Held*: the adjustment of the price of the concentrates under the contract with defts. named agent, who was still in Adelaide, did not involve a prohibited intercourse with the enemy.—ZINC CORPN., LTD. v. HIRSCH (1917), V. L. R. 289.—AUS.



**Sect. 3.—Under war legislation, 1914–18: Sub-sect. 1.]**

L. T. 523; 31 T. L. R. 420; 59 Sol. Jo. 475, C. A.

**Annotations.**—*Consd. Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541, C. A.; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Mentd. Halsey v. Lowenfeld*, [1916] 32 T. L. R. 709, C. A.; *Blackburn Bobbin v. Allen*, [1918] 1 K. B. 540; *Ertel & Fieber v. Rio Tinto*, [1918] A. C. 260; *Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331.

**380. Attempting to trade with enemy—Goods in enemy country ordered from neutral in neutral country.]**—Petitioners, who carried on business in Australia as spirit merchants, had dealt very largely for a long time with an American co. carrying on business in New York & having a branch at Rotterdam. The American co. sold gin which had been made at Rotterdam, & were in the habit of sending it to Hamburg to be bottled there before being shipped to their customers. In Aug., 1914, when war broke out between Great Britain & Germany, the American co. had a considerable quantity of gin at Hamburg, & after an interval they began to withdraw it from time to time & to take it to Rotterdam, where they shipped it in execution of their contracts. Petitioners ordered gin from the American co., knowing that the latter would have to get it from Hamburg in order to ship it from Rotterdam to them in Australia:—*Held*: the action of petitioners was a direct breach of the Proclamation against trading with the enemy, & petitioners were properly convicted of attempting to trade with the enemy.—*Moss v. Donohoe* (1916), 32 T. L. R. 343, P. C.

**381. Payment to English wife separated from alien husband—Resident in neutral or allied State.]**—Deft. in 1903 had married C., an Austrian subject resident in Austria. No marriage settlement or agreement for one was executed on the marriage. In Oct., 1914, upon their joint petition C. & deft. obtained from the Vienna cts. a decree of separation *a mensa et thoro*. In Apr., 1915, deft. went to reside in Rome, & remained there with no intention of returning to Austria. In 1917 deft. became absolutely entitled to a certain sum, being part of a fund under a settlement & the will of her father, & entitled for her separate use, without power of anticipation, to the income of a sum produced by policies of insurances settled by her father. On summonses taken out by the trustees of the two settlements to ascertain whether payments could be made to deft., the questions raised were (1) whether C. had any marital rights under Austrian law, which prevented deft. from giving good receipt for the capital or interest, & (2) whether the fact that deft. was an enemy subject prevented the payments being made to her. The evidence of the Austrian law upon the subject was to the effect that, in the absence of a marriage contract modifying the rights of the spouses in respect of the wife's property, deft. could give a valid discharge, both as regarded the capital sum & the income of the same, & also for the income derived from the policy moneys, without the concurrence or authorisation of C., & that he had no claims on any property belonging to deft.:—*Held*: (1) deft. was not an alien enemy within Trading with the Enemy Acts, 1914 to 1916; (2) the income of the two sumssubject to the trusts of the settlements should be paid to deft. so long as she was resident in an allied or neutral country, or in the United Kingdom.—*Re GRIMTHORPE*, [1918] W. N. 16.

**382. "Act A.," s. 1—"Proc. A.," par. 8—Inciting to trade.]**—Applt., a British subject employed by an enemy firm which was indebted to an English firm, suggested to the English firm that they should buy three ships belonging to the enemy firm, mtged. by them to the English firm, which were lying idle

in neutral ports owing to the European war, the mtges. to be cancelled & the English firm to pay a sum of money, which was to be remitted to a firm in Holland & paid by them to a solr. in Germany as trustee for the enemy firm. In the course of the negotiations nothing was said by applt. as to the obtaining of a licence. On a charge of soliciting & inciting the persons constituting the English firm to trade with the enemy, contrary to the provisions of the above Act:—*Held*: (1) the jury were entitled to come to the conclusion that the proposal was not intended to be conditional upon a licence being obtained; (2) applt. was rightly convicted of inciting to trade with the enemy.—*R. v. SPENCER* (1914), 84 L. J. K. B. 1457; 112 L. T. 479; 24 Cox, C. C. 588; 11 Cr. App. Rep. 30; 78 J. P. Jo. 581, C. C. A.

**383. —"Proc. A.," par. 6—Voting in trading company.]**—Prohibition of intercourse with alien enemies extends to all intercourse, whether commercial or not, which tends to detriment to one's own country or to advantage to the enemy. The exercise of the voting power of enemy shareholders in a British trading co. for the purpose of obtaining control, where the co. owns large property in the enemy's country, is forbidden on this principle. The exercise of such voting power is in fact a commercial transaction. Commercial intercourse is not confined to making contracts between an alien enemy & a British subject, & a transaction directed to obtaining control of a trading co. is commercial.—*ROBSON v. PREMIER OIL & PIPE LINE CO., LTD.*, No. 379, *ante*.

**Annotations.**—*Consd. Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Mentd. Halsey v. Lowenfeld*, [1916] 2 K. B. 707; *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541, C. A.; *Blackburn Bobbin v. Allen*, [1918] 1 K. B. 540; *Ertel & Fieber v. Rio Tinto*, [1918] A. C. 260; *Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331.

**384. —"Proc. A.," par. 5 (7)—Obtaining delivery of enemy goods—"Goods, wares & merchandise."]**—Under business arrangements made between a lithographic printer in England & a firm in Germany, the printer was entitled, when war was declared between Great Britain & Germany, to be supplied by the firm without payment with a certain number of lithographic transfers. He made arrangements by which these transfers were sent to him in London & was convicted of trading with the enemy:—*Held*: (1) the transfers were "goods, wares & merchandise" within the above Proclamation; (2) the goods were obtained from the enemy within the Proclamation; (3) applt. was properly convicted.—*R. v. OPPENHEIMER & COLBECK*, [1915] 2 K. B. 755; 84 L. J. K. B. 1760; 113 L. T. 383; 79 J. P. 383; 31 T. L. R. 369; 59 Sol. Jo. 442; 25 Cox, C. C. 39; 11 Cr. App. Rep. 146, C. C. A.

**385. —"Proc. A.," pars. 5, 7—Making payment extinguishing liability of enemy to neutral—"By or on account of enemy."]**—The words "for the benefit of an enemy" in par. 5 of the above Proclamation were introduced for the purpose of preventing devices, tactics, & various means, by which mercantile houses might seek, but for those words, to make payments indirectly, notwithstanding there is an express prohibition of a direct payment. The words are wide & must be construed to have a wide application, & are intended to cover the making of payments to an enemy by any device or by any recourse to indirect means.

Prisoner was a partner in a firm consisting of himself & two brothers which traded at Frankfurt-on-Main in Germany, & in London. All the partners were naturalised British subjects. The prisoner resided & carried on business in London, & his two brothers resided at Frankfurt & carried on business there. Before Aug. 4, 1914 (the date on

which war broke out between Great Britain & Germany), the firm became indebted to a neutral in Holland in respect of transactions which had taken place between the Frankfurt partners & the neutral. The neutral looked to the Frankfurt partners for payment, & there was no suggestion that he had threatened legal proceedings against prisoner in respect of the debt. Acting upon instructions from his Frankfurt partners, prisoner, after the date of the Proclamation, paid the amount of the debt to a firm of foreign bankers in London, with directions to them to credit the neutral through their Holland branch with the amount paid to them in London, & the foreign bankers did so credit the neutral. He also paid to the London branch of another neutral, who carried on business in Rotterdam & London, the amount of a debt owing by his Frankfurt partners to the neutral in Rotterdam:—*Held*: (1) as the effect of payments to the neutrals was to extinguish the obligations of the Frankfurt partners to pay the debts to the neutrals, the resources of individuals in Germany were to that extent augmented, & those of Great Britain diminished, & the payments were for the benefit of an enemy within par. 5 of the Proclamation; (2) the payments were not protected by par. 7 of the Proclamation, as they were not payments "by or on account of enemies" within that paragraph, but payments for the benefit of enemies. *Qu.*: whether prisoner could have been convicted, if he had made the payments under threats of legal proceedings by the neutrals.

386 i. "Act A., s. 1—"Act B., s. 10—"Proc. A., par. 5 (7)—*Proposal to supply goods to enemy through neutral.*—An indictment charged A. with proposing to supply goods to the enemy, by writing & posting a letter addressed to B. residing in Holland, requesting B. to write to certain firms in Germany asking "if you can deliver thro' you any goods for summer orders":—*Held*: (1) the indictment was relevant in respect that the letter in question might constitute a proposal to supply goods to persons resident in Germany, although made indirectly through B., who was not an agent for either party; (2) the letter having been actually posted inferred not merely "preparation" but perpetration of the offence charged.—*H. M. ADVOCATE v. INNES*, [1915] S. C. (J.) 40; 52 Sc. L. R. 275; 1 S. L. T. 105.—SCOT.

386 ii. *Proc. A., par. 5 (7) (9)—Proposing or agreeing to supply or supplying goods to enemy.*—Where a person is charged with supplying, or with attempting to supply, or with proposing to supply, or with agreeing to supply, goods to the enemy, or with entering into any commercial transaction for the benefit of the enemy, it does not signify where the parties or the goods were at the time when the acts founded on were committed; nor to whom the goods belonged (for a person may supply goods to the enemy which do not belong to him at all); nor whether the person selected by the accused, as the intermediary through whom the goods were to be supplied, was the servant or agent of the accused or a total stranger, nor whether the accused received payment for the goods or made conditions subject to which he was willing to supply them & did supply them; nor how the goods, short of a licence, came to be available. It is sufficient that the accused was resident, carrying on business or being in the British Dominions, & that the goods were supplied or permitted to be supplied to the enemy, & it is not necessary to specify in the indictment a locus of the offence, provided that the transaction is particularised, e.g., by the goods being identified & the date & place of sale given.—*H. M. ADVOCATE*

*v. HETHERINGTON & WILSON*, [1915] S. C. (J.) 79; 52 Sc. L. R. 742; 2 S. L. T. 90.—SCOT

386 iii. ——"Proc. A., par. 5 (9)—*Agreement to release to enemy cargo stored in neutral country.*—An indictment charged a British firm with the offence of trading with the enemy, in that they had agreed with their agents in a neutral country to take for their account the storage charges on the balance of a cargo of iron ore stored in the neutral country, in order that the balance might be released & delivered to an alien enemy:—*Held*: the indictment validly charged an offence under the above par.—*H. M. ADVOCATE v. HETHERINGTON & WILSON*, [1915] S. C. (J.) 79; 52 Sc. L. R. 742; 2 S. L. T. 90.—SCOT.

386 iv. *Proc. A.—Attempt to trade.*—A person was charged on indictment with attempt to trade with the enemy in respect of a letter written by him to a merchant in Germany on Sept. 22, 1914, with regard to delivery of goods under contract entered into before war:—*Held*: apart from "Act B., s. 10" "attempt" to trade with the enemy was an indictable offence under "Act A." taken along with Criminal Procedure (Scotland) Act, 1887 (c. 35), s. 61.—*H. M. ADVOCATE v. MITCHELL* (1915), 52 Sc. L. R. 273; 1 S. L. T. 92.—SCOT.

g. *Acts of 1914 (Nos. 9 & 17), ss. 2, 3—Completing sale of land with agent of enemy.*—Application was made to the Registrar-General to register a transfer. Payment of part of the purchase-money was made to an attorney of an alien enemy, a part-owner of the land. The power of attorney was executed, & the contract for purchase of the land was made before the outbreak of war. The ct. directed the Registrar-General not to register the transfer.—*Re WHITE* (1915), 15 S. R. N. S. W. 217.—AUS.

h. *Proc. A.—Correspondence as to business relations with enemy.*—*Held*: a person, who took part in correspondence intended to conserve existing or promote future business relations with a person carrying on busi-

In summing up to the jury the judge directed them that, if they found prisoner made the payments with the intention of benefiting himself, it would not quite answer the case, & they must further consider whether he made the payments knowing they would in fact benefit the enemy & in order to benefit him:—*Held*: without deciding that the offence might not be committed even if it was not established that the payments were made in order to benefit the enemy, the direction was right, although possibly too favourable to prisoner.

The offence of trading with the enemy is a serious offence & ought to be dealt with with proper severity, all the circumstances of the case being taken into account.—*R. v. KUPFER*, [1915] 2 K. B. 321; 84 L. J. K. B. 1021; 112 L. T. 1138; 79 J. P. 270; 31 T. L. R. 223; 24 Cox, C. C. 705; 11 Cr. App. Rep. 91, C. C. A.

*Annotations*:—*Distd. Willson v. Ragosine* (1915), 84 L. J. K. B. 2185; *Tingloy v. Müller*, [1917] 2 Ch. 144. C. A. *Reid. Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

386. "Act B., s. 10—"Act C., s. 4—"Proc. A., pars. 3 & 5—*Completing sale of land with British agent of enemy.*—*Def.*, a German by birth but for many years resident in England, although never naturalised, being about to proceed to Germany, executed a power of attorney on May 20, 1915, by which he appointed his solr. his attorney to sell his leasehold house & to execute such transfers & deeds as were necessary. The power of attorney was made irrevocable for twelve months. On May 26, *def.* obtained a Govt. permit from the police to travel to Tilbury in order

ness in Germany, might properly be convicted of the offence of trading with the enemy under the above sects.—*R. v. SNOW* (1917), 23 C. L. R. 256.—AUS.

k. *Act of 1914 (No. 9), ss. 3, 6—"Proc. A., par. 5—Agreement to ship goods to neutral country & hold proceeds for enemy.*—A., an American subject, discovered that certain cocoa at Sydney, which had been consigned by him to B., a German merchant carrying on business at Hamburg, had not been sent. The cocoa was accordingly consigned to C. & Co. at San Francisco. *Def.*, managing director of D. Co., registered in New South Wales, assisted in consigning the cocoa, and wrote to E. & Co., D. Co.'s business correspondents in New York, informing them of what had happened so that they might advise B. as to the proceeds of the cocoa, which were intended for his account & were to be held by C. & Co. pending instructions from B.:—*Held* (*ISAACS, HUGGINS & POWERS, JJ. diss.*): there was no evidence of an attempt by A. to trade with the enemy by sending the cocoa to C. & Co., which either *def.* or D. Co. aided or abetted, or of an independent attempt on the part of *def.* or D. Co. to trade with the enemy.—*BERWIN v. DONOHUE, BERWIN & Co., LTD. v. DONOHUE* (1915), 21 C. L. R. 1.—AUS.

l. *Act of 1914 (No. 9), s. 2 (2) (b)—Proclamation of July 7, 1915—Validity.*—*Held*: (1) the above sub-sect. was a valid exercise of the legislative power of the Commonwealth Parliament; (2) *plffs.* not entitled to declarations that the above Proclamation was unlawful & that a notice published in the *Gazette* by the A.-G., that *plffs.* were "managed or controlled, directly or indirectly, by or under the influence of, or carried on wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in an enemy country," was unlawful & contrary to fact, because (a) the Proclamation was within the authority conferred by the above sub-sect. & the notice was a sufficient compliance with the Proclamation; (b) even though the notice was not in conformity with the Proclamation, the publication of the notice did not in the



**Sect. 3.—Under war legislation, 1914-18: Subsects. 1 & 2.]**

to embark for Germany, & started on that day. On June 2, 1915, the leasehold premises were sold to pltf. by public auction, & a deposit was paid & an agreement signed by him. Deft. reached Germany some time between May 26 & June 11, 1915. In an action for a declaration that the agreement for sale had been dissolved by the act of deft. in becoming an alien enemy:—*Held*: (1) the agreement entered into by the attorney in execution of the power did not involve any intercourse with the enemy, & was not within the mischief of the common law or of the above Proclamation or of the above Acts, & was valid; (2) the sale could legally be carried out by the attorney & if necessary be completed by a vesting order under Trustee Act, 1893 (c. 53), or with the assistance of the custodian under Act C., s. 4, & pltf. was not entitled to have the agreement rescinded.—TINGLEY v. MÜLLER, [1917] 2 Ch. 144; 86 L. J. Ch. 625; 116 L. T. 482; 33 T. L. R. 369; 61 Sol. Jo. 478, C. A.

*Anno u i n s.*—*Refd.* Naylor, Benzon v. Krainische Industrie, [1918] 1 K. B. 331; Rodriguez v. Speyer (1918), 119 L. T. 409. H. L. *Mentd.* Speyer v. Rodriguez (1917), 87 L. J. K. B. 171, C. A.

**387. — “Act B.,” s. 1 (1)—“Proc. A.,” par. 5 (1)—Making payment resulting in improvement of enemy security.]**—Pltf., a naturalised British subject resident in England, sued defts. for the price of goods sold & delivered before the outbreak of war. The goods were in fact supplied to pltf. by A., who had become an alien enemy, on terms under which A. took a share of the price on such in excess of a certain minimum, but pltf. resold as principal:—*Held*: payment of money to a third person, which merely improved the position of an enemy, by giving him further security that he would ultimately recover the money, was not an offence within the above Proclamation & “Act A.,” where there was no intention that the enemy, while such, should benefit by it as a payment.—SCHMITZ (SCHMIDT) v. VAN DER VEEN & Co. (1915), 84 L. J. K. B. 861; 112 L. T. 991; 31 T. L. R. 214.

*Annotation*:—*Refd.* Tingley v. Müller, [1917] 2 Ch. 144, C. A.

**388. — “Act B.,” s. 2—“Proc. A.,” par. 5—Payment of premiums by surety for alien enemy—Right to assignment of security.]**—B., an alien, effected two policies on his own life with an insurance co., & assigned them to the co. by way of mtge. to secure a loan, & he & his sureties jointly & severally covenanted with the co. to repay the loan with interest, & also to pay the annual premiums for keeping the policies on foot. On the outbreak of war in Aug., 1914, B. became an alien enemy & left the country. Afterwards one of the sureties paid to the co. the premiums as they accrued due from time to time, which the co. accepted with the reservation that they did not warrant the validity of the policies. Subsequently the surety tendered the amount due on the mtge. & claimed an assignment of the policies which the co. refused to execute without a similar reserva-

tion:—*Held*: (1) the policies were not voided merely by B. becoming an alien enemy, & the payment to & receipt by the co. of the premiums from the surety did not involve illegal intercourse with an enemy; (2) the surety, on payment of what was due under the mtge., was entitled to an assignment of the policies without reservation.—SELIGMAN v. EAGLE INSURANCE CO., [1917] 1 Ch. 519; 86 L. J. Ch. 353; 116 L. T. 146.

**389. “Act B.,” s. 6—English partner taking over English assets—Dissolution before war—Right to sue alone for firm debt.]**—Pltf., a British subject, carried on business in Germany in partnership with S., a German subject, but outbreak of war being imminent between Great Britain & Germany, the partnership was dissolved, under an arrangement by which S. took over the German & Austrian assets & liabilities, & pltf. took over all assets & liabilities outside Germany & Austria, & was to carry on business in London. The result of the transaction was to divert a balance of £6,500 & the goodwill of the business from Germany to England. In an action on a bill of exchange given by defts., an English firm, to the German firm, & for goods sold & delivered before the war:—*Held*: (1) the transaction was not trading with or for the benefit of the enemy; (2) the arrangement before the war was not invalidated by the above sect.; (3) as to the claim in respect of goods sold & delivered before the war, pltf. could sue alone as equitable assignee without joining his partner, who could not be effectually served or joined, but in the circumstances he was not entitled to costs.—WILSON v. RAGOSINE & Co., LTD. (1915), 84 L. J. K. B. 2185; 113 L. T. 47; 31 T. L. R. 264.

**390. — Transfer of bill by indorsement to neutral in foreign country.]**—The provisions of s. 6 (2) of the above Act extend to a case where there has been a transfer of a bill by indorsement to a neutral in a foreign country.—WELD v. FRUHLING & GOSCHEN (1916), 32 T. L. R. 469.

**391. “Proc. B.”—Payment of insurance loss—“Transaction.”]**—Pltfs. effected a policy of marine insurance with defts., a German co., with their head office in Germany. The policy was issued on July 31, 1914, & the loss occurred at the end of Aug. or the beginning of Sept. Defts. carried on business in England through their underwriters & agents, who accepted & settled risks & issued policies for them, the policy in question being so effected. Defts. had complied with Cos. (Consolidation) Act, 1908 (c. 69), s. 274, respecting cos. established outside the United Kingdom which established a place of business within the United Kingdom. The policy contained a clause giving jurisdiction to the English cts. as fully as if the co. were incorporated in England, & authorising the service of process upon its agents there. On a summons to transfer the action to the Commercial Ct.:—*Held*: the payment of a loss was not a “transaction” within the above Proclamation, & an order for transfer ought to be made.—INGLE (W. L.), LTD. v. MANNHEIM INSURANCE CO., [1915] 1 K. B. 227; 84 L. J. K. B. 491; 112 L. T. 510; 31 T. L. R. 41; 59 Sol. Jo. 59.

circumstances give pltfs. a cause of action against either the Commonwealth or the A.-G.—WEISBACH LIGHT CO. v. COMMONWEALTH (1916), 22 C. L. R. 268; (1917) 33 T. L. R. 382, P. C.—AUS.

*m. Act of 1914 (No. 9), ss. 2 (2), 3—“Proc. A.,” par. 5—Obtaining goods consigned to neutral port before war & arriving after outbreak of war at enemy port.]*—Goods bought for an Australian co. & consigned to them f.o.b. before the European war at Copenhagen reached Hamburg, in Germany, on

their way to Australia, after the beginning of the war. Later, the agents in Sweden of the co. obtained the goods from Hamburg & sent them to Sydney, where they subsequently arrived. The co. knew the goods were to be so obtained & sent, & knew they were in transit to Australia, & took no means to prevent their shipment or their delivery:—*Held*: (1) the co. were properly convicted on a charge of trading with the enemy by obtaining goods from Germany; (2) the managing director of the co., who knew all the facts, but was absent from Sydney when the goods

arrived there, was properly convicted on a similar charge in respect of the same transaction.—BALTIC SEPARATOR CO., LTD. & SIWERTZ v. DONOHUE (1917), 22 C. L. R. 534.—AUS.

*n. Regulation of Trade & Commerce Act, 1914, s. 35—Supplying goods to enemy outside enemy territory.]*—*Held*: an offence was committed under the above sect., if goods were supplied to an enemy subject, although they did not actually reach enemy territory.—R. v. DUERKOP (1915), 34 N. Z. L. R. 474.—N.Z.



**392. "Proc. A.," par. 6—Shipment by enemy branch in allied country to enemy.]—**Parcels of goods seized as prize were claimed by the shippers, the Japanese branch office of a German co. with its head office at Hamburg. The goods were consigned by claimants from Japan to their order, Hamburg:—*Held*: the above Proclamation did not protect the goods from condemnation, & the goods must be regarded as the property of the German co., & not of the Japanese branch.—*THE EUMAEUS* (1915), 85 L. J. P. 130; 114 L. T. 190; 32 T. L. R. 125; 60 Sol. Jo. 122; 13 Asp. M. L. C. 228.

*Annotation*:—*Mentd. Casdagli v. Casdagli* (1917), 87 L. J. P. 73, C. A.

#### SUB-SECT. 2.—OTHER CASES.

**393. "Act A.," s. 1—"Proc. A.," par. 5—Jurisdiction of justices.]—**Twenty-three summonses, in accordance with the form contained in the schedule to Summary Jurisdiction Acts, to appear before the justices of B. on a day of which public notice had been given that they would sit as justices in petty sessions for the hearing of indictable offences, were served on appets. The summonses required them to answer an information preferred against them of having committed twenty-three separate offences under the above Act, but twenty-one of them were alleged to have been committed more than six months before the preferring of the information. At the hearing the justices treated the charges as indictable offences, & committed appets. for trial:—*Held*: the justices had jurisdiction to treat the offences as indictable offences & to commit appets. for trial.—*R. v. BOLTON J.J., Ex p. HOLT (WILLIAM A.), LTD.* (1916), 85 L. J. K. B. 649; *sub nom. R. v. WALMSLEY, Ex p. HOLT (WILLIAM A.), LTD.*, 80 J. P. 209.

**394. — Conviction under—Pleading absence of Attorney-General's consent—Time for plea.]—**Applt. was convicted of an offence under the above sect. It was proved at the police ct. that the consent of the A.-G. to the prosecution had been obtained, but no proof of the consent was given at the trial, & no objection was taken at the trial that the consent had not been proved:—

**392 i. "Proc. A."—Onus of proof.]—**In view of the above Proclamation it is for the person alleging enemy acts to establish them.—*VIOLA v. MACKENZIE, MANN & Co.* (1915), Q. R. 24 K. B. 31; 24 D. L. R. 208.—*CAN.*

**392 ii. — Payment of money in pursuance of contract made before war—"Transaction."]—**Payment of money after the date of the above Proclamation in fulfilment of a previous contract:—*Held*: not a "transaction" within the Proclamation.—*ORENSTEIN & KOPPEL v. EGYPTIAN PHOSPHATE CO., LTD.*, [1915] S. C. 55; 52 Sc. L. R. 54; [1914] 2 S. L. T. 293.—*SCOT.*

**392 iii. — Commercial Intercourse with Enemies Ordinance VI. of 1914, s. 3.—Attempting to obtain possession of goods in enemy country.]—**The accused, a trader in Madras, was convicted of attempting to trade with the enemy under the above sect., by writing two letters, one to a neutral subject in Holland, & another to an enemy in Germany, requesting them to secure for him his merchandise in Germany:—*Held*: the accused was guilty of an attempt to trade, even if the goods in the enemy's country became his own before the outbreak of war, or even if there were no goods of his there at the time he wrote the letters.—*HOOPER v. KING EMPEROR* (1917), 1 L. R. 40 Mad. 34.—*IND.*

**392 iv. "Proc. A.," par. 5 (1)—Payment to agent of enemy creditor.]—**A firm carrying on business in London brought an action against a British firm carrying on business in Glasgow for the price of goods supplied to the latter. Defenders admitted their liability to pay, but averred that pursuers were agents for a German firm, & that they were precluded from making payment to pursuers by the above Proclamation, & consigned the sum sued for in ct. The ct. allowed a proof, but ordered intimation to the Lord Advocate.—*GUYOT-GUENIN & SON v. CLYDE SOAP CO.*, [1916] S. C. 6; 53 Sc. L. R. 45; [1915] 2 S. L. T. 244.—*SCOT.*

**392 v. "Proc. A.," par. 5 (7)—Directing agent to obtain & deliver goods to enemy.]—Qu.**: whether mere directions to an agent to apply for goods in the possession of a third party, & to deliver same to an enemy against payment, amounted to trading within the above par.—*INDAR CHAND v. EMPEROR* (1915), 1 L. R. 42 Calc. 1094.—*IND.*

**392 vi. — Commercial Intercourse with Enemies Ordinance VI. of 1914, s. 3.—Obtaining goods from enemy in enemy country "by way of transmission."]—**The accused, a trader in Madras, cabled on July 28, 1914, to R., a German residing in Germany, for certain tobacco. R. sent tobacco to accused's agents at Amsterdam about the end of Sept., 1914, & the agents again shipped them

*Held*: (1) it was too late to raise the objection in the Criminal Court of Appeal; (2) the consent of the A.-G. must be presumed, unless the point was taken at the trial that it had not been proved; (3) the objection was in the circumstances purely technical, & the conviction must stand.—*R. v. METZ* (1915), 84 L. J. K. B. 1462; 113 L. T. 464; 79 J. P. 384; 31 T. L. R. 401; 59 Sol. Jo. 457; 25 Cox, C. C. 67; 11 Cr. App. Rep. 164, C. C. A.

**395. — "Proc. A.," par. 6—Right to vote.]—**Shares were mtgd. by two cos., which had no business in England & had become alien enemies, to an alien enemy bank, in consideration of an advance of money of a branch in England of the bank, though it was not suggested that the moneys of the branch were not the moneys of the German bank, & the shares were not transferred to, or registered in the name of, any one but the alien enemy bank itself:—*Held*: the right of voting in respect of the shares could not be exercised on behalf of the branch of the alien enemy bank, although it held a licence from the Secretary of State under Aliens Restriction (No. 2) Ord., 1914, & Aliens Restriction Act, 1914 (c. 12), which was silent on the subject of voting.—*ROBSON v. PREMIER OIL & PIPE LINE CO., LTD.*, No. 379, *ante*.

*Annotations*:—*Consd. Tingley v. Müller*, [1917] 2 Ch. 144, C. A. *Mentd. Halsey v. Lowenfeld*, [1916] 2 K. B. 707; *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541, C. A.; *Blackburn Bobbin v. Allen*, [1918] 1 K. B. 540; *Friel Bleher v. Rio Tinto*, [1918] A. C. 260; *Naylor, Lenzon v. Krainsche Industrie*, [1918] 1 K. B. 331.

**396. "Proc. A.," par. 6—"Proc. B.," par. 5—Application to trade with branch—Whether retrospective.]—**An insurance co., registered under the law of Germany & having its head office in that country, had a branch office in London where insurance business was transacted on its behalf by the co.'s underwriters & agents. A policy of marine insurance was effected by pltfs. in July, 1914, with the co., through its branch office. A loss under the policy occurred after the outbreak of war, but before the coming into force of "Proc. B." In an action to recover the loss:—*Held*: (1) apart from "Proc. B." the rules applicable to trading with alien enemies did not apply to business transacted with the branch office; (2) the Proclamation had not a retrospective effect.—*INGLE (W. L.), LTD. v.*

*on Oct. 7, 1914, to L. & Co., accused's agents in London, who re-shipped them, & accused received same in Madras between Nov. 21 & 26, 1914. War was declared between Great Britain & Germany on Aug. 4, 1914, the above Proclamation was made on Sept. 9, 1914, & the above Ordinance was passed on Oct. 14, 1914, & it came into force on that day. Accused was convicted of trading with the enemy under s. 3 of the Ordinance, on the ground that he obtained in Madras between Nov. 21 & 26, 1914, goods from an enemy & from an enemy country:—Held*: (1) the conviction could not be sustained, as the charge was not proved as laid; (2) the ct. would not amend the charge into one of obtaining goods by way of transmission under par. 5 (7) of the above Proclamation.—*HOOPER v. KING EMPEROR* (1917), 1 L. R. 40 Mad. 34.—*IND.*

#### PART IV. SECT. 3, SUB-SECT. 2.

**o. Act of 1914 (No. 9), s. 3—Consent of Attorney-General.]—**A document signed by the A.-G. for the Commonwealth, stating that he thereby "consents to a prosecution being instituted against A. of Sydney in the State of New South Wales for an offence against Trading with the Enemy Acts, 1914," is sufficient to authorise a prosecution of A. for an offence against the above sect.—*BERWIN v. DONOHUE, BERWIN & Co., LTD. v. DONOHUE* (1915), 21 C. L. R. 1.—*AUS.*

**Sect. 3.—Under war legislation, 1914-18: Subsect. 2. Sect. 4.]**

MANNHEIM INSURANCE CO., [1915] 1 K. B. 227; 84 L. J. K. B. 491; 112 L. T. 510; 31 T. L. R. 41; 59 Sol. Jo. 59.

**397. — Meaning of "branch."]**—All the partners of an enemy firm were in Hamburg, & the headquarters of the firm were there. It was directed from there, & the lease of the London premises of the firm was in the firm's name, & the London business was conducted by the managers at a salary, who had no power to accept orders. These were received by them & submitted to Hamburg for sanction, & the books were kept at Hamburg. The London banking account was in the firm's name, & the balance thereof was transferred from time to time to Hamburg:—*Held*: the London premises were not a "branch" within the above par. (par. 6)—*Re COUTINHO, CARO & Co.*, [1918] 2 Ch. 384; 87 L. J. Ch. 565; 118 L. T. 746; 62 Sol. Jo. 754.

**398. — Extent of protection.]**—After the outbreak of the European war a quantity of hides were shipped on a British vessel by the Bangkok branch of an Austrian co. consigned to the co.'s branch in Manchester. The hides were landed in Liverpool & stored in a warehouse, where they were seized as prize. It was contended that the above par. &/or certain correspondence between the manager of the Manchester branch & the Trading with the Enemy Committee constituted a licence to the Manchester & Bangkok branches of the enemy co. to trade, & that on this ground the goods were immune from confiscation:—*Held*: (1) the above par. afforded protection to a person acting within it from being convicted of the offence of trading with the enemy, but it had no application to the case of the transfer of goods belonging to an enemy from one branch house to another so as to affect the property in the goods, & could not be construed as taking away the right to seize enemy goods on a British ship or in a British port; (2) a licence from the Crown must be strictly construed & proved, & the Trading with the Enemy Committee neither had the authority to give a licence which would defeat the rights of captors, nor purported to give such a licence.—*THE ACHILLES*, [1917] P. 218; 86 L. J. P. 170; 117 L. T. 414; 14 Asp. M. L. C. 154.

**399. "Act D."—"Reg. A.," regs. 18 & 57—Communicating with enemy—Truth or falsity of communication immaterial.]**—Applt. was indicted for unlawfully attempting to communicate in a certain letter information of a nature calculated to be directly or indirectly useful to the enemy. The indictment was framed under the above regulations & contained six counts, each of which alleged an attempt to commit an offence against reg. 18, & each of which ended by alleging that the offence was committed by applt. with the intention of assisting the enemy. The trial judge in summing up told the jury that whether the information contained in the letter was true or false was wholly immaterial; if prisoner was sending information

which from its very nature he must have known would be of use to the enemy, it would not be an answer to the charge that the information sent was wrong:—*Held*: (1) each count in the indictment charged one offence only, & the averment as to intent was necessary to justify the judgment for the offence when it was committed in an aggravated form; (2) the question of intent was one of fact which was properly left to the jury; (3) the trial judge did not misdirect the jury, & if a person intentionally communicated information, intending to inform & not to mislead, he took the risk whether the information was true or not.—*R. v. M.* (1915), 32 T. L. R. 1; 11 Cr. App. Rep. 207; 79 J. P. Jo. 508, C. C. A.

**400. "Act E."—Employment agency—London County Council (General Powers) Act, 1910 (c. cxxix.).]**—Resp., a German naturalised as a British subject in 1889, & against whose personal character & loyalty no suggestion was made, applied to the licensing authority for a licence to carry on an employment agency in the city of London, such agency having for its object the procuring of employment for naturalised subjects of German, Austrian or Hungarian birth. The licensing authority refused the application on the ground that in the circumstances of the war they would not be justified in giving facilities to such persons to obtain situations in the city of London. Resp. appealed to an alderman, sitting as the appeal tribunal under the above Act of 1910, who, after a rehearing of the application, decided that he was precluded by "Act E." from holding on the facts that applt. was an unsuitable person for the grant of a licence within s. 22 (1) of the Act of 1910, & granted the licence. On a case stated:—*Held*: he was not so precluded, & the case should be remitted to him for the purpose of considering whether, in the circumstances of the war, applt., being of enemy origin, was an unsuitable person to hold the licence.—*LONDON CORPN. v. WOLFF* (1916), 86 L. J. K. B. 534; 115 L. T. 830; 80 J. P. 453; 14 L. G. R. 1123.

**SECT. 4.—EFFECT OF PARTY TO EXECUTORY CONTRACT BECOMING ALIEN ENEMY.**

**401. Sale of goods—Contract suspended only.]**—Contracts were entered into by plffs. before the outbreak of war with Germany & Austria to supply a firm of those countries with zinc. Under those contracts certain events, including *force majeure* & causes beyond control of the parties which prevented or delayed the contract being carried out, were grounds on which the contract should be suspended:—*Held*: (1) the contracts were not abrogated by the war; (2) all obligations under them were suspended while it continued.—*ZINC CORPN. & ROMAINE, LTD. v. SKIPWORTH* (1914), 31 T. L. R. 106; *reusd.* on another point, 31 T. L. R. 107, C. A.

**402. — Contract dissolved.]**—By a contract made in 1908, as varied & extended by a contract

**397 i. "Proc. A.," par. 6—Meaning of "branch."]**—A German co., having its head office in Berlin & having manufacturing works in different parts of Germany, had also an office in London, in charge of a manager, who had authority to enter into contracts & to sue & be sued on behalf of the co. In respect of this office the co. was registered under Cos. (Consolidation) Act, 1908 (c. 69), as a foreign co. having a place of business in the United Kingdom:—*Held*: (1) the co.'s office in the United Kingdom was not a "branch" within the above par.—*ORENSTEIN & KOPPEL*

*v. EGYPTIAN PHOSPHATE CO., LTD.*, [1915] S. C. 55.—**SCOT.**

**p. Customs (War Powers) Act, 1915 (c. 31)—Customs (War Powers) Act, 1916 (c. 102)—Action for penalties—Defences available.]**—Where an exporter has made a declaration, under the order of the Comrs. of Customs & Excise of Apr. 26, 1915, as to the destination of goods shipped by him, & has been called upon, & has failed to satisfy the Comrs. that the goods had reached an enemy country, it is not competent for him, in defence to an action for recovery of penalties under s. 5 (1) of the above Act of 1915, to

tender evidence that the goods have not *de facto* reached an enemy country. The only defence open to him is that, if they had, it has not been with his consent & connivance, & that he has taken all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration.—*LORD ADVOCATE v. VAN WHEEL*, [1917] S. C. 227.—**SCOT.**

**PART IV. SECT. 4.**

**402 i. Sale of goods—Contract dissolved.]**—In May & June, 1914, defts. agreed to purchase goods at Calcutta from A. & Co., who also carried on busi-



made in 1910, *plfts.*, a co. incorporated in England, agreed to sell, & *defts.*, who resided & carried on business in Germany, agreed to purchase during each of the ten years 1910 to 1919, both inclusive, the whole of *plfts.*' production of zinc concentrates at their mine in Australia, such production not to be less than 85,000 tons nor more than 95,000 tons in each year; & *plfts.* were prohibited, so long as the contract should be in force, from selling any zinc concentrates to any person other than *defts.*, who were entitled at any time to leave 2,200 tons of concentrates on *plfts.*' floors & 800 tons in their vats at *plfts.*' expense. By clause 17 of the contract of 1908 it was provided that in the event of (*inter alia*) any strike, suspension of labour, floods, fire, stoppage of water supply, acts of God, *force majeure*, or any cause beyond the control of either the sellers or the buyers preventing or delaying the carrying out of the contract, "then this agreement shall be suspended during the continuance of any & every such disability." War was not specified as a cause of suspension. The contract contained various provisions as to notices being given, as to fixing the price of & the method & time of payment for the concentrates, as to weighing, sampling & assaying the concentrates, & as to other matters. On the outbreak of war between Great Britain & Germany on Aug. 4, 1914, *defts.* became alien enemies:—*Held*: (1) assuming that war was a cause of suspension within clause 17 of the contract of 1908, the suspension was only of deliveries of concentrates & not of the whole contract, & the effect of the prohibition against selling to any person other than *defts.* was to prevent *plfts.* from using their resources for the benefit of England; (2) the further performance of the contract after the outbreak of war became illegal as being detrimental to the interests of the country & of assistance to the King's enemies, & the contract was dissolved; (3) the continued existence of the contract would involve commercial intercourse with the enemy, & upon that ground also the agreement had become illegal & was dissolved.—*ZINC CORPN., LTD. v. HIRSCH*, [1916] 1 K. B. 541; 85 L. J. K. B. 565; 114 L. T. 222; 32 T. L. R. 232; 21 Com. Cas. 273, C. A.

*Annotations*:—*Distd.* Orconera Iron Ore Co. v. Fried Krupp Akt. (1917), 86 L. J. Ch. 613. *Folld.* Rio Tinto v. Ertel Bieher (1917), 116 L. T. 471; *Veithardt & Hall v. Rylands* (1917), 86 L. J. Ch. 604, C. A. *Appld.* Clapham S.S. Co. v. Handels-on-Transport, etc., [1917] 2 K. B. 639. *Refd.* *Stevenson v. Akt. für Cartonnagen Industrie*, [1917] 1 K. B. 842, C. A.; *Ertel Bieher v. Rio Tinto*, [1918] A. C. 260. *Mentd.* *Stevenson v. Akt. für Cartonnagen Industrie*, [1916] 1 K. B. 763; *British Assocn. of Glass Bottle Manufacturers v. Forster* (1917), 86 L. J. Ch. 489; *Metropolitan Water Board v. Dick, Kerr*, [1917] 2 K. B. 1; *Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331; *Blackburn Bobbin v. Allen*, [1918] 1 K. B. 540; *Re Coutinho Caro*, [1918] 2 Ch. 384.

403. ———.]—On the outbreak of war between two nations an executory contract between subjects of those nations, if the postponement of the performance of mutual obligations therein

ness in Hamburg. Delivery of the goods was to be made in 1915. On the commencement of the war with Germany on Aug. 4, 1914, one of the partners of A. & Co., who was not a British subject & was domiciled in Germany, returned to Germany. *Defts.* having repudiated the contracts:—*Held*: the contracts were avoided on declaration of war.—*STOLL (TRADING AS MOLL, SCHULTE & CO., LTD.) v. PATERSON & CO., LTD.* (1915), 18 W. A. R. 42.—AUS.

402 ii. ———.]—*Defts.*, a German joint-stock co. incorporated under the laws of Hanover, & having a branch in Bombay under the sole management of B., a German subject, agreed in Feb., 1914, to purchase from *plfts.* waste produced in *plfts.*' mills during the

year ending Dec. 31, 1914, & to take delivery of whatever waste might be ready at least once monthly. After the outbreak of the European war B. was interned & *defts.* failed to carry out the terms of the contract:—*Held*: (1) the contract became illegal & was dissolved on the outbreak of war.—*TEXTILE MANUFACTURING CO., LTD. v. SALOMON BROTHERS* (1916), 1 L. R. 40 Bom. 570.—IND.

402 iii. ———.]—*Payment for goods delivered before war not affected.*—The judgment of the English Ct. of Appeal in *Zinc Corpn., Ltd. v. Hirsch* (No. 402, *supra*) was declared to be made without prejudice to the rights of either party in respect of concentrates supplied before war. In an action for payment

which fall due during the war, or the cancellation of such obligations, involves a substantial alteration of the contract, is dissolved & not merely suspended.

*Plfts.*, a British co., agreed to sell all their pig iron of a certain description to *defts.*, a German firm, who were to act as *plfts.*' sole agents for the sale of the pig iron on the Continent of Europe & to do their utmost in promoting its sale. *Plfts.* also agreed to refer all Continental purchasers to *defts.* as their sole agents, whilst *defts.* were to take a certain quantity of the pig iron yearly, but if they failed to do so they incurred no liability beyond the loss of control of the output. In case of strikes or stoppage of their works from unforeseen causes *plfts.* were not bound to deliver, & during mobilisation of German military forces *defts.* were not bound to take delivery. Twelve months' notice of discontinuance might be given by either party:—*Held*: the contract was dissolved on the outbreak of war between Great Britain & Germany.—*DISTINGTON HEMATITE IRON CO., LTD. v. POSSEHL & CO.*, [1916] 1 K. B. 811; 85 L. J. K. B. 919; 115 L. T. 412; 32 T. L. R. 349.

*Annotations*:—*Refd.* *British Assocn. of Glass Bottle Manufacturers v. Forster* (1917), 86 L. J. Ch. 489, C. A.; *Marshall v. Glanville*, [1917] 2 K. B. 87; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *Veithardt & Hall v. Rylands* (1917), 116 L. T. 706, C. A. *Mentd.* *Metropolitan Water Board v. Dick, Kerr*, [1918] A. C. 119; *Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331.

404. ———.]—A Hamburg firm before war accepted, through its office in London, orders from British customers for delivery of iron & steel goods at future dates which, in the event, were after the outbreak of war. Delivery was not made:—*Held*: the contracts were dissolved on both sides on the outbreak of war. & were not revived by an order being subsequently made, & a controller appointed, for winding up the firm's English business under Trading with the Enemy Amendment Act, 1916 (c. 105).—*Re COUTINHO CARO & CO., No. 397, ante.*

405. ———.]—*Effect of suspensory clause.*—In May & July, 1914, *plfts.*, merchants in London, made with *defts.*, German subjects carrying on business in Germany, contracts whereby *plfts.* sold to *defts.* certain quantities of pyrites to be delivered f.o.b. at Huelva in Spain at various dates between Aug., 1914 & 1917, times of shipment to be mutually arranged. The contracts provided that in case of war hindering shipment or delivery the deliveries might be suspended during its continuance, shipment to be resumed as soon as practicable:—*Held*: the contracts were dissolved as from Aug. 4, 1914, by reason of the outbreak of war with Germany.—*NAYLOR, BENZON & CO., LTD. v. HIRSCH & SON* (1917), 33 T. L. R. 432.

406. ———.]—An English registered co. was formed in 1873 by four firms in the iron & steel trade, of which two were British, one Spanish,

of the balance of the price of concentrates delivered before war, it appeared that *deft.*'s named agent was in Adelaide, & genuine quotations of the kind mentioned in the contract were still obtainable in London, although these did not represent the world's prices:—*Held*: (1) the outbreak of war had not revoked the authority of the agent to adjust the price of the concentrates under the contract; (2) there was no express or implied condition in the contract that, in the event of war affecting the character of the London quotation, payment of the balance of the price of concentrates delivered before war should be abrogated, or be suspended during war.—*ZINC CORPN., LTD. v. HIRSCH* (1917), V. L. R. 289.—AUS.



**Sect. 4.—Effect of party to executory contract becoming alien enemy.]**

& one German. The object of the co. was to acquire certain mines & railways in Spain from the Spanish firm. The capital of the co. was subscribed by the four firms equally, & by its articles contracts were to be entered into by the co. with each of the four firms for the yearly supply to them respectively of iron ore. The mines & railways were acquired by the co., & contracts for ninety-nine years dated Aug. 15, 1873, were entered into by the co. with each of the firms for the supply of ore to them. These contracts were in identical terms, except as to the amount of ore to be supplied. Clause 18 of the contract with the German firm provided that the contract (except as to that clause & as to clauses for arbn. & the settlement of accounts & the payment & receipt of money) should be suspended during any period in which "an unavoidable cause" prevented the delivery or receipt of ore, & should revive on the cessation or removal of such cause. At the outbreak of the war with Germany the German firm was indebted to the co. for ore delivered, which indebtedness was discharged by the Public Trustee:—*Held*: the suspensory clause, assuming it applied to a war between the countries of the contracting parties, was void as being against public policy, & the contract being an ordinary executory contract with an enemy, not connected with the proprietary right to the shares, was dissolved by the outbreak of war. — *ORCONERA IRON ORE CO., LTD. v. FRIED KRUPP AKT.* (1918), 87 L. J. Ch. 313; 118 L. T. 237; 34 T. L. R. 307, C. A.

**407.** — — — — —.] Before the outbreak of war plffs., an English limited co., made with defts., enemy cos. carrying on business in Germany, contracts dealing with the fruit trade in Germany for some years ahead. The contracts contained a clause providing for their suspension, & during such suspension plffs. were under an obligation to pay to defts. a certain sum per annum for office expenses in Hamburg. Most of the shares in plff. co. were held in the United States, but there were directors in England, who acted on instructions from America:—*Held*: plffs., although controlled from America, were an English co., & as the directors in England, would be personally liable if they communicated with the enemy, & as the contracts contained a provision that even during their suspension the sum payable for office expenses should continue to be paid, the contracts were not merely suspended but were void since the outbreak of war.—*ELDERS & FYFFES, LTD. v. HAMBURG AMERIKANISCHE PACKETFAHRT AKT., ELDERS & FYFFES, LTD. v. HAMBURG-COLUMBIEN BANANEN AKT.* (1917), 34 T. L. R. 275, C. A.

**408.** — — — — —.]—An English co., owning cupreous ore mines in Spain, on various dates before the outbreak of the war between Great Britain & Germany contracted to sell to three German cos. large quantities of this ore, to be shipped from Spain to Rotterdam or certain other Continental ports & to be delivered to the several buyers by instalments extending over a number of years. Each of the contracts contained a suspensory clause providing that, if owing to strikes, war, or any other cause, over which the sellers had no control, they should be prevented from shipping or delivering the ore, the obligation to ship & deliver should be suspended during the continuance of the impediment & for a reasonable time afterwards, & the clause contained a corresponding provision in favour of the buyers, suspending the obligation to receive in the like event. At the date of the outbreak of war some of the contracts had been partially executed, & the others were wholly executory. The contracts with one of the German cos.

were in English form; those with the two other cos. were made in Germany & were in the German language:—*Held*: (1) apart from the suspensory clause, the contracts were abrogated on the outbreak of war inasmuch as they involved trading with the enemy; (2) the suspensory clause, assuming that it applied to a war between the countries of the contracting parties, was void as against public policy as tending to the detriment of England & the advantage of the enemy country; (3) as regarded the German contracts, in the absence of evidence to the contrary, the presumption was that the law of Germany was the same as the law of England, & assuming these contracts were valid by the law of Germany, the question whether they were void as against public policy was to be determined by the law of this country.—*ERTEL BIEBER & CO. v. RIO TINTO CO., DYNAMIT AKT. v. SAME, VEREINIGTE KÖNIGS UND LAURA-HÜTTE AKT. v. SAME*, [1918] A. C. 260; 87 L. J. K. B. 531; 118 L. T. 181; 34 T. L. R. 208, H. L.

*Annotations*:—*Apld.* Naylor, Benzon v. Krainische Industrie, [1918] 2 K. B. 486, C. A. *Consd.* Orconera Iron Ore Co. v. Fried Krupp Akt. (1918), 87 L. J. Ch. 313, C. A. *Refd.* Blackburn Bobbin v. Allen, [1918] 1 K. B. 540. *Mentd.* County Hotel & Wine Co. v. L. & N. W. Ry. Co., [1918] 2 K. B. 251.

**409.** — — — — —.]—By a contract made before the European war plffs., a British firm, agreed to sell, & defts., an Austrian firm, agreed to buy, certain iron ore at a price to include cost, freight, & insurance to Servola, near Trieste, payable in cash on receipt of invoice for each shipment. Delivery was to be in about equal quantities in two years, & shipments were to be at as regular intervals as could be arranged. The contract contained a suspension clause providing for the suspension of deliveries in case of stoppage of mines or works or of loss or delay during transit owing to accidents, strikes, lock-outs, wars, civil commotions, epidemics, quarantine, dangers of the sea, or any other cause beyond the control of the sellers or the buyers during the continuance of same without liability, but the buyers undertook to receive any quantities for which the sellers should have engaged freight before receiving advice of the stoppage. The contract also contained an arbn. clause providing that any dispute arising out of the contract was to be referred to arbn. in London. After part of the ore had been delivered war was declared between the United Kingdom & Austria-Hungary:—*Held*: the contract was dissolved on the outbreak of war.—*NAYLOR, BENZON & CO., LTD. v. KRAINISCHE INDUSTRIE GESELLSCHAFT*, [1918] 2 K. B. 486; 87 L. J. K. B. 1066; 118 L. T. 783; 34 T. L. R. 536, C. A.

**410.** — — — — —.]—**Subject of allied State & alien enemy—Void.**—Before the European war plffs., Belgians, carrying on business in Antwerp & London, made with deft., a German, carrying on business in Hamburg & before the war in London also, c.i.f. contracts, by which plffs. sold to deft. certain hides. After the outbreak of war deft. repudiated the contracts:—*Held*: (1) as plffs. were subjects of a State allied with England, the contracts, having been made with a subject of a State at war with England, became illegal on the outbreak of war, & after that date there could be no breach of them; (2) plffs. could not recover damages.—*KREGLINGER & CO. v. COHEN (TRADING AS SAMUEL & ROSENFELD)* (1915), 31 T. L. R. 592.

**411. Sale of land—By attorney under power given before donor became alien enemy.**—Deft., a German by birth, but for many years resident in England, although never naturalised, being about to proceed to Germany, executed a power of attorney on May 20, 1915, by which he appointed his solr. his attorney to sell his leasehold house

& to execute such transfers & deeds as were necessary. The power of attorney was made irrevocable for twelve months. On May 26 deft. obtained a Govt. permit from the police to travel to Tilbury in order to embark for Germany, & started on that day. On June 2, 1915, the leasehold premises were sold to pltf. by public auction, & a deposit was paid & an agreement signed by him. There was no evidence as to the date when deft. reached Germany, but it was some time between May 26 & June 11, 1915. In an action for a declaration that the agreement for sale had been dissolved by the act of deft. in becoming an alien enemy:—*Held*: (1) the proper inference to be drawn from the facts was that at the date of the sale deft. had arrived & was resident in Germany & was an alien enemy; (2) the power of attorney having been given by deft. at a time when he was not an alien enemy, & being irrevocable for a year, was not avoided by his subsequently becoming an alien enemy; (3) the agreement entered into by the attorney in execution of the power did not involve any intercourse with the enemy, & was valid; (4) pltf. was not entitled to have the agreement rescinded.—*TINGLEY v. MÜLLER*, [1917] 2 Ch. 144; 86 L. J. Ch. 625; 116 L. T. 482; 33 T. L. R. 369; 61 Sol. Jo. 478, C. A.

*Annotations*:—*Distd.* Naylor, Benzon v. Krainische Industrie [1918] 1 K. B. 331; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. *Mentd.* Speyer v. Rodriguez (1917), 87 L. J. K. B. 171, C. A.

**412. Charterparty — Dissolved — Effect of suspensory clause.**—By a charterparty made in 1913 pltf., as owners of the British s.s. *F.*, agreed to let, & V. Co. agreed to hire, the *F.* for about five years. V. Co. was a Dutch co., but all its shares were held by Germans: it was managed by directors who were Germans resident in Holland, & who were subject to the control of a supervisory committee of Germans resident in Germany, & it existed for the purpose of furthering the operations of certain German cos. The charterparty provided that the vessel should only be employed in lawful trades, & it contained the following clause: "That in the event of war between the nation to whose flag the chartered steamer belongs & any European power or any other Power operating or likely to operate in European waters, charterers, &/or owners shall have the option of suspending this charter for the time during which hostilities are in progress." On the outbreak of war between Great Britain & Germany on Aug. 4, 1914, V. Co. gave notice suspending the charterparty during the continuance of hostilities:—*Held*: the charterparty was dissolved & not merely suspended by the outbreak of war.—*CLAPHAM S.S. CO., LTD. v. HANDELS-EN-TRANSPORT-MAATSCHAPPIJ VULCAAN OF ROTTERDAM*, [1917] 2 K. B. 639; 86 L. J. K. B. 1439; 116 L. T. 826; 33 T. L. R. 546; 23 Com. Cas. 13; 14 Asp. M. L. C. 104.

*Annotation*:—*Folld.* Naylor, Benzon v. Krainische Industrie, [1918] 1 K. B. 331.

**413. Lease—Alien enemy tenant—Rent.**—Pltf., before the outbreak of war between Great Britain & Austria, let to deft., an Austrian subject, a residential flat at W. for a term of years. By the terms of agreement deft. was not to assign or underlet the premises without the lessor's licence, such licence not to be unreasonably withheld. On war breaking out deft. became an alien enemy. By an Ord. in Council alien enemies were prohibited from residing within certain specified areas, including W.—*Held*: (1) it was not the basis of the contract of tenancy that deft. should continue to be allowed by law to inhabit the flat in person;

(2) the Ord. had not the effect of extinguishing the tenancy; (3) deft. was liable for rent accrued due since the date of the Ord.:—*LONDON & NORTHERN ESTATES CO. v. SCHLESINGER*, [1916] 1 K. B. 20; 85 L. J. K. B. 369; 114 L. T. 74; 32 T. L. R. 78; 60 Sol. Jo. 223.

*Annotation*:—*Mentd.* Tingley v. Müller, [1917] 2 Ch. 144, C. A.

**414.** ————*Where the lessee under a lease made before war becomes an alien enemy on the outbreak of war, his covenant in the lease to pay the rent is not thereby extinguished or suspended, & he may be sued for rent that accrues due during the war.*—*HALSEY v. LOWENFELD*, [1916] 2 K. B. 707; 85 L. J. K. B. 1498; 115 L. T. 617; 32 T. L. R. 709, C. A.

*Annotations*:—*Refd.* Seligman v. Eagle Insee., [1917] 1 Ch. 519; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260; *Orconera Iron Ore Co. v. Fried Krupp Act.* (1918), 87 L. J. Ch. 313, C. A. *Mentd.* Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.

**415. Partnership—Dissolved.**—There can be no partnership between alien enemies & a subject of England when war has once been declared. Commercial intercourse is prohibited, & immediately that prohibition comes into force it is impossible for the relationship of partners to subsist, at any rate during the war.—*R. v. KUPFER*, [1915] 2 K. B. 321; 84 L. J. K. B. 1021; 112 L. T. 1138; 79 J. P. 270; 31 T. L. R. 223; 24 Cox, C. C. 705; 11 Cr. App. Rep. 91, C. C. A.

*Annotations*:—*Refd.* Tingley v. Müller, [1917] 2 Ch. 144, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. *Mentd.* Wilson v. Ragosine (1915), 84 L. J. K. B. 2185.

**416.** ————*Rights of enemy partners.*—Where a partnership between a British subject & a foreign partner for carrying on a business in England is dissolved by the outbreak of war between the countries of the partners, the usual rule, as expressed in Partnership Act, 1890 (c. 39), s. 42, applies, & the enemy partner is entitled, in the absence of any special agreement to the contrary, to the value of his shares in the partnership property, including the goodwill, if any, as it stood at the date of the dissolution of the partnership, although it cannot be paid to him until peace is restored, & also to his share of any profits which have been made in the meantime, or to interest on the value of his share of the property.—*STEVENSON (HUGH) & SONS v. AKT. FÜR CARTON-NAGEN INDUSTRIE*, [1918] A. C. 239; 87 L. J. K. B. 416; 118 L. T. 126; 34 T. L. R. 206; 62 Sol. Jo. 290, H. L.

*Annotations*:—*Consd.* Rodriguez v. Speyer (1918), 119 L. T. 409, H. L. *Refd.* Ertel Bieber v. Rio Tinto, [1918] A. C. 260.

**417. Patent—Vested in alien enemy—British licensee—Avoided.**—In 1907 an international assocn., called the Verband, was formed in Germany for the purchase from a co., incorporated in the United States of America, of certain patents relating to machines for making glass bottles over a territory including the whole of Europe, & a contract was entered into by the Verband accordingly for the purchase of these patents, the purchase price being made payable to the vendors by instalments down to Mar. 1, 1917, & the vendors assigned the patents to a German co., called the Treuhand, on trust that they should assign the patents to the Verband upon payment in full of the purchase price, or re-assign them to the vendors in case of any default by the Verband. No default had in fact been made at the date of the order of the Board of Trade hereafter mentioned. National assocns. were formed in six European countries, including Great Britain & Germany, which took

**413 i. Lease—Alien enemy tenant—Liability on covenants after internment.**—The internment of an enemy subject does not relieve him from the covenants of a lease.—*HICKIE v. LOWE* (1915), 10 Hongkong, 53.—**HONG KONG.**



**Sect. 4.—Effect of party to executory contract becoming alien enemy. Sect. 5: Sub-sect. 1.]**

up the capital of the Verband in shares proportionate to the output of glass bottles in their several countries. Under an agreement entered into between the Verband & the British assocn., which resembled the agreements entered into by the Verband with the other national assocns., the British assocn. had the right to obtain machines manufactured under the patents, & to enter into contracts with its members, granting them the right to be supplied with & use such machines, subject to certain restrictions on output. A licence was in fact granted by the British assocn. to (*inter alios*) their co-pltfs., an English co., which sued on behalf of themselves & all other licensees. In 1915 the Board of Trade made an order suspending the British patents in favour of one of defts., another English co., to which the Board granted a licence to make & use the inventions described in the patents. This order purported to be made under Patents, Designs, & Trade Marks (Temporary Rules) Act, 1914 (c. 27), which empowered the Board to avoid or suspend "any patent or licence, the person entitled to the benefit of which was the subject of any State at war with his Majesty." Pltfs. brought an action for a declaration that the order of the Board of Trade & the licence granted by them were null & void:—*Held*: (1) neither the interests of the British assocn. & their licensees, nor the lien of the vendors for unpaid purchase-money, operated to deprive the Board of Trade of jurisdiction to make the order suspending the patents & to grant the licence complained of; (2) the agreement between the Verband & the British assocn., so far as it had not then already been carried out, was avoided by the outbreak of war between Great Britain & Germany.—**BRITISH ASSOCN. OF GLASS BOTTLE MANUFACTURERS, LTD. v. FOSTER & SONS, LTD.** (1917), 86 L. J. Ch. 489; 116 L. T. 433; 33 T. L. R. 314; 61 Sol. Jo. 430; 34 R. P. C. 217, C. A.

**SECT. 5.—TRADING UNDER CROWN LICENCE.**

**SUB-SECT. 1.—IN GENERAL.**

**418. Necessity for licence—Application to allies.]**

All trading with the enemy, without the King's permission, is forbidden, & property taken in such a trade is confiscable as prize to the captor. This is a universal principle of law & is not peculiar to the law of England. It makes no difference to the legal result that the intention of the parties may have been innocent, & that they had consulted the Comrs. of Customs first.

The rule that all trading with the enemy without the licence of the Crown is forbidden, & that property taken in such a trade is confiscable as prize, is enforced not only against subjects of the Crown, but also those of its allies.—**THE HOOP** (1799), 1 Ch. Rob. 196.

*Annotations*:—**Apprvd.** Potts v. Bell (1800), 8 Term Rep. 548. **Distd.** The Ionian Ships (1855), 2 Ecc. & Ad. 212. **Consd. & Apld.** Esposito v. Bowden (1857), 7 E. & B. 763, Ex. Ch. **Refd.** Arnhold Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam, [1915] 2 K. B. 379; Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co. (1915), 84 L. J. K. B. 926, C. A. **Mentd.** Willison v. Patteson (1817), 1 Moore, C. P. 133; The Chile (1914), 84 L. J. P. 1; The Marie Glaeser, [1914] P. 218; The Mowe, [1915] P. 1; The Panariellos (1915), 84 L. J. P. 140; Porter v. Freudenberg, [1915] 1 K. B. 857, C. A.; Robson v. Premier Oil & Pipe Line Co., [1915] 2 Ch. 124, C. A.; British & Foreign Marine Insce. v. Sanday, [1916] 1 A. C. 650, H. L.; Halsey v. Lowenfeld, [1916] 2 K. B. 707, C. A.; Horlock v. Beal, [1916] 1 A. C. 486, H. L.; The Mannigtry, [1916] P. 329; Stevenson v. Akt. für Carton-

nagen Industrie (1916), 115 L. T. 594, C. A.; Zinc Corp'n. v. Hirsch, [1916] 1 K. B. 541, C. A.; Ertel Bieber v. Rio Tinto, [1918] A. C. 260; Naylor, Benzon v. Krainische Industrie, [1918] 1 K. B. 331; Rodriguez v. Speyer (1918), 119 L. T. 409, H. L.

**419.**

—**When war breaks out between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except so far as it may be expressly allowed or licensed by the head of the State. Where the intercourse is of a commercial nature, it is usually denominated "trading with the enemy." On the outbreak of a war in which a belligerent has allies, the citizens of all the allied States are under the same obligations to each allied State as its own subjects would be to a single belligerent State, with relation to intercourse with the enemy. Where such illegal intercourse is proved between allied citizens & the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to capture by any allied belligerent, & is subject to condemnation in that belligerent's own Prize Cts. When such intercourse in fact takes place, the property of the persons engaged in it is confiscable whether they were acting honestly & with *bona fides* or not.**

Whatever intercourse with an enemy is prohibited by international law, no relaxation whatever can be allowed by one State in favour of its citizens which can affect the confederate State unless expressly sanctioned by the latter. This rule must be enforced & confiscation decreed whether a person engaging in the prohibited intercourse acts innocently, in good faith, & in pursuance of advice honestly believed to be sound, or of licences or permissions honestly believed to be valid.—**THE PANARIELLOS** (1915), 84 L. J. P. 140; 112 L. T. 777; 31 T. L. R. 326; 59 Sol. Jo. 399; 13 Asp. M. L. C. 52; *affd.* (1916), 85 L. J. P. 112, P. C.

*Annotations*:—**Refd.** Robson v. Premier Oil & Pipe Line Co. [1915] 2 Ch. 124, C. A.; Halsey v. Lowenfeld, [1916] 2 K. B. 707, C. A.; Tingley v. Müller, [1917] 2 Ch. 144, C. A.; Naylor, Benzon v. Krainische Industrie, [1918] 1 K. B. 331; Ertel Bieber v. Rio Tinto, [1918] A. C. 260.

**420. — How given.]—The consent of the Crown to legalise trade of British subjects with the enemy may be signified in a variety of ways—by a licence granted to the individual for the special occasion, by an Ord. in Council, by Proclamation, or under the authority of an Act of Parliament, to which the Crown is necessarily a party.—THE CHARLOTTA** (1914), 1 Dods. 387.

**421. — Withdrawal of property from enemy country.]—The ct. cannot sufficiently inculcate the duty of applying in all cases for the protection of a licence where property is to be withdrawn from the enemy's country; it is the only safe way in which parties can proceed.—THE JUFFROW CATHARINA** (1804), 5 Ch. Rob. 140.

*Annotation*:—**Consd.** Esposito v. Bowden (1857), 7 E. & B. 768, Ex. Ch.

**422. — After Order in Council declaring ports not hostile.]—It belongs to the Govt. of the country to determine in what relation of peace or war any other country stands towards it; in the absence of any express promulgation of the Sovereign's will in that respect, it may be collected from other acts of the State. When the Crown has considered an enemy country as ceasing to be hostile, the subject may also consider it open to lawful commercial adventure as any other neutral State.**

By Ords. in Council certain ports in St. Domingo, which had formerly been, but were no longer, in the possession nor under the dominion of France, were declared not hostile:—*Held*: (1) the effect was to remove entirely the restriction on trading caused by war, notwithstanding the orders were made for collateral & limited purposes, not covering in



their terms the trading in question; (2) the inference as to legality of such trade was not rebutted by a subsequent Ord. in Council opening trade generally (so as to cover in its terms the particular adventure) to all ports of St. Domingo not in the possession of France; (3) since the trade required no licence from the Crown, it was not restricted by the fact of a British ship carrying a licence for trading to such ports from Great Britain with a certain specified cargo, but the British trader might carry other lawful goods, & insure his whole adventure, & recover from the underwriter a loss arising from capture by a British cruiser, for the licence itself not being necessary, the carrying of goods not included in it was no legal cause of seizure, however it might operate upon the question of costs in the Prize Ct.—*BLACKBURN v. THOMPSON* (1812), 15 East, 81; 104 E. R. 775.

*Annotation*: *Mentd.* *Wright v. Welbie* (1819), 1 Chl. 49.

**423.** —.—.]—Though a State may be in the military possession of one or two belligerents, that will not constitute her subjects enemies to the other belligerent, if the Sovereign Power of the latter chooses to permit a continuance of commerce with them; & where an insurance was effected on property, shipped in England on account of persons who were domiciled at Hamburg, at a time when that country was in the possession of French troops, the Senate continuing to exercise the powers of civil govt. in the same manner as before:—*Held*: the assured were entitled to recover for a loss which happened in the course of a voyage permitted by His Majesty's Ords. in Council.

Here this country has, by the effect of these orders, placed Hamburg in different relations at different periods. In Nov., 1807, we find her treated as hostile; afterwards it was thought expedient to alter her relative situation, & to recognise her inhabitants, as persons with whom trade might be carried on, & their ships & goods were released from confiscation & condemnation. From this review of the several Ords. in Council, seeing nothing to render the inhabitants of Hamburg hostile, or persons with whom trade might not lawfully be carried on, it is unnecessary to look to the licence, for under these circumstances no licence was necessary (*LORD ELLENBOROUGH, C.J.*).—*HAGEDORN v. BELL* (1813), 1 M. & S. 450; 105 E. R. 168.

*Annotation*:—*Apld.* *The Gerasimo* (1859), 11 Moo. P. C. C. 88, P. C. *Mentd.* *The Leonora*, [1918] P. 182.

**424.** —.— *Effect of outbreak of war.*]—War prohibits all trading with the enemy except with the Royal licence, & dissolves all contracts which involve such trading (*LORD LINDLEY*).—*JANSON v. DRIEFONTEIN CONSOLIDATED MINES, LTD.*, [1902] A. C. 484, at p. 497; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 18 T. L. R. 796; 7 Com. Cas. 268, H. L.

*Annotations*:—*Refd.* *Arnhold Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1916] 1 K. B. 495, C. A. *Mentd.* *Amorduct Manufacturing Co. v. Defries* (1914), 84 L. J. K. B. 586; *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937; *Ingle v. Mannheim Insee.*, [1915] 1 K. B. 227; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A.; *Robinson v. Continental Insee. Co. of Mannheim*, [1915] 1 K. B. 155; *Re Sutherland, Bechoff v. Bubna* (1915), 31 T. L. R. 248; *Dalmler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307, H. L.; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44; *Stevenson v. Akt. für Cartonnagen Industrie* (1916), 115 L. T. 594, C. A.; *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541, C. A.; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260; *Montelloro v. Monday, etc., Co.*, [1918] 2 K. B. 241; *Naylor, Benzon v. Krainische Industrie*, [1918] 1 K. B. 331; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1918), 87 L. J. Ch. 313, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**425. Power to grant licence —Royal prerogative.**]—By the law of the constitution of England, the Sovereign alone has the power of declaring war &

peace. He alone who has the power of entirely removing the state of war has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is partial suspension of war. On certain occasions such intercourse might be expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce merely, & possibly on grounds of private advantage, not reconcilable with the general interest of the State. It is for the State alone, on more enlarged views of policy & all circumstances connected with such intercourse, to determine when it shall be permitted & under what regulations. Another principle of law, of a less politic nature, but equally general in its reception & direct in its application, forbids this sort of communication as inconsistent with the relation existing between the two countries; & that is, the total inability to sustain any contract by an appeal to tribunals of the one country, on the part of subjects of the other. The legality of commerce & the mutual use of cts. of justice are inseparable.—*THE HOOP*, No. 418, ante.

*Annotations*:—*Refd.* *Potts v. Bell* (1800), 8 Term Rep. 548; *Esposito v. Bowden* (1857), 7 E. & B. 763, Ex Ch.; *The Chile* (1914), 84 L. J. P. 1; *The Marie Glaeser*, [1914] P. 218; *Arnhold Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1915] 2 K. B. 379; *Continental Tyre & Rubber Co. (Great Britain) v. Dalmler Co.* (1915), 84 L. J. K. B. 926, C. A.; *Porter v. Freudenberg*, [1915] 1 K. B. 857, C. A.; *British & Foreign Marine Insee. v. Sanday*, [1916] 1 A. C. 650, H. L.; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707, C. A.; *Zinc Corpn. v. Hirsch*, [1916] 1 K. B. 541, C. A.; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L. *Mentd.* *Willison v. Patteson* (1817), 1 Moore, C. P. 133; *The Ionian Ships* (1855), 2 Ecc. & Ad. 212; *The Mowe*, [1915] P. 1; *The Panariellos* (1915), 84 L. J. P. 140; *Robson v. Premier Oil & Pipe Line Co.*, [1915] 2 Ch. 121, C. A.; *Horlock v. Beal*, [1916] 1 A. C. 486, H. L.; *The Mannigtry*, [1916] P. 329; *Stevenson v. Akt. für Cartonnagen Industrie* (1916), 115 L. T. 594, C. A.; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260; *Naylor, Benzon v. Krainische Industrie* [1918] 1 K. B. 331.

**426.** —.— *By one of several allied States.*]—A claim for ship & cargo was made on behalf of an asserted Ionian subject, resident at Mitylene, a Turkish possession, & carrying on trade in partnership with his son, resident at Constantinople. The ship was captured on a voyage to Galatz, then in possession of Russia, during war carried on by England, France, Turkey & Sardinia against Russia:—*Held*: (1) residence in the dominions of one of several belligerent allies making all trade with the common enemy illegal, & the property of such trader being liable to forfeiture in the cts. of any of the allies, it would not be competent to any one of the allies to license, on its own authority, such trade to residents within its own dominions; (2) residence in a factory under consular authority would not so far preserve the original national character as to legalise trade with the enemy of the Govt. in whose dominions the factory was situated.—*THE SAN SPIRIDIONE* (1856), 28 L. T. O. S. 204; 2 Jur. N. S. 1238; 5 W. R. 102.

**427.** —.— *Subject to conditions.*]—Though the King may at common law license trading with an enemy generally, yet he may disqualify his licence, in which case the party seeking to protect himself under such licence must conform to the requisitions of it.

If it be provided in the licence that the party acting under it shall give a bond for due exportation to the places proposed of the goods intended to be exported to such country, & they are exported without such bond being given, such exportation is illegal, & the owners cannot recover on a policy to protect the goods.—*VANDYCK v. WHITMORE* (1801), 1 East, 475; 102 E. R. 183.

**428.** —.— *Limited by existing navigation laws.*]—As the Crown could not license importation of enemy's property, produce of a foreign country,

**Sect. 5.—Trading under Crown licence: Sub-sect. 1.]**

into the realm in neutral vessels, contrary to former navigation laws, a licence in fact granted for such purpose would not legalise an insurance upon the property so imported. If a policy were made upon the supposed efficacy of such a licence, for the purpose of covering the importation of British as well as enemy's property in that manner, the former of which was legalised by 43 Geo. 3, c. 153, ss. 15, 16, & 45 Geo. 3, c. 34, the underwriters could not at any rate recover premiums for more than the amount of the British interest insured, the assured not resisting their claim to that extent.—**SHIFFNER v. GORDON** (1810), 12 East, 290; 104 E. R. 116.

**Annotation** —**Refd.** *R. v. Speyer, R. v. Cassel*, [1916] 1 K. B. 595.

**429. — By subordinate authority—East India Company.]**—A ship & cargo were taken on a voyage from Madras to the Spanish settlement of Manilla, & claimed by Armenian merchants, resident in Madras, on the ground that a trade of this nature had been carried on by this class of merchants under the knowledge & permission of the Govt. of Madras, & that it had in former wars also been a trade specially privileged by the East India Co.'s governing officers in India, & by the Spanish Govt. at Manilla. There had been a subsequent permission of the Governor of Madras & of the Governor-General for the carrying on a similar trade, granted to claimants:—**Held**: (1) the East India Co. could not, in respect to a trade carried on with a general & public enemy of the Crown of Great Britain, relax the operations of war, so far as to license the trade of individuals with such an enemy; (2) as it was in the power of the Crown alone to declare war, so it rested with that authority only to dispense with its operations, & the ship & cargo must be condemned as the property of British subjects taken in trade with the enemy, but in the circumstances expenses of the suit should be paid out of the proceeds.—**THE ANGELIQUE** (1801), 3 Ch. Rob. App. 7.

**430. — Commissioners of customs.]**—All trading whatsoever between the subjects of the country declaring war & the country against which it is declared is wholly prohibited, & is totally & entirely illegal. The Crown alone can alter or relax that law, & it is not competent to any authority, save that by implication derived from the Crown, to relax the general prize law of the land.

During war between Great Britain & Russia, a Russian ship, coming into a British port under the protection of the Ords. in Council & discharging her cargo, instead of departing forthwith, was sold to a British subject & remained in a British port. Permission for the purchase had been given by the Comrs. of Customs:—**Held**: (1) no permission of the Comrs. of Customs could have the effect of legalising the sale of an enemy ship to a British subject in a British port, since no subordinate authority, or any authority short of the Crown, could change the prize law there or elsewhere; (2) the purchase of the ship by a British subject was a trading with the enemy not specially permitted by the Ords. in Council, & illegal.—**THE NEPTUNE** (1855), Spinks, 281.

**431. Alteration of licence—Proof of authority—Validity of licence as altered.]**—The limitation of time in the licence is a very important ingredient; if the party takes upon himself to extend the term of the licence, it is *licentia non sumpta pudenter*.

A licence had been originally granted for three months from its date; it was afterwards altered to three months from the date of the bill of lading:—**Held**: (1) the alteration was unsatisfactory; (2) the matter should be referred to another ct. composed of members of the Privy Council best

capable of judging of the sufficiency of the authority under which the alteration was made, & of the validity of the licence so altered.—**THE COSMOPOLITE** (1801), 4 Ch. Rob. 8.

**Annotations**:—**Refd.** *Robson v. Premier Oil & Pipe Line Co.*, [1915] 2 Ch. 124, C. A. **Mentd.** *The Panariellos* (1915), 84 L. J. P. 140; *Ertel Bieber v. Rio Tinto*, [1918] A. C. 260.

**432. Assignment of licence—Licence to named merchant to import goods being his property.]**—A licence to A. to import in neutral ships from an enemy's country, "goods being the property of" A., cannot be assigned, so as to authorise importation of goods the property of the assignee. **Qu.**: whether, if there is a special property remaining in A. as general consignee of the cargo, the licence is not then sufficient.—**FRIZE v. THOMPSON** (1808), 1 Taunt. 121; 127 E. R. 778.

**Annotations**:—**Refd.** *Morgan v. Oswald* (1812), 3 Taunt. 554. **Mentd.** *Bernstein v. Bernstein* (1893), 69 L. T. 513, C. A.

**433. Determination of licence—On conclusion of war—No revival on renewal of war.]**—A licence to trade with the enemy is terminated by conclusion of war, & is not revived by a subsequent war between the two belligerents.—**THE PLANTER'S WENSCH** (1803), 5 Ch. Rob. 22.

**434. Licence ineffective—Misdescription of grantee.]**—A wrong description of the person, to whom a licence from the Crown to trade with the enemy is granted, invalidates it; as where he was described to be "of London, merchant," whereas he was resident at the time at Heligoland, from whence he passed into Germany, intending to return immediately & settle in London.—**KLINGENDER v. BOND** (1811), 14 East, 484; 104 E. R. 687.

**Annotation**:—**N.F.** *Lemcke v. Vaughan* (1824), 1 Bing. 473.

**435. — Absence of fraud.]**—A misdescription of a party applying to the Crown for a licence to trade with an enemy, if made without fraud, does not vacate the licence, or vitiate a policy effected upon it.—**VAUGHAN v. LEMCKE** (1825), 7 Dow. & Ry. K. B. 236, Ex. Ch.

**436. — Fraudulent misdescription as to destination.]**—An Admiralty licence was obtained under Convoy Act, 1803 (c. 57), for a ship to sail without convoy, describing her as bound on a voyage to Gibraltar. In fact she sailed with instructions to make the best of her way direct to Palermo, without touching at Gibraltar, unless ordered into the bay by any cruisers she might meet in passing:—**Held**: (1) the licence was fraudulent & void, & would not legalise an insurance upon goods on board insured to Palermo, etc.; (2) the licence would not cover a loss which happened in the latter part of the voyage, though the ship did in fact go into Gibraltar, being compelled to it by stress of weather against the master's intentions, since if the Crown were deceived at the time of the licence granted, the licence could not be made good by what happened afterwards.—**INGHAM v. AGNEW** (1812), 15 East, 517; 104 E. R. 939.

**Annotation**:—**Appld.** *Darby v. Newton* (1816), 6 Taunt. 544.

**437. — Concealment that applicant was hostile trader.]**—**FLINDT v. SCOTT, FLINDT v. CROKATT**, No. 472, *post*.

**438. — Issued after capture.]**—A licence not granted till after the fact of capture, though bearing a previous date, can afford no protection, at any rate where, by mistake of the inferior officers of the Council, the licence granted on a renewed application is dated as of the day of a previous application which was refused.

A licence was applied for on Jan. 20, 1812, & was refused. The ship was captured on Jan. 24. Further application was made on Jan. 25 or 26 & was granted, the licence being dated Jan. 20:—**Held**: this did not protect the voyage.—**THE VROW DEBORAH** (1812), 1 Dods. 160.



**439. Granted after voyage commenced.]—**A prospective licence from the Crown for a voyage from an enemy's country, granted after the voyage has commenced, is insufficient to render it legal; but if the parties to a policy of insurance on such voyage contemplated obtaining a licence, & the risk was in fact believed to be legal, the premium may be recovered by the assured from the underwriters.—*HENRY v. STANFORTH* (1815), 4 Camp. 270.

**440. Conditions of licence must be complied with—Acts of hostile Government no excuse.]—**The violence of a hostile Govt. will not privilege persons to act in contravention of the essential terms of a British licence. The party must look for indemnification to the quarter from which he has received the injury.—*THE SEYERSTADT* (1813), 1 Dods. 241.

**441. — Substantial compliance—Condition as to indorsement of clearance date.]—**A licence to import goods from an enemy port required the date of the ship's clearance from such port to be indorsed thereon. If the defence in an action upon a policy insuring the goods is that this indorsement was not truly made, it is incumbent on deft. to prove what a clearance is, & the discrepancy between the real date of the clearance & the date indorsed. If the date be indorsed as the 17th & the real date of the clearance is the 20th:—*Semble*: it is a substantial compliance with the condition.—*MORGAN v. OSWALD* (1812), 3 Taunt. 554; 128 E. R. 219.

*Annotations*:—*Refd.* Flindt v. Scott (1814), 5 Taunt. 674. *Lemcke v. Vaughan* (1824), 1 Bing. 473. *Mentd.* Robinson v. Imray (1813), 1 M. & S. 217; Robinson v. Morris (1814), 5 Taunt. 720.

**442. Security to be given by merchant exporter Security given by manufacturer & licensee.]—**A licence for exportation of gunpowder was granted on the petition of A. on behalf of himself & others, on condition that the merchant exporter should give a certain security therein mentioned. A., the manufacturer of the gunpowder, sold it to C., & contracted to deliver it free on board a ship:—*Held*: (1) the condition of the licence was not complied with by A.'s giving the required security, he not being the merchant exporter within the licence; (2) the ship having been captured, C. could not recover on a policy on the gunpowder.—*CAMELO v. BRITTEN* (1820), 4 B. & Ald. 184; 106 E. R. 906.

**443. Effect of licence—Granted same day as blockade notified.]—**A licence to import Spanish wool from Holland was granted on the same day as a notification of the blockade of that country:—*Held*: it must be presumed it was intended the parties should have full benefit of importing the articles mentioned without molestation.—*THE HOFFNUNG* (1799), 2 Ch. Rob. 161.

**444. — On contract made in anticipation of licence—Guarantee.]—**The provisions of 43 Geo. 3, c. 153, s. 15, empowered the King by Ord. in Council to license importation of certain goods, British or neutral property, from the enemy's country in neutral ships. A contract was made by A. & B., plffs., British subjects, for the purchase of brandy from G. & W., merchants, of France (an enemy), to be shipped thence in a neutral ship on account of plffs. The contract was made in contemplation of obtaining a licence for that purpose, & the licence was obtained soon after the making of the contract & before it was begun to be executed:—*Held*: (1) it was a legal contract & might lawfully be guaranteed before the licence by defts., C. & D., other British subjects; (2) after such licence obtained the guarantors were liable in damages for non-shipment of the goods by the house in France on board a neutral ship sent there

for that purpose.—*TIMSON v. MERAC* (1807), 9 East, 35; 103 E. R. 486.

**445. — Granted to alien enemy resident in Great Britain.]—**A native Spaniard, domiciled in Great Britain in time of war between Great Britain & Spain, had a licence from the Crown in general terms to ship goods in a neutral vessel from Poole to Bilboa or Santander. In an action on a policy of insurance effected by him on goods covered by the licence:—*Held*: (1) such commerce was legalised for all purposes of its due & effectual prosecution, & the Crown in licensing the end impliedly licensed all the ordinary legitimate means of attaining that end; (2) the insurance was legal, & plff. entitled to sue.—*USPARICHA v. NOBLE* (1811), 13 East, 332; 104 E. R. 398.

*Annotations*:—*Apld.* De Tastet v. Taylor (1812), 4 Taunt. 233. *Distd.* Flindt v. Scott (1812), 15 East, 525. *Consd.* Mennett v. Bonham (1812), 15 East, 477. *Foll.* Morgan v. Oswald (1812), 3 Taunt. 554. *Mentd.* Aubert v. Gray (1862), 7 L. T. 469, Ex. Ch.

**446. — Permission inferred to proceed abroad without losing status.]—**Although an Ord. in Council, licensing a party to export & import certain goods to & from an enemy's country, does not expressly authorise his residence & trading in the enemy's country, yet, if he be there for the fair purposes of his licence, he retains his British character & can sue & present a petition in bkpcy.—*Ex p.* BAGLEHOLE (1812), 18 Ves. 525; 1 Rose, 271; 34 E. R. 417.

*Annotation*:—*Mentd.* Ertel Bieber v. Rio Tinto, [1918] A. C. 260.

**447. — To import—Implied right of unpaid enemy vendor to stop in transitu.]—**A licence from the Crown to British merchants to send a ship in ballast to an enemy's port, there to receive & load a cargo, & import it into England, by legalising the purchase by the subject, legalises the sale by the enemy, & impliedly legalises the vendor enemy's right to stop the goods *in transitu* after their arrival in port there, upon the intermediate insolvency of the vendees.—*FENTON v. PEARSON* (1812), 15 East, 419; 104 E. R. 903.

*Annotations*:—*Apld.* Morgan v. Oswald (1812), 3 Taunt. 554; Robinson v. Morris (1814), 5 Taunt. 720. *Consd.* Flindt v. Scott (1814), 5 Taunt. 674. *Refd.* Mennett v. Bonham (1812), 15 East, 477.

**448. — Seizure of goods by neutral Government.]—**Two neutral Prussians, one of them resident in England, the other at Königsberg, having a licence to export to all Baltic ports, some whereof were hostile, are not precluded from recovering on an insurance of goods exported & confiscated by an act of the Prussian Govt., then neutral.—*ANTHONY v. MOLINE, ANTHONY v. WATERS* (1814), 5 Taunt. 711; 128 E. R. 870.

**449. — Granted for limited purpose.]—**Two c.i.f. contracts for the sale of beans to be shipped from Chinese ports to Naples & Rotterdam respectively each contained a provision that payment was to be in net cash in London on arrival of the goods at port of discharge in exchange for bills of lading & policies of insurance, but payment was to be made in no case later than three months from date of bills of lading or upon the posting of the vessel at Lloyd's as a total loss. The beans were shipped in July, 1914, on German vessels, which on the outbreak of war between Great Britain & Germany on Aug. 4, 1914, entered ports of refuge in the East, where they remained. At the expiration of three months from the date of the bills of lading the sellers tendered to the buyers the shipping documents, in one case a German bill of lading & an English policy of insurance, & in the other a German bill of lading & a German policy of insurance. The buyers in each case refused to accept the tender & pay the price:—*Held*: the



**Sect. 5.—Trading under Crown licence: Sub-sects. 1 & 2, A.]**

licence granted by the Board of Trade on Sept. 25, 1914, to British owners of cargo lying in a neutral port in an enemy ship to pay freight & other necessary charges to the agent of the shipowner at such port, for the purpose of obtaining possession of the cargo, did not make the contract of affreightment valid as to any further execution, or indeed since the declaration of war.—**KARBERG (ARNHOLD & Co. v. BLYTHE, GREEN, JOURDAIN & Co., SCHNEIDER (THEODOR) & Co. v. BURGETT & NEWSAM**, [1916] 1 K. B. 495; 85 L. J. K. B. 114 L. T. 152; 32 T. L. R. 186; 60 Sol. Jo. 156; 21 Com. Cas. 174, C. A.

**Annotations:—Mentd.** *Wels v. Crédit Colonial et Commercial* (1915), 114 L. T. 168; *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1917] 1 K. B. 320, C. A.; *Mambré Saccharine Co. v. Corn Products Co.*, [1918] 1 K. B. 198.

— **Licence construed liberally.]—See Nos.** 460, 464, 481, 491, 497, 510, 511, *post*.

**450. Pleading exemption under licence.]—Where** a licence is relied on to create a privileged exemption in favour of any particular transaction, it is necessary the licence should be distinctly alleged & proved.—**THE NAYADE** (1802), 4 Ch. Rob. 251.

**Annotations:—Mentd.** *The San Spiridione* (1856), 28 L. T. O. S. 205; *The Teutonia* (1871), L. R. 3 A. & E. 394.

**451. Loss of licence—Parol evidence of contents—Use of note to refresh memory.]—A** licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, & did not know what had become of it:—**Held**: (1) this was reasonable & probable evidence of the loss of the licence, so as to let in parol evidence of its contents; (2) the witness might speak as to the contents of the licence from memory, though he had made an entry of it in his memorandum book for the private information of himself & the governor, which was not produced, he having given it to the governor, who was gone abroad without returning it to him; (3) such book, if in et., would not have been evidence *per se*, but could only have been used by the witness to refresh his memory.—**KENSINGTON v. INGLIS** (1807), 8 East, 273; 103 E. R. 316.

**Annotations:—Mentd.** *De Tastet v. Taylor* (1812), 4 Taunt. 233; *Flindt v. Waters* (1812), 15 East, 260; *Willison v. Patteson* (1817), 1 Moore, C. P. 133; *Weir v. Aberdeen* (1819), 2 B. & Ald. 319; *Bacon v. Simpson* (1837), 3 M. & W. 78; *Schmitz v. Van Der Veen* (1915), 84 L. J. K. B. 861; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**452. — Secondary evidence—Register of Secretary of State.]—If** a licence to trade is lost, the next best evidence is the register of it in the books of the Secretary of State.—**RHIND v. WILKINSON** (1810), 2 Taunt. 237; 127 E. R. 1068.

**Annotations:—Mentd.** *Abithol v. Bristow* (1816), 6 Taunt. 464; *Doxford v. King* (1846), 8 L. T. O. S. 190.

**453. — Copies.]—When** a ship insured is captured in a voyage to an enemy's country, & the British licence legalising the voyage is lost, to show she had such licence it is necessary to prove the loss of the paper purporting to be a licence put on board & to produce examined copies of the Ord. in Council granting the licence, & of the copy of the licence preserved in the Secretary of State's office.—**EYRE v. PALSGRAVE** (1811), 2 Camp. 605.

**SUB-SECT. 2.—CONSTRUCTION.**

**A. Whose Goods Protected.**

**454. Licence in general terms—Whether enemy property protected.]—An** American ship bound from Senegal (an enemy's colony) to London carried a

cargo of grain for account of British & neutral owners under a Crown licence. The ship having been captured, it was found by the Prize Ct. that part of the cargo was enemy property, & it was condemned:—**Held**: (1) property imported on account of an enemy was not protected by a general licence; (2) the condemnation was right.—**THE JOSEPHINE** (1810), 1 Act. 313; 12 E. R. 121.

**Annotations:—Refd.** *Flindt v. Crockatt* (1812), 15 East, 522. **Mentd.** *The Hendrick* (1810), 1 Act. 322.

**455. — Not necessarily restricted to applicant.]—A** licence granted at A.'s request is not necessarily restricted to trading by him, unless it is a licence given to him by name.—**THE HENDRICK** (1810), 1 Act. 322; 12 E. R. 125.

**Annotation:—Mentd.** *Flindt v. Crockatt* (1812), 15 East, 522.

**456. Licence to "British subjects"—Limited to British merchants.]—The** Crown may exempt any individual from the operation of a state of war, but unless there are express words to this effect to be found in a licence, its meaning will be construed as giving such liberty only to subjects of Great Britain; & a licence to "British subjects" to import, etc., means they are to import on their own account, & does not extend to importation on the account of other than British merchants.—**THE HOFFNUNG** (1799), 2 Ch. Rob. 161.

**457. Licence to named merchants, their agents or bearer of bills of lading—Necessity for disclaiming enemy interest.]—A** licence was granted to A. & Co., of London, or their agents, or the bearer of their bills of lading, to import Spanish wool from Bilbao on neutral vessels:—**Held**: the terms of the licence did not exempt A. & Co., in claiming goods under it, from negating enemy interest in the claim, & they were bound to certify that the goods were not the property of an enemy.—**THE BEURSE VAN KONINGSBERG** (1800), 2 Ch. Rob. 169.

**458. — Effective bills of lading granted to persons other than licensees.]—When** a licence is granted to one person, it cannot be extended to the protection of all other persons permitted by that person to take advantage of it. Subjects are not to trade with the enemy without the Govt.'s special permission; & a material object of the control which the Govt. exercises over such a trade is that it may judge of the particular persons fit to be intrusted with an exemption from ordinary restrictions of a state of war.

A cargo of flax captured while on a voyage from Rotterdam to ports in the north of England was consigned to sundry merchants there, by bills of lading, expressing their account & risk. A claim was given for the various proprietors by one of the partners of B. & S., of London, stating that a licence had been taken out for this shipment by the firm in consequence of letters from their correspondents. B. & S. had obtained a licence to import as for themselves, their agents, or the bearer of their bills of lading:—**Held**: claimants were not within the protection of the licence, because (1) B. & S. were not the importers, since the real & effective bills of lading consigned the goods to other persons; (2) they were not the agents of B. & S.; (3) they derived, in the circumstances, no title from bills of lading transferred from B. & S.—**THE JONGE JOHANNES** (1802), 4 Ch. Rob. 263.

**Annotation:—Mentd.** *Vaughan v. Lemeke* (1825), 7 Dow. & Ry. K. B. 236.

**459. Licence to named merchant "& Co."—Who included.]—Where** a licence was taken by A. for himself "& Co.," & A. made oath in subsequent proceedings that he intended to include certain other persons:—**Held**: as a matter of indulgence, the licence was taken in an abbreviated form, & in

effect included the intended persons.—*THE CHRISTINA SOPHIA* (1801), cited 4 Ch. Rob. 12, 267.

*Annotations* : **Distd.** *The Jonge Johannes* (1802), 4 Ch. Rob. 263. **Mentd.** *The Cosmopolite* (1801), 4 Ch. Rob. 8; *Fayle v. Bourdillon* (1811), 3 Taunt. 546.

**460. Licence to British merchant—Double commercial domicile—Goods shipped by licensee as enemy merchant.**—A licence to a British merchant to import from Holland, then an enemy country, did not protect shipments made by him in person in Holland, as a merchant of that country.

A licence was granted to R., of Birmingham, "for importation from Holland of certain goods, being his property":—*Held*: goods shipped for B., "but at the risk of R. during the voyage," were within the words of the licence "being his property."

If trade with the enemy is generally unlawful, it is not in the ct.'s power to admit it, beyond the degree fairly described in the terms of the licence. The ct. is not disposed to narrow the operation of a licence, especially under the severe pressure British commerce sustains in war; but it cannot bend principles of law for relief of merchants thus placed in difficulty (*per CUR.*).—*THE JONGE KLAS-SINA* (1804), 5 Ch. Rob. 296.

*Annotations* :—**Refd.** *Janson v. Driefontein Consolidated Mines* (1902), 71 L. J. K. B. 857, H. L.; *Oreouera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *The Hypatia*, [1917] P. 36. **Mentd.** *The Lutzow*, [1918] A. C. 435, P. C.

**461. Shipment by firm containing neutral partners—Subsequently becoming alien enemies.**—

A licence to export to Archangel was granted to ship's brokers on behalf of British merchants. The cargo was purchased by A., by domicile a British merchant, & shipped on the joint account of himself & his two partners B. & C. The latter were then neutrals, but before action brought became enemies. The cargo was lost by capture & confiscation. In an action on the policy of insurance:—*Held*: (1) the licence legalised the adventure & covered the interest of A.'s partners as well as his own, especially as since the war he was in fact sole purchaser; (2) since plff. on the record was not an alien enemy, it was no objection that he was suing for an alien enemy protected by a licence.—*DE TASTET v. TAYLOR* (1812), 1 Taunt. 233; 128 E. R. 318.

*Annotation* :—**Refd.** *Schmitz v. Van Der Veen* (1915), 84 L. J. K. B. 861.

**462. Whether enemy property protected.**—

A licence was granted to A., a British resident merchant, permitting a vessel, bearing any flag except the French, to proceed in ballast from any port north of the Scheldt to Archangel, there to load a cargo of such goods as were permitted by law to be imported, & proceed with same to a port in the United Kingdom:—*Held*: (1) the licence was not confined personally to A., or any particular class of persons; (2) Russian subjects at Archangel, who were alien enemies, & had shipped goods under such licence for the purpose of being brought into England, were protected by it; (3) an insurance made for their benefit was legal.—*ROBINSON v. TOURAY* (1813), 1 M. & S. 217; 105 E. R. 81.

*Annotations* : **Folld.** *Hullman v. Whitmore, Hullman v. Scott* (1815), 3 M. & S. 337. **Refd.** *Flindt v. Scott* (1814), 5 Taunt. 674; *Rucker v. Ansley* (1816), 5 M. & S. 25. **Mentd.** *Ionides v. Pacific Fire & Marine Insee.* (1871), 25 L. T. 490.

**463. S. P. ROBINSON v. CHEESEWRIGHT** (1813), 1 M. & S. 220; 105 E. R. 83.

**464. ———.**—A licence was granted upon the representation of A., on behalf of different British merchants, for permitting a named ship to proceed under any colours, except the French, with

a cargo of such goods as were permitted by an Ord. in Council to be exported from London to any ports within certain limits, the whole of the country within those limits being in hostility with England:—*Held*: (1) the licence protected the property of an alien enemy residing in the hostile country shipped on his account in this country; (2) an insurance for his benefit was legal.

It is not a correct rule of construction that, if there are no express words permitting an alien interest, the ct. cannot decide in favour of such interest except upon inevitable inference to be drawn from the licence. Certain checks were imposed by the terms of the licence, & it was fair to conclude that no other restraints were intended (*per CUR.*).—*HULLMAN v. WHITMORE, HULLMAN v. SCOTT* (1815), 3 M. & S. 337; 105 E. R. 638.

*Annotation* :—**Refd.** *Rucker v. Ansley* (1816), 5 M. & S. 25.

**465. ——— Evidence of connection with licence necessary.**—An importation from a hostile port by B., an alien enemy there resident, may be legalised by a licence to W., on behalf of British merchants, for a ship not named. But in order so to legalise it, it is not sufficient the ship's name should be indorsed on the licence at the hostile port of loading; evidence must be given connecting B. with the licence, & in the absence of such evidence the voyage is not legal, & an action will not lie on a policy of insurance effected on behalf of B.—*ROBINSON v. MORRIS* (1814), 5 Taunt. 720; 123 E. R. 874.

**466. Licence to named merchants "& other British merchants"—Owners specified in bills of lading—Property in goods shipped.**—A licence was granted permitting T. M. & Co. "& other British merchants" to import certain goods from any port of France, "being the property of the said persons or some of them, as may be specified in their bills of lading." T. M. & Co. did not themselves import goods, but guaranteed a contract by G. & Co., French merchants, to ship them on account of plffs. The goods were not shipped. In an action against T. M. & Co. as to the guarantee, it was objected that the licence did not legalise the trade since it was not made out to plffs. by name, & that neither plffs. nor T. M. & Co. had any property in the goods:—*Held*: (1) the protection of the licence was not confined to T. M. & Co., the persons specifically named, but included other British merchants to whom the goods belonged, & the property would have been in plffs. on shipment & importation; (2) the contract by G. & Co. was valid & the guarantee was valid.—*TIMSON v. MERAC* (1807), 9 East, 35; 103 E. R. 486.

**467. ——— Licensee agent of persons interested.**—A licence to export goods to certain places within the enemy's influence & interdicted to British commerce, granted to A. on behalf of himself "& other British merchants," etc., is sufficient to legalise an insurance on such adventure, if it appear A. was the agent employed by the British merchants really interested in it to get the licence, though he had no property in the goods himself.—*RAWLINSON v. JANSON* (1810), 12 East, 223; 104 E. R. 87.

**468. ——— Whether enemy property protected.**—If an alien enemy, commorant here under the King's licence to reside here, purchases goods for exportation, the exportation thereof by him, after his licence to reside has ceased, is not protected by a licence to trade, also obtained after his licence to reside has ceased, authorising exportation of the identical goods by B. & K. or other British merchants.—*WARIN v. SCOTT* (1812), 4 Taunt. 605; 128 E. R. 467.

*Annotation* :—**Consd.** *Lemcke v. Vaughan* (1824), 1 Bing. 473.

**Sect. 5.—Trading under Crown licence: Sub-sect. 2, A. B.]**

**469. Licence to named merchants “& others” — Connection of “others” with licence must be shown.]**—A licence was granted permitting six neutral vessels, under neutral flags, to pass unmolested to or from any port of Holland (then an enemy) from or to any port of the United Kingdom with certain goods. It was provided that A. “& other British merchants,” to whom the licence might be granted, should cause it to be delivered up to them or their agents, whenever the ship should enter any port of the United Kingdom. The licence was addressed to A. “& others.” A British merchant, other than A., interested in insurance of goods which it was claimed were protected by the licence, proved possession of the licence before the voyage commenced, & produced it at the trial:—*Held*: (1) not sufficient to entitle him to the benefit of the licence; (2) there must also be probable evidence to account for his possession of the licence, & to show his user of it was lawful, as by showing from whom & when he received it, & thereby connecting his own particular adventure with such general licence.—*BARLOW v. M'INTOSH* (1810), 12 East, 311; 104 E. R. 122.

**470. ———.]**—A licence to trade with an enemy granted to A. & Co. “& others” may be used by the person for whom A. & Co. were acting as agents in procuring such licence & in carrying on the adventure, though the person was a foreigner residing here under an alien licence at the time. The rule is that the “others” using the licence must connect themselves with the person to whom it is particularly granted.—*FEISE v. NEWNHAM* (1812), 16 East, 197; 104 E. R. 1063.

**471. ——— Whether “others” includes enemies.]**—A licence granted to P. B. & S., British merchants residing here, although not so stated in the licence, on behalf of themselves & others, to export goods on board a certain vessel, bearing any flag except the French, from London to any port in the Baltic, of which most were hostile, but some neutral:—*Held*: not to warrant an export of goods, which were property at the time of shipment of an alien enemy, a Russian residing at St. Petersburg, then a hostile port of the Baltic, to which place the cargo was consigned & at whose desire the licence was obtained by P. B. & S., since, construing the licence according to the fair meaning of the words used, P. B. & S. were to be taken to be British subjects, & “others” meant persons *ejusdem generis*, & did not include an alien enemy resident in the enemy country.—*MENNETT v. BONHAM* (1812), 15 East, 477; 104 E. R. 924.

**Annotations:—***Dbtd.* Vaughan v. Lemeke (1825), 7 Dow. & Ry. K. B. 236. *Mentd.* Robinson v. Morris (1814), 5 Taunt. 720.

**472. ———.]**—A licence was granted to G. F. & Co., of London, merchants, on behalf of themselves & others, to export on board a ship named, bearing any flag except the French, to a hostile port & to import from thence specified goods, notwithstanding all the documents might represent the ship to be destined to a neutral or hostile port, & to whomsoever such property might appear to belong:—*Held*: (1) the licence authorised an enemy subject of the hostile country to which the ship was licensed legally to export from London; (2) it legalised an insurance made by his agent here for his benefit; (3) it was no objection to his agent's recovering for his use that the loss was occasioned by the act of the hostile trader's own State, as he separated himself from those acts by engaging in the traffic thus licensed; (4) although the agent, in obtaining the licence, did not represent that he applied on behalf of a hostile trader, the concealment did not vacate the licence,

vitiating the policy.—*FLINDT v. SCOTT, FLINDT v. CROKATT* (1814), 5 Taunt. 674; 128 E. R. 856.

**Annotations:—***Folld.* Anthony v. Moline (1814), 5 Taunt. 711; *Schnakoneg v. Andrews* (1814), 5 Taunt. 716. *Apld.* Robinson v. Morris (1814), 5 Taunt. 720. *Mentd.* Bazett v. Meyer (1814), 5 Taunt. 824; Vaughan v. Lemeke (1825), 7 Dow. & Ry. K. B. 236; Aubert v. Gray (1862), 32 L. J. Q. B. 50, Ex. Ch.

**473. Licence to named merchants—Connection of other parties with licence must be shown.]**—During war with Russia a licence was issued in pursuance of an Ord. in Council to R. C. & Co., of London, merchants, permitting them to export a cargo of British manufactures by a named vessel to any Baltic port, & to import thence a cargo of grain. In an action on a policy of insurance on goods by this ship from St. Petersburg to London, interest in the goods was averred to be in D. B. & G., British merchants, Wakefield, Yorkshire:—*Held*: evidence was necessary to connect D. B. & G. with the licensees, as by showing that the licensees were their agents.—*BUSK v. BELL* (1812), 16 East, 3; 104 E. R. 990.

**Annotation:—***Apld.* Robinson v. Morris (1814), 5 Taunt. 720.

**474. Licence to named merchant & “other British or neutral merchants” —Whether enemy interest protected.]**—A licence was granted to A., of London, merchant, on behalf of himself & other British or neutral merchants, to import a cargo from certain limits, within which an enemy's port was situate, in any vessel bearing any flag except the French:—*Held*: (1) the licence protected a ship trading from that port, in which ship A. & an alien enemy domiciled in Denmark were jointly interested; (2) such interest was insurable.—*HAGEDORN v. REID* (1813), 1 M. & S. 567; 3 Camp. 377; 105 E. R. 212.

**Annotations:—***Distd.* Grigg v. Scott (1815), 4 Camp. 339. *Consd.* Lemeke v. Vaughan (1824), 1 Bing. 473. *Mentd.* Doe d. Pattoshall v. Turford (1832), 3 B. & Ad. 890.

**475. ———.]**—A licence was granted to H., on behalf of himself & other British & neutral merchants, permitting a vessel bearing any flag except the French to import a cargo from certain limits, within which an enemy's port was situate. The ship was loaded with a cargo on British & neutral account, & S., an alien enemy, was interested, apparently as consignor. H. effected an insurance for all persons concerned, & a loss happened. Two years afterwards S. adopted the insurance:—*Held*: S. entitled to the benefit of the insurance, & H. could enforce it on his behalf.—*HAGEDORN v. OLIVERSON* (1814), 2 M. & S. 485; 105 E. R. 461.

**Annotations:—***Mentd.* Hull v. Pickersgill (1819), 1 Brod. & Bing. 282; Cary v. Patton (1874), L. R. 9 Q. B. 577; Bolton Partners v. Lambert (1889), 41 Ch. D. 295; *Re* Portugal Consolidated Copper Mines, Badman's & Bosanquet's Cases (1890), 39 W. R. 25, C. A.

**476. Whether enemy property protected.]**—A licence was granted to A. & B., on behalf of themselves & “other British or neutral merchants,” permitting a named vessel to sail in ballast from London to Holland, then in a state of hostility, notwithstanding anything contained in an Ord. of Council, which prohibited all vessels from sailing to any port within the district to which the ship was bound:—*Held*: not to protect a ship which was the property of an alien enemy, since, although the Crown might grant a licence to an alien enemy, & legalise the voyage, the licence was intended only to remove the disability occasioned by the Ord. in Council.—*GREGG (GRIGG) v. SCOTT* (1815), Holt, N. P. 129; 4 Camp. 339.

**477. ———.]**—A licence to shipbrokers in London, on behalf of themselves & British or neutral merchants, to load & export a cargo on board a named Russian ship from London to any port in the



Baltic not under blockade:—*Held*: to protect Russian property exported from this country on a voyage to a Russian port, Russia being at war with Great Britain.—*RUCKER v. ANSLEY* (1816), 5 M. & S. 25; 105 E. R. 961.

*Annotation*:—*Mentd.* *Clemontson v. Blessig* (1855), 11 Exch. 135.

**478. Licence to trade to & from named port—Enemy interested in export as well as in import cargo.**—Under a licence to a British merchant by name, on behalf of himself & others, to export to P. & to import a cargo thence, an alien enemy may lawfully be interested in the export as well as in the import cargo.—*FEISE v. BELL* (1811), 4 Taunt. 4; 128 E. R. 227.

*Annotation*:—*Consd.* *Flindt v. Scott* (1814), 5 Taunt. 674.

**479. Licence to import goods to whomsoever belonging—Goods of British firm—Partner resident in enemy country.**—A licence was granted to British brokers, F. & Co., resident here, permitting a ship bearing any flag to import from an enemy country (Russia) to whomsoever the property might appear to belong. Goods belonging to three partners, British subjects, one of whom resided at Hamburg, which was also hostile, were loaded at St. Petersburg under the licence, & consigned to F. & Co. The latter effected the insurance & were the consignees, but they were not interested in the goods, which were lost on the voyage to England:—*Held*: (1) the licence legalised the voyage; (2) F. & Co. could recover on the insurance.—*FAYLE v. BOURDILLON* (1811), 3 Taunt. 516; 128 E. R. 216.

**480. Licence to export goods to whomsoever belonging—Restriction as to destination.**—A licence to F. & Co., obtained by them as pltf.'s agents, permitting them to export in a ship named, bearing any flag except the French, specified goods from London to Dantzic or any port in the Baltic not blockaded, though the documents might represent her destination to any neutral or hostile port, & to whomsoever the property might appear to belong, protects a consignment made by a Prussian neutral alien, resident here by licence under 33 Geo. 3, c. 4, to a hostile Russian port of the Baltic; & pltf., having insured, may recover for a total loss occasioned by the act of the Govt. of Prussia, the country of which he was a native, by seizure in a Prussian port, whither the ship was driven by stress of weather.—*SCHNAKONEG v. ANDREWS* (1814), 5 Taunt. 716; 128 E. R. 872.

**481. Position of agent of necessity.**—A ship was taken on a voyage from Antwerp to London, & claimed by A. & Co. as property which had been accepted by B., their agent, at Antwerp, for their account, in satisfaction of a debt due to them from bkpt. estate of a merchant of that place, under a licence obtained by them for that purpose in Feb., 1805. B. gave a bond to the French Govt. for restitution of the ship at the conclusion of war:—*Held*: (1) this circumstance, if known, ought to have been disclosed to Govt. at the time of obtaining the licence; (2) since the licence was obtained in Feb., & the first mention of the bond was not till the May following, what had been done was agreeable to the intention of Govt.; (3) the parties were not to purchase, but to take from a bkpt.'s estate.

When Govt. grants a licence it must be supposed to grant all that is necessary to carry it into effect. The claimants could not go to Antwerp themselves; they were under the necessity of employing an agent; he, acting as their mandatory, under the licence, might be entitled to recover against them, though an alien enemy, a full indemnification for the terms of the assignment. They would be answerable to him if the bonds were put in suit, on their refusal to redeliver the vessel. In acceding

to the terms of the bond the claimants would do no more than they were bound to do for the indemnification of their agent, & were entitled, under the fair construction of the licence, to accept the ship upon these terms, as the only terms, perhaps, upon which it could be obtained (*per CUR.*).—*THE CLIO* (*alias THE WILLIAM PITT*) (1805), 6 Ch. Rob. 67.

#### *B. What Goods protected.*

**482. Licence to import—Not limited to raw materials.**—A licence may include not merely raw materials for the necessary employment of the skill & labour of British artisans, but the finished productions of foreign industry & art, which may come in competition with British articles.—*THE CHRISTINA SOPHIA* (1801), unreported, cited 4 Ch. Rob. 12.

*Annotations*:—*Consd.* *The Cosmopolite* (1801), 4 Ch. Rob. 8. *Mentd.* *The Jonge Johannes* (1802), 4 Ch. Rob. 263.

**483. — Goods specified in bill of lading—Particular bills of lading to individual consignees—General bill of lading to licensee.**—A licence was obtained from the British Govt. by A. to import from an enemy's country in six ships "such goods as should be specified in his bills of lading." Goods were imported on one of the six ships on account of B., C. & D., to whom several bills of lading were sent for their respective goods, & one general bill of lading for the whole cargo was sent to A.:—*Held*: the whole cargo was protected.—*DEFFLIS v. PARRY* (1802), 3 Bos. & P. 3; 127 E. R. 2.

*Annotations*:—*Apld.* *Fayle v. Bourdillon* (1811), 3 Taunt. 516. *Refd.* *Feise v. Waters* (1810), 2 Taunt. 248; *De Tastet v. Taylor* (1812), 4 Taunt. 233.

**484. — — — — —**—Under a licence to A. to import goods, "the property of" A., as specified in his bills of lading, if the goods be consigned to others with particular bills of lading, a general bill of lading signed to A., without proof of some special interest in A. in the goods, will not entitle the consignment to the benefit of the licence. Otherwise, if A. had had a special property in the goods.—*FEISE v. WATERS* (1810), 2 Taunt. 248; 127 E. R. 1072.

**485. — Raw materials—Manufactured goods ordered before war—No time for countermand.**—Lace is not properly included under a licence for raw materials, but the ct. ordered the lace to be restored on proof that it was a work of long & slow process, that more time was required to countermand, that, during hostilities, there had been a more than ordinary difficulty in carrying on any correspondence with the enemy's countries, & that the orders had been given previous to the war.—*THE JUFFROW CATHARINA* (1801), 5 Ch. Rob. 141.

*Annotation*:—*Refd.* *Esposito v. Bowden* (1857), 7 E. & B. 763, Ex. Ch.

**— Severance of licensed & unlicensed goods.**—If a vessel brings under a licence from an enemy country a cargo of goods specified in the licence, & also certain other goods not so specified, the insurance on the licensed goods is not thereby vitiated.—*PIESCHELL v. ALLNUTT*, *PIESCHELL v. LAVIE* (1813), 4 Taunt. 792; 128 E. R. 543.

*Annotation*:—*Refd.* *Keir v. Andrade* (1816), 2 Marsh. 196.

**487. Licence to export—Severance of licensed & unlicensed goods.**—Although a licence to pltf., of London, merchant, on behalf of himself & other British & neutral merchants, to export on board a certain vessel, bearing any flag except the French, a specified cargo from London to any port in the Baltic not under blockade, & to whomsoever the property may appear to belong, was held not to protect a part of the cargo which was the property of Russian subjects at the time of the shipment, Russia being then at war with England, so as to entitle pltf. to recover in respect of that part upon

*Sect. 5.—Trading under Crown licence: Sub-sect. 2, B. C. D. & E.]*

a policy effected by him as the agent for & by the orders of those Russian subjects, the loss being occasioned by seizure & confiscation in a Russian port by comrs. appointed by the Russian Govt., yet as the licence was also obtained & the policy effected by pltf. on his own account, & as agent for certain Hamburgers respectively interested in separate & distinct proportions of the cargo:—*Held*: pltf. entitled to recover in respect of his own interest & that of the Hamburgers, Hamburg being in a state of permissive neutrality with England.—*HAGEDORN v. BAZETT* (1813), 2 M. & S. 100; 105 E. R. 319.

*Annotation*:—*Refd.* *Rucker v. Ansley* (1816), 5 M. & S. 25.

**488. — Unauthorised goods sent—Ulterior neutral destination—Bona fides immaterial.**—Where a licence is given to the enemy's port for enumerated articles, & other articles, not inserted in the licence, are sent at the same time on the part of the British subject, such articles are subject to condemnation, notwithstanding an ulterior destination to a neutral port. Mere honesty of intention cannot be alleged as justification in such a course of transaction, which, if allowed, would leave no means of preventing fraud in an infinite number of other cases.—*THE FRIENDSHIP* (1801), 4 Ch. Rob. 96.

**489. — Permitted quantity exceeded—Protection of permitted quantity.**—At a time when exportation of gunpowder was prohibited by Royal Proclamation issued under statutory authority, an assured, licensed to export one hundred & fifty barrels of gunpowder, exported three hundred barrels:—*Held*: (1) exportation of one hundred & fifty barrels licensed was legal, & the insurance on them was legal; (2) he might recover against the underwriter their value.—*KEIR v. ANDRADE* (1816), 6 Taunt. 498; 2 Marsh. 196; 128 E. R. 1128.

**490. Licence to proceed in ballast—Cargo carried under compulsion of enemy.**—A licence to proceed in ballast to an enemy port, for the purpose of bringing a cargo from thence to England, will not protect the vessel carrying a cargo to a port of the enemy. The excuse that enemy authorities had compelled the master to take the cargo on board cannot be admitted. If it were, force would in all cases be employed, & in many collusively.—*THE CATHERINA MARIA* (1809), Edw. 337.

**491. Licence to proceed to hostile ports & bring home goods—Whether enemy goods protected.**—A licence to A., a British merchant, that a ship may go to a hostile port & bring home a cargo of goods, authorises importation of such goods, being the property of an alien enemy subject of that hostile country, & authorises an insurance of the goods on behalf of the alien enemy & enforcement of the contract of insurance in British cts. This species of licence has been considered an exception out of the general law, but it is now used to carry on a great part of the country's trade; unless it were so carried on, a great part of the trade must be lost, & for preserving it the licence ought to be construed liberally, not strictly, as in the case of a Crown grant (*LORD MANSFIELD, C.J.*).—*MORGAN v. OSWALD* (1812), 3 Taunt. 554; 128 E. R. 219.

*Annotations*:—*Folld.* *Robinson v. Towray* (1813), 1 M. & S. 217. *Consd.* *Flindt v. Scott* (1811), 5 Taunt. 674; *Leineke v. Vaughan* (1824), 1 Bing. 473. *Mentd.* *Robinson v. Morris* (1814), 5 Taunt. 720.

*C. Restrictions as to Time.*

**492. Voyage not completed by named day—Without fault of ship—Burden of proof.**—A voyage legalised in its commencement by a licence for four months which expires during the voyage may be legally finished, if special circumstances, not in the

power of the licensed person to control, clear of fraud & laches on his part, have protracted the voyage. It is incumbent on the assured to prove the special circumstances. It is not necessary that the ultimate port of discharge of a licensed ship should be specified in her clearance from Great Britain. If there are circumstances which will render the voyage legal beyond the time mentioned in the licence, they ought to be specified in such licence, & persons applying for a licence ought to apply for the full time within which a ship may with certainty be able to perform her voyage.—*LEEVIN v. CORMAC* (1811), 4 Taunt. 483; 128 E. R. 416.

**493. — — — — —.**—If a licence to trade be limited in duration to a certain day, & the vessel has not completed her voyage before the licence expires, it is incumbent on pltf. to prove that such due diligence had been used by the master of the vessel, that the adventure is still protected within the spirit of the licence. If there had been no default in the conduct of the vessel, the licence, though expired, would still have protected the adventure till its completion.—*FREELAND v. WALKER* (1812), 4 Taunt. 478; 128 E. R. 414.

**494. — Detention & deviation—Alteration of date—Bona fides.**—A voyage from Cuba to New Providence was not completed within the time limited by the licence, owing to detention by the enemy's privateers from a suspicion of having a British licence on board, & to the vessel deviating from the regular course to obtain provisions. The date of the licence had been altered, but without the master's knowledge:—*Held*: no fraud was attributable to the parties engaged in the transaction, which was duly conducted according to the tenor & effect of the licence.—*THE DIANA* (1811), 2 Act. 54; 12 E. R. 176.

**495. Voyage begun out of time—Unavoidable delay.**—A licence by the King in Council legalises the prosecution of the intended adventure after the time specified in the licence has expired, if the delay were caused by unavoidable necessity, whether the voyage protected commence after the licence expired or before.—*EFFURTH v. SMITH* (1814), 5 Taunt. 329; 128 E. R. 716.

**496. Importation—Shipment within limit—Sailing out of time.**—By 48 Geo. 3, c. 37, the Crown was empowered by Ord. in Council to permit the importation into Great Britain or Ireland of such goods as should be specified therein from any place, from which the British flag was excluded in any ship, whether belonging to a friendly country or not. By 49 Geo. 3, c. 60, it was made lawful under any Ord. in Council already issued or to be issued to import into the United Kingdom from any part of Europe or Africa, in any British or friendly ship, any goods which might be lawfully imported, the growth or produce of any country, on payment of duties, etc.:—*Held*: (1) though it was doubtful whether the former Act authorised an Ord. in Council licensing a British merchant, in general terms, to import a cargo "of such goods as are permitted by law to be imported (except German linens, stock-fish & oil)," yet an importation into Great Britain from a port of Russia under such a licence of such lawful goods in a neutral Hamburg ship was authorised by the latter Act; (2) an insurance on such goods for the voyage was legal, notwithstanding the licence was limited to be in force until Sept. 29, & the ship did not sail from the foreign port till Oct. 4, it appearing the goods were loaded on board by Sept. 12, & the adventure was then *bonâ fide* prosecuting under the licence, & the policy attaching at & from her loading port.—*SCHROEDER v. VAUX* (1812), 15 East, 52; 104 E. R. 764.

**497. Original cargo destroyed—Substituted**



**cargo loaded out of time.]**—Where the original cargo has been spoiled by unavoidable accident, the protection of a licence is not forfeited by taking in a fresh cargo of the same kind after the time for which the licence was granted had expired. The ct. puts a liberal interpretation on the intention of the Govt. & the acts of individuals under those intentions as expressed; & where the ship is in a distant port, & the foreign shippers are acting for persons in England without the ready means of communication with the principals, they are entitled to act so as not to render the licence abortive. In such a case there is no new speculation, nor any change, except such as is produced by time & unavoidable accidents.—*THE WOHLFORTH* (1813), 1 Dods. 305.

**498. ——— ——— ———.]**—A licence to trade, which is to expire on a certain day, will protect the adventure beyond that day if it be protracted by events which the licensed party cannot control.

Where a homeward cargo, shipped without laches after the licence expired, was, through perils of the sea, necessarily unladen in the course of the voyage & destroyed by fire on shore.—*Held*: the licence protected a cargo of other specified goods substituted for the cargo burnt.—*SIFFKIN v. GLOVER* (1813), 4 Taunt. 717; 128 E. R. 512.

**499. ——— Ship driven back by weather—Re-loading fresh cargo out of time.]**—A licence was granted to pltf. on May 25, 1810, to take a cargo from London to Archangel, & to return from thence with a cargo of grain & other goods permitted by law to be imported to any port of the United Kingdom, & the licence was limited to Sept. 29 following, which time was afterwards extended to Jan. 1, 1811. The ship, after taking in a cargo of pitch & tar at Archangel, sailed on her homeward voyage on Oct. 13, 1810, but was driven back to Archangel, there unloaded, her cargo sold, & the ship laid up for the winter; she did not sail again from thence with a cargo of wheat until Aug. 1, 1811:—*Held*: the licence was not exhausted by taking in the first cargo of pitch & tar, but would cover the cargo of wheat also, notwithstanding the time limited for its continuance had elapsed, provided it appeared the voyage was prosecuted with all reasonable dispatch, which was a question for the jury.—*SIFFKIN v. ALLNUTT* (1813), 1 M. & S. 39; 105 E. R. 15.

*Annotation*:—*Refd.* *Siffkin v. Glover* (1813), 4 Taunt. 717.

**500. Exportation—Shipment within limit—Sailing out of time.]**—If a licence to export & deliver goods to an enemy's country is granted for a limited time, it is not sufficient that the goods were shipped before expiration of the time, the ship not sailing till afterwards.—*VANDYCK v. WHITMORE* (1801), 1 East, 475; 102 E. R. 183.

**501. ——— Delay from accident—Clearing out of time.]**—Under a licence to export to a hostile country within a limited time, a ship cleared at the Custom-house in London on the day before the licence expired, but was delayed in the river by the breaking of a bowsprit, & did not obtain her clearing note at Gravesend till two days after expiration of the licence:—*Held*: (1) if a ship so licensed did not sail within the time limited by the licence, although delayed by accident, she was not protected by the licence; (2) the ship had not exported within the time limited; (3) there is a difference between a licence to export & a licence to import, & the former, if the time elapses, must be renewed, because the parties, being at home, can easily apply to renew.—*WILLIAMS v. MARSHALL* (1817), 1 Moore, C. P. 168; 7 Taunt. 468; 129 E. R. 188.

**502. ——— Delay from fear of enemy—Sailing out of time.]**—A licence was granted for two vessels, purchased for the purpose, sailing under any flag, to proceed from England to Holland with goods allowed by an Ord. in Council to be exported, to

cruise from one port of Holland to another, & to bring back goods allowed by same Ord. to be imported to England, the licence to be renewed on application by the parties at the return from each voyage during six months from July 2, 1807. The exporter, fearing the vigilance of the Govt. in Holland, where his trade was contraband, delayed to export until after expiration of the six months, & the ship then sailed & was captured:—*Held*: the parties being in England, & not applying for a renewed licence, the adventure was not legalised by the original licence.—*TULLOCH v. BOYD* (1817), 1 Moore, C. P. 174; 7 Taunt. 472, 475; 129 E. R.

#### *D. Restrictions as to Ship.*

**503. Neutral ship—Enemy ship.]**—A licence to import in a neutral vessel would be no licence for an importation in an enemy's vessel. But it is sufficient for the protection of the British importer of the cargo, if the ship is visibly & to all appearance neutral. If an enemy's ship comes under a licence granted only in terms to neutral vessels, she abuses the licence, & must be considered not as coming on the faith of this Govt., but as endeavouring fraudulently to take the benefit of a licence to which she is not entitled.—*THE HOFFNUNG* (1799), 2 Ch. Rob. 161.

**504. ——— British ship flying neutral flag.]**—A licence had been obtained by British subjects for importation of sundry articles from a port of the enemy "in neutral ships":—*Held*: (1) the licence being for importation on board a neutral ship could not afford protection to a British ship sailing under Prussian colours & claimed by a merchant of Emden; (2) the property was subject to condemnation.—*THE JONGE AREND* (1803), 5 Ch. Rob. 14.

**505. Named foreign ship—British interest therein—Ship appearing to be foreign.]**—A licence for a named foreign ship will not protect it, if it is in fact & in appearance British; but where the ship bears every appearance of being foreign, the ct. will not inquire whether there is any British interest in the ship.—*THE GUTE HOFFNUNG* (1813), 1 Dods. 251.

#### *E. Restrictions as to Port of Loading.*

**506. Port of loading changed—Necessity.]**—A licence was granted for importation of a cargo of brandy from the port of Charente to Hull, upon a representation that same had been purchased for account of several British merchants, & was then lying at Charente. The parties' agents in France finding it difficult, if not impossible, to export this cargo from Charente, caused part of the brandy to be carried over land to Bordeaux, where it was shipped on board a Dutch ship & a copy of the licence indorsed for her protection, the original not being arrived, stating the port of shipment as at Charente. The remainder of the cargo was afterwards shipped in another vessel from Charente, bearing the original licence, & arrived at Hull:—*Held*: the former shipment was protected by the licence.—*THE VROW CORNELIA* (1811), 2 Act. 68; 12 E. R. 181.

**507. Licence to sail in ballast from port north of Scheldt to foreign port to import.—Limitation not applicable to British port.]**—A licence to import from any port in Norway, or to sail in ballast from any port north of the Scheldt to any port in Norway, & in either case to import from thence, authorises by the first clause a sailing from a British port, whether north or south of the Scheldt, to Norway to fetch the cargo.—*LE CHEMINANT v. PEARSON, LE CHEMINANT v. ALLNUTT* (1812), 4 Taunt. 367; 128 E. R. 372.

*Annotations*:—*Mentd.* *Stewart v. Steele* (1842), 5 Scott, N. R. 927; *Kemp v. Halliday* (1866), 6 B. & S. 723; *Aitchison v. Lohre* (1879), 4 App. Cas. 755, H. L.



*Sect. 5.—Trading under Crown licence: Sub-sect. 2, E. & F. Part V. Sects. 1, 2 & 3.*

**508. — Sailing in ballast not necessary condition.]**—A licence was granted to sail in ballast from any port north of the Scheldt to Archangel, or any other port of the White Sea, there to take a cargo of specified goods & import them into the United Kingdom. A vessel, which had sailed from Great Britain to St. Petersburg with colonial produce, was employed under the licence to bring back a cargo of the specified goods:—*Held*: (1) the sailing in ballast from a port north of the Scheldt was not a necessary condition, but only permitted in order to facilitate the bringing home of the desired cargo; (2) the voyage was legalised by the licence.—*STANFORTH v. COOMBE* (1814), 5 Taunt. 726; 128 E. R. 876.

#### *F. Restrictions as to Destination.*

**509. Whether deviation justified—General rule.]**—A licence to one port of the United Kingdom will not protect a voyage to another port. An enemy, to whom a special permission to trade with the ports of England has been given, must comply strictly with the conditions under which that permission is granted. The only excuse for deviation from that course is the pressure of irresistible necessity. If the party is not within the terms of the licence, the character of enemy revives & the property is subject to confiscation.—*THE MANLY* (1813), 1 Dods. 257.

**510. — What amounts to deviation.]**—To shut up the ports of a country, & exclude neutrals from all commerce with it, is a great inconvenience upon them, although they are bound to submit to it. It is a harsh right, & though a licence is a privilege, licences in such a case are to be favourably regarded; it imports the good faith & honour of the Govt. which grants them not to press the letter too rigorously. A licence "to carry a cargo to the ports of the Vlie or elsewhere," with several provisions, amongst which there is no proviso that she shall come out again, does not prevent the licensee coming out again with a cargo, because that is a benefit incidental to the licence & inseparable from it. A ship that has entered previous to the blockade may only retire in ballast, or taking a cargo that had been put on board before the blockade.

An American vessel coming from America without any knowledge of the blockade of Amsterdam, bringing a cargo for that port, came to Falmouth, &

finding that the port of Amsterdam was under blockade petitioned for a licence, & obtained from the Govt. a licence to go to Amsterdam. The terms of the permission were "to the ports of the Vlie, Emden, Rotterdam, or elsewhere." The vessel was taken entering the Texel:—*Held*: a licence to go through the Vlie was not substantially violated by going through another passage, unless it was shown that it contained some specific prohibition as to other passages.—*THE JUNO* (1799), 2 Ch. Rob. 116.

**Licence not restricted by Order in Council.]**—If a licence is obtained, giving a neutral wider scope than the exceptions & conditions in the Ords. in Council give, & not referring thereto, he may avail himself of privileges conferred by the licence, & is not confined by restrictions contained in those Ords. Where an Ord. in Council legalised exportation of colonial produce by neutrals clearing out from England under such regulations as His Majesty should think fit to prescribe, which should be proceeding direct to the port specified in their clearance, & the licence authorised the vessel to proceed to Sweden or any port in the Baltic, though the clearance obtained named only Gottenburg:—*Held*: the licence, not being founded on the Ord. in Council, but on the general power of the Crown, authorised the vessel to proceed to Pillaw, a port in the Baltic.—*SPITTA v. WOODMAN* (1810), 2 Taunt. 416; 127 E. R. 1139.

*Annotations*:—**Mentd.** *Bell v. Hobson* (1812), 16 East, 240; *Horneyer v. Lushington* (1812), 15 East, 46; *Langhorn v. Hardy* (1812), 4 Taunt. 628; *Nonnen v. Reid*, *Nonnen v. Kettlewell* (1812), 16 East, 176; *Mellish v. Allnutt* (1813), 2 M. & S. 106; *Rickman v. Carstairs* (1833), 5 B. & Ad. 651; *Carr v. Montefiore* (1864), 5 B. & S. 408; *Joyce v. Realm Insee* (1872), L. R. 7 Q. B. 580; *Wells Fargo v. Pacific Insee* (1872), 2 Asp. M. L. C. 111.

**512. Return to port of departure—Return to intermediate port.]**—A voyage was insured from Bordeaux to London, warranted with a British & French licence. The ship had previously sailed from Dantzic to London & thence to Bordeaux with a French licence, which authorised that voyage & further allowed her to load at Bordeaux for the destination of the port from which she departed:—*Held*: (1) the port of departure was the port of original departure at commencement of the voyage, & the French licence did not cover the voyage from Bordeaux to London; (2) the warranty was not complied with, & the assured could not recover on a policy for the voyage.—*EVERTH v. TUNNO* (1817), 1 B. & Ald. 142; 106 E. R. 53.

## Part V.—Acquisition of British Nationality.

### SECT. 1.—DENIZATION.

**513. Power to grant.]**—The King can grant letters patent of denization to whom & how many he will; & this power to make aliens born subjects of the realm, & capable of inheriting the lands of England as natural-born subjects, is a point of high prerogative & cannot be severed from the Crown & vested elsewhere.—*CALVIN'S CASE* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; *Moore*, K. B. 790; *Jenk.* 306; 77 E. R. 377.

*Annotations*:—**Refd.** *Lyons Corpn. v. East India Co.* (1836), 1 Moo. Ind. App. 175, P. C. **Mentd.** *R. v. Hampden* (1637), 3 State Tr. 826; *Collingwood v. Pace* (1661), O. Bridg. 410; *Manby v. Scott* (1663), 1 Keb. 361; *Anon.* (1678), *Freem.* K. B. 249; *R. v. Tucker* (1692), 1 Ld. Raym. 1; *R. v. Knowles* (1693), 12 Mod. Rep. 55; *Owen v. Saunders* (1696), 1 Ld. Raym. 158; *Clayton v. Kinaston* (1697), 1 Ld. Raym. 419; *Scot v. Schawrtz* (1739), 2 Com. 677; *Omychund v. Barker* (1745), 1 Atk. 21; *R. v. Cowle* (1759), 2 Burr. 834; *Campbell v. Hall* (1774), 1 Cowp. 204; *Queen Caroline's Claim to be Crowned* (1821), 1 St.

*Tr. N. S.* 919, C. A.; *Ruding v. Smith* (1821), 2 Hag. Con. 371; *Jephson v. Riera* (1835), 3 Knapp, 130; *Lane v. Bennett* (1836), 1 M. & W. 70; *Birtwhistle v. Vardill* (1840), 7 Cl. & Fin. 895, H. L.; *Brunswick v. Hanover* (1844), 6 Beav. 1; *Taylor v. Best* (1854), 14 C. B. 487; *Rittson v. Stordy* (1855), 3 Eq. Rep. 1039; *Ex p. Anderson* (1861), 3 E. & E. 487; *Ex p. Brown* (1864), 5 B. & S. 280; *Low v. Routledge* (1865), 1 Ch. App. 42, L.J.J.; *The Franconia* (1876), 2 Ex. D. 63, C. C. R.; *De Geer v. Stone* (1882), 22 Ch. D. 243; *Re Stepney Petn., Isaacson v. Durant* (1886), 17 Q. B. D. 54; *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821; *Gibson v. Gibson*, [1913] 3 K. B. 379; *R. v. Speyer*, [1916] 2 K. B. 858, C. A.; *Bowman v. Secular Soc.*, [1917] A. C. 406, H. L.; *Tingley v. Müller*, [1917] 2 Ch. 144, C. A.; *R. v. Francis*, [1918] 1 K. B. 617; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**514. — Retrospective effect.]**—An alien, resident in England, purchased an equitable interest in freehold lands, & also a lease for a long term of years, & afterwards obtained letters of denization, which in terms conferred upon him, not only the power of acquiring lands in future, but of retaining & enjoying all lands he had theretofore acquired:

**Annotations :—Distd. & Expld.** Du Hourmelin v. Sheldon (1839), 1 Beav. 79. In *Fourdrin v. Gowdey* Sir John Leach held that aliens could no more take an interest in land than the land itself; he must have meant to use the word "hold" instead of the word "take," because it is clear that aliens may take land, though they cannot hold it against the King (LORD LANGDALE, M.R.). **Consd.** Barrow v. Wadkin (1857), 24 Beav. 1. **Mentd.** A.-G. v. Southgate (1842), 12 L. J. Ch. 147; Boughton v. Boughton. Boughton v. James (1848), 1 H. L. Cas. 406, H. L.; Fairer v. Park (1876), 3 Ch. D. 309.

**517.** .]—An alien, domiciled & naturalised in England, is subject to the same disabilities as a natural-born subject. He is incapable of contracting a marriage which would have been void if contracted by a natural-born subject, although valid by the law of his domicile of origin, & by the *lex loci contractus*.

A., a native of Marburg in the Electorate of Hesse Cassel, domiciled in England, married in 1835, & in 1836 was naturalised by Act of Parliament. In 1841 he made his will. His wife having died, he went to Frankfort in 1846, & there married a sister, by the half-blood, of his deceased wife, with a view to subsequent residence in England, such marriage being valid by the law of Frankfort, & of Hesse Cassel. Soon after his second marriage he returned to England, where he died in 1856, never having since its acquisition abandoned his English domicile :—*Held* : A.'s second marriage was rendered void by Marriage Act, 1835 (c. 54), s. 2, & did not revoke his will.—*METTE v. METTE* (1859), 1 Sw. & Tr. 416; 28 L. J. P. & M. 117; 33 L. T. O. S. 139.

**518. Naturalisation Act, 1870 (c. 14)—Retrospective effect.**—*Held*: s. 2 of the above Act was not retrospective.—**SHARP v. ST. SAUVEUR** (1871), 7 Ch. App. 343; 41 L. J. Ch. 576; 26 L. T. 142; 20 W. R. 269, L.C.

**519. Partial naturalisation.]—**The usual qualified certificate of naturalisation under the above Act effects only a partial, not a complete naturalisation; so that a Frenchman, in taking out such a certificate, does not thereby lose his status as a French subject, since by the French law he cannot be completely naturalised in a foreign country except by the authority of the French Govt.—*Re BOURGEOISE* (1889), 41 Ch. D. 310, 318; 60 L. T. 553; 37 W. R. 563; 5 T. L. R. 363, C. A.

**520. Colonial naturalisation.]—**M., a German by birth, settled in Australia in 1878, & carried on business there until 1909. In 1908 a certificate of naturalisation was granted to him under Commonwealth of Australia Constitution Act, 1900, by the Commonwealth of Australia. In 1909 M. came to England, & resided & carried on business here after that date. In Dec., 1917, a charge

515 i. *Effect*—*Not retrospective.*]—A municipal councillor was an alien at the time of his election as such & at the time of the issue of a writ of *quo warranto* to deprive him of the office, on the ground that he was not a British subject:—*Held*: he could not, by becoming naturalised *pendente lite*, obtain the discharge of the writ, naturalisation not having a retroactive effect.—*CAMPEAU v. GROSBILLOT* (1900), Q. R. 17; S. C. 116.—*CAN.*

**518 i.** — *Naturalisation Act, 1870* (c. 14)—*Aliens Act, 1908*—*Infants Act, 1908*—*Adopted child of naturalised alien.*]  
—Resp., who was born in Germany of German parents, had been there adopted according to German law by a German subject, who married resp.'s mother & came with her & the child to New Zealand, & was there naturalised. Both before & after the naturalisation resp. lived

**520 f. — Colonial naturalisation — Ineffective outside territory]**—Letters of naturalisation issued in a colony have no extra-territorial validity.

The "certificate" mentioned in 45 Vict. No. 11, s. 10, is not a certificate of naturalisation.—*Ex p. LAU YOU FAT* (1888), 9 N. S. W. Adm. 269.—AUS.

**q. Alien enemy applicant.]**—An alien enemy quietly pursuing his ordinary avocation in Canada may apply for naturalisation.—*Re HERZFELD* (1914), Q. R. 46 S. C. 281.—**CAN.**

**r. 31 Vict. c. 66 — Application to prevent issue of certificate—Grounds of objection overruled.] — Re WEBSTER (1870), 7 C. L. J. O. S. 39.—CAN.**

**s. — Certificate—Filing & reading.]**—The certificate required by s. 5 of the above Act must be both filed & openly read in ct. on the first day of the term.—*Ex p. Dow*, 2 P. & B. 302.—**CAN.**

*signed.] —*  
The certificate required by s. 4 (3) of the  
above Act respecting aliens & naturalisa-



*Sect. 3.—Naturalisation. Part VI.]*

was brought against M. that he had failed to register himself in accordance with Aliens Restriction (Consolidation) Ord., 1916. For the defence it was contended that M. was not an alien, but the magistrate convicted him:—*Held*: the conviction was right, for although an alien might obtain a certificate of naturalisation in one part of His Majesty's dominions, it was not a necessary consequence that the naturalisation had any effect elsewhere, & wherever the certificate had no effect there the person to whom it had been granted still remained an alien.—*R. v. FRANCIS, Ex p. MARKWALD*, [1918] 1 K. B. 617; 87 L. J. K. B. 620; 118 L. T. 502; 82 J. P. 134; 31 T. L. R. 273; 16 L. G. R. 219.

**521. Married woman.**—The foreign wife of a British subject is not entitled to compensation for the loss of her separate property, under a treaty providing such compensation for British subjects, unless she has herself acquired a domicile in Great Britain at the time of her loss: for a Frenchwoman becomes in no way a British subject by marrying an Englishman.—*DU BOUCHET (MARQUIS) v. CLAIMS ON FRANCE COMRS., DE CONWAY'S (COUNTESS) CASE* (1834), 2 Knapp, 364; 3 State Tr. N. S. App. 1281; 12 E. R. 522, P. C.

*Annotation*:—*Consd.* De Wall's Case (1848), 6 Moo. P. C. C. 216, P. C.

**522. — Naturalisation Act, 1844 (c. 66).]**—A testatrix born at Smyrna of Dutch or Russian parents, residing there under the protection of the Dutch Consulate, married a British subject, who, though residing abroad as consul & for purposes of trade, retained his British domicile. After his death she continued to reside during the remainder of her life in the Levant, & made a will, disposing of property in England, in the English

form:—*Held*: *prima facie* she was entitled to be considered a British subject, having become so by marriage, & having done no act whereby she divested herself of the character so acquired.—*GOUT v. ZIMMERMAN* (1847), 5 Notes of Cases, 440; 9 L. T. O. S. 412.

**523. — — —.]**—A native-born Irishman, a British subject, married a French woman domiciled in France. They resided in France till the breaking out of the French revolution, when they emigrated to Germany. The wife died in her husband's lifetime without having ever come within the territory of Great Britain:—*Held*: she did not by her marriage become a British subject, as at common law while she remained abroad she was not within allegiance of the Crown of England; (2) s. 16 of the above Act, by which an alien woman, married to a natural-born subject, was naturalised, was not a declaratory Act.—*DE WALL'S (COUNT) CASE* (1818), 6 Moo. P. C. C. 216; 6 State Tr. N. S. 1125; 12 Jur. 145; 13 E. R. 666, P. C.

**524. — — — Naturalisation Act, 1870 (c. 14).]**—*JAFFE v. KEEL*, No. 27, *ante*.

*Infant.*—See Nos. 9, 26—28, *ante*.

**525. Private Act—Construction—Retrospective effect.**—An alien, devisee in trust to sell, joined in a conveyance, & afterwards obtained an Act of Naturalisation, by which it was declared he was "from thenceforth naturalised," & should be & was enabled "to ask, take, have, retain, & enjoy, etc., all lands which he might or should have by purchase or gift of any person or persons whatsoever":—*Held*: the Act did not operate to confirm the title of the purchaser under a conveyance previously made, although apparently it would have enabled the alien to hold land of which he continued seised.—*FISH v. KLEIN* (1817), 2 Mer. 431; 35 E. R. 1001.

## Part VI.—Loss of British Nationality.

**526. General rule —Natural-born subject.—Separation of Crown.**—Naturalisation due & vested by birthright cannot by any separation of the Crown afterwards be taken away; nor he that was by judgment of law a natural subject at the time of his birth become an alien by such a matter *ex post facto*.—*CALVIN'S CASE* (1608), 7 Co. Rep. 1a; 2 State Tr. 559; Moore, K. B. 790; Jenk. 306; 77 E. R. 377.

*Annotations*:—*Refd.* Thomas v. Sorrel (1672), 3 Keb. 143; Tingley v. Müller, [1917] 2 Ch. 141, C. A. *Mentd.* Parliament in Ireland, Case of (1613), 12 Co. Rep. 110; R. v. Hampden (1637), 3 State Tr. 826; Collingwood v. Pace (1661), O. Bridg. 410; Manby v. Scot (1663), 1 Keb. 361;

tion, must be signed by the person who administers the oaths of residence & allegiance required by s. 4 (1), (2).—*Re DEZETER (AN ALIEN)*, 20 N. B. R. 267.—CAN.

**u. Naturalisation Act—Amendments of 1903.—Fitness of applicant—Duty of judge.**—The judge, upon opposition filed, or objection taken in open ct. to the granting of the certificate, has power to take any necessary measures to satisfy himself as to the truth of the facts stated by appet., & of his fitness to become a British subject.—*Re SADDJIRO MALSUFURO*, 13 B. C. R. 417.—CAN.

**v. — Application for certificate — Form B.**—Upon an application to a District Ct. Judge under the above Act for a certificate of naturalisation, strict compliance with form B. in the schedule thereto is required. The direction as to the particulars to be inserted is impera-

tive. Contents of certificate in form B. required by an alien who desires to be naturalised in Alberta.—*Re CABULAK* (1911), 19 W. L. R. 171; Alta. L. R. —CAN.

**w. British Columbia Naturalisation Act, ss. 13, 14, 15, 19—When granted under.**—*Re FUKUCHI AHO* (B. C.) (1909), 9 W. L. R. 652.—CAN.

**x. Naturalisation Act, R. S. C., 1906 (c. 77), s. 19—Duty of judge.**—*Re CIMONIAN* (1915), 8 O. W. N. 448; 34 O. L. R. 129; 23 D. L. R. 363.—CAN.

**y. Oath of allegiance — Certificate as evidence.**—The certificate of a comr. for administering the oath of allegiance is evidence, after his death & that of the party taking the oath, that such oath was administered.—*DOE d. MCFARLANE v. LINDSAY*, Dra. 123.—CAN.

**z. — Duties of justice administer—Ministerial, not judicial.**—Aliens

Anon. (1678), Freem. K. B. 249; R. v. Tucker (1692), 4 Mod. Rep. 162; R. v. Knowles (1693), 12 Mod. Rep. 55; Loddington v. Kime (1695), 3 Lev. 431; Owen v. Saunders (1696), 1 Ld. Raym. 158; Clayton v. Kinaston (1697), 1 Ld. Raym. 419; Scot v. Schawrtz (1739), 2 Com. 677; Onychund v. Barker (1744), 1 Atk. 21; R. v. Cowle (1759), 2 Burr. 834; Campbell v. Hall (1774), 1 Cowp. 204; Queen Caroline's Claim to be Crowned (1821), 1 St. Tr. N. S. 949, P. C.; Ruding v. Smith (1821), 2 Hag. Con. 371; Jephson v. Hiera (1835), 3 Knapp, 130, P. C.; Lane v. Bennett (1836), 1 M. & W. 70; Lyons Corpn. v. East India Co. (1836), 1 Moo. Ind. App. 175, P. C.; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895, H. L.; Brunswick v. Hanover (1841), 6 Beav. 1; Taylor v. Best (1854), 14 C. B. 487; Rittson v. Stordy (1855), 1 Jur. N. S. 771; R. v. Lopez, R. v. Sattler (1858), Dears. & B. 525, C. C. R. *Ex p. Anderson* (1861), 3 E. & E. 487; *Ex p. Brown* (1861), 5 B. & S.

had taken the oaths of allegiance, etc., before a justice of the peace of a town, which oaths were administered to them in a township, but within the same county:—*Held*: under Alien Act, 34 Vict. c. 22, s. 2, the justice of the peace, in administering the oaths, was acting ministerially & not judicially, & the oaths were properly administered.—*JOHNSON'S VOTE, LINCOLN (PROV.)* (1877), H. E. C. 500.—CAN.

**a. Duties of naturalisation officials—Ministerial, not judicial.**—In Canada, the comr. who receives a petition for naturalisation, oaths of allegiance, & examines petitioner, the judge who orders the reading of the certificates given by the comr. & orders their inscription in a register, & the ct. which affixes its seal to the certificate of naturalisation, discharge administrative & not judicial duties.—*Re HERZFELD* (1911), Q. R. 46 S. C. 281.—CAN.



280; *Low v. Routledge* (1865), 1 Ch. App. 42, L.J.J.; *The Franconia* (1876), 2 Ex. D. 63, C. C. R.; *De Geer v. Stone* (1882), 22 Ch. D. 243; *Re Stepney Petn., Isaacson v. Durant* (1886), 17 Q. B. D. 54; *Re Johnson, Roberts v. A.-G.*, [1903] 1 Ch. 821; *Gibson v. Gibson*, [1913] 3 K. B. 379; *R. v. Speyer*, [1916] 2 K. B. 858, C. A.; *Bowman v. Secular Soc.*, [1917] A. C. 406, H. L.; *R. v. Francis*, [1918] 1 K. B. 617; *Rodriguez v. Speyer* (1918), 119 L. T. 409, H. L.

**527. — — — — — Naturalisation or employment abroad.]**—Prisoner, indicted for treason, had been educated in France, where he had spent his riper years in employment, & had held a commission from the French king:—*Held*: (1) where prisoner contends that he was born outside the King's dominions, the burden of proving this lies upon him; (2) it is not in the power of any private subject to shake off his allegiance, & to transfer it to a foreign prince, nor is it in the power of any foreign prince, by naturalising or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject & the Crown.—*MACDONALD'S CASE* (1740), 18 State Tr. 857, at p. 860; *Fost.* 59, at p. 60.

*Annotations*:—*Mentd.* *R. v. Whitley* (1810), 1 Car. & Kir. 150; *Knowlden v. R.* (1864), 5 B. & S. 532; *Re Stepney Petn., Isaacson v. Durant* (1886), 17 Q. B. D. 54.

**528. — — — — —**—*Held*: a natural-born subject of Great Britain admitted a citizen of the United States of America, either before or after the declaration of American independence, might be considered as a subject of the United States so as to entitle him to trade to the East Indies under the treaty confirmed by 37 Geo. 3, c. 97.—*MARRYAT v. WILSON* (1799), 1 Bos. & P. 430; 126 E. R. 993, Ex. Ch.; *affg.* 8 Term Rep. 31.

*Annotations*:—*Consd. & Expld.* *Bell v. Reid, Bell v. Buller* (1813), 1 M. & S. 726. *Consd.* *The Matchless* (1822), 1 Hag. Adm. 97. *Refd.* *The Indian Chief* (1801), 3 Ch. Rob. 12, 21; *The Recovery* (1807), 6 Ch. Rob. 311; *Crocker v. Hertford* (1844), 4 Moo. P. C. C. 339, P. C. *Mentd.* *Sewell v. Royal Exchange Assce.* (1813), 4 Taunt. 856.

**529. — — — — — Abjuration of allegiance Effect.]**—The abjuration by a British subject of his allegiance to the Crown & the promise of obedience to a foreign State, although it might have rendered him liable to the penalty of high treason, did not operate as a renunciation of nationality so as to disqualify his children from inheriting by virtue of British Nationality Act, 1730 (c. 21).—*FITCH v. WEBER* (1847), 6 Hare, 51; 17 L. J. Ch. 73; 10 L. T. O. S. 284; 12 Jur. 76; 67 E. R. 1077.

*Annotation*:—*Refd.* *Re Bourgoise* (1889), 41 Ch. D. 310, C. A.

**530. — — — — —**—By the law of England a natural-born subject cannot put off his allegiance, but he may take upon himself the duty of allegiance to another State by becoming naturalised there, although he may be embarrassed by the conflicting duties of a double allegiance.—*METTE v. METTE* (1859), 1 Sw. & Tr. 416; 28 L. J. P. & M. 117; 33 L. T. O. S. 139; 7 W. R. 543.

*Annotations*:—*Consd.* *Ogden v. Ogden*, [1908] P. 46, C. A. *Refd.* *Sottomayer v. De Barros*, [1899] 5 P. D. 94; *Chetti v. Chetti*, [1909] P. 67. *Mentd.* *Re Martin, Loustalan v. Loustalan*, [1900] P. 211, C. A.

**531. — — — — — Loss of territory by treaty.]**—The attempt to maintain the proposition, as applied to

the United States of America, that the character of a natural-born subject of the Crown of Great Britain is indelible, & that he cannot become an alien *ex post facto*, is to deny the validity of the declaration of independence, as recognised by the treaty between the Crown of England & the inhabitants of the United States & sanctioned by Act of Parliament & the law of nations. All the inhabitants of those States, although born subjects of the king of Great Britain, by continuing to be inhabitants, that is, by continuing to reside permanently & for the rest of their lives in those States after the Treaty of 1783, became & were citizens of the United States & ceased to be British subjects (*STUART, V.-C.*).—*RITSON v. STORDY* (1855), 3 Sm. & G. 230; 3 Eq. Rep. 1839; 25 L. T. O. S. 315; 1 Jur. N. S. 771; 3 W. R. 627; 65 E. R. 637.

*Annotations*:—*Mentd.* *Barrow v. Wadkin* (1857), 24 Beav. 1; *Sharp v. St. Sauveur* (1871), 7 Ch. App. 343, L.C.

**532. Naturalisation Act, 1870 (c. 14)—Voluntary naturalisation in foreign State.]**—T., who was born in England, went abroad in 1816, & while abroad had a son, who claimed to be his only legitimate child. T. went to Switzerland in 1842 & acquired a Swiss nationality, without being required to renounce his English nationality, which in the then state of English law he could not have done effectually. He could have relinquished his Swiss nationality with the consent of the cantonal authorities, but never did so. He ultimately went to France where he died in 1878, having by his will left his property away from his son to deft. By the Swiss law, the son, if legitimate, was entitled to nine-tenths of the property as his compulsory portion, but deft.'s contention was that he was illegitimate. By virtue of a treaty between France & Switzerland, right of succession to property of Swiss subjects dying in France was regulated according to the law of their nationality. The Swiss Ct. decided in favour of the son's legitimacy, & declared him entitled to nine-tenths of the property. In an action brought here to enforce the Swiss judgment:—*Held*: (1) s. 6 of the above Act applied to testator, who was at his death a Swiss, not a British subject; (2) the Zurich Ct. had, according to the law of his domicile, jurisdiction to decide on the right of succession to his estate, & the Ct. was bound by the decision of the Swiss Ct.—*Re TRUFFORT, TRAFFORD v. BLANC* (1887), 36 Ch. D. 600; 57 L. J. Ch. 135; 57 L. T. 674; 36 W. R. 163; 3 T. L. R. 798.

*Annotations*:—*Refd.* *Re Martin, Loustalan v. Loustalan*, [1900] P. 211, C. A. *Mentd.* *Pemberton v. Hughes*, [1899] 1 Ch. 781, C. A.; *Re Bonnefoi, Surrey v. Perrier*, [1912] P. 233, C. A.

**533. — — — — — Applicability in time of war.]**—The above Act, s. 6, does not empower a British subject to become naturalised in an enemy State in time of war. The act of becoming naturalised in such circumstances is in itself an act of treason, & it is no defence to an indictment for treason for subsequently joining the military forces of the enemy.—*R. v. LYNCH*, [1903] 1 K. B. 444; 72 L. J. K. B. 167; 88 L. T. 26; 67 J. P. 41; 51 W. R. 619; 19 T. L. R. 163; 20 Cox, C. C. 468.

## PART VI.

**529 i. General rule—Natural-born subject—Abjuration of allegiance—Effect.]**—A person by birth a British subject, who has renounced his allegiance & become the subject of a foreign State, being an alien, has no status as a petitioner, although on the voters' list.—*SOUTH ONTARIO (PROV.)*, 18 C. L. T. Occ. N. 221.—*CAN.*

**531 i. — — — — — Loss of territory by treaty.]**—*Held*: the American treaty dissolved all connection with the subjects of the United States, & persons born there under the King's allegiance were not entitled to the privileges of

British subjects.—*THE PROVIDENCE* (1810), *Stewart*, 186.—*CAN.*

**532 i. Naturalisation Act, 1870 (c. 14)—Voluntary naturalisation in foreign State.]**—Samoa is not a civilised State within s. 6 of the above Act, in which a British subject can become naturalised, & so lose his British allegiance.—*HUNT v. R.* (No. 2) (1882), *Udal* 59.—*FIJI.*

**532 ii. — — — — —**—By the term "foreign State," in s. 6 of the above Act, must be understood a civilised State. A British subject who seeks to renounce his natural allegiance must come under some equivalent social & national restraint. A State such as can

be recognised as a member of the family of nations must be one in which there has been habitual obedience by its subjects to superior authority, & a power of enforcing obedience to the laws, & the observance of the demands of international law. Samoa is not an independent State. Where the Crown has by Ord. in Council declared what is & what is not to be recognised as a foreign State, the Cts. of the Empire must take their direction from the Crown, & the question in such case is not one to be determined by a jury.—*HUNT v. GORDON*, 2 N. Z. L. R. 160.—*N.Z.*





## Part VIII.—Immigration and Expulsion of Aliens.

**540. Right to refuse admission—No cause of action—International comity.]—**An alien friend has no legal right, enforceable by action, to enter British territory. Refusal to permit an alien to land may be such an interference with international comity as to give rise to diplomatic remonstrance from the country of which he is a native, but it is no interference with his rights for which he can maintain an action.—*MUSGROVE v. CHUN TEEONG TOY*,

[1891] A. C. 272 ; 60 L. J. P. C. 28 ; 64 L. T. 378 ; 7 T. L. R. 378, P. C.

*Annotation:—*Ext'd. A.-G. for Canada v. Cain, Same v. Gilhula, [1906] A. C. 542, P. C.

**541. — Or impose conditions.]—**One of the rights possessed by the supreme power in every State is that of refusing to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, & to expel or deport from

## PART VIII.

**540 i. Right to refuse admission—Chinamen.]—**A Chinaman coming to New South Wales for the first time cannot be excluded on payment of statutory poll-tax.—*Ex p. LEONG KUM* (1888), 9 N. S. W. 250.—**AUS.**

**540 ii. —.]—**Appet., a Chinese subject holding a certificate of exemption under 45 Vict. No. 11, returned to New South Wales, in company with a number of other Chinamen, on board a vessel, which was allowed to enter the harbour & to come up to one of the wharves of the city. The police, however, were, by order of the Govt., stationed on the wharf to prevent appet. & the other Chinamen from landing:—*Held*: the police, in acting "under the authority & by the orders of the Govt. of the Colony," were restraining appet. of his liberty, & he must be discharged.—*Ex p. LO PAK* (1888), 9 N. S. W. 221.—**AUS.**

**540 iii. —.]—**A Chinaman is entitled to land in New South Wales on payment of £10 poll-tax. Any detention of such Chinese by the authority of the Govt. on board ship after such tender is an illegal imprisonment.—*Ex p. WOO TIN* (1888), 9 N. S. W. 493.—**AUS.**

**540 iv. — Railway company entitled to detain Chinese immigrants passing through Canada.]—***WING TOY v. CANADIAN PACIFIC RY. CO.* (1904), 13 B. C. R. 172.—**CAN.**

**540 v. — Criminal undesirables.]—**An inhabitant of Victoria, who had been convicted there of an offence punishable by imprisonment for twelve months, having within three years after the termination of his imprisonment come into New South Wales, was convicted there of an offence under Influx of Criminals Prevention Act (N. S. W., No. 6 of 1903), s. 3:—*Held*: the conviction was bad.—*R. v. SMITHERS, Ex p. BENSON* (1912), 16 C. L. R. 99.—**AUS.**

**540 vi. — British subjects born in United Kingdom—British North America Act, 1867 (c. 3).]—***Held*: the above Act vested in the Parliament of Canada sovereign power over immigration into Canada, including the right to exclude British subjects, not even excepting those born in the United Kingdom.—*Re MUNSHI SINGH* (1914), 29 W. L. R. 45 ; 6 W. W. R. 1347 ; 20 B. C. R. 243.—**CAN.**

**540 vii. — Certificated alien under Act 47 of 1902, s. 3.]—**Appet. entered into a contract in England with S., an alien, under which S. engaged to serve him on arrival in the Cape Colony at an adequate remuneration & for a reasonable period, & a certificate to that effect was given to S. by the Agent-General in terms of the above sect. On his arrival in the Cape Colony the Govt. refused to allow him to land, whereupon appet. moved for an order compelling the Colonial Secretary to authorise such landing:—*Held*: as, independently of the Act, an alien had no legal right enforceable by action to enter British territory, & as the Act conferred no such legal right on aliens, appet., as employer of S., was not entitled to the order prayed for.—*RANER v. COLONIAL SECRE-*

*TARY*, 21 S. C. 163 ; 14 C. T. R. 247.—**S. AF.**

**540 viii. — Alien having served in forces of Crown.]—**L., an alien, served as a volunteer during the South African War. By virtue of such service he was held exempt from deportation under Prohibited Immigrant Act. Thereafter he left the colony. Subsequently he returned in a German vessel & desired to land. The Colonial Secretary prohibited his landing on the ground that he was an undesirable alien:—*Held*: he was still an alien & not entitled to land in face of the Colonial Secretary's prohibition.—*Ex p. LIS* (1906), 16 C. T. R. 478.—**S. AF.**

**541 i. — Or impose conditions.]—***Held*: 38 Geo. 3, c. 1, ss. 1, 3, was merely a local police regulation to place aliens under the eye & control of the Govt., & gave them no new rights or privileges.—*THE PROVIDENCE* (1810), Stewart, 188.—**CAN.**

**a. Right to deport.]—**Applt. was a Kanaka labourer introduced into Queensland under State Pacific Islands Immigration Act (44 Vict. No. 17). A ct. of summary jurisdiction, upon being satisfied that a Pacific Island labourer, found in the Commonwealth before Dec. 31, 1906, & reasonably supposed not to be employed under agreement, is not or has not been so employed for a month past, may order his deportation from Australia. Applt. was brought before a police magistrate, who ordered his deportation under Federal Pacific Island Labourers Act, 1901, s. 8:—*Held*: (1) the right to expel involved the right to do all things necessary to make the expulsion effective, among which was necessarily included the act of deportation to the extent of the complete exclusion of the alien from the territorial borders of the State; (2) the right of expulsion was not limited to ordering the deportation of the alien to the place whence he came, but was general & unlimited, & could be exercised by the deporting State in whatever manner & to whatever place was necessary for effective deportation.—*ROBT. TELMES v. BRENNAN* (1906), 4 C. L. R. 395.—**AUS.**

**b. Act III. of 1864, s. 3.]—**The above sect. gives the fullest power to the Govt. to order any foreigner to remove himself from British India. The Govt. is the sole judge of what is necessary for the peace & security of British India, & if it acts in accordance with the letter of the Act, the ct. cannot inquire into the sufficiency of its reasons for so acting.—*ALTER CAUFMAN v. BOMBAY GOVT.*, I. L. R. 18 Bom. 636.—**IND.**

**c. Deportation order—Ultra vires—Habeas corpus.]—**Immigrants from Hindustan, ordered to be deported under Ords. in Council, which were ultra vires:—*Held*: entitled to be discharged, upon habeas corpus, from confinement under the deportation order.—*Re NARIAN SINGH*, 18 B. C. R. 506.—**CAN.**

**d. — Form of order.]—**An order for deportation must show upon its face the jurisdiction of the officer making it.—*Re WALSH, COLLIER &*

(1913), 13 E. L. R. 132 ; 13 D. L. R. 288.—**CAN.**

**e. —.]—**A deportation order stated that an alien had been deported because of lack of funds, in that he only had \$21.50, whereas he had in fact also produced three gold sovereigns to the immigration authorities, who paid no attention to them, & had a written contract of employment with a Canadian firm. The order also did not show jurisdiction in the officer making it:—*Held*: the order was bad.—*Re GARDNER* (1913), 13 E. L. R. 147 ; 12 D. L. R. 610.—**CAN.**

**f. Chinese Immigrants Regulation Act, 1877 (41 Vict. No. 8), s. 3—"Chinese passengers."]**—The words "Chinese passengers" in the above sect. mean all the Chinese passengers in course of transit.—*DRAKE v. THORNTON* (1883), 1 Q. L. J. 159.—**AUS.**

**g. Immigration Restriction Act, 1887 (61 Vict. No. 13)—Prohibited immigrant—Onus of proof—Chinamen class specially dealt with.]—***Held*: (1) the onus of proof, that accused was a prohibited immigrant within the above Act, lay upon the prosecution, & the onus was not on accused to show he was not a prohibited immigrant; (2) the magistrate, having found that accused was a Chinaman, could not find him to be a prohibited immigrant within the Act, because the Act did not apply to any persons of a class for whom provision had been made by law, & provision had been made by law for the immigration into Western Australia of Chinese.—*MAN KIT v. SAMPSON* (1901), 3 W. A. R. 71.—**AUS.**

**h. Immigration Restriction Act, 1901 (No. 17 of 1901), s. 3 (a)—Prohibited immigrant—Dictation test.]—**In order to obtain a conviction under the above sect., it is essential that a passage of fifty words, neither more nor less, should be dictated; & where the officer stopped after reading out ten words, being satisfied that the immigrant did not understand what was being read to him, & had not attempted to write any of the ten words so dictated:—*Held*: no offence was committed.—*CHRISTIE v. AH FOO* (1904), 29 V. L. R. 533.—**AUS.**

**k. —.]—**An officer of customs intending to put the dictation test to deft. as provided by the above sect. (as amended by Immigration Restriction Amendment Act, 1905, s. 4), told him he would read the passage slowly & then, if deft. said he could write it, he, the officer, would read it again slowly. The officer then read the passage slowly, deft. said that he could not write it, the passage was not read again, & the officer told deft. he was a prohibited immigrant:—*Held*: the dictation test was not properly put so as to make deft. a prohibited immigrant.—*POTTER v. MINAHAN* (1908), 7 C. L. R. 277.—**AUS.**

**l. — Persons already domiciled.]—**Immigrants restricted from entering Australia do not include persons already domiciled there as British subjects. *Semble*: there is no Australian nationality as distinguished from British nationality, so as to limit the power of the Commonwealth under the



the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, & good govt., or to its social or material interests.—*A.-G. FOR CANADA v. CAIN, SAME v. GILHULA*, [1906] A. C. 542; 75 L. J. P. C. 81; 95 L. T. 314; 22 T. L. R. 757, P. C.

**542. Aliens Act, 1905 (c. 13)—Recommendation for expulsion—Criminal undesirables—Evidence of alienage.]**—On the question whether an expulsion order should be recommended, the ct. will hear

Constitution, s. 51, to exclude persons from Australia.—*A.-G. FOR THE COMMONWEALTH v. AH SHEUNG* (1906), 4 C. L. R. 949.—AUS.

**m. — Previous judgment not admissible in subsequent proceedings.]**—On the return of a *habeas corpus* to L. to procure the body of A., a Chinaman, L. alleged that he held A. under the authority of Commonwealth Immigration Acts as being a prohibited immigrant. The judge of the Supreme Ct. of Victoria who heard the matter found as a fact that A. was identical with a naturalised Victorian subject of the King of that name, & was domiciled in Victoria, & ordered his release. On a subsequent prosecution of A. under those Acts for being a prohibited immigrant found within the Commonwealth:—*Held*: such judgment was not admissible evidence upon the question of fact of the identity of A.—*CHRISTIE v. AH SHUNG* (1906), 3 C. L. R. 998.—AUS.

**n. Immigration Restriction Act, 1901–1905 (No. 17 of 1901, No. 17 of 1905)—Prohibited immigrant—Son of domiciled Chinaman.]**—The fact that the father of an infant, born out of Australia, & who has never been in Australia, is domiciled in Australia is irrelevant to the question whether that infant on coming to Australia is a prohibited immigrant within the above Acts.—*AH YIN v. CHRISTIE* (1907), 4 C. L. R. 1428.—AUS.

**o. — Member of Australian community returning from abroad—Illegitimate child of white woman & Chinaman.]**—A person, whose permanent home is in Australia, & who is a member of the Australian community, is not, on arriving in Australia from abroad an immigrant within the above Act.

The illegitimate son of a Victorian woman had his original home in Victoria, but at the age of five years was taken by his father, a Chinaman, to China, where he remained for twenty-six years:—*Held*: he had never abandoned that home, & on his return to Australia was not an immigrant within the above Act.—*POTTER v. MINAHAN* (1908), 7 C. L. R. 277.—AUS.

**p. Immigration Restriction Act, 1901–10 (No. 17 of 1901, No. 10 of 1910)—Prohibited immigrant—Onus of proof—Statements of accused.]**—A Chinaman suspected of being a prohibited immigrant under the above Act, having been arrested by police officers, was taken to a police station, & interrogated by the police through an interpreter, & was alleged to have made answers tending to incriminate him. The answers were taken down in writing, & the following statement added: "I made this statement of my own free will, it has been read over to me, & I have nothing to add or to alter." The accused then signed the statement after it had been translated to him:—*Held*: (1) the statement was not admissible in evidence against the accused; (2) a statement by another Chinaman to the interpreter, not being shown to have been made in the presence of the accused, or to have been heard by him, was not admissible; (3) the magistrate ought to have accepted the uncontradicted testimony of two persons, who had deposed to having known the accused to have been in Australia for

more than two years, as discharging the onus of proof which was on the accused.—*AN HOY v. HOUGH* (1912), 14 W. A. R. 214.—AUS.

**q. — Return after previous residence without acquiring domicile.]**—A Chinaman came from China to Australia in 1898, leaving his wife behind him. He remained in Australia about six years, not learning English, of which he acquired only an imperfect knowledge of a few words, & having no residence or house of his own. He went back to China in 1904 at the call of filial duty, remained there for eight years, & came back to Australia in 1912, still without his wife:—*Held*: the evidence did not establish that he had an Australian domicile before he went to China in 1904, & he was properly convicted of an offence under s. 7 of the above Act in respect of his coming to Australia in 1912.—*LING PACK (OTHERWISE AH LING) v. GLEESON* (1913), 15 C. L. R. 725.—AUS.

**r. Immigration Restriction Act, 1901–1912 (No. 17 of 1901, No. 38 of 1912), ss. 3, 4, 5, 7—Prohibited immigrant—Previous conviction.]**—The fact that a person has been convicted under the above Act of being a prohibited immigrant is not, on a subsequent prosecution of the same person for being a prohibited immigrant found on a subsequent occasion within the Commonwealth, evidence that he is then a prohibited immigrant.—*BAIN v. AH KEE*, [1913] 17 C. L. R. 433.—AUS.

**s. Alien Labour Act—60 & 61 Vict. c. 11—Action for penalty—Discovery.]**—An action in the High Ct. of Justice for Ontario, in the name of Her Majesty, to recover a penalty for a violation of the above Act restricting the importation & employment of aliens, is an action to which Canada Evidence Act (59 Vict. c. 31) applies, within s. 2. In such an action deft. can be examined for discovery before trial.—*R. v. FOX* (1899), 18 P. R. 343.—CAN.

**t. — 1 Edw. 7, c. 13, s. 3 — Mens rea.]**—An information & conviction under the above Act:—*Held*: bad for not stating that deft. "knowingly" did the acts charged, such omission being a matter of substance, & a fatal & incurable defect in the conviction.—*R. v. HAYES* (1903), 23 C. L. T. 88; 5 O. L. R. 198; 2 O. W. R. 123; 6 Can. Crim. Cas. 857.—CAN.

**u. — 1 Edw. 7, c. 13, s. 4 — Advertisement in newspaper not "promise of employment" within.]**—*DOWNIE v. VANCOUVER ENGINEERING WORKS, LTD.*, 10 B. C. R. 367; 24 C. L. T. 284; 8 Can. Crim. Cas. 66.—CAN.

**7, c. 13 — County court judge cannot convict for offence committed outside territorial jurisdiction.]**—*R. v. FORBES, Ex p. CHESTNUT* (1906), 37 N. B. R. 402; 1 E. L. R. 437.—CAN.

**w. — R. S. C., 1906, c. 97 — Agent of company liable as principal—Importing labourer residing in foreign country with similar laws, but domiciled in another foreign country without similar restrictions is an offence—Meaning of "skilled labour for purpose of new industry."]**—*FRANCO v. DISNEY* (1908), 17 B. C. R. 488; Q. R. 17 K. B. 488; *sub nom. R. v. DISNEY*, 14 Can. Crim. Cas. 152.—CAN.

evidence on the point whether applt. is an alien or not.—*R. v. FERGUSON* (1911), 7 Cr. App. Rep. 24, C. C. A.

**543. — Length of residence.]**—The validity of a recommendation of deportation is not necessarily affected by the length of time the alien has resided in England.

Applt. was convicted of receiving a bicycle, & sentenced to six months' imprisonment with hard labour, & was recommended for expulsion. He

*Form of written consent to—Action for penalty.]—Held*: an action brought by M., pursuant to the consent of a judge obtained upon the application of M. Brothers, did not come within s. 4 of the above Act, & must be dismissed.—*MURRAY v. HENDERSON* (1910), 19 M. R. 649; 14 W. L. R. 170.—CAN.

**y. — Requisites of the written consent of a judge required by s. 4 of the above Act stated. Where the consent does not satisfy the Act, the ct. has no jurisdiction to entertain an action based upon it.]**—*RIRIAZE v. LANGTRY* (B. C. 1912), 21 W. L. R. 430; 3 D. L. R. 824.—CAN.

**z. — Criminal prosecution.]**—Requisites of the written consent of a judge required by s. 5 of the above Act stated.—*R. v. JOHNSON & CAREY CO.* (1911), 18 O. W. R. 985; 2 O. W. N. 1011.—CAN.

**a. — Letter to American in America appointing him manager of Ontario company is a breach of.]**—*R. v. GAMBLE-ROBINSON FRUIT CO.* (1913), 25 O. W. R. 522; 5 O. W. N. 598.—CAN.

**b. Master & Servant Act, 1899—Employment of English bank clerk in Canada.]**—Pltf. was engaged in England by defts. to serve them in Canada as a bank clerk for three years, at \$700 a year:—*Held*: the contract was void within s. 3 of the above Act.—*ASHMORE v. BANK OF BRITISH NORTH AMERICA* (1913), 24 W. L. R. 810; 4 W. W. R. 1014.—CAN.

**c. Chinese Immigration Act, 1900 (c. 32)—Deportation of prostitute—Evidence.]**—Evidence of the general reputation of a house, in which a Chinese immigrant has lived, is admissible in *habeas corpus* proceedings directed against the collector of customs, who is detaining such immigrant for deportation to China on the ground that she is a prostitute.—*Re FONG YUK & CHINESE IMMIGRATION ACT* (1901), 8 B. C. R. 118.—CAN.

**d. — Deportation of Chinaman refused admittance to United States.]**—Where a Chinaman, who contracts with a transportation co. for his passage from China through Canada to the United States, on the understanding that, if he is refused admittance to the United States, he will be deported to China by the co., is refused admittance to the United States & is being deported, he will not be granted his discharge by the ct. on *habeas corpus* proceedings, as the contract is not illegal, & under the above Act deportation is proper.—*Re LEE SAN* (1904), 10 B. C. R. 270; 24 C. L. T. 162.—CAN.

**e. Chinese Immigration Act, R. S. C., 1906 (c. 95)—Entry into Canada without paying tax.]**—Deft. was convicted for violation of the above Act, for that he being a person of Chinese origin entered Canada without paying the tax required by the Act. The question being whether the accusation sufficiently charged deft. with an indictable offence under ss. 7 & 30 of the Act:—*Held*: there was nothing in the Act which made it an offence for a Chinaman to enter Canada, & the conviction was unwarranted.—*R. v. SAM*

had been eleven years in L., & this was his first conviction:—*Held*: there being other matters alleged against applt., that portion of the sentence recommending his deportation must stand.—*R. v. KLEISS* (1910), 4 Cr. App. Rep. 101, C. C. A.

544. ———— *Residence in England since childhood.*—A Russian, convicted of receiving stolen goods, who had lived in England since the age of five & could not speak the Russian language, appealed against his sentence & against a

*CHAK* (1907), 4 E. L. R. 391; 42 N. S. R. 374.—CAN.

f. ———— *Arrest & imprisonment under circumstances in which action for false imprisonment successful.*—*CHEN FUN v. CAMPBELL*, 7 E. L. R. 147.—CAN.

g. ———— *Measure of damages for illegal detention.*—*SAM CHAK v. CAMPBELL* (1909), 44 N. S. R. 25; 7 E. L. R. 419.—CAN.

h. ———— *Applicant for exemption—Remedy by mandamus.*—Where an applicant for exemption under the above Act is dissatisfied with the decision of the controller of customs, his proper remedy is by way of mandamus.—*Re LEE HIM* (1910), 15 B. C. R. 163, 390.—CAN.

k. *Immigration Act, 1902 (c. 14)—Canadian resident returning from abroad not "passenger" or immigrant within.*—*Re CHIN CHEE* (1905), 11 B. C. R. 400; 2 W. L. R. 237.—CAN.

l. ———— *Immigrant suffering from disease.*—A proclamation was issued & published in the *Canada Gazette*, empowering the Minister of the Interior, or any officer appointed by him for the purpose, in pursuance of the above Act, to prohibit the landing in Canada of any immigrant or other passenger suffering from any loathsome or infectious disease, & who, in the opinion of the Minister, or such officer, should be so prohibited:—*Held*: the stat. & the proclamation issued thereunder merely authorised the deportation of the diseased person, but did not take away the right of the ct. to decide the question of fact on a proper application.—*IKKZOYA v. CANADIAN PACIFIC RY. CO.* (1907), 12 B. C. R. 454.—CAN.

m. *Immigration Act, R. S. C., 1906 (c. 93)—Immigration Act, 1907 (c. 19)—Powers of Governor-General—Delegation.*—The power conferred upon the Governor-General in Council, by s. 30 of the above Act of 1906, to prohibit the landing of immigrants of a specified class, cannot be delegated to the Minister of the Interior.—*Re BEHARI LAL* (1908), 13 B. C. R. 415; 8 W. L. R. 129.—CAN.

n. ———— *Immigrants detained on ship for deportation—Liability for escape.*—The owners, master & others of a vessel, on which immigrants are detained for deportation, who land them & produce them in ct. in obedience to a writ of *habeas corpus*, are not liable for the penalties imposed by s. 66 of the above Act, if, in the interval of the landing, the immigrants, or any of them, escape without their aid or abetting.—*SIFTON v. BALLS* (1908), Q. R. 35 S. C. 259; 6 E. L. R. 225.—CAN.

o. *British Columbia Immigration Act, 1908—Not applicable to Japanese.*—*Re NAKANE & OBAZAKE* (1908), 13 B. C. R. 370.—CAN.

p. ———— *Inoperative by reason of Immigration Act, R. S. C., 1906 (c. 93).*—*Re NARAIN SINGH* (1908), 13 B. C. R. 477.—CAN.

q. *Immigration Act, 1910 (c. 27)—Person convicted during previous residence seeking to return.*—Appet. came to Canada from the United States on Feb. 27, 1910. She then resided in the city of Vancouver continuously for more than three years. On Mar. 4, 1910, she was convicted in Vancouver

recommendation for an order of expulsion:—*Held*: (1) he was an alien only in a technical sense; (2) the recommendation for expulsion should be quashed.—*R. v. FRIEDMAN* (1914), 49 L. Jo. 181; 10 Cr. App. Rep. 72; 78 J. P. Jo. 112, C. C. A.

545. ———— *Liability to punishment in country of origin.*—Applt. was convicted of larceny as a bailee, & sentenced to six months' imprisonment with hard labour, & was recom-

*CHU LIN v. BRABAZON, CHAN YEE HOP v. BRABAZON* (1916), 35 N. Z. L. R. 1095.—N.Z.

y. *Act 47 of 1902 (Cape)—Deportation of prohibited aliens after notice of motion for release.*—Appets. were deported from Cape Colony as prohibited immigrants under s. 8 of the above Act. Before they were actually removed notice was served on resps., the Colonial Secretary & the Immigration Officer, that an application would be made to the Supreme Ct. for the release of appets., but as resps. had already made all their arrangements for sending appets. away by a steamer on the afternoon of that day, they proceeded to carry out their arrangements:—*Held*: as appets. were prohibited immigrants under the Act, & were not domiciled in South Africa, the ct. could not order their restoration to the Colony.—*FEIN & COHEN v. COLONIAL GOVERNMENT* (1906), 23 S. C. 750; 16 C. T. R. 1101.—S. AF.

z. ———— *Act 30 of 1906—Effect of.*—*Held*: (1) the rights & privileges protected by the Act of 1906 were rights acquired under the Act of 1902, not rights theretofore enjoyed under the common law; (2) appets., who fell within the definition of "prohibited immigrants" under both Acts & had been, both in 1902 and 1906, domiciled in the Transvaal, & were there resident when the Act of 1906 took effect, had acquired no such statutory rights.—*MAHOMED v. UNION GOVERNMENT* (1911), A. C. 1.—S. AF.

a. *Acts 15 of 1907 & 36 of 1908 (Transvaal)—Prohibited alien—Wife of immigrant.*—Applt., an Indian woman, who was unable to write out & sign in the characters of an European language an application for permission to enter the Province, was convicted under s. 5 of the Act of 1907 of being a prohibited immigrant found within the Transvaal. She alleged she was the wife of a person not a prohibited immigrant, but her husband, who had entered the Transvaal after the passing of the Act of 1908, had refused to apply for registration under this Act:—*Held*: as such refusal rendered him liable at the time when he entered the Transvaal to be removed from or ordered to leave the Transvaal under s. 2 (4) of the Act of 1907, he was a prohibited immigrant & applt. was also a prohibited immigrant.—*R. v. SODHA* (1911), A. D. 264.—S. AF.

b. *Immigration Ordinance, Trinidad, s. 203—Power of Governor under.*—The power given by the above sect. to the Governor "on sufficient ground shown to his satisfaction," to transfer the indentures of immigrants from one employer to another, cannot properly be exercised without inquiry; except in special circumstances such as an emergency, any person against whom a complaint is made must be given a fair opportunity to make any relevant statement, & to controvert any relevant statement made to his prejudice.

The discretion is properly exercised when, after an order has been made *ex p.* in consequence of complaints by the Protector of Immigrants, the employer & his manager are given a fair opportunity to answer the complaints, & the order is put into operation only after a consideration of their explanations.—*DE VERTEUIL v. KNAGGS*, [1918] A. C. 557; 87 L. J. P. C. 128; 118 L. T. 739; 34 T. L. R. 323, P. C.—TRINIDAD.

of being an inmate of a house of ill-fame. She then went on a visit to the State of Washington, & on attempting to return to Canada, was ordered to be deported:—*Held*: she was an immigrant passenger who had been convicted of a crime involving moral turpitude, & was not a Canadian citizen & had not a Canadian domicile within s. 3 (d) of the above Act.—*Re MURPHY* (1910), 15 W. L. R. 381; 15 B. C. R. 401; 17 Can. Crim. Cas. 103.—CAN.

r. ———— *Not retrospective as regards alien tourist who entered Canada before Act.*—*Re RAHIM* (1911), 17 W. L. R. 127; 16 B. C. R. 469.—CAN.

s. ———— *Re RAHIM* (No. 2), (1911), 19 W. L. R. 440; 16 B. C. R. 471.—CAN.

t. ———— *Deportation order—Appeal from.*—No ct. is authorised to revise, set aside or amend an order given by the Minister of Agriculture or a public officer, under the above Act respecting the deportation of immigrants; in the circumstances a writ of *habeas corpus* will be refused.—*ROBINSON v. REGIMBAL* (1911), 13 Q. P. R. 41.—CAN.

u. ———— *Dominion Order in Council, No. 926, passed on May 9, 1910—Validity of.*—*Re HINDUS & IMMIGRATION ACT* (1913), 26 W. L. R. 319.—CAN.

v. ———— *Decision of Board of Inquiry under—Appeal.*—A decision of a properly constituted Board of Inquiry, acting within its jurisdiction & in accordance with the above Act, which decision is not impeached on the ground of fraud, is not open to review except by the Minister of the Interior.—*Re MUNSII SINGH* (1914), 29 W. L. R. 45; 6 W. W. R. 1347; 20 B. C. R. 243.—CAN.

w. *Immigration & Public Works Act, 1870—Amendment Act, 1871—Contract for importation of immigrants.*—A contract for the introduction of immigrants was alleged to have been entered into between "Sir G. F. B., Governor of the colony, for & on behalf of the colony, by J. E. F., the Agent-General of New Zealand," & suppliers:—*Seem*: the contract was good in form, as the above Act of 1871 was merely directory, & the Act was substantially complied with, "for & on behalf of the colony" meaning "for & on behalf of Her Majesty in New Zealand" (PRENDERGAST, C.J.).—*BROGDEN BROTHERS v. R.*, 3 N. Z. L. R. 201; 1 J. R. N. S. 69.—N.Z.

x. *Immigration Restriction Act, 1908—Burden of proof—Mens rea.*—A non-naturalised Chinese woman, through the fraud of her husband in adopting the name & using the naturalisation papers of another Chinaman, had entered New Zealand without paying the poll-tax imposed by s. 31 of the above Act, or passing the reading test required by s. 42 (1) (a) of that Act. The woman was convicted of an offence under the latter sect., & her husband of procuring her to commit the offence:—*Held*: (1) as regarded the female applt., the burden of ascertaining the requirements of the law lay on applt., & *mens rea* was not an ingredient of the offence; (2) as regarded the male applt., *mens rea* was not an ingredient of the offence of aiding or assisting or procuring the commission of an offence under Justices of the Peace Act, 1908, s. 53.—VAN



mended for deportation to Russia at expiration of his sentence. On appeal against the recommendation for deportation, applt. stated he was a deserter from the Russian army, & if he returned to that country he would be shot. Inquiries made showed that though applt. would be punished for desertion, he would not be shot:—*Held*: (1) while the ct. was satisfied that nothing applt. had done would expose him to the punishment of being shot, yet, having regard to all the circumstances, it was better the recommendation should not be made; (2) that part of the sentence should be quashed.—*R. v. ZAUSMER* (1911), 7 Cr. App. Rep. 41; 75 J. P. Jo. 532, C. C. A.

**546. ——— Married woman living with husband.**—Applt., who had been convicted of receiving, was sentenced to two months' imprisonment in the second division, & recommended for expulsion at termination of that sentence. On appeal against the part of the sentence recommending her expulsion, applt. stated she was an alien, & that she was a married woman. On this point the ct. expressed doubt, but applt. had a child living with her. In these circumstances the ct., pointing out that if applt. were married the sentence as it stood was equivalent to a decree of divorce, reversed that part of the sentence recommending applt. for expulsion. *Qu.*: whether a married woman living with her husband can or should be recommended for expulsion.—*R. v. FINE* (1912), 77 J. P. 79; 29 T. L. R. 61; 8 Cr. App. Rep. 78, C. C. A.

**547. ——— Intercession of prosecutrix.**—Applt. was convicted of fraudulent conversion & sentenced to twelve months' imprisonment with hard labour & recommended for expulsion:—*Held*: the ct. would not, in the ordinary course, interfere with the order recommending applt. for expulsion, which was a matter for the Home Secretary's discretion, but as it was asked on behalf of the prosecutrix to extend some mercy to him, for that reason the ct. was justified in saying that so much of the sentence as referred to the recommendation for expulsion should be annulled.—*R. v. GRUNSPAN* (1913), 8 Cr. App. Rep. 269, C. C. A.

**548. ——— Judicial discretion.**—In 1893 applt., an alien, was convicted of administering a drug with intent to rob, & in 1905 was convicted of conspiracy. In 1913, on a charge of indecent assault, applt. pleaded guilty to a common assault; the judge accepted this plea, passed a sentence of imprisonment & recommended applt. for expulsion:—*Held*: (1) the question of recommendation for expulsion was a matter for the judge's discretion; (2) on the facts his decision to make such recommendation ought not to be reversed.—*R. v. JOSEPHSON* (1914), 110 L. T. 512; 30 T. L. R. 243; 24 Cox, C. C. 128, C. C. A.

**549. ——— Destitute undesirables—Form of certificate.**—On a summons against an alien to show cause why a magistrate should not grant a certificate (with a view to his expulsion) that he has been in receipt of such relief as disqualifies a person for the parliamentary franchise, the question whether the alien has merely been in receipt of medical relief, which would not disqualify, or of parochial relief, which would do so, is a question of fact for the magistrate.

The certificate need not be in the exact form provided by Summary Jurisdiction (Aliens) Rules, 1906, & need not state in the schedule thereto the "Facts of Complaint certified," provided they are stated in the body of the certificate.—*R. v. LEYCESTER, Ex p. GREENBAUM* (1914), 79 J. P. 14; 13 L. G. R. 159, D. C.

**550. ——— Expenses of deportation—Liability of ship's master.**—Where the Secretary of State makes an order for expulsion of an alien under the

above Act, & pays the expenses incidental to the alien's deportation under s. 4 (1), he may under s. 4 (2) recover the sums so paid by him from the master of the ship in which the alien was brought to the United Kingdom, notwithstanding that the alien had, by secreting himself on board the ship as a stowaway, caused himself to be brought here without the master's consent.—*A.-G. v. SUTCLIFFE*, [1907] 2 K. B. 997; 76 L. J. K. B. 991; 97 L. T. 373; 23 T. L. R. 711.

**551. Aliens Restriction Act, 1914 (c. 12)—Power of expulsion in war time—Validity of Order in Council.**—Aliens Restriction (Consolidation) Ord., 1914, art. 12, whereby a Secretary of State may order the deportation of any alien, & may direct the detention of the alien pending his deportation, is within the power conferred by the above Act upon His Majesty in Council in time of war or imminent national danger or great emergency to impose restrictions on aliens.

An alien, suspected of being of immoral & criminal character, may be a person against whom an order of deportation under the above art. may properly be made as being necessary or expedient with a view to the safety of the realm.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SARNO*, [1916] 2 K. B. 742; 86 L. J. K. B. 62; 115 L. T. 608; 80 J. P. 389; 32 T. L. R. 717; 14 L. G. R. 1060.

*Annotations*:—**Mentd.** *R. v. Chiswick Police Station Superintendent*, [1918] 1 K. B. 578, C. A.; *R. v. Garrett* (1917), 87 L. J. K. B. 894.

**552. ——— Power to specify destination.**—The above Act, s. 1 (1), & Aliens Restriction (Consolidation) Ord., 1916, made thereunder, do not give a Secretary of State power to order the deportation of an alien to any particular country. They do, however, empower a Secretary of State, upon making a deportation order, to cause the alien to be detained & placed on board a ship which the Secretary of State selects, & there detained until the ship finally leaves the United Kingdom, with the result that the alien may be obliged to disembark at the port to which the ship sails.

The jurisdiction of the Secretary of State to make a deportation order under the above Act & Ord. is not affected by the fact that the alien is a political refugee, though that fact may properly be taken into account by the Secretary of State in considering whether in the exercise of his discretion he will make a deportation order.

The ct. refused to make absolute a rule for a writ of *certiorari* to bring up an order made by the Home Secretary under the above Act & Ord. that the alien "shall be deported from the United Kingdom," the order being in form a valid order, though the Home Secretary stated that it was intended under the order to send the alien to a particular country.—*R. v. HOME SECRETARY, Ex p. CHATEAU THIERRY (DUKE)*, [1917] 1 K. B. 922; 86 L. J. K. B. 923; 116 L. T. 226; 81 J. P. 125; 33 T. L. R. 264; 61 Sol. Jo. 367; 15 L. G. R. 351, C. A.

*Annotation*:—**Consd.** *R. v. Chiswick Police Station Superintendent*, [1918] 1 K. B. 578, C. A.

**553. ———**—The Home Secretary made an order under the above Act, & Aliens Restriction (Consolidation) Ord., 1916, art. 12, that a certain alien, a French subject, of military age, should be deported from the United Kingdom & should remain out of the United Kingdom during the continuance of the war. The order was made in consequence of an arrangement between the French & British Govts., by which French subjects resident in the United Kingdom, who were liable to military obligation in France, were sent to France. At the same time the Home Secretary gave directions that the orders should be enforced immediately. The Home Secretary had previously given general directions that any person named



in a deportation order which was intended to be enforced immediately should be arrested & conveyed by ship from the United Kingdom & should be detained between the time of his arrest & the sailing of the ship selected for his passage. Acting under those general directions an assistant secretary in the Home Office caused instructions to be given to the police for the alien's arrest & conveyance to the ship selected for his deportation. The alien was accordingly arrested. On an application for a writ of *habeas corpus*:—*Held*: the order for arrest was a valid order, & applt. was in legal custody.

*Semble*: (1) an order for the arrest & detention of an alien against whom a deportation order has been made must be made by the Secretary of State himself in each individual case, & in this particular case this had been done; (2) the ct. can go behind an order for arrest which is valid on its face, as for instance, if it is a mere sham not made *bonâ fide*.—*R. v. CHISWICK POLICE STATION SUPERINTENDENT, Ex p. SACKSTEDER*, [1918] 1 K. B. 578; 87 L. J. K. B. 608; 118 L. T. 160; 82 J. P. 137; 34 T. L. R. 279; 62 Sol. Jo. 363; 16 L. G. R. 335, C. A.

## Part IX.—Registration, Internment, and other Restrictions.

**554. Aliens Restriction Act, 1914 (c. 12)—Aliens Restriction (Consolidation) Orders, 1914–1916—Registration.]**—The above Ord. of 1914, made under the above Act, contained a provision requiring aliens to register their names, & non-compliance with this requirement was made an offence:—*Held*: if, in registering his name, an alien, for the purpose of concealing his identity, did not give his full name, he committed an offence, even if he gave the name by which he was generally known.—*SILVERMAN v. HUNT* (1915), 31 T. L. R. 410.

**555. ———.]**—Applt.'s father was living in Berlin at the time of his marriage to applt.'s mother, who was a German, in 1874. Applt.'s parents resided in South Africa for some time between 1881 & 1891, & during that period a certificate of naturalisation under the laws of Cape Colony was issued to applt.'s father. In 1891 applt.'s parents returned to Berlin, & applt. was born there in 1893. Except for the period between 1881 & 1891, applt.'s father from an early age resided continuously in Berlin. Applt. came to England in 1913, & had since resided in London. Upon an information charging applt. with having failed to comply with the above Ord. of 1914, by furnishing to the registration officer of his district particulars as to the matters specified in the Ord., the magistrate held that applt. had failed to discharge the *onus* cast upon him by s. 1 (4) of the above Act of showing that he was not an alien enemy, & convicted applt.:—*Held*: the nationality of applt. depended upon that of his father, & upon the evidence his father's nationality was left in doubt, & applt. was properly convicted.—*KOPELOWITZ v. McLAUGHLAN* (1916), 85 L. J. K. B. 1700; 114 L. T. 1037; 80 J. P. 263; 25 Cox, C. C. 384; 14 L. G. R. 1074.

**556. ———.]**—Applt. had failed to register as an alien enemy or furnish particulars required by the above Ord. of 1914. He was born in Germany in 1869. In 1887 he emigrated to the United States, in 1891 obtaining a document of discharge from his German nationality. In 1894 he obtained a certificate of naturalisation as an American citizen. For many years after this he lived & worked in London, & in 1915 he applied to be registered at the American Consulate in London as an American citizen. This registration was refused. The magistrate, before whom applt. was summoned for non-compliance with the above Ord., convicted him on the ground that he, being admittedly

an alien of German origin & not a citizen of the United States, had failed to show that it was not incumbent on him to register as a German during the war:—*Held*: the conviction was right.

Under s. 1 (4) of the above Act, when a question arises whether a person charged with an offence against Aliens Restriction (Consolidation) Ord., 1914, is an alien, or whether he belongs to a particular class of alien, the *onus* of proving that he is not an alien, or does not belong to the particular class, is upon him, & if the magistrate is not satisfied that the person has discharged this *onus*, the magistrate's finding is, apart from the admission or rejection of evidence, one of fact & not of law, & there is no ground for the review by the ct. of his decision on appeal.

The stat. has to some extent superseded the principles of the common law in regard to the law & evidence as to nationality (*LORD READING, C.J.*).—*SIMON v. PHILLIPS* (1916), 85 L. J. K. B. 656; 114 L. T. 460; 80 J. P. 197; 32 T. L. R. 243; 25 Cox, C. C. 315; 14 L. G. R. 476.

**557. ———.]**—A naturalised alien had originally, on signing a form in pursuance of National Registration Act, 1915 (c. 60), described himself as "Russian Naturalised British." In the registration card issued to him he was by mistake described as "Russian." He adopted the mistake, & being thus already a person deemed to be of British nationality, applied to a registration officer to be registered under the above Act of 1914, & art. 19 of the above Ord. of 1916, as of Russian nationality. He was convicted under art. 27 (2) of the above Ord. of having unlawfully furnished the registration officer with false particulars, & appealed upon the ground that the art. did not make it an offence for a person who was not an alien to furnish false particulars, & that he was not an alien when he furnished the particulars in question:—*Held*: the offence under the art. of furnishing false particulars to a registration officer was not confined to aliens, but applied equally to British subjects & aliens who had become naturalised as British subjects.—*AGDESHMAN v. HUNT* (1917), 86 L. J. K. B. 1334; 117 L. T. 406; 81 J. P. 251; 15 L. G. R. 620.

**558. ——— Hotel & boarding house registers.]**—A person who for reward supplies an alien with board & lodging for a substantial period is the keeper of a boarding house within the above Ord. of 1915, art. 20d (1).

Applt.'s wife kept a school for young girls, applt.

### PART IX.

**c. War Precautions Act, 1914—1915 (No. 10 of 1914, No. 2 of 1915), s. 4—War Precautions Regulations, 1915—Belief of Minister of Defence.]—Held**: reg. 55 (1) of the above regulations was a valid exercise of the power conferred by the above sect. To a writ of *habeas corpus* in respect of W., who had been

naturalised & was detained in military custody, the military officer, in whose custody W. was, returned a warrant under the hand of the Minister of Defence, which recited that the Minister, upon information furnished to him, had reason to believe & did believe that W. was disaffected or disloyal. The Minister being called as a witness refused on the ground of public policy to state the

grounds of his belief:—*Held*: (1) the Minister was entitled to refuse to answer questions as to his belief; (2) there was no evidence to challenge either the fact of his belief or the grounds for it; (3) the detention of W. under the warrant was justified.—*LLOYD v. WALLACH* (1915), 20 C. L. R. 299.—**AUS.**

not interfering with the management thereof, but his private income & the wife's profits from the school were paid into a joint banking account, upon which applt. & his wife drew. The school was carried on in one of two adjoining houses communicating with each other, applt. & his wife living in the other, of both of which they were joint lessees. One of the school boarders was the daughter of Dutch parents resident in Java, & they, being desirous of living near their child, were received by applt.'s wife as paying guests for a substantial period. Applt. knew of this arrangement, but not of its terms. He was charged under the above art. with failing to keep a register of aliens residing on his premises, & was convicted:—*Held*: there was evidence to support the conviction.—*VECSEY v. SMITH* (1916), 86 L. J. K. B. 249; 115 L. T. 833; 81 J. P. 1; 33 T. L. R. 15; 14 L. G. R. 1167; 25 Cox, C. C. 586.

**559. Defence of Realm Consolidated Regulations, 1914—Restrictions on residence.**—N., a person of German origin, was naturalised as a British subject in 1909. An order was made against him in Feb., 1916, under reg. 14 of the above regulations, by the competent military authority of the district in which he resided, that he should not reside in or enter certain areas except with the permission of a competent naval or military authority; & also that he should leave the area in which he then resided & report his new place of residence, & should not subsequently change his residence without the leave of such authority. N. applied for writs of *certiorari* & prohibition to the competent military authority:—*Held*: as the competent military authority had acted honestly in the exercise of his judgment in making the order, he had jurisdiction to make it, & it was not necessary for him to show in addition that he had acted "reasonably."—*R. v. DENISON, Ex p. NAGALE* (1916), 85 L. J. K. B. 1744; 115 L. T. 229; 80 J. P. 421; 32 T. L. R. 528; 60 Sol. Jo. 527; 14 L. G. R. 1088.

*Annotation*:—*Reid. Ronnfeldt v. Phillips* (1918), 34 T. L. R. 556.

**560. — Internment—Application to British subjects.**—Reg. 14b of the above regulations, which empowers the Secretary of State to order the internment of any person "of hostile origin or assocns." where on the recommendation of a competent naval or military authority it appears to him expedient for securing the public safety or the defence of the realm, is authorised by Defence of the Realm Consolidation Act, 1914 (c. 8), s. 1 (1), which confers upon the King in Council power during the continuance of the war "to issue regulations for securing the public safety & the defence of the realm"; & an order made in accordance with

reg. 14b for the internment of a naturalised British subject of German birth is valid.—*R. v. HALLIDAY, Ex p. ZADIG*, [1917] A. C. 260; 86 L. J. K. B. 1119; 116 L. T. 417; 81 J. P. 237; 33 T. L. R. 336; 61 Sol. Jo. 443; 25 Cox, C. C. 650, H. L.

*Annotations*:—*Reid. R. v. Brixton Prison (Governor), Ex p. Sarno*, [1916] 2 K. B. 742; *Ex p. Howsin* (1917), 33 T. L. R. 527, C. A.

**561. — Obtaining passport by fraud.**—Appcts., Russian subjects of military age, obtained passports from the Russian Consul in London by statements that they intended to go to Russia. When they reached Christiania they embarked on a Danish vessel bound for the United States. This vessel was stopped by the British naval patrol & directed to go to the port of Kirkwall by virtue of an arrangement between the British & Danish Govts., whereby search for contraband was to be made in port & not on the high seas. When the vessel was in the port of Kirkwall the appcts. were arrested, & they were afterwards taken to London & summarily charged with having obtained the passports by falsely stating that they intended to return to Russia, the charge being made under the above regulations. No complaint as to the arrest was made by the Russian or the Danish Govt. On the argument of a rule *nisi* for a writ of prohibition to the magistrate, it was contended that, as the offence charged was neither extraditable nor prejudicial to the safety of the realm, the arrest of appcts. being subjects of a friendly State on a neutral vessel, which, though in a British port, was only there by constraint, was unlawful:—*Held*: without deciding whether the right to arrest in a British port a foreigner on a neutral vessel, which was only there for the purpose of being searched for contraband, did not extend to offences which were neither extraditable nor prejudicial to the safety of the realm, the offence of obtaining a passport by false statements in time of war was an offence prejudicial to the safety of the realm, & a writ of prohibition must be refused.—*R. v. GARRETT, Ex p. SHARF*, [1917] 2 K. B. 99; 86 L. J. K. B. 894; 116 L. T. 398; 81 J. P. 145; 33 T. L. R. 305; 25 Cox, C. C. 627, C. A.

**562. Internment.**—*Ex p. WEBER*, No. 161, *ante*.

**563. — Royal prerogative—Immateriality of registration.**—The Crown is entitled, by virtue of its prerogative, to intern an alien enemy as a prisoner of war, whether such alien enemy has or has not been registered as an alien under Aliens Restriction Ord. made in pursuance of Aliens Restrictions Act, 1914 (c. 12).—*R. v. KNOCKALOE CAMP (COMMANDANT), Ex p. FORMAN* (1917), 87 L. J. K. B. 43; 117 L. T. 627; 82 J. P. 41; 34 T. L. R. 4; 62 Sol. Jo. 35; 16 L. G. R. 295.

**562 i. Internment—Subsequent liberation on parole.**—Where an alien enemy has been interned & is then paroled, he recovers the exercise of all his civil rights.—*FABRY v. FINLAY* (1916), Q. R. 50 S. C. 14.—*CAN.*

## ALIMONY.

See HUSBAND AND WIFE.

## ALLEGIANCE.

See ALIENS; CONSTITUTIONAL LAW.

## **ALLOTMENTS.**

This subject, owing to the small number of cases thereon, will be dealt with under  
**SMALL HOLDINGS AND SMALL DWELLINGS.**



## ALLUVION.

*See* WATERS AND WATERCOURSES.

## ALTERATION OF DOCUMENTS.

*See* DEEDS AND OTHER INSTRUMENTS; WILLS.

## AMBASSADORS.

*See* CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

## AMBIGUITY.

*See* DEEDS AND OTHER INSTRUMENTS; WILLS.

## AMENDMENT.

*See* CRIMINAL LAW AND PROCEDURE; PLEADING; PRACTICE AND PROCEDURE.

## AMUSEMENTS.

*See* THEATRES AND OTHER PLACES OF ENTERTAINMENT.

## ANCIENT DEMESNE.

*See* REAL PROPERTY AND CHATTELS REAL.

## ANCIENT LIGHTS.

*See* EASEMENTS AND PROFITS À PRENDRE.

# ANIMALS.

	PAGE
PART I. CLASSIFICATION OF ANIMALS . . . . .	204
SECT. 1. WILD ANIMALS AND DOMESTIC ANIMALS . . . . .	204
SECT. 2. HARMLESS DOMESTIC ANIMALS, ANIMALS NATURALLY FEROCIOUS, AND DOMESTIC ANIMALS KNOWN TO BE VICIOUS . . . . .	204
SECT. 3. DIFFERENT KINDS OF ANIMALS . . . . .	204
PART II. PROPERTY IN ANIMALS . . . . .	204
SECT. 1. DOMESTIC ANIMALS .. . . .	204
SUB-SECT. 1. IN GENERAL . . . . .	204
SUB-SECT. 2. AS SUBJECTS OF LARCENY . . . . .	204
SECT. 2. WILD ANIMALS . . . . .	205
SUB-SECT. 1. ALIVE . . . . .	205
A. In General . . . . .	205
B. As Subjects of Larceny . . . . .	210
SUB-SECT. 2. DEAD. . . . .	211
SECT. 3. INCREASE IN ANIMALS . . . . .	212
PART III. RIGHTS AND LIABILITIES OF OWNERS OF ANIMALS . . . . .	213
SECT. 1. RIGHTS . . . . .	213
SUB-SECT. 1. WHEN THE ANIMAL IS INTERFERED WITH, INJURED, OR KILLED. . . . .	213
A. By Person acting in Self-defence . . . . .	213
B. By Person acting in Defence of his own Animal . . . . .	214
C. By Person acting in Defence of Property . . . . .	214
D. By Animals belonging to Another . . . . .	217
E. Through Act, Neglect, or Default of Another . . . . .	217
F. In Questions of Insurance . . . . .	221
G. Statutory Provisions . . . . .	222
H. Measure of Damages . . . . .	222
SUB-SECT. 2. RIGHT TO FOLLOW AND RECOVER STRAYING DOMESTIC ANIMALS . . . . .	222
SUB-SECT. 3. OTHER RIGHTS . . . . .	223
SECT. 2. LIABILITIES . . . . .	223
SUB-SECT. I. HARMLESS DOMESTIC ANIMALS . . . . .	223
A. Liability for Trespass . . . . .	223
B. Liability for Negligence . . . . .	229
C. Liability for Injuries to Persons and Property on Highway . . . . .	229
D. Liability for Injuries to Persons and Property on Lawful Business but not on Highway . . . . .	236

	PAGE
SUB-SECT. 2. ANIMALS NATURALLY VICIOUS AND DOMESTIC ANIMALS KNOWN TO BE VICIOUS . . . . .	236
A. Animals naturally Vicious . . . . .	236
B. Domestic Animals known to be Vicious . . . . .	238
(a) In General . . . . .	238
(b) Where the Person injured is a Trespasser. . . . .	241
(c) Injuries to Servants . . . . .	241
(d) Averment and Proof of <i>Scienter</i> . . . . .	242
(e) Who may be Liable as Owner . . . . .	244
(f) Where Notice to or Knowledge of Parties other than Owner sufficient . . . . .	244
(g) Evidence of <i>Scienter</i> . . . . .	244
SUB-SECT. 3. POSITION OF DOG OWNERS UNDER DOGS ACTS AND ORDERS . . . . .	247
SUB-SECT. 4. LIABILITY FOR NUISANCE . . . . .	250
SUB-SECT. 5. ANIMALS DAMAGE FEASANT: <i>see</i> DISTRESS.	
PART IV. AGISTMENT . . . . .	252
PART V. HIRING . . . . .	255
PART VI. SALE AND EXCHANGE OF ANIMALS . . . . .	258
SECT. 1. IN GENERAL . . . . .	258
SECT. 2. WARRANTY . . . . .	260
SUB-SECT. 1. WHAT AMOUNTS TO A WARRANTY . . . . .	260
SUB-SECT. 2. EVIDENCE OF WARRANTY . . . . .	263
SUB-SECT. 3. CONSTRUCTION OF TERMS OF WARRANTY . . . . .	264
A. In General . . . . .	264
B. Limitations of Warranty . . . . .	266
SUB-SECT. 4. BREACH OF WARRANTY . . . . .	268
A. Remedies in General . . . . .	268
B. Defences available where Seller brings Action for Price . . . . .	269
C. Return of Animal by Purchaser . . . . .	269
D. Action for Damages . . . . .	271
E. Proof of Breach . . . . .	272
F. Pleading . . . . .	273
SECT. 3. MISREPRESENTATION AND FRAUD . . . . .	274
PART VII. CARRIAGE OF ANIMALS . . . . .	275
SECT. 1. RIGHTS AND LIABILITIES OF OWNERS . . . . .	275
SUB-SECT. 1. APART FROM RAILWAY AND CANAL TRAFFIC ACT, 1854 . . . . .	275
A. RIGHTS . . . . .	275
B. LIABILITIES . . . . .	277
SUB-SECT. 2. UNDER RAILWAY AND CANAL TRAFFIC ACT, 1854 . . . . .	278
SECT. 2. UNDER SPECIAL CONTRACT . . . . .	280
PART VIII. WILD BIRDS . . . . .	282
PART IX. PARTICULAR KINDS OF ANIMALS . . . . .	
SECT. 1. BEARS . . . . .	
SECT. 2. BEES . . . . .	
SECT. 3. BIRDS OTHER THAN GAME BIRDS . . . . .	283
SECT. 4. BULLS . . . . .	283
SECT. 5. CATS . . . . .	283
SECT. 6. DEER . . . . .	283



	PAGE
SECT. 7. ELEPHANTS . . . . .	283
SECT. 8. FISH . . . . .	283
SECT. 9. GAME BIRDS . . . . .	284
SECT. 10. MONKEYS . . . . .	284
SECT. 11. RABBITS AND HARES . . . . .	284
SECT. 12. WILD ANIMALS GENERALLY . . . . .	284
 PART X. CRUELTY TO AND KILLING, MAIMING, AND WOUNDING ANIMALS	 284
SECT. 1. CRUELTY TO ANIMALS . . . . .	284
SUB-SECT. 1. GUILTY KNOWLEDGE . . . . .	284
SUB-SECT. 2. SPECIFIC OFFENCES . . . . .	287
SUB-SECT. 3. PENALTIES AND PROCEDURE . . . . .	290
SUB-SECT. 4. DESTRUCTION OF INJURED ANIMALS . . . . .	292
SUB-SECT. 5. VIVISECTION . . . . .	292
SECT. 2. KILLING, MAIMING, AND WOUNDING ANIMALS . . . . .	292
 PART XI. DISEASED ANIMALS . . . . .	 295
SECT. 1. IN GENERAL . . . . .	295
SECT. 2. UNDER STATUTE . . . . .	297
SUB-SECT. 1. ISOLATION . . . . .	297
SUB-SECT. 2. DISINFECTION . . . . .	299
SUB-SECT. 3. IMPORTATION OF DISEASED ANIMALS . . . . .	300
SUB-SECT. 4. SLAUGHTER OF DISEASED ANIMALS AND COMPENSATION . . . . .	300
SUB-SECT. 5. LOCAL AUTHORITIES . . . . .	301
SUB-SECT. 6. POLICE POWERS AND PENALTIES . . . . .	302

<i>Carriage, generally</i>	<i>See</i> CARRIERS.	<i>Insurance, generally</i>	<i>See</i> INSURANCE.
<i>Cows and Dairies</i>	„ FOOD & DRUGS ; PUBLIC HEALTH & LOCAL ADMINISTRA- TION.	<i>Nuisance, generally</i>	„ NUISANCE.
		<i>Sale, generally</i>	„ AUCTION & AUC- TIONEERS ; SALE OF GOODS.
<i>Damage to Crops by</i>		<i>Sale of Cattle by</i>	
<i>Game, etc.</i>	„ GAME.	<i>Weight .</i>	„ MARKETS & FAIRS.
<i>Destructive Insects</i>	„ AGRICULTURE.	<i>Sale of Cattle in</i>	
<i>Distress upon Ani-</i>		<i>Markets</i>	„ MARKETS & FAIRS ; SALE OF GOODS.
<i>mals</i>	„ DISTRESS.	<i>Slaughter-houses</i>	„ PUBLIC HEALTH & LOCAL ADMINISTRA- TION.
<i>Distress Damage</i>			„ MAGISTRATES.
<i>Feasant</i>	„ DISTRESS.	<i>Summary Procedure</i>	
<i>Dog Licences</i>	„ REVENUE.	<i>Theft of Animals,</i>	
<i>Fish and Fishing</i>	„ FISHERIES.	<i>generally</i>	„ CRIMINAL LAW & PRO- CEDURE.
<i>Fisheries</i>	„ FISHERIES.		
<i>Game, Poaching, etc.</i>	„ GAME.	<i>Veterinary Surgeons</i>	„ MEDICINE & PHAR- MACY.
<i>Hiring, generally</i>	„ BAILMENT.		
<i>Horseflesh, Sale of</i>	„ FOOD & DRUGS.		
<i>Horse Racing and</i>			
<i>Coursing</i>	„ GAMING & WAGERING.		

## Part I.—Classification of Animals.

### SECT. 1.—WILD ANIMALS AND DOMESTIC ANIMALS.

See Part II.

### SECT. 2.—HARMLESS DOMESTIC ANIMALS, ANIMALS NATURALLY FEROCIOUS, AND

### DOMESTIC ANIMALS KNOWN TO BE VICIOUS.

See Part III., Sect. 2.

### SECT. 3.—DIFFERENT KINDS OF ANIMALS.

See Part IX.

## Part II.—Property in Animals.

### SECT. 1.—DOMESTIC ANIMALS.

#### SUB-SECT. 1.—IN GENERAL.

**1. Dog—Discussion of right of property in.]—**F. brought trespass for the seizing of his bloodhound :—*Held* : the action lay.

In this case deft. took my dog, & though it only be kept for my pleasure still I have property in it. When I have taken a fowl & by my industry have tamed it by restraining its liberty, then I have especial property therein seeing that by my labour it became obedient, & then it is not lawful for any one to take it, *e.g.*, deer in my park, fish in my pond ; *aliter* if they are in the river. It is the same of any tame animal which is useful to my house ; *aliter* if it escapes. Thus if I have a singing bird, although it be of no profit to me still it gives me pleasure, & if any one takes it from me I should have an action. In this case a hound is useful for several purposes ; it can go out with me & protect me from assault, or can track down a thief. Thus a cur is useful to a shepherd, & if one takes it out of his possession he suffers damage (BROOK, J.).—*FILOW'S CASE* (1521), Y. B., 12 Hen. 8, fo. 3, pl. 3.

*Annotation* :—*Consd.* Millar v. Taylor (1769), 4 Burr. 2303.

**2. — Trover—Without averment of tameness.]—**Trover lies for a greyhound, & it need not be averred that it was tame. A mastiff, a hound, a spaniel, & a tumbler, the law will take notice of.—*IRELAND v. HIGGINS* (1588), Cro. Eliz. 125 ; *Het.* 50 ; *Owen*, 93 ; 78 E. R. 383.

*Annotation* :—*Consd.* Millar v. Taylor (1769), 4 Burr. 2303.

**3. — — — Cost of keep.]—**Trover lies for a dog which was lost, & which deft. refused to deliver unless paid for his keeping.—*BINSTEAD v. BUCK* (1777), 2 Wm. Bl. 1117 ; 96 E. R. 660.

*Annotation* —*Refd.* Nicholson v. Chapman (1793), 2 Hy. Bl. 254.

**4. — Detention — “ Goods.”]**—The term “ goods ” in Metropolitan Police Courts Act, 1839 (c. 71), s. 40, includes a dog, & a magistrate can entertain an application under that sect. for delivery up of a dog alleged to be unlawfully detained.—*R. v. SLADE* (1888), 21 Q. B. D. 433 ; 57 L. J. M. C. 120 ; 59 L. T. 640 ; 52 J. P. 599 ; 4 T. L. R. 777 ; 37 W. R. 141 ; 16 Cox, C. C. 496.

*Annotation* :—*Refd.* Evans v. Davies (1893), 62 L. J. Ch. 661.

**5. — Offer of reward.]—**Defts., newspaper proprietors, published in their newspaper an advertisement by the owner of a dog which had been stolen, offering a reward & stating that no questions would be asked. In an action by a common informer for a penalty under Larceny Act, 1861 (c. 96), s. 102 :—*Held* : (1) the words “ any property

whatsoever ” in the sect. included a dog ; (2) defts. were liable.—*MIRAMS v. OUR DOGS PUBLISHING Co., LTD.*, [1901] 2 K. B. 564 ; 70 L. J. K. B. 879 ; 85 L. T. 6 ; 49 W. R. 626 ; 17 T. L. R. 649, C. A.

#### SUB-SECT. 2.—AS SUBJECTS OF LARCENY.

See, now, Larceny Act, 1861 (c. 9 s. 21 Larceny Act, 1916 (c. 50), ss. 3, 4.

See, further, CRIMINAL LAW & PROCEDURE.

**6. Animals generally.]—**Larceny cannot be committed in some things whereof the owner may have a lawful property, & such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, greyhounds, bloodhounds, or of some things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, etc., or their whelps or calves, because, though reclaimed, they serve not for food but pleasure, & so differ from pheasants, swans, etc., made tame, which, though wild by nature, serve for food. Only of the reclaimed hawk, in respect of the nobleness of its nature, & use for princes & great men, larceny may be committed, if the party know it to be reclaimed.— (undated), 1 Hale, P. C. 512.

**7. Horse — Felonious intention.]—**It is not felony to take a horse & ride him 40 miles away, there leaving him, if there was no attempt to sell or dispose of him.—*R. v. PHILLIPS & STRONG* (1801), 2 East, P. C. 662.

*Annotation* :—*Appld.* R. v. Holloway (1848), 1 Den. 370, C. C. R.

**8. S. P. R. v. ADDIS** (1844), 3 L. T. O. S. 410 ; 1 Cox, C. C. 78.

**9. Fowl—Indictment—Turkey—Alive or dead.]—**Upon an indictment for stealing a live animal evidence cannot be given of stealing a dead one. An indictment for stealing a dead animal should state that it was dead ; upon a general statement that prisoner stole the animal it is to be intended that he stole it alive.

Prisoner was indicted for stealing four live tame turkeys. He stole them in the city of C. & brought them dead into the city of H. :—*Held* : he could not be convicted on this indictment.—*R. v. EDWARDS & WALKER* (1822), Russ. & Ry. 497.

**10. S. P. R. v. HALLOWAY** (1823), 1 C. & P. 128.

**11. — — — Hen—Tame, wild or alive.]—**Prisoners were convicted of stealing “ five hens.” The indictment containing no averment that they were tame hens, judgment was arrested.—*R. v. TATE* (1833), 1 Lew. C. C. 234.

*Annotation* :—*Dbtd.* R. v. Stide & Millard, [1908] 1 K. B. 617, C. C. R.

#### PART II. SECT. 1, SUB-SECT. 1.

**a. Colt let loose on prairie.]—**Pltf. owned a bay stallion colt, & defts. owned a bay stallion colt, both of

which animals were let out to range over the prairie :—*Held* : the weight of evidence established the property to be that of pltf.—*PEARCE v. HART* (1905), 1 W. L. R. 476.—CAN.

#### PART II. SECT. 1, SUB-SECT. 2.

**b. Cow — Statutory offence — Chattels —9 Geo. 4, c. 55, ss. 40–42.]—***Held* : cows were not chattels, within the above sects.—*R. v. DENENY* (1899), Jebb, Cr. & Pr. Cas. 255.—IR.

**12.** —.]—On an indictment for stealing "fowls":—*Held*: the indictment was bad for not alleging that the fowls were dead or "domestic." *Seemle*: (1) the indictment could not be amended to get rid of the ambiguity of the word "fowls," as the fault was more than a "mere formal defect"; (2) "mere formal defect" & "mere variance in the name or description of any matter or thing" related to matters merely formal or collateral, not to a statement of the very subject of the offence, & of the article, the reception of which was the *corpus delicti*, & that subject must be such, & must be stated to be such, as that it could be the subject of larceny.—*R. v. LONSDALE* (1864), 4 F. & F. 56.

*Annotation*:—*Consd.* *R. v. Stride & Millard*, [1908] 1 K. B. 617, C. C. R.

*See, now*, Indictments Act, 1915 (c. 90), s. 5.

**13. Sheep — Statutory offence—Larceny Act, 1740 (c. 6).**—On an indictment under the above Act for killing sheep, with intent to steal the whole carcase, proof of killing with intent to steal part is sufficient to support the charge. *Seemle*: merely removing a live sheep, for the purpose of killing it with intent to steal part of the carcase, is an asportation under the above Act of the live sheep, as removal whilst alive is essential to constitute larceny.—*R. v. WILLIAMS* (1825), 1 Mood. C. C. 107.

**14. Bullock stealing—Statutory offence—Criminal Law Act, 1826 (c. 64), s. 28.**—The phrase "bullock stealing" in the above sect., relating to the allowance of rewards in certain cases for the discovery of offenders, includes all cases of cattle stealing of that particular description, *e.g.*, ox, cow, heifer, etc.—*R. v. GILLBRASS* (1836), 7 C. & P. 444.

**15. Dog — Statutory offence — Compensation — 8 & 9 Vict. c. 47.**—A writ of *certiorari* was granted to remove a conviction by a justice of a metropolitan police ct. under the above Act, on the ground (*inter alia*) that as the dog was restored the justice was not authorised in ordering £5 5s. to be given to the owner as the value of it.—*Ex p. RICHARDS* (1850), 15 L. T. O. S. 235.

**16. ——— "Chattels"—Larceny Act, 1827 c. 29), s. 53.**—A dog is not included in the term "chattels" in the above sect., & is not the subject of the misdemeanour of false pretences. Such things only are included in that enactment as were the subjects of larceny at common law.—*R. v. ROBINSON* (1859), Bell, C. C. 34; 28 L. J. M. C. 58; 32 L. T. O. S. 302; 23 J. P. 70; 5 Jur. N. S. 203; 7 W. R. 203; 8 Cox, C. C. 115, C. C. R.

*See, now*, Larceny Act, 1916 (c. 50), s. 32.

## SECT. 2.—WILD ANIMALS.

### SUB-SECT. 1.—ALIVE.

#### A. In General.

**17. Animals generally — Distinction between property in wild & domestic animals.**—If a man has a close adjoining a forest or park & allows his fence to be defective, & wild animals escape into it from the forest, it is not lawful for the owner of the forest to take them outside the forest, as he has no property in them & his pursuit of them would be a trespass.

There is a distinction between wild & domestic animals, as the owner of the latter has property in

them & may retake them, as they have escaped from the fault of the other (*BRIAN, C.J.*).—*ANON.* (1496), Keil. 30; 72 E. R. 186.

*Annotation*:—*Refd.* *Davies v. Powell* (1738), Willes, 46.

**18. — Nature of property.**—A man may have a special or qualified property in things which are *feræ naturæ*, three ways: *ratione infirmitatis*, *ratione loci*, & *ratione privilegii*.—*CHILD (CHILDE) v. GREENHILL* (1639), Cro. Car. 553; March, 48; 79 E. R. 1077; *sub nom.* *GREENHILL'S CASE*, W. Jo. 440.

*Annotation*:—*Apld.* *Pollexfen v. Crispin* (1671), 1 Vent. 122.

**Domestication.**—A man has a property *ratione loci* in animals which are *feræ naturæ* on his land; but this property ceases when they quit or are hunted off the land. The right of the owner of a forest or warren in the animals of the forest or warren continues after they are hunted out of the forest or warren, but not after they voluntarily quit it.

A man has an absolute property in *feris natura sua mansuetis*; he has a qualified property in *feris mansuetis*; & he has a possessory property in *feris*. Now whoever has this possessory property which is also a property *ratione privilegii*, there he may declare for the thing killed or taken without saying it was *suum* (*HOLT, C.J.*).—*SUTTON v. MOODY* (1697), 1 Ld. Raym. 250; 3 Salk. 290; Holt, K. B. 608; 1 Com. 34; Comb. 458; 5 Mod. 375; 91 E. R. 1083.

*Annotations*:—*Consd.* *Hannam v. Mockett* (1824), 4 Dow. & Ry. K. B. 518; *Lonsdale v. Rigg* (1856), 11 Exch. 654; *Blades v. Higgs* (1863), 13 C. B. N. S. 844. *Apprvd.* *Blades v. Higgs* (1865), 20 C. B. N. S. 214, H. L. *Refd.* *Deane v. Clayton* (1817), 7 Taunt. 489; *Graham v. Ewart* (1855), 11 Exch. 326; *Blades v. Higgs* (1862), 12 C. B. N. S. 501; *Read v. Edwards* (1864), 17 C. B. N. S. 245.

**20. — Statutory reservation of hunting.**—An Act of Parliament for allotting the land of a stinted pasture of a manor for the purposes of improvement (in which manor there was no right of free warren) declared all the allotments freehold to all intents & purposes. It then reserved to the lord the right to mines & the right to get the minerals, making compensation for damage to the herbage, & it declared the allotment to him to be in full recompense & satisfaction for all his right & interest as lord of the manor in & to the residue of the stinted pasture. It provided that he should enjoy signories, royalties, etc., & "also right of hunting, shooting, fishing & fowling in, through & over the stinted pasture & every part & allotment thereof & all other signories to the lords of the manor belonging (except those barred by the Act) in as full & ample a manner as if the Act had not been passed":—*Held*: the lord still possessed the exclusive right of hunting, shooting, etc., over the allotments.

Such a right is an interest in the realty which is well known to the law. The property in animals *feræ naturæ* while they are on the soil belongs to the owner of the soil, & he may grant a right to others to come & take them by a grant of hunting, shooting, fowling, & so forth; that right may be granted by the owner of the fee simple, & such a grant is a licence of a *profit à prendre* (*LORD CAMPBELL, C.*).—*EWART v. GRAHAM* (1859), 7 H. L. Cas. 331; 29 L. J. Ex. 88; 33 L. T. O. S. 349; 23 J. P. 483; 5 Jur. N. S. 773; 7 W. R. 621; 11 E. R. 132, H. L.

*Annotations*:—*Distd.* *Bruce v. Helliwell* (1860), 5 H. & N. 609; *Leconfield v. Dixon* (1867), L. R. 2 Exch. 202; *Sowerby v. Smith* (1874), L. R. 9 C. P. 524. *Consd.* *Devonshire v. O'Connor* (1890), 24 Q. B. D. 468, C. A.

## PART II. SECT. 2, SUB-SECT. 1.—A.

**19 i. Animals generally—Domestication—Escape & recapture.**—Wild animals are no longer the property of a man than while they continue in his

keeping or actual possession; but if they regain their natural liberty, his property ceases until they have a mind to return, which is only to be known by their usual custom of returning, or are

instantly pursued by their owner, for during such pursuit his property remains.—*CHOYTUN CHURN DOSS v. SYLHET COLLECTOR* (1873), 21 W. R. 75. —*IND.*



**Sect. 2.—Wild animals: Sub-sect. 1, A.]**

**Reid.** Leconfield v. Dixon (1867), L. R. 3 Exch. 30, Ex. Ch.; Musgrave v. Forster (1871), L. R. 6 Q. B. 590; Rogers v. St. Germans Union (1876), 35 L. T. 332; Fitzhardinge v. Purcell (1908), 99 L. T. 154. **Mentd.** Blades v. Higgs (1862), 12 C. B. N. S. 501; Jeffryes v. Evans (1865), 19 C. B. N. S. 246.

**21. Killing by trespasser.]—**Title to property created merely by the act of reducing a thing in possession necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser cannot create a title to property.

Game chased & killed on the land of A. is his property; & where a stranger, without A.'s permission, killed coney on the land of A., & immediately took them up & carried them away & sold them to a third person:—**Held:** the servants of A. were justified in taking possession of them as being the property of A.—**BLADES v. HIGGS** (1865), 20 C. B. N. S. 214; 11 H. L. Cas. 621; 6 New Rep. 274; 34 L. J. C. P. 286; 12 L. T. 615; 29 J. P. 390; 11 Jur. N. S. 701; 13 W. R. 927; 144 E. R. 1087, H. L.; *affg.* 13 C. B. N. S. 844.

**Annotations:—****Consd.** R. v. Townley (1870), L. R. 1 C. C. R. 315; R. v. Petch (1878), 38 L. T. 788, C. C. R. **Reid.** Read v. Edwards (1864), 17 C. B. N. S. 245; Hooper v. Clark (1867), 36 L. J. Q. B. 79; R. v. Roe (1870), 11 Cox. C. C. 557, C. C. R.; Musgrave v. Foster (1871), 24 L. T. 614; R. v. Read (1878), 37 L. T. 722, C. C. R.; Elwes v. Brigg Gas Co. (1886), 55 L. T. 831.

**22. Hawk—Reclaimed or tame.]—**In trover for a hawk deft. pleaded that the hawk first after its loss came to the hands of G., who sold it to R., who gave it to deft., who sold it to P., etc. On demurrer exception was taken to the count because it was not expressly alleged that the hawk was reclaimed or tame, & judgment was given against pltf. Afterwards a new action upon the case was brought for a reclaimed hawk called a lanner *cum tintinnabulis*, etc., & the matter was compounded for forty sheep & one ram.—**FINES v. SPENCER** (1572), 3 Dyer, 306b; 73 E. R. 692.

**Annotations:—****Reid.** Case of Swans (1592), 7 Co. Rep. 15b; Lyster v. Home (1639), Cro. Car. 544; R. v. Stride & Millard, [1908] 1 K. B. 617, C. C. R.

**23. — Trespass for injury to.]—**Trespass for that deft. *accipitrem ipsius F. percussit* with his staff, upon which stroke the hawk died. Verdict for pltf. It was moved in arrest of judgment that the declaration was not good, for it did not show that the hawk was reclaimed:—**Held:** the declaration was sufficient, being in an action of trespass for striking & killing, etc., which he only might have who had the possession.—**VINCENT v. LESNEY** (1625), Cro. Car. 18; 79 E. R. 621.

**24. — Trover—Form of declaration.]—**In trover for a hawk, judgment was given for pltf. It was moved in arrest of judgment, because it was not said in the declaration that it was a tame hawk, the words being *accipitricem suum, Anglice vocat'* a

**26 i. Rabbits—Warren—Waste.]—**To break up a rabbit-warren, unless it be a warren by charter or prescription, is not waste at common law, & the ct. will not grant an injunction to prevent it. *Qu.*: if the warren be demised as such.—**LURTING v. CONN** (1850), 1 I. Ch. R. 273.—**IR.**

**c. Rabbits & deer—Escaping from park—Property.]—**In 1898 W. came into possession of a demesne where there were rabbits & deer, which trespassed upon adjoining lands in the occupation of B. W.'s predecessor had, on two occasions, let loose foreign rabbits, with a view to the improvement of the breed, & W. had, since he entered into possession, trapped the rabbits for profit, & exported them to England, but had done nothing to improve them or increase their numbers. Rabbits bred in considerable numbers on B.'s

land as well. The deer, which at one time had been confined within a walled deer-park in the demesne, broke loose in the year 1893 through a temporary breach in the wall, & only a portion were recaptured. The remainder had since been wandering about the demesne, breeding there, & trespassing continuously on B.'s lands, but always returning to the demesne. W. with his friends occasionally shot the deer for sport; & in response to B.'s complaints, told him that he might shoot them, & in fact, gave it out generally in the neighbourhood that he desired that any one who could shoot might do so. At the same time he kept a wood-ranger, whose duty it was to look after the deer, & his predecessor had occasionally fed the deer in winter time with hay, laurels, & oats:—**Held:** (1) W. was not liable in respect of the damage done by trespass of the rabbits; (2) there

was evidence to support the finding of the jury that the deer were W.'s deer, were tame & "kept" by W., & under his control, & W. was liable for any damage done by the deer to B.'s land & crops.—**BRADY v. WARREN**, [1900] 2 I. R. 632.—**IR.**

**25. Swans—Title by prescription.]—**All white swans not marked, which having gained their natural liberty & are swimming in an open & common river, may be seized to the King's use by his prerogative, & all those, the property whereof is not known, do belong to the King by his prerogative; & so whales & sturgeons are Royal fish & belong to the King by his prerogative. But the subject may have property in white swans not marked, as some may have swans not marked in his private waters, the property of which belongs to him, & not to the King; & if they escape out of his private waters into an open & common river, he may bring them back & take them again. But if they have gained their natural liberty & are swimming in open & common rivers, the King's officer may seize them in the open & common river for the King; for one white swan, without such pursuit as aforesaid, cannot be known from another; & when the property of a swan cannot be known, the same being of its nature a fowl Royal belongs to the King. So every one who has swans within his manor, that is to say, within his private waters, has a property in them; one may prescribe to have a game of swans within his manor as well as a warren or park; he who has such a game of swans may prescribe that his swans may swim within the manor of another; a swan may be an estray & so cannot any other fowl.—**CASE OF SWANS** (1592), 7 Co. Rep. 15b; 77 E. R. 435.

**Annotations:—****Mentd.** Davies v. Powell (1737-8), Willes, 46; Hannam v. Mockett (1824), 4 Dow. & Ry. K. B. 518; R. v. Robinson (1859), Bell, C. C. 34; Blades v. Higgs (1865), 20 C. B. N. S. 214, H. L.

**26. Rabbits—Escaping from warren—Property.]—**If a man makes a rabbit-warren on his own land, & the rabbits wander on to the adjoining land & do damage, no action lies, as they are not deft.'s conies when they are out of the warren, notwithstanding that the making of the warren would seem to be the cause of the damage, but the making of a warren is presentable in the ct. leet, & finable there.—**ANON.** (1595), Moore, K. B. 420; 72 E. R. 669.

**27. — Manor—Waste by lessee.]—**In an action for waste against the lessee of a manor & a warren, for that he had destroyed a cony borough:—**Held:** (1) waste lay for a warren; (2) it was not waste to destroy cony boroughs, because there was no inheritance in conies & a man could have no property in them but only possession.—**MOYLE v. MAYLE** (1599), Owen, 66; 74 E. R. 905.

**Annotation:—****Mentd.** Elias v. Griffith (1878), 8 Ch. D. 521, C. A.

was evidence to support the finding of the jury that the deer were W.'s deer, were tame & "kept" by W., & under his control, & W. was liable for any damage done by the deer to B.'s land & crops.—**BRADY v. WARREN**, [1900] 2 I. R. 632.—**IR.**

**d. Ostrich—Trespass—Measure of damages.]—**Z. trespassed upon the land of V. & drove off from it & appropriated certain young wild ostriches, which had been reared upon it. In an action for trespass:—**Held:** the ct. might take into consideration all the circumstances of the case, & though the ostriches, being *feræ naturæ*, had not been the property of V., the ct. was justified in making their value the measure of the damages awarded.—**DE VILLIERS v. VAN ZYL** (1880), F. 77.—**S. AF.**

**28. — Commoner's rights.]—**Trespass for breaking pltf.'s *liberam warrennam* & taking, killing & carrying away conies. Deft. pleaded justification in that he was seised in fee of a messuage & land & had common by prescription appertaining thereto, in the place where, & that he was ready to use his common, & many conies being there *damage feasant* & spoiling the grass, he entered to chase them out:—*Held*: (1) the plea was not good; (2) the lord might have beasts of warren, & the commoner could not destroy them, & should the lord surcharge the common & deprive him of his common, he ought to have his remedy by assize or action upon the case, but could not kill the conies no more than he might kill any other beasts of the lord's; (3) so long as conies were in the lord's own land, the lord had property in them, but when they went out he had no longer property in them.—*HADDEN* (*HODDESDON, HOLDESDEN*) v. *GRYSSEL* (*GRESEL*) (1607), Cro. Jac. 195; Yelv. 104; 1 Brownl. 208; 79 E. R. 170.

*Annotations*:—*Consd.* Hassard v. Cantrell (1694), 1 Lut. 101; Atkinson v. Teasdale (1772), 3 Wils. 278. *Mentd.* Howard v. Spencer (1665), 1 Sid. 251; Ashmead v. Ranger (1699), Fortes. Rep. 152; Hall v. Harding (1769), 1 Wm. Bl. 673.

**29. Damage feasant—Landowner's rights.]—**Pltf. was tenant of certain land under a lease reserving the game to the landlord (deft.), one of the fields adjoining a wood belonging to deft. In an action for damage done to the crops by the rabbits which came out of the wood:—*Held*: (1) rabbits were not property; (2) deft. was not the owner of them, & there was no duty or obligation with reference to them, either express or implied, & no contract by him that he would kill them or keep them down.—*WOOLWICH* v. *GATAKER* (1868), 32 J. P. 455.

**30. Fish—Royal franchise.]—**The King shall have wreck, as he shall have great fish, etc., because they are *nullius in bonis*, or as he shall have *animalia vagantia sive vacantia*, scil. estrays, because none claims the property, & franchise may be granted of such wreck of sea & cattle estraying, conies, hares, partridges, & other savage beasts found in the grantee's soil, fee, warrens, & demesne lands.—*CONSTABLE'S CASE* (1601), 5 Co. Rep. 106a; 77 E. R. 218.

*Annotations*:—*Refd.* R. & Waller v. Hanger (1615), 3 Bulst. 1; Pridoux v. Warne (1673), Freem. K. B. 355; Dunwich Corp'n. v. Skerry (1831), 1 B. & Ad. 831; R. v. G. W. Ry. Co. (1842), 3 Q. B. 333; R. v. Thurborn (1848), 2 Car. & Kir. 831; R. v. Wood (1849), 3 Cox, C. C. 453; The Cargo ex Schiller (1877), 2 P. D. 145, C. A. *Mentd.* Admiralty Case (1609), 13 Co. Rep. 51; Gold v. Death (1615), Cro. Jac. 381; Onslow v. Horne (1771), 3 Wils. 177; Baldwin v. Elphinstone (1775), 2 Wm. Bl. 1037; R. v. Forty-nine Casks of Brandy (1836), 3 Hag. Adm. 257; Beaufort v. Swansea Corp'n. (1849), 3 Exch. 413; Penryn Corp'n. v. Holm (1877), 37 L. T. 133; The Gas Float Whitton, No. 2, [1896] P. 42, C. A.; The Olympic, [1913] P. 92, C. A.

**31. — Pond—Rights of heir & executor.]—**In trespass for entering a close & taking fish out of a fishpond with nets & other engines, deft. pleaded he took the fishes as exor. of the person who had placed the fishes in the pond:—*Held*: (1) the fish were chattels descendable, & the heir should have them & not the exor.; (2) to take them was felony.—*GRAY* v. *TROWE* (1601), Gouldsb. 129; 75 E. R. 1043.

**32. — Trespasser—Free or several piscary.]—**In trespass for fishing in *separati piscaria* of pltf., a verdict was found for pltf. In arrest of judgment it was objected that pltf. had declared of taking of *pisces suos*, whereas being *feræ naturæ* pltf. had not property in them:—*Held*: (1) while in a general sense they could not be said *pisces ipsius*, in a particular sense they might; (2) in the present case pltf. had them by reason of privilege, & he was entitled to judgment.—*CHILD* (*CHILDE*) v. *GREENHILL*

(1639), Cro. Car. 553; March, 48; 79 E. R. 1077; *sub nom.* *GREENHILL'S CASE*, W. Jo. 440.

*Annotation*:—*Folld.* Pollexfen v. Crispin (1671), 1 Vent. 122.

**33. — — — — —.]—**Pltfs. brought trespass *quare pisces suos cepit in separati piscaria*. After verdict for them, it was moved in arrest of judgment that, unless in a trunk or pond, the fishes were improperly called *pisces suos*, there being no more property in fishes in a several piscary than in a free piscary:—*Held*: good upon demurrer, by reason of the local property, for he that had possession had property.—*POLLEXFEN* (*POLYXPHEN*) v. *CRISPIN* (1671), 1 Vent. 122; 2 Keble, 757, 765; 86 E. R. 84.

*Annotations*:—*Refd.* Sutton v. Moody (1696), 1 Ld. Raym. 250. *Mentd.* Hartfort v. Jones (1699), 1 Ld. Raym. 588; Cary v. Hilton (1734), 2 Barn. K. B. 449; R. v. Landaff (1735), 2 Stra. 1006.

**34. — Profit à prendre.]—**E. granted by deed to pltfs. for a term of years "the exclusive right of fishing" in a defined part of the river C., with a proviso that "the right of fishing hereby granted shall only extend to fair rod & line angling, & to netting for the sole purpose of procuring fish baits." Deft. wrongfully discharged into the stream water loaded with sediment, the effect of which was to drive away the fish & injure the breeding:—*Held*: (1) the grant did not give a mere licence to fish, but a right to fish & to carry away the fish caught; (2) this was a *profit à prendre* & was an incorporeal hereditament; (3) pltfs. had a right of action against any one who wrongfully did any act, by which the enjoyment of the rights given to them by the deed was prejudicially affected.—*FITZGERALD* v. *FIRBANK*, [1897] 2 Ch. 96; 66 L. J. Ch. 529; 76 L. T. 584; 13 T. L. R. 390; 41 Sol. Jo. 490, C. A.

*Annotations*:—*Refd.* (3) Ecroyd v. Coulthard, [1897] 2 Ch. 554; (1) Lowe v. Adams, [1901] 2 Ch. 598.

See, further, EASEMENTS & PROFITS À PRENDRE; FISHERIES.

**35. Musk cat, monkey & parrot—Trover.]—**In an action of trover & conversion of one hundred musk cats & sixty monkeys, after verdict, it was moved in arrest of judgment that the declaration did not show that they were tame or reclaimed:—*Held*: (1) the declaration was sufficient, for they were merchandise & valuable; (2) likewise in an action for a parrot.—*GRYMES* v. *SHACK* (1610), Cro. Jac. 262; 79 E. R. 226.

*Annotation*:—*Mentd.* Forbes v. Cochrane (1823), 3 Dow. & Ry. K. B. 679.

**36. — — — — —.]—**In an action upon the case of trover & conversion of three monkeys & divers musk cats, after verdict, it was moved in arrest of judgment that the declaration did not allege the monkeys were reclaimed:—*Held*: if the action had been for sixty musk cats taken & a parrot, the action would well lie; in case of hawks, there the declaration ought to allege that they were reclaimed, but in the case of monkeys, as there, the declaration was good without showing that they were reclaimed.—*ANON.* (1610), 1 Bulst. 95; 80 E. R. 794.

**37. Pigeons—At large or in dovecot.]—**In doves in a dovecot there is *jus proprietatis & privilegii*. So trespass lies for taking a goshawk in respect of the place, & so of other things which are *feræ naturæ*. And if a deer goes out of a park, albeit it be in the King's case, yet it is lawful for the owner of the soil to take it, if it be in the place where the deer has chase & re-chase. So trespass lies *quare columbare fregit et columbas cepit*; but trespass does not lie for killing of doves, but there is a *quære* of an action upon the case. A man has property in the doves only by the possession, for being at large, they are *nullius in bonis*, & when they are in his possession, to wit, in a dovecot, they do no harm to any.—



**Sect. 2.—Wild animals: Sub-sect. 1, A.]**

**NORTHUMBERLAND'S (EARL) CASE** (1617), Poph. 141; 79 E. R. 1242.

**38. Deer.]—**A man cannot have property by common law in deer, unless they are tame or reclaimed, even though they are in a park.—**MALLOCK v. EASTLEY** (1685), 3 Salk. 291; 3 Lev. 227; 91 E. R. 832.

*Annotation:—***Refd.** **Davies v. Powell** (1738), Willes, 46.

**39. — Whether distrainable.]—**Deer in an inclosed ground are subjects of property *ratione loci* & are distrainable for rent. The reason why deer have been said not to be distrainable is because they were considered as things not of profit & in which no man could have a valuable property; but that fails now that they are chiefly kept for profit & not for pleasure.—**DAVIES (DAVIS) v. POWELL** (1738), Willes, 46; **Cooke, Pr. Cas.** 146; 7 Mod. Rep. 249; 125 E. R. 1048.

*Annotations:—***Apprvd.** **Morgan v. Abergavenny** (1849), 8 C. B. 768. **Refd.** **Steel v. Lacy** (1810), 3 Taunt. 285; **Ford v. Tynte** (1861), 31 L. J. Ch. 177.

**40. — Whether liable to execution.]—***Qu.*, whether deer & wild cattle are liable to be taken in execution under a writ of *fi. fa.*, issued against a tenant for life.—**DAVIS v. TANKERVILLE (LORD)** (1843), 2 L. T. O. S. 125; 7 J. P. 726.

**41. — Personal property, not part of inheritance.]—**Deer in a park (though an ancient & legal park) may be so tame & reclaimed from their natural wild state as to pass to exors. as personal property.

In trover by exors. against the heir, it appeared that deer had been kept in a park over 900 acres in extent, which deer were tended by keepers & fed in winter with hay, beans & other food, etc. The jury found for pltf., observing that the animals had been originally wild but had been reclaimed:—**Held**: (1) deer are now ordinarily kept for ornament & profit & rarely for sport, their whole management differing but little from that of sheep or other animals kept for profit; (2) the verdict was sufficient in law; (3) while each case must depend upon the particular facts, in that case the facts were such as were proper to be submitted to the jury.—**MORGAN v. ABERGAVENNY (EARL)** (1849), 8 C. B. 768; 14 L. T. O. S. 328; 137 E. R. 710.

*Annotation:—***Folld.** **Ford v. Tynte** (1861), 2 John. & H. 150.

**42. — —.]—**Deer in a park, when reclaimed, become personal chattels & cease to be parcel of the inheritance.

In a suit by incumbrancers of a tenant for life of a deer park & other property, an application by remaindermen to prevent the receiver from letting the park, except as a deer park & with proper covenants for preserving the deer, was refused on evidence that the deer were reclaimed.

The ct. will not interfere to restrain waste in not keeping up the breed.—**FORD v. TYNTE** (1861), 2 John. & H. 150; 31 L. J. Ch. 177; 26 J. P. 228; 70 E. R. 1008.

*Annotations:—***Consd.** **White v. Paine** (1914), 83 L. J. K. B. 895. **Mentd.** **Tynte v. Hodge**, **Tynte v. Bevan** (1864), 11 L. T. 490.

**43. Tenant for life—Use & enjoyment.]—**In a suit to administer real & personal estate:—**Held**: deer in a park & pigeons in a dovecot did not belong to the tenant for life absolutely, but he was entitled to their reasonable use & enjoyment.—**MAYNARD v. GIBSON**, [1876] W. N. 204.

*Annotation:—***Folld.** **Paine v. Warwick**, [1914] 2 K. B. 486.

**44. — —.]—**A testator bequeathed certain "live & dead stock including deer" to trustees in trust for his wife for life, & after her decease for the persons who, for the time being, should under the

will be entitled to the possession or the rents & profits of certain real estate. At the time of testator's death there was a herd of tame deer in a park which formed part of the estate. A tenant for life under the will from time to time purchased deer & added them to the herd for the purpose of improving it. The deer in the herd at the time of testator's death having died:—**Held**: (1) the herd of deer did not belong to the tenant for life absolutely, but she was only entitled to their reasonable use & enjoyment as in the case of farming stock; (2) the deer which had been added to the herd by the tenant for life must be taken to have been added in accordance with her obligation to maintain the herd, & they became subject to the trusts of the will.—**PAINE v. WARWICK (COUNTESS)**, [1914] 2 K. B. 486; *sub nom.* **WHITE v. PAINE**, 83 L. J. K. B. 895; 30 T. L. R. 347; 58 Sol. Jo. 381.

**45. Wild duck—Decoy—Disturbance by third party—On his own ground.]—**Pltf. declared that he was possessed of a decoy pond frequented with ducks of which he made great gains, & that deft. knowingly & maliciously discharged guns, frightening away his ducks, etc. After verdict & in arrest of judgment, it was objected that deft. stood on his own ground & could not be guilty of a trespass on pltf.'s close:—**Held**: there was no ground for interfering with the verdict; though wild, the ducks were *fluminea volucres* & in pltf.'s decoy pond & so in his possession, which was sufficient without showing that he had any property in them.—**KEEBLE (KEBLE) v. HICKERINGHALL** (1706), 3 Salk. 9; Holt, K. B. 14, 17, 19; Kelw. 273; 11 Mod. 74, 130; 11 East, 574, n.; 91 E. R. 659.

*Annotations:—***Appld.** **Carrington v. Taylor** (1809), 11 East, 571. **Distd.** **Hannam v. Mockett** (1824), 2 B. & C. 934. **Consd.** **Mogul S.S. Co. v. McGregor, Gow**, [1892] A. C. 25, H. L.; **Allen v. Flood**, [1898] A. C. 1, H. L. **Refd.** **Mogul S.S. Co. v. McGregor, Gow** (1889), 23 Q. B. D. 598, C. A. **Mentd.** **Pannell v. Mill** (1846), 3 C. B. 625; **Rogers v. Rajendro Dutt** (1860), 13 Moo. P. C. C. 209, P. C.; **Ibbotson v. Peat** (1865), 34 L. J. Ex. 118; **Flood v. Jackson**, [1895] 2 Q. B. 21, C. A.; **Trollope v. London Building Trades Federation** (1895), 11 T. L. R. 228; **Quinn v. Leathem** (1901), 70 L. J. P. C. 76, H. L.

**46. On open river.]—**Pltf. brought an action on the case in respect of the firing at wildfowl from a boat on a public river or open creek where the tide ebbed & flowed, so near to an ancient decoy on the shore as to make the birds there take flight. At the trial, the right of pltf. to the decoy was established, & the jury found for him with 40s. damages. On motion to set aside the verdict:—**Held**: there was no ground for disturbing the verdict.—**CARRINGTON v. TAYLOR** (1809), 11 East, 571; 103 E. R. 1126.

*Annotations:—***Distd.** **Hannam v. Mockett** (1824), 4 Dow. & Ry. K. B. 518. **Appld.** **Ibbotson v. Peat** (1865), 3 H. & C. 644. **Distd.** **Allen v. Flood**, [1898] A. C. 1, H. L. **Refd.** **Mogul S.S. Co. v. McGregor, Gow** (1891), 66 L. T. 1, H. L. **Mentd.** **Rogers v. Rajendro Dutt** (1860), 13 Moo. P. C. C. 209, P. C.; **Flood & Taylor v. Jackson** (1895), 64 L. J. Q. B. 665, C. A.; **Quinn v. Leathem** (1901), 70 L. J. P. C. 76, H. L.

**47. Whether birds of warren—Foreshore—Right of wild fowlers.]—**Action brought by the lord of certain manors adjoining a tidal & navigable river for trespass on the foreshore parcel of the manors, in a boat & on foot, for the purpose of shooting wild duck. Deft. denied that the foreshore was parcel of the manors, & even if it were, he claimed the right to go upon the foreshore & shoot & carry away wild duck on the ground of immemorial user, in four alternative ways: (1) as a member of the public in exercise of a general right of all the King's subjects in & over the foreshore of a tidal navigable river; (2) as one of the inhabitants of the manors by virtue of a presumptive trust or reservation in their favour; (3) as an inhabitant of the manors, being a wild-fowler by occupation, by virtue of a custom of the



manors; (4) by prescription as a right in gross enjoyed by him & his ancestors:—*Held*: there was not sufficient evidence of user to enable the ct. to presume the existence of a trust, or to establish a prescriptive right.

The right claimed to kill & carry away wild duck is, whether wild fowl are birds of warren or mere wild birds in which there is no property, a *profit à prendre* & cannot be claimed by custom, but *semble*, wild duck are birds of warren.—*FITZHARDINGE (LORD) v. PURCELL*, [1908] 2 Ch. 139; 77 L. J. Ch. 529; 99 L. T. 154; 72 J. P. 276; 24 T. L. R. 564.

*Annotation*:—*Mentd.* Secretary of State for India v. Sri Raja Chellini Rama Rao (1916), 32 T. L. R. 652, P. C.

*See, further*, EASEMENTS & PROFITS À PRENDRE; WATERS & WATERCOURSES.

**48. Rooks—Disturbance of rookery.**—A declaration stated that pltf. was possessed of a close of land with trees growing thereon, to which rooks had been used to resort & settle & build nests & rear their young in the trees, by reason whereof pltf. had been used to kill & take the rooks & their young, & great profit & advantages had accrued to him, yet deft. wrongfully & maliciously intending to injure pltf., alarm & drive away the rooks, & cause them to forsake pltf.'s trees, wrongfully & injuriously caused guns loaded with gunpowder to be discharged near pltf.'s close, & disturbed & drove away the rooks, whereby pltf. was prevented from killing the rooks & taking the young. Plea, not guilty. On motion in arrest of judgment:—*Held*: (1) the action was not maintainable, as rooks were a species of birds *feræ naturæ*, destructive in their habits, not known as an article of food or alleged so to be, & not protected by any Act of Parliament; (2) pltf. could not have any property in them, or show any right to have them resort to his trees.—*HANNAM v. MOCKETT* (1824), 2 B. & C. 934; 4 Dow. & Ry. K. B. 518; 2 L. J. O. S. K. 183; 107 E. R. 629.

*Annotations*:—*Consd.* Read v. Edwards (1864), 17 C. B. N. S. 245; Allen v. Flood, [1898] A. C. 1, H. L.

**49. Bees.**—Bees are property & the subject of larceny (BAYLEY, J.).—*HANNAM v. MOCKETT* (1824), 2 B. & C. 934; 4 Dow. & Ry. K. B. 518; 2 L. J. O. S. K. B. 183; 107 E. R. 629.

*Annotations*:—*Mentd.* Read v. Edwards (1864), 17 C. B. N. S. 245; Allen v. Flood, [1898] A. C. 1, H. L.

**50. Swarming in another's trees.**—Pltf. saw a swarm of bees leaving one of his hives & alighting on the branch of an apple tree in deft.'s garden, which was next to his. Pltf. wished to go to the tree to try to take the bees, but deft. would not allow him to enter his garden. Eventually deft. permitted pltf. (subject to his liability, if any, for trespass) to go into his garden to take the bees. In the meantime deft.'s son had, as agent of his father, been to the apple tree & shaken the bees to the ground, where they remained in a cluster. As soon as pltf. came up to them to hive them they flew right up to the sky, a course which the bees would most likely have taken if pltf. had gone in the same unskilful way to the tree at first. In an action for damages for the loss of the swarm of bees:—*Held* (1) bees were a sort of wild animals, but a man who hived them had property in them, & the property in the bees remained in pltf. when they alighted on

deft.'s tree, for pltf. had not lost sight of them, & could identify them; (2) the shaking of the bees from the tree was an illegal act, & if the bees had flown to the sky instead of clustering on the ground, deft. would have been liable for destroying pltf.'s chance of taking his bees; (3) in the present case the wrongful act of deft. caused no appreciable damage to pltf., & the action failed.—*QUANTRILL v. SPRAGGE* (1907), 71 J. P. Jo. 425.

**51. Grouse—Trespass for killing & taking.**—The franchise of free warren is of great antiquity & very singular in its nature; it gives a property in wild animals, which property may be claimed in the land of another to the exclusion of the owner of the land. But such a right ought not to be extended by inference to any animals not clearly within it. Pheasants & partridges are certainly birds of warren, but grouse are not, because grouse were not birds that could be taken by any of the ordinary modes of sport in use when this franchise had its origin (LORD TENTERDEN, C.J.).—*DEVONSHIRE (DUKE) v. LODGE* (1827), 7 B. & C. 36; 9 Dow. & Ry. K. B. 875; 5 L. J. O. S. K. B. 319; 108 E. R. 638.

*Annotations*:—*Consd.* Fitzhardinge v. Purcell, [1908] 2 Ch. 139; *Refd.* Lonsdale v. Rigg (1856), 11 Exch. 654.

**52.**—The property in wild grouse is not absolute in any one; it is a wild bird *feræ naturæ*. So long as the grouse is on a man's land he has a possessory title in it, but as soon as it flies or goes off his land, his property is gone (MARTIN, B.).—*LONSDALE (EARL) v. RIGG* (1856), 11 Exch. 654; 25 L. J. Ex. 73; 26 L. T. O. S. 242; 20 J. P. 118; 156 E. R. 992; *sub nom.* Rigg v. LONSDALE (EARL) (1857), 1 H. & N. 923, Ex. Ch.

*Annotations*:—*Fold.* Blades v. Higgs (1863), 13 C. B. N. S. 844. *Distd.* Read v. Edwards (1864), 17 C. B. N. S. 245. *Consd.* Blades v. Higgs (1865), 20 C. B. N. S. 214, H. L.; R. v. Townley (1870), L. R. 1 C. C. R. 315; Fitzhardinge v. Purcell, [1908] 2 Ch. 139. *Mentd.* Bruce v. Helliwell (1860), 5 H. & N. 609; Bird v. G. E. Ry. Co. (1865), 13 W. R. 989.

**53. Wild Cattle—Rights of crown grantee.**

Her Majesty's Emigration Comrs. in the course of negotiations for grants of land to the Falkland Islands Co., with the right of hunting & taking wild cattle on the lands granted, treated all the wild cattle upon the islands as *feræ naturæ*, & distinctly intimated to the co. that no property in them could be acquired. In the years 1859 & 1860, grants of land were made by the Crown to that co. in fee, with a reservation to the Crown of the right of re-entry, for the purpose of making roads, canals & other works of public utility, together with a right to cut timber, & to search for & carry away stones & other materials for making or keeping such works in repair, together with all minerals & coal, & full liberty to search for & carry away same. Incidental to these grants, a licence, or lease, to depasture stock on 10,000 acres, the limits of which were strictly defined, was granted by the Crown to the co., for a term of years, at a fixed rent, subject to the same reservation as was contained in the grants of land in fee. Neither in the grants, or the licence, was any provision made as to the right to hunt & kill wild animals:—*Held*: (1) the grants & licence to depasture stock must be considered to have been applied for & entered into on the faith of the admission by the Crown that the wild cattle were *feræ*

**50 i. Bees—Swarming in another's trees.**—Bees in a wild state are the property of the person who can get possession of them. When they come into cultivation & swarm from a hive, they remain the property of the owner so long as he is pursuing them where he is entitled to go. If they come upon another person's land, that person is entitled to prevent pursuit on his land, & if they are hived by that person, they become his property.—*HARRIS v. ELDER* (1893), 57 J. P. 553.—SCOT.

**e. Wild game—Damages for shooting.**—A land surveyor, being on a farm for a lawful purpose, shot several head of game which were running wild, but which the owner of the property was endeavouring to preserve:—*Held*: no action lay for damages sustained through the shooting of wild animals neither in actual nor constructive possession of the owner of the land. *Semble*: an action for trespass would lie.—*WRIGHT v. ASHTON* (1905), 2 Buch. A. C. 240; 15 C. T. R. 544.—S. AF.

**f. Elephant—Domestication—Escape & recapture.**—Where an elephant, which had apparently been in a state of domestication for a long time, disappeared from the jungle, where it regularly grazed, but resumed its domestic habits on being recaptured:—*Held*: the elephant was not a "wild animal," & the property in it never ceased with the original owner.—*MAHADAR MOHANTA v. BALARAM GAGOI* (1908), L. L. R. 35 Cal. 413; 12 C. W. N. 547.—IND.

## ANIMALS.

### **Sect. 2.—Wild animals: Sub-sect. 1, A. & B.; sub-sect. 2.]**

*naturæ*, & the co., in the absence of any stipulation to the contrary in the grant or licence, had, as such grantees & lessees, the exclusive right of killing & taking all game, beasts of chase, & animals which were properly *feræ naturæ*, & which at any time were upon their land, so long as such animals remained upon the land so granted or demised; (2) as wild cattle were to be treated as animals *feræ naturæ*, the co. might lawfully kill or hunt them; (3) the co.'s right to kill or take such cattle was not affected or prohibited by the Local Ordinance of 1853, s. 37, & a conviction & order under that sect. imposing penalties for killing wild cattle without a licence was bad, & must be set aside.—**FALKLAND ISLANDS CO. v. R.** (1864), 2 Moo. P. C. C. N. S. 266; 11 L. T. 9; 10 Jur. N. S. 807; 13 W. R. 57; 15 E. R. 902, P. C.

#### *B. As Subjects of Larceny.*

See, now, Larceny Act, 1861 (c. 96), s. 21.

See, generally, CRIMINAL LAW & PROCEDURE.

**54. Animals in general—Distinctions.]**—The stealing of peacocks or any reclaimed fowl is felony, so of tame herons, pigeons & young hawks in their nests, so of fishes in a private lake & ponds; it is otherwise of the pheasant, partridge, hare, coney, although they be so kept that they cannot escape, if they do not become reclaimed & be known so to be by him who steals them. The same law of all wild beasts which serve for men's food, but as to cats, dogs, monkeys & the like, it is no felony to steal them, but trespass may lie for taking of them.—**ANON.** (1527), Y. B., 18 Hen. 8, 2 pl. 11; Jenk. 193, 204; 145 E. R. 130, 138.

**55. ———.]**—When a man has savage beasts *ratione privilegii*, as by reason of a park, warren, etc., he has no property in the deer or conies or pheasants or partridges; &, therefore, in an action he shall not say *suos*, for he has no property in them, but they belong to him *ratione privilegii* for his gamed pleasure, so long as they remain in the privileged place; for if the owner of the park dies, his heir shall have them, & not his exors. or administrators, because without them the park, which is an inheritance, is not complete; nor can felony be committed of them, but of those which are made tame in which a man by his industry has any property felony may be committed. But a man may have property in some things which are of so base a nature that no felony can be committed of them, & no man shall lose life or member for them as of a bloodhound or mastiff.—**CASE OF SWANS** (1592), 7 Co. Rep. 15b; 77 E. R. 435.

**Annotations:—****Consd.** **Hannam v. Mockett** (1824), 4 Dow. & Ry. K. B. 518; **Blades v. Higgs** (1865), 20 C. B. N. S. 214, H. L. **Refd.** **Davies v. Powell** (1738), Cooke, Pr. Cas. 146. **Mentd.** **R. v. Robinson** (1859), Bell, C. C. 34.

**56. ——— Ownership of soil.]**—Wild animals whilst living, though they are according to Lord Holt the property of the owner of the soil on which they are living, are not his personal chattels so as to be the subject of larceny. They partake while living of the quality of the soil, & are, like growing fruit, considered as part of the realty (**LORD CRANWORTH**).—**BLADES v. HIGGS** (1865), 20 C. B. N. S. 214; 11 H. L. Cas. 621; 6 New Rep. 274; 34 L. J. C. P. 286; 12 L. T. 615; 29 J. P. 390; 11 Jur. N. S. 701; 13 W. R. 927; 144 E. R. 1087, H. L.; *affg.* 13 C. B. N. S. 844.

**Annotations:—****Mentd.** **Read v. Edwards** (1864), 17 C. B. N. S. 245; **Hooper v. Clark** (1867), 36 L. J. Q. B. 79; **R. v.**

**Roe** (1870), 22 L. T. 414, C. C. R.; **R. v. Townley** (1870), L. R. 1 C. C. R. 315; **Musgrave v. Foster** (1871), 24 L. T. 614; **R. v. Petch** (1878), 38 L. T. 788, C. C. R.; **R. v. Read** (1878), 37 L. T. 722, C. C. R.; **Elwes v. Brigg Gas Co.** (1886), 55 L. T. 831.

**57. Fish—Pond—Owner of pond.]**—Where A. puts fish into a pond & dies, the fish as chattels descendable pass to the heir of A., & not to A.'s exors.

It is felony to take them (**CLINCH, J.**).

If they be in a trunck so that they may be taken out by the hands of men, without nets or other engines, it is felony, otherwise not (**POPHAM, C.J.**).—**GRAY v. TROWE** (1601), Gouldsb. 129; 75 E. R. 1043.

**58. ——— Form of indictment—5 Geo. 3, c. 14, s. 1.]**—An indictment under the above sect. charged deft. with unlawfully entering A.'s garden adjoining her dwelling-house, in which was a pond for keeping fish, & without her consent taking from the pond with a net gold & silver fish, her goods & chattels. The pond was 20 yards long by 10 yards broad, & gold & silver fish were kept in it & were usually fished for with hook & line. It was objected that the fish were *feræ naturæ* & not the property of anyone as alleged in the indictment. Deft. having been convicted:—**Held**: the allegation in the indictment that the fish were the goods & chattels of prosecutrix was surplusage, & the indictment was good, it being only for the misdemeanour under the above Act. **Semble**: if the indictment had been at common law for felony, it should have described what sort of pond it was, in order that it might appear on the face of the indictment that taking fish out of such a pond was felony.—**R. v. HUNDSON** (1781), 2 East, P. C. 611; O. B. S. P. 1781, case 190.

**59. Pheasant—Feræ naturæ—Form of indictment.]**—Prisoner was convicted on an indictment for stealing a pheasant of the goods & chattels of S.:—**Held**: the conviction was bad, for in cases of larceny of animals *feræ naturæ* the indictment must show that they were either dead, tame or confined, otherwise they must be presumed to be in their original state, & it was not sufficient to add "of the goods & chattels" of such an one.—**R. v. ROUGH** (1779), 2 East, P. C. 607.

**Annotations:—****Apprvd.** **R. v. Roe** (1870), 22 L. T. 414, C. C. R. **Distd.** **R. v. Stride & Millard**, [1908] 1 K. B. 617.

**60. ——— Under common hen—Returning for food.]**—Pheasants that have been reared under hens & can fly some distance, but come to be fed by a keeper, & have never become wild, may be subjects of larceny.—**R. v. HEAD** (1857), 1 F. & F. 350.

**61. ——— "Game."]**—Young pheasants which have been hatched by a hen, & have not yet become wild, while under the care & protection of the hen which hatched them, are to be considered the property of the owner of the hen & are subjects of larceny. Being his property they are not "game" within Night Poaching Act, 1828 (c. 69), for that term necessarily implies something which is not the subject of property.—**R. v. GARNHAM** (1861) 2 F. & F. 347; 8 Cox, C. C. 451.

**62. ——— In distant field.]**—Young pheasants, hatched by a hen & under the care of the hen in a field at a distance from a dwelling-house, are subjects of larceny.—**R. v. CORY** (1864), 10 Cox, C. C. 23.

**Annotation:—****Folld.** **R. v. Shickle** (1868), L. R. 1 C. C. R. 158.

**63. Ferrets—Confined in hutch.]**—Prisoner was indicted for stealing "five live tame ferrets confined in a certain hutch" of the price of 15s., the property of F. It appeared in evidence that

#### **PART II. SECT. 2, SUB-SECT. 1.—B.**

**59 i. Pheasant — Feræ naturæ — Form of complaint.]**—Prisoner was convicted, under a summary complaint, of

the theft from a public road of a pheasant, the property or in the lawful possession of A.:—**Held**: where theft of an animal *feræ naturæ* was charged, the complaint must specify how the animal

became property, & the conviction must be quashed.—**WILSON v. DYKES** (1872), 44 Sc. Jur. 251; 2 Couper, 183; 10 L. 444.—**SCOT.**



ferrets were valuable animals & that those in question had been sold by prisoner for 9s.:—*Held*: ferrets, though tame & saleable, could not be subjects of larceny.—*R. v. SEARING* (1818), Russ. & Ry. 350, C. C. R.

*Annotation*:—*Dbd.* *R. v. Sheriff* (1903), 20 Cox, C. C. 334.

**64. — Resistance by thief—Murder—Larceny Act, 1861 (c. 96), ss. 21, 22.]**—Ferrets are “animals kept in a state of confinement” within the above sects., & persons resisting apprehension by a police officer, who finds them in possession of a ferret which they know to be stolen, are guilty of murder, if such resistance directly results in the police officer’s death.—*R. v. SHERIFF* (1903), 20 Cox, C. C. 334.

**Bees.]—See No. 49, ante.**

**65. Pigeons—Roosting in boxes.]**—If pigeons are so far tame that they come home every night to roost in wooden boxes, hung on the outside of the house of their owner, & a party come in the night & steal them out of these boxes, this is a larceny.—*R. v. BROOKS* (1829), 4 C. & P. 131, N. P.

**66. — In dovecot.]**—Pigeons were shut up in a dovecot every night. A person broke open the dovecot & stole a number of them:—*Held*: he was guilty of larceny.—*R. v. HOWELL* (1830), 2 Den. 363, n.

*Annotation*:—*Refd.* *R. v. Cheafor* (1851), 2 Den. 361, C. C. R.

**67. — Free to wander.]**—Pigeons if tame & reclaimed may be subjects of larceny, though not in a state of confinement, but living in an ordinary dovecot, which affords them free access at their pleasure to the open air.—*R. v. CHEAFOR* (1851), T. & M. 621; 2 Den. 361; 21 L. J. M. C. 43; 18 L. T. O. S. 128; 15 J. P. 801; 15 Jur. 1065; 5 Cox, C. C. 367, C. C. R.

*Annotation*:—*Consd.* *Taylor v. Newman* (1863), 4 B. & S. 89.

**68. Partridges—Under hen—Free to wander.]**—Partridges about three weeks old & able to fly a little, which had been hatched & reared under a common hen, placed under a hen-coop, & after the removal of the coop, had remained about the place with the hen as her brood, sleeping under her wings at night, may be the subject of larceny.—*R. v. SHICKLE* (1868), L. R. 1 C. C. R. 158; 38 L. J. M. C. 21; 19 L. T. 327; 32 J. P. 790; 17 W. R. 144; 11 Cox, C. C. 189.

**69. — Reduction into possession—Living or dead.]**—Prisoner was indicted for stealing one dead partridge, & the proof was that the partridge was wounded, but was picked up or caught by prisoner while it was alive but in a dying state:—*Held*: (1) the indictment was not proved; (2) to make a partridge the subject of larceny, it must be shown either that it was dead, or if alive that it was reduced into possession, or under the owner’s control.—*R. v. ROE* (1870), 22 L. T. 414; 34 J. P. 373; 11 Cox, C. C. 554, C. C. R.

*Annotation*:—*Refd.* *R. v. Read* (1878), 3 Q. B. D. 131, 133.

**70. Hawk—Young in nest.]**—Of young hawks in the nest larceny may be committed, but not of hawks’ eggs (LORD ALVERSTONE, C.J. & DARLING, J.).—*R. v. STRIDE & MILLARD*, [1908] 1 K. B. 617; 24 T. L. R. 243, C. C. R.

*Annotations*:—*Mentd.* *R. v. Meyer* (1908), 1 Cr. App. Rep. 10, C. C. A.; *R. v. Garland*, [1910] 1 K. B. 154, 157, C. C. A.

#### SUB-SECT. 2.—DEAD.

**71. Flesh of animals.]**—A dead animal *feræ naturæ*, or part of one, may be a subject of larceny.

#### PART II. SECT. 2, SUB-SECT. 2.

**74 i. Landowner’s rights—Killing animal on own land.]**—Deft. killed upon his own land, which adjoined that of

pltf. & was unfenced, a deer, one of the progeny of deer imported by pltf. & deft., & allowed to run at large upon the land:—*Held*: the deer was *feræ naturæ*, & having been shot by deft. on

The authorities as to animals *feræ naturæ* do not apply to dead animals or parts of them (PATTERSON, J.).—*R. v. GALLEARS* (1849), 2 Car. & Kir. 981; T. & M. 196; 1 Den. 501; 3 New Sess. Cas. 704; 19 L. J. M. C. 13; 14 L. T. O. S. 296; 13 J. P. 747; 13 Jur. 1010; 3 Cox, C. C. 572, C. C. R.

*Annotation*:—*Consd.* *R. v. Stride & Millard*, [1908] 1 K. B. 617, C. C. R.

**72. Custom or usage—Southern whale fishery.]**—By the custom of the Southern whale fishery among the Gallipagos islands, he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it.—*FENNINGS v. GRENVILLE (LORD)* (1808), 1 Taunt. 241; 127 E. R. 825.

*Annotations*:—*Consd.* *Hogarth v. Jackson* (1827), 2 C. & P. 595; *Jacobs v. Seward* (1872), L. R. 5 H. L. 464, H. L.

**73. Greenland whale fishery.]**—By the custom of the Greenland whale fishery the first striker is entitled to the fish, though his harpoon be detached from the line when the second striker strikes, if the fish be so entangled in his line that he might probably have secured the fish without the interference of the second striker.—*HOGARTH v. JACKSON* (1827), 2 C. & P. 595; Mood. & M. 58, N. P.

**74. Landowner’s rights—Animal killed by trespasser—Hare.]**—Pltf.’s dogs having hunted & caught, on deft.’s land, a hare started on the land of another, the property is thereby vested in pltf., who may maintain trespass against deft. for afterwards taking away the hare; & so it would be though the hare, being quite spent, had been caught up by a labourer of deft. for the benefit of the hunters.—*CHURCHWARD v. STUDDY* (1811), 14 East, 249; 104 E. R. 596.

*Annotations*:—*Consd.* *Deane v. Clayton* (1817), 1 Moore, C. P. 203. *Refd.* *Graham v. Ewart* (1855), 11 Exch. 326; *Lonsdale v. Rigg* (1856), 11 Exch. 654; *Blades v. Higgs* (1862), 12 C. B. N. S. 501.

**75. Grouse.]**—Grouse shot on a man’s land belong to him, according to all the authorities (COLERIDGE, J.).—*LONSDALE (EARL) v. RIGG* (1856), 11 Exch. 654; 25 L. J. Ex. 73; 26 L. T. O. S. 242; 20 J. P. 118; 156 E. R. 992; *sub nom.* *RIGG v. LONSDALE (EARL)* (1857), 1 H. & N. 923, Ex. Ch.

*Annotations*:—*Folld.* *Blades v. Higgs* (1863), 13 C. B. N. S. 501. *Distd.* *Read v. Edwards* (1864), 17 C. B. N. S. 245. *Consd.* *Blades v. Higgs* (1865), 20 C. B. N. S. 214, H. L.; *R. v. Townley* (1870), L. R. 1 C. C. R. 315, C. C. R.; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139. *Mentd.* *Bruce v. Helliwell* (1860), 5 H. & N. 609; *Bird v. G. E. Ry. Co.* (1865), 13 W. R. 989.

**76. Rabbits.]**—If wild rabbits be both started & killed on the same estate, they are the absolute property of the landowner, & not of the captor.—*BLADES v. HIGGS* (1865), 20 C. B. N. S. 214; 11 H. L. Cas. 621; 6 New Rep. 274; 34 L. J. C. P. 286; 12 L. T. 615; 29 J. P. 390; 11 Jur. N. S. 701; 13 W. R. 927; 144 E. R. 1087, H. L.

*Annotations*:—*Consd.* *Hooper v. Clark* (1867), 36 L. J. Q. B. 79; *R. v. Townley* (1870), L. R. 1 C. C. R. 315; *R. v. Petch* (1878), 38 L. T. 788, C. C. R. *Refd.* *Chambers v. Miller* (1862), 13 C. B. N. S. 125; *Read v. Edwards* (1864), 17 C. B. N. S. 245. *Mentd.* *R. v. Roe* (1870), 22 L. T. 414, C. C. R.; *Musgrave v. Foster* (1871), 24 L. T. 614; *R. v. Read* (1878), 37 L. T. 722, C. C. R.; *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562.

**77. — Game.]**—Game found & killed upon land by a trespasser is the property of the owner of the land (COCKBURN, C.J.).—*HOOPER v. CLARK* (1867), 36 L. J. Q. B. 79.

**78. — Deer killed outside forest—Larceny Act, 1861 (c. 96), s. 14.]**—A person who kills & carries away a deer, usually kept in a forest, when

his own land, belonged to him.—*Re LONG POINT CO. v. ANDERSON* (1890), 19 O. R. 487; *revid.* on another point, 18 A. R. 401.—CAN.



**Sect. 2. — Wild animals: Sub-sect. 2. Sect. 3.**  
**Part III. Sect. 1: Sub-sect. 1, A.]**

it is outside of the limits of the forest & upon the land of a third party, cannot be convicted under the above sect. of being in unlawful possession thereof.—*THRELKELD v. SMITH*, [1901] 2 K. B. 531; 70 L. J. K. B. 921; 85 L. T. 275; 50 W. R. 158; 17 T. L. R. 612; 45 Sol. Jo. 618; 20 Cox, C. C. 38.

**79. Possession—Wounded partridge—Picked up alive.]**—Prisoner was indicted for stealing one dead partridge, & the proof was that the partridge was wounded, but was picked up or caught by prisoner while it was alive but in a dying state:—*Held*: (1) the indictment was not proved; (2) if the partridge had been reduced into possession, there might have been some ground for charging a larceny in a different form.—*R. v. ROE* (1870), 22 L. T. 414; 34 J. P. 373; 11 Cox, C. C. 554, C. C. R.

*Annotation*:—*Mentd. R. v. Read* (1878), 3 Q. B. D. 131, C. C. R.

**80. — Rabbits—Killing & removal as continuous act.]**—Rabbits were netted, killed, & placed in a place of deposit, *e.g.*, a ditch, on the land of the owner of the soil on which the rabbits were caught, & some three hours afterwards the poachers came to take them away, one of whom was captured by gamekeepers, who had previously found the rabbits & lay in wait for the poachers:—*Held*: this did not amount to larceny, the killing of the rabbits & their removal being one continuous act.—*R. v. TOWNLEY* (1871), L. R. 1 C. C. R. 315; 40 L. J. M. C. 144; 24 L. T. 517; 35 J. P. 709; 19 W. R. 725; 12 Cox, C. C. 59, C. C. R.

*Annotation*:—*Consd. R. v. Petch* (1878), 38 L. T. 788, C. C. R.

**81. Killing, removal & sale as continuous act.]**—A gamekeeper, not authorised to take or kill rabbits for his own use, took & killed some wild rabbits upon his master's land, & converted them dishonestly to his own use by selling them. The taking, killing, removing, & selling, were parts of one continuous action:—*Held*: a conviction of such gamekeeper for embezzlement of the rabbits could not be sustained, as it was impossible to say the rabbits had been received or taken into possession by prisoner for, or in the name of or on account of, his employer.—*R. v. READ* (1878), 3 Q. B. D. 131; 47 L. J. M. C. 50; 37 L. T. 722; 42 J. P. 470; 26 W. R. 283; 14 Cox, C. C. 17, C. C. R.

*Annotation*:—*Consd. R. v. Petch* (1878), 38 L. T. 788, C. C. R.

**82. — Marking by gamekeeper of owner.]**  
 —Prisoner was employed to trap wild rabbits, & it

was his duty to take them when trapped to the head keeper. Contrary to his duty he trapped from time to time rabbits, & took them to another part of the land & placed them in a bag, to which another keeper observing went & took some of the rabbits out of the bag during prisoner's absence & nicked them, & put them into the bag. His reason for nicking was that he might know them again. Prisoner afterwards took away the bag & the rabbits with the intention of appropriating them to his own use:—*Held*: the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make prisoner guilty of stealing them.—*R. v. PETCH* (1878), 38 L. T. 788; 42 J. P. 694; 14 Cox, C. C. 116, C. C. R.

**83. — Fish—Deposited in ship's hold before removal.]**—Prisoner was employed by the prosecutors as the master of a fishing smack, engaged in making voyages from Grimsby to the North Sea & back for the purpose of catching fish for the prosecutors, who sold the fish on the return of the vessel after each of its voyages. Prisoner had the full charge & control of the vessel during the voyages. Whilst returning to Grimsby with a cargo of fish, which had been caught & deposited in the usual receptacle provided for that purpose in the hold of the vessel, prisoner put into Bridlington harbour for the purpose of having a new trawl-net mounted. Whilst in that harbour a boat came from the shore, & by prisoner's orders some of the fish was taken out of the hold, put into the boat & taken ashore, where it was subsequently sold by prisoner, who appropriated the proceeds:—*Held*: the fish had been reduced into the possession of the prosecutors before prisoner took it out of the hold, & prisoner was properly convicted of larceny.—*R. v. MAILLISON* (1902), 66 J. P. 503; 86 L. T. 600; 20 Cox, C. C. 204, C. C. R.

**SECT. — INCREASE IN ANIMALS.**

**84. As between executors & heir.]**—If a testator have sheep, swine, or cows, & dies, & they have young lambs, pigs, or calves, they are assets (*WINDHAM, J.*).—*KITTLE'S CASE* (1584), Godb. 29; 78 E. R. 19.

**85. As between landlord & tenant.]**—In a replevin action P. had granted a lease of land with a stock of sheep for twenty years rendering rent, & the lessee covenanted to render back at the expiration of the lease one thousand sheep of the age of three or four years, & the lessor granted all his chattels & this stock of sheep to V. The sheep of

**79 i. Possession — Seals — Necessity for panning.]**—Action for trover to recover the value of seals, killed, sculped, panned & flagged by pltf., but owing to the shifting of the ice, carried away from where pltf.'s vessel lay & brought near that of deft., whose crew took them:—*Held*: pltf. had obtained an absolute property in the seals which could not be divested without their consent.—*CLIFT v. KANE* (1870), 5 Nfld. L. R. 327.—NFLD.

**79 ii. — — — — —.]**—The crews of vessels distributing themselves over large areas of the ice fields, indiscriminately slaughtered seals as they went, leaving them round, taking no heed to collect, or mark, or pan same:—*Held*: no right of property was acquired in the seals, as the killing must be accompanied by possession.—*POWER v. KENNEDY* (1884), 7 Nfld. L. R. 34.—NFLD.

**PART II. SECT. 3.**

**g. Foals of mares wrongfully detained—Foaled while in possession of person so detaining.]**—In Apr., 1846, certain mares, pltf.'s property, strayed to deft.'s farm, who advertised them, &

no owner appearing, he began to use them about a year afterwards. In July, 1846, the same mares, being supposed to be on pltf.'s pasture, were sold to S., who never obtained possession of them, but hearing, in 1852, that they had foaled, & were in deft.'s possession, made a written demand on deft. for them & their progeny in Sept. of that year. A year afterwards S. made over his interest to pltf., who made a demand on deft. for the mares & their colts, which was refused:—*Held*: the measure of damages was the value of the property at the time of the conversion, & pltf. had no claim to be the owner of the animals subsequently bred from the mares.—*SCOTT v. McALPINE* (1857), 6 C. P. 302.—CAN.

**h. On execution.]**—After a testator's death his widow, one of the trustees, remained on his farm & in possession of the stock & personal property, some of which she sold, & the stock had been added to by breeding. A writ of execution came into the sheriff's hands against her, & while it was there, the two other trustees took from her a mtge. of all the personal

property for advances made by them to her. The sheriff afterwards seized under the writ, & the two trustees forbade the sale; but it went on, & one of them bought the goods, & took a bill of sale from the sheriff, against whom they then brought an action for the seizure:—*Held*: (1) they were not estopped from complaining of the seizure & sale as illegal by having purchased at the sale; (2) the increase of stock belonged to the owner of the stock at the time & went by the same rule.—*PEERE v. CARRALL* (1860), 19 U. C. R. 229.—CAN.

**k. As between bailor & bailee.]**—In the case of a gratuitous loan all the increase & offspring of the loan, *e.g.*, a pair of mares offspring of a mare loaned, belong to the lender, & must be returned at the determination of the loan, & are not subject to seizure under execution against the bailee.—*DILLAREE v. DOYLE* (1878), 43 U. C. R. 442.—CAN.

**l. As between grantor & grantee of bill of sale.]**—The holder of a bill of sale of a mare has no property in a colt foaled by her, especially where the bill

the old stock were all spent, & others supplied, part by increase & part by purchase:—*Held*: (1) increase of stock went to the lessee, these things being severed from the principal; (2) in a lease of dead goods anything added for reparation or otherwise went to the lessor, because it belonged to the principal.—*WOOD v. ASH & FOSTER* (1586), Owen, 139; Godb. 112; Palm. 549; 74 E. R. 958; *sub nom.* *WOOD & FOSTER'S CASE*, 1 Leon. 42.

*Annotations*:—*Refd.* Robinson v. Macdonnell (1816), 5 M. & S. 228; Westropp v. Elligott (1884), 9 App. Cas. 815, H. L.

**86. Custom & usage.**—By the custom of the county of Buckingham, if any swan which had its course in any water within the same county came on the land of any man & there built, & had cygnets on the same land, then he who had the property of the swan should have two of the cygnets, & he who had the land should have the third cygnet which should be of less value than the other two:—*Held*: (1) the custom was good, because the possessor of the land suffered them to build there where he might drive them off; (2) by the general custom of the realm, cygnets belonged to the owners of the cock & of the hen, & were divisible between them.—*CASE OF SWANS* (1592), 7 Co. Rep. 15b; 77 E. R. 435.

*Annotations*:—*Refd.* Lyster v. Home (1639), Cro. Car. 544; Hannam v. Mockett (1824), 4 Dow. & Ry. K. B. 518; R. v. Robinson (1859), Bell. C. C. 34; Blades v. Higgs (1865), 20 C. B. N. S. 214, H. L. *Mentd.* Davies v. Powell (1738), Cooke, Pr. Cas. 146.

**87. As between lord of manor & tenant.**—If birds build nests in trees upon land of copyhold

tenure, the eggs are the tenant's.—*ASHMOND (ASHMEAD) v. RANGER* (1700), Holt, K. B. 162; 12 Mod. Rep. 378; 1 Ld. Raym. 551; Fortes. Rep. 152; 90 E. R. 987.

*Annotation*:—*Refd.* Odel v. King (1729), 1 Barn. K. B. 302.

**88. Young pheasants hatched by common hen.**—*R. v. GARNHAM*, No. 61, *ante*.

**89. Calves of stolen cows—Calved while in possession of bona fide purchaser.**—Cows were stolen & sold in market overt by the thief to a cattle dealer, who sold them to a bona fide purchaser; they calved while in his possession. The thief was convicted of stealing the cows, notice of the conviction was given to the purchaser, & the cows & calves were demanded of him on behalf of the original owner:—*Held*: the calves were the property of the original owner, as on the thief's conviction the property in the stolen cows reverted in the original owner.—*WALKER v. MATTHEWS* (1881), 8 Q. B. D. 109; 51 L. J. Q. B. 243; 46 L. T. 915; 30 W. R. 338.

**90. As between tenant for life & remainderman.**—Deer were settled on a tenant for life & remainderman. The tenant for life subsequently bought other deer:—*Held*: (1) the progeny of such deer were bound by the settlement equally with those of the original deer; (2) deer are not within the rule that things *qua non consumuntur* cannot be settled.—*PAINE v. WARWICK (COUNTESS)*, [1914] 2 K. B. 486; *sub nom.* *WHITE v. PAINE*, 83 L. J. K. B. 895; 30 T. L. R. 347; 58 Sol. Jo. 381.

## Part III.—Rights and Liabilities of Owners of Animals.

### SECT. 1.—RIGHTS.

#### SUB-SECT. 1.—WHEN THE ANIMAL IS INTERFERED WITH, INJURED OR KILLED.

##### A. By Person acting in Self-defence.

**91. Dog entering adjoining premises—Frightening occupiers thereof.**—The plea in an action for trespass for killing pltf.'s mastiff justified the killing on the ground that to pltf.'s knowledge the dog was savage & given to biting men & cattle, that it had often been to deft.'s yard adjoining his dwelling-house barking & putting deft. & his family in fear of being bitten if they left the house, that although deft. gave pltf. notice of this, pltf. neglected to restrain the dog, & that upon the dog again coming to deft.'s premises & putting him & his

family in fear as aforesaid, deft. for their safety shot the dog. After verdict for deft., upon motion in arrest of judgment:—*Held*: the plea was good.—*KECK v. HALSTEAD* (1699), 2 Lut. 1494; 125 E. R. 823.

**92. Dog attacking person—Unreasonable violence in self-defence.**—A party using unreasonable violence to beat off a dog which runs at him is guilty of a wilful trespass under Malicious Injuries to Property Act, 1827 (c. 30), s. 24.

Pltf., a pedlar, went to deft.'s yard to sell goods; a small dog ran out & barked at him, & pltf. struck the dog a violent blow which made it permanently blind:—*Held*: pltf. had wilfully injured the dog under the above sect., if the violence he had used clearly exceeded all that was necessary for his own protection & was not reasonably done in his own

of sale is held merely as security for a loan & the mare has never been in his possession.—*HIRSCHFIELD v. HALIFAX (CITY)* (1889), 22 N. S. R. 52.—CAN.

m. —.]—Pltfs. were the grantees & H. the grantor of a bill of sale, by way of mtge., which conveyed four horses, with a proviso giving power to pltfs., on default, to take possession & dispose of the property as they should see fit. After default in payment of principal & interest, a mare, described in the mtge., dropped a foal, which was seized by the sheriff under an execution against H.:—*Held*: the foal having been dropped after default made &, therefore, while pltfs. were owners & entitled to possession of the mare, such foal was their property.—*TEMPLE v. NICHOLSON* (1881), Cass Dig. (2nd ed.) 114.—CAN.

n. *As between tenants in common & purchaser from sheriff.*—A. & B. became tenants in common of a mare, B. to keep & take care of the mare for a year, when A. was to have her. While in B.'s possession she was seized & sold

by the sheriff under an execution against B., but notice of A.'s claim was given to the sheriff & publicly at the sale. Subsequently the mare had a colt which was *in gremio* at the time of the sale. In an action by A. against C., the purchaser at the sheriff's sale:—*Held*: the sheriff's sale passed only B.'s interest in the mare, & C. by his purchase became a co-owner with A.; & the property in the colt following that of its dam, A. was an owner of an undivided moiety in both.—*GUNN v. BURGESS* (1884), 5 O. R. 685.—CAN.

o. *As between buyer & creditors of vendor.*—Horses, having been seized in execution, were claimed by deft. as his property under a direct purchase from one of the execution debtors, or as the increase of animals so purchased:—*Held*: (1) as to one of the animals, said to have been *in gremio* of a mare when purchased, as no bill of sale was given to deft. upon the sale of the dam, & the sale was not accompanied by an immediate delivery nor followed by an actual & continued change of possession, the sale was under Bills of Sale Ord-

nance C. O. (1898), c. 43, s. 9, absolutely void as against pltf.; (2) as to four of the horses, the progeny of mares said to have been sold to deft. long before the progeny were conceived, the sale of the dams was absolutely void as against pltf., & no property in their increase ever became vested in deft. as against pltf.; (3) the brood of all tame & domestic animals belonged to the owner of the dam.—*GRAF v. LINGERELL* (1914), 27 W. L. R. 707; 7 Alta. L. R. 340; 6 W. W. R. 566; 16 D. L. R. 417.—CAN.

p. *As between mortgagor & mortgagee.*—Colts of mares covered by mtge. are part of "the natural increase of the goods & chattels," & as such are covered by mtge. until they no longer need the nurture of their mother; in order that the mtge. cover the increase beyond this time there must be express provision.—*JOHNSON v. COLE* (1914), 30 W. L. R. 290; 7 W. W. R. 593.—CAN.

q. *S. P. CASE THRESHING MACHINE Co. v. GOVLEY* (1914), 29 W. L. R. 811; 7 W. W. R. 584.—CAN.



1.—*Rights: Sub-sect. 1, A. B. & C.*

defence.—*HANWAY v. BOULTBEE* (1830), 4 C. & P. 350; 1 Mood. & R. 15; 2 Man. & Ry. M. C. 481.

*Annotation* :—*Mentd.* *Downing v. Capel* (1867), 36 L. J. M. C. 97.

**93. — Plea of self-defence.]**—To justify shooting another person's dog, it is not sufficient to show that the dog was of a ferocious disposition, & was at large, but the dog must be actually attacking the party at the time.

Where deft. was passing pltf.'s house, & pltf.'s dog ran out, & bit deft.'s gaiter, & on deft. turning round, & raising his gun, the dog ran away & he shot the dog as he ran away :—*Held* : deft. was not justified in so doing.—*MORRIS v. NUGENT* (1836), 7 C. & P. 572.

**94. — Known ferocity of animal.]**—If defts. justify shooting a dog by pleading that it attacked them, & that it "was accustomed to attack & bite mankind," pltf. may call witnesses to prove the general quietness of the dog.—*CLARK v. WEBSTER* (1823), 1 C. & P. 104.

*B. By Person acting in Defence of his own Animal.*

**95. Dog killed—Chasing rabbits in warren.]**—A warrener may justify killing a mastiff dog in the warren to prevent his destroying the conies.—*WADHURST v. DAMME* (1604), Cro. Jac. 45; 79 E. R. 37.

*Annotations* :—*Refd.* *Barrington v. Turner* (1681), 3 Lev. 28; *Protheroe v. Mathews* (1833), 5 C. & P. 581.

**96. While attacking another dog.]**—In an action of trespass for killing a mastiff-dog, deft. pleaded pltf. suffered the dog to go unmuzzled, & that he fell on a dog kept by deft. for preservation of the house, & deft., to preserve his dog, killed pltf.'s dog :—*Held* : (1) (*TWISDEN & WINDHAM, JJ.*) the plea was ill, without saying that he could not otherwise save his dog; (2) (*KEELING & MORETON, JJ.*) the plea was sufficient.—*WRIGHT v. RAMSCOT (RAINSCAR)* (1667), 1 Saund. 84; 1 Sid. 336; 85 E. R. 93; *sub nom.* *WRIGHT v. WRANSCOT (WRANSCOTT)*, 2 Keb. 237; 1 Lev. 216.

*Annotations* :—*Consd.* *Vere v. Cawdor* (1809), 11 East, 568. *Mentd.* *Errington v. Thompson* (1696), 1 Ld. Raym. 183.

**97. — While attacking hogs.]**—Deft. may justify killing pltf.'s mastiffs to prevent them from killing deft.'s hogs, although the hogs were trespassing.—*KING v. ROSE* (1673), 1 Freem. K. B. 347; 3 Keb. 228; 89 E. R. 258.

**98. — Chasing deer in park.]**—A deer having

escaped from a park & being in pltf.'s land, he chased it with his dogs, who pursued & killed it in the park :—*Held* : the park owner might kill the dogs.—*BARRINGTON v. TURNER* (1681), 3 Lev. 28; 83 E. R. 560.

*Annotation* :—*Refd.* *Protheroe v. Mathews* (1833), 5 C. & P. 581.

**99. —.]**—The servant of a park owner may shoot a dog chasing deer therein, though such shooting be not absolutely necessary for the deer's preservation, & the dog was not actually pursuing when so shot, if the chasing & the shooting were all one transaction.—*PROTHEROE v. MATHEWS* (1833), 5 C. & P. 581.

**100. — When attacking fowls.]**—If deft. justifies shooting a dog, because the dog was worrying his fowl, & could not otherwise be prevented, he must prove that the dog was in the act of worrying the fowl at the very moment he shot it.—*JANSON v. BROWN* (1807), 1 Camp. 41.

**101. — Chasing hares in close.]**—A plea to an action of trespass for killing pltf.'s dog cannot justify the act by stating that the lord of the manor was possessed of a close, & that deft., as his gamekeeper, killed the dog when running after hares in that close for the preservation of the hares, such plea not even stating that it was necessary to kill the dog for the preservation of the hares, nor that it was the dog of an unqualified person.—*VERE v. CAWDOR (LORD)* (1809), 11 East, 568; 103 E. R. 1125.

*Annotations* :—*Consd.* *Deane v. Clayton* (1817), 17 Taunt. 489. *Distd.* *Protheroe v. Mathews* (1833), 5 C. & P. 581. *Expld.* *Taylor v. Newman* (1863), 4 B. & S. 89.

**102. —.]**—Pltf.'s dogs passed through a gap in a hedge on to deft.'s land, & were shot by him. There was no evidence that the dogs were coursing a hare :—*Held* : the only question for the jury was the amount of damages.—*MOORE v. CLARKE* (1898), 62 J. P. 522.

**103. — When chasing sheep.]**—The owner of sheep in a field which had been worried by a dog shot the dog when in another field at some distance off. In an action by the owner of the dog :—*Held* : deft. was not justified in the act of shooting as it was not done in protection of his property.—*WELLS v. HEAD* (1831), 4 C. & P. 568; 2 Man. & Ry. M. C. 517.

*C. By Person acting in Defence of Property.*

**104. Cattle chased off land—By stranger.]**—If a man see the beasts of his neighbour in another's land

into a farmer's wheat field, & his servants having chased them out by driving them across a fence which divided the two farms, & one of them having, in leaping, fallen on a stake & been killed :—*Held* : the servant was not liable, there being no appearance of intention to injure the horses, & the injury being accidental.—*HERRIOT v. UNTHANK* (1827), 6 S. 211.—*SCOT.*

**w. —.]**—A horse broke out of a field & entered, in pursuit of some mares, the farm-close of a neighbouring farm. A servant on the farm having beaten him with a stake in order to drive him away, & the horse having thereafter died from a wound alleged to have been inflicted by a nail in the stake :—*Held* : the servant was not liable for the price of the horse.

When a party's horses or cattle break in among the crop or stock of a neighbour, the servants of the latter are entitled & bound to use ordinary & reasonable compulsion to drive them away; & if any accident happen to the animals trespassing from the means used, it is a casualty which their owner must take upon himself.—*CUMMING v. TURNBULL* (1840), 2 D. 579.—*SCOT.*

**104 i. Cattle chased off land.]**—Deft. set his dog on pltf.'s cows, which were

## . 1, SUB-SECT. B.

**96 i. Dog killed—While attacking horse.]**—While deft. was driving along the public highway in his carriage pltf.'s dog barked & jumped at the horse, which was a nervous animal & became greatly excited in consequence of the actions of the dog. A short distance ahead was a steep hill with a narrow road to descend. Deft., fearing that the horse would get beyond his control, & that an accident would follow, shot the dog :—*Held* : he was justified in so doing.—*QUIGLEY v. PUDSEY* (1894), 26 N. S. R. 240.—*CAN.*

**103 i. — When chasing sheep.]**—In trespass for shooting a dog, deft. justified that the dog was used to worry sheep, etc., that being so used, just before he was shot by deft., he was worrying deft.'s sheep. General demurrer, the causes of demurrer assigned being that the plea did not disclose a legal justification, as it should have averred that the dog was in the act of worrying, & not that he was worrying "just before" the time, etc. :—*Held* : (1) an averment that the dog was about to renew the attack would be a legal justification, & the averments in the pleas amounted to that; (2) the pleading was sufficient on general

demurrer.—*KELLETT v. STANNARD* (1850), 2 I. C. L. R. 156; 4 Ir. Jur. O. S. 50.—*IR.*

**s. Horse killed—When attacking mare—Unnecessary violence.]**—Resp. was the owner of a stallion running on terms on the land of applt. & under applt.'s charge in an enclosed paddock. A servant of applt. went to repair a fence of the paddock in which the stallion was running. He rode a mare belonging to his master to the place, & tied her up to the fence inside the paddock, & went to work. Afterwards he heard the stallion squealing at the mare, & found the mare in the ditch of the fence, & the horse biting her neck. Having a spade in his hand, he threw it at the horse, inflicting an injury so severe that the animal had to be destroyed :—*Held* : in protecting his master's property applt.'s servant had proceeded with unnecessary violence amounting to a criminal act, being an excess for which, nevertheless, the master was responsible.—*HUNTER v. McRAE* (1897), 15 N. Z. L. R. 701.—*N.Z.*

## PART III. SECT. 1, SUB-SECT. 1.—C.

**t. Horse chased off land—By servant of owner of land.]**—Several horses from a neighbouring farm having broken



*damage feasant*, it is not lawful for him to drive them off, & if he do, the owner shall have trespass, although he did a good act, & saved the owner from damages for the depasturing of his beasts.—**MALEVERER v. SPINKE** (1537), 1 Dyer. 35b; 73 E. R. 79.

**Annotations**:—**Consd.** Cope v. Sharpe (No. 2), [1912] 1 K. B. 498, C. A. **Refd.** Monse's Case (1608), 12 Co. Rep. 63. **Mentd.** Liford's Case (1614), 11 Co. Rep. 46h; Secheverel v. Dale (1627), Poph. 193; Simmons v. Norton (1831), 9 L. J. O. S. C. P. 185; Cope v. Sharpe, [1910] 1 K. B. 168; Cope v. Sharpe (No. 2), [1911] 2 K. B. 837.

**105. By owner of land.**—T. was seised of a right of common in lands belonging to A. & in lands belonging to B. B. purchased the lands & demised them to pltf., who put cattle for pasture into A.'s lands from whence they were driven out by deft., A.'s tenant, with a dog:—**Held**: (1) the right of common was a right of common appurtenant, & extinguished by the unity of ownership; (2) A. could enclose his lands against B. & his tenant, & the act of the latter was a trespass; (3) when pltf.'s cattle trespassed on deft.'s land, he might chase them out with a dog, without being compelled to distrain them.

In the case of persons entitled to common by vicinage one may enclose against the other, for he who has such common cannot put his cattle into the lands of the other, but he ought to put them in the land where he has common; & if they stray into the other land, the trespass is excused by reason of the ancient usage.—**TYRRINGHAM'S CASE** (1584), 4 Co. Rep. 36b; 76 E. R. 973.

**Annotations**:—**Refd.** Mitten v. Faudrye (1625), Poph. 16; Rumsey v. Rawson (1667), 2 Keb. 410; King v. Rose (1673), Freem. K. B. 347; Wells v. Pearey (1835), 1 Bing. N. C. 556; Rea v. Sheward (1837), 2 M. & W. 424; Warrick v. Queen's College, Oxford (1871), 40 L. J. Ch. 780. **Mentd.** Knight's Case (1623), Godb. 352; Shury v. Piggot (1626), 3 Bulst. 339; Wyld's Case (1659), 8 Co. Rep. 78b; Reynoldson v. Blake (1696), 1 Ld. Raym. 192; Bennett v. Reeve (1740), Willes, 227; Barwick v. Matthews (1814), 5 Taunt. 365; Davies v. Lowndes (1838), 6 Scott, 435; Jones v. Robin (1845), 10 Q. B. 581; Prichard v. Powell (1845), 10 Q. B. 589; Baring v. Abingdon, [1892] 2 Ch. 374, C. A.; A.-G. v. Reynolds, [1911] 2 K. B. 888.

**106. Ewes in lamb chased off another's land—By owner of land.**—In trespass for chasing ewes being great with lambs, so as by such driving pltf. lost his lambs, deft. pleaded they were in his several *damage feasant*, wherefore he took them & drove them to the pound:—**Held**: this was no plea, for although he might take, yet he could not drive them with peril, etc.—**ANON.** (1572), 3 Leon. 15; 74 E. R. 511.

**107. Rabbits killed on another's land—By owner of land.**—Where a man makes coney-burrows in his own lands, & the conies go on to other lands & do damage, the conies, being *feræ naturæ*, may be killed by the person upon whose land they go.—**BOULSTON'S CASE** (1597), 5 Co. Rep. 104b; 77 E. R. 216.

**Annotations**:—**Folld.** Pelling v. Langden (1601), Owen, 114. **Consd.** Northumberland's Case (1618), Poph. 141; Dewell v. Sanders (1619), Cro. Jac. 490; Hannam v. Mockett (1824), 2 B. & C. 934. **Expld.** Blades v. Higgs (1863), 32 L. J. C. P. 182, Ex. Ch. **Refd.** Boulston v. Hardy (1598), Cro. Eliz. 547. **Mentd.** Ashby v. White (1703), 2 Ld. Raym. 938.

**108. Rabbits killed damage feasant—By commoner.**—In trespass for breaking his close & killing conies deft. pleaded he had common time out of

mind, & the conies were *damage feasant* in the place where he killed them:—**Held**: (1) conies were beasts of warren & profitable as deer, & were not to be compared to foxes & vermin which might be killed, but the owner of the soil might keep conies where the common was as well as other cattle, & might make fish-ponds which the commoner could not destroy; (2) judgment must be given for pltf.—**PELLING v. LANGDEN** (1601), Owen, 114; 74 E. R. 940.

**109. Sheep chased off land—Pursued into adjoining land.**—In an action of trespass for chasing sheep, it appeared they were trespassing upon certain land, & deft. with a dog chased them out, & as soon as the sheep were out of the land he called in his dog, but the dog pursued the sheep into another man's land next adjoining:—**Held**: trespass did not lie, as it was lawful for deft. to chase the sheep out of his own land, & he did his best endeavour to recall the dog.—**MITTEN v. FAUDRYE** (1626), Poph. 161; *sub nom.* MILLEN (MILLER) v. FAWEN (FAWTREY, FAWDRY, HAWERY), Benl. 171; W. Jo. 131; Lat. 13, 119.

**Annotations**:—**Distd.** Beckwith v. Shordike (1767), 4 Burr. 2092. **Consd.** Gundry v. Feltham (1786), 1 Term Rep. 334; Deane v. Clayton (1817), 7 Taunt. 489. **Refd.** King v. Rose (1673), Freem. K. B. 347; Mason v. Keeling (1699), 1 Ld. Raym. 606. **Mentd.** Anthony v. Haney (1832), 8 Bing. 186.

**110. Swine killed on another's land—When trespassing.**—In an action for keeping a mastiff, deft. knowing that it was used to bite swine & that the mastiff bit & killed pltf.'s sow, it was moved in arrest of judgment that it was proper for a dog to hunt hogs out of ground:—**Held**: (1) it was not lawful to keep dogs to bite & kill swine; (2) judgment must be for pltf.—**BOULTON v. BANKS** (1632), Cro. Car. 254; 79 E. R. 822.

**Annotation**:—**Refd.** Mason v. Keeling (1699), 12 Mod. Rep. 332.

**111. Sheep killed on another's land—Worried while being chased off same.**—Pltf.'s sheep were trespassing on deft.'s field which adjoined pltf.'s land, & while the sheep were being driven by their owner back to his own field, deft.'s dog, which was in the field where the sheep were so trespassing, worried & killed one of the sheep. Deft. had several times warned pltf. to prevent his sheep from trespassing on his land:—**Held**: under Dogs Act, 1865 (c. 60), s. 1, the owner of the dog was liable for the injury done by his dog to the sheep, although such sheep was trespassing on his land at the time when the injury was inflicted.—**GRANGE v. SILCOCK** (1897), 77 L. T. 340; 61 J. P. 709; 46 W. R. 221; 13 T. L. R. 565; 41 Sol. Jo. 697.

**112. Dog killed—Notice that trespassing dogs will be shot.**—In an action of trespass for shooting pltf.'s dog, the defence was that deft. had put up a notice that dogs trespassing would be shot:—**Held**: a man was not at liberty to shoot another's dog by virtue of such a notice.—**CORNER v. CHAMPNEYS** (1814), cited 2 Marsh. at p. 584.

**113. —Setting dog-spear—Notice.**—Deft. was owner & occupier of a wood adjoining a wood of B., divided therefrom by a low bank & a shallow ditch, not being a sufficient fence to prevent dogs from passing from B.'s wood into deft.'s wood. There were public footpaths through deft.'s wood, not fenced off therefrom. Deft., to preserve hares in his wood, & to prevent them from being killed

trespassing. In running away, one of the cows broke her leg:—**Held**: the questions for the judge to consider were: "Was what was done by deft. in setting the dog on the cows reasonably necessary in the circumstances of the case, & was this the cause of the injury."—**MURRAY v. MUIR** (1915), 8 O. W. N. 222.—**CAN.**

**109 i. Sheep chased off land.**—Pltf.'s sheep strayed into the field of deft.'s employer, & deft. chased them out of the field & in so doing his dog injured one sheep so that it had to be killed. The dog used was not a fierce dog & had been used by deft. before in driving pltf.'s sheep out of the same field, & no harm resulted:—**Held**: pltf.'s action to recover for the sheep lost must be

dismissed.—**CARMICHAEL v. FELTOE** (1908), 9 W. L. R. 15.—**CAN.**

**112 i. Dog killed—By farmer.**—Where a farmer had shot his neighbour's dog for trespassing on his property:—**Held**: he had no right to take the law into his own hands & must pay damages.—**TRENHOLME v. MILLS** (1881), 4 L. N. 79.—**CAN.**

**Sect. 1.—Rights: Sub-sect. 1, C. D. & E.]**

therein by dogs & foxes that came thereinto in pursuit of hares, kept iron spikes screwed & fastened into several trees in his wood, each spike having two sharp ends, & so placed that each end should point along the course of a hare-path, & purposely placed at such a height from the ground, as to allow a hare to pass under them without injury, but to wound & kill a dog, that might happen to run against one of the sharp ends thereof, the spikes being, from their nature & positions, adapted to effect the purpose for which deft. fastened them there; none of them was at a less distance than 50 yards from any footpath, & some were from 150 to 160 yards distant therefrom. Deft. kept notices painted on boards placed at the outside of some parts of the wood that steel-traps, spring-guns, & dog-spikes were set in that wood for vermin. Pltf., with B.'s permission, was sporting in his wood with a valuable pointer; a hare rose in his wood & was pursued by the dog thereout, over the bank & ditch, into deft.'s wood, & in the pursuit, there ran against one of the sharp spikes, & was killed. Pltf. endeavoured as much as in him lay to prevent his dog from pursuing the hare into deft.'s wood, but was unable so to do. Pltf. having brought an action against deft. to recover compensation for the loss of his dog:—*Held*: (1) (GIBBS, C.J., & DALLAS, J.) the action was not maintainable; (2) (PARK & BURROUGH, JJ.) pltf. was entitled to recover.—*DEANE v. CLAYTON* (1817), 7 Taunt. 489; 1 Moore, C. P. 203; 2 Marsh. 577; 129 E. R. 196.

*Annotations*:—*Consd.* *Ilott v. Wilkes* (1820), 3 B. & Ald. 304; *Bird v. Holbrook* (1828), 4 Bing. 628; *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Jordin v. Crump* (1841), 8 M. & W. 782; *Corby v. Hill* (1858), 4 C. B. N. S. 556; *Ponting v. Noakes*, [1894] 2 Q. B. 281; *Lowery v. Walker*, [1910] 1 K. B. 173. C. A. *Refd.* *Latham v. Johnson*, [1913] 1 K. B. 398, C. A.

114. —[A declaration alleged that deft. wrongfully & unlawfully set & concealed a dog-spear, the same being an engine calculated to do grievous bodily harm, as well to the liege subjects of the Queen as to their dogs happening to run upon same, among the bushes near a public footway running through a close of deft.'s, by means whereof a dog of pltf.'s, with which he was going on foot along the footway, & which, by reason of a rabbit having crossed the footway in his view, had then, against the will of & unavoidably by pltf., begun to pursue & was in pursuit of the rabbit, ran upon the dog-spear & was wounded, etc. Plea, that deft. set & concealed the engine for the purpose of preserving his game, & of disabling & killing dogs that might come upon his close, lest they should pursue & destroy the game, whereof pltf. had notice:—*Held*: (1) this plea was a good answer to the action; (2) it would have been so even without the allegation of notice.—*JORDIN v. CRUMP* (1841), 8 M. & W. 782; 11 L. J. Ex. 74; 5 Jur. 1113; 151 E. R. 1256.

*Annotations*:—*Distd.* *Corby v. Hill* (1858), 4 C. B. N. S. 556. *Foldd.* *Bryan v. Eaton* (1875), 40 J. P. 213. *Consd.* *Clark v. Chambers* (1878), 3 Q. B. D. 327; *Ponting v. Noakes*, [1894] 2 Q. B. 281. *Refd.* *Barnes v. Ward* (1850), 9 C. B. 392; *Lowery v. Walker*, [1909] 2 K. B. 433.

115. —“Unlawful dog” on Crown lands.—**Crown Lands Act, 1825 (c. 17), s. 14.**—If there be evidence that a dog is brought into the Forest of Dean for the purpose of taking or destroying deer, etc., the dog is an “unlawful dog” within the above sect., & if not delivered up may be shot by the game-

keeper whilst going along a public highway which passes through the forest.—*DAVIS v. GIRDER* (1846), 7 L. T. O. S. 63; 10 J. P. Jo. 261.

116. —**Shot without intention to kill.**—A gamekeeper fired at a dog near an aviary, wherein were his master's pheasants, & killed it. The justices found as a fact that he fired with the intention of driving it away & not of killing it, & that he thought it necessary to fire for the protection of his master's property:—*Held*: if the gamekeeper *bona fide* believed that what he did was necessary for the protection of his master's property, he was not guilty.—*MILES v. HUTCHINGS*, [1903] 2 K. B. 714; 72 L. J. K. B. 775; 89 L. T. 420; 52 W. R. 284; 20 Cox, C. C. 555.

*Annotation*:—*Refd.* *Nye v. Niblett* (1917), 87 L. J. K. B. 590.

117. **Shooting fowls—Eating grain on defendant's land.**—S., the occupier of land sown with seed, shot two domestic fowls of W., which were trespassing, having got through the fence. S. had previously warned W. that unless the fowls were kept off he should kill them:—*Held*: S. could not be convicted under Malicious Damage Act, 1861 (c. 97), s. 41, of unlawfully killing the fowls.—*SMITH v. WILLIAMS* (1892), 56 J. P. 840; 37 Sol. Jo. 11; 9 T. L. R. 9.

*Annotations*:—*Dbtd.* *Armstrong v. Mitchell* (1903), 88 L. T. 870. *Consd.* *Nye v. Niblett* (1917), 16 L. G. R. 57.

118. **Killing pigeons.**—The erecting of a new pigeon-house by the freeholder of a manor is not a common nuisance inquirable at the leet; but if the pigeons fly abroad to the damage of the King's subjects, the judges of assize may take cognizance of it.—*DEWELL (DUELL) v. SANDERS* (1618), Cro. Jac. 490; 2 Roll. Rep. 3; 79 E. R. 419.

*Annotations*:—*Consd.* *Hannaam v. Mockett* (1824), 2 B. & C. 934; *Taylor v. Newman* (1863), 4 B. & S. 89. *Mentd.* *Nye v. Niblett* (1917), 16 L. G. R. 57.

119. —**Eating crops on another's land—Larceny Act, 1861 (c. 96), s. 23.**—House pigeons kept by A. were in the habit in the day-time of flying over & feeding upon the land of B. He served notice on A., requesting that he would immediately cause them to be destroyed or prevent them from doing further injury to his crops; if not, he would be compelled in self-defence to shoot or otherwise to destroy them, besides claiming damages for the injury he sustained from their feeding on his land. After this B. found them feeding on his land & fired at them & thereby caused them to rise; he then fired at them a second time, & killed one, which he left on the ground:—*Held*: he had not unlawfully killed it within the above sect.—*TAYLOR v. NEWMAN* (1863), 4 B. & S. 89; 2 New Rep. 275; 32 L. J. M. C. 186; 8 L. T. 424; 27 J. P. 502; 11 W. R. 752; 9 Cox, C. C. 314; 122 E. R. 393.

*Annotations*:—*Consd.* *Hudson v. Mac Rae* (1863), 4 B. & S. 585; *R. v. Prince* (1875), L. R. 2 C. C. R. 154. *Refd.* *R. v. Tolson* (1889), 23 Q. B. D. 168, C. C. R.

120. **Trapping dogs—Baited trap near highway.**—If a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbour's premises, must probably be attracted by their instinct into the traps, & in consequence of such act his neighbour's dogs be so attracted, & thereby injured, an action on the case lies.—*TOWNSEND v. WATHEN* (1808), 9 East, 277; 103 E. R. 579.

*Annotations*:—*Distd.* *Deane v. Clayton* (1817), 7 Taunt. 489; *Langridge v. Levi* (1837), Murp. & H. 134; *Barnes*

116 i. —**By gamekeeper—Poaching dog.**—A gamekeeper has no right to shoot a poaching dog as such. The law as to a gamekeeper's right to shoot a dog in the act of poaching considered & discussed.—*BROWN v. BELFAST WATER COMRS.* (1912), 47 L. L. T. 153.—*IR.*

x. **Shooting cat—Measure of damages.**—Pltf.'s cat was in the habit of wandering from pltf.'s land, but returned every evening. The cat while off pltf.'s land was intentionally shot at & killed by deft., a gamekeeper, for the protection of his master's game:—

*Held*: pltf. was entitled to recover damages for the loss of the cat, & the shooting being intentional, the damages should exceed the mere value of the cat.—*WHITTINGHAM v. IDESON* (1862), 8 U. C. L. J. 14.—*CAN.*



*v. Ward* (1850), 9 C. B. 392. *Refd.* *Ponting v. Noakes*, [1894] 2 Q. B. 281; *Latham v. Johnson*, [1913] 1 K. B. 398, C. A. *Mentd.* *Lowery v. Walker*, [1910] 1 K. B. 173 C. A.

**121. Trapping cat—Trap set in garden.]**—There is nothing unlawful or contrary to Malicious Damage Act, 1861 (c. 97), s. 41, in setting a trap in a garden to catch cats trespassing there.—*BRYAN v. EATON* (1875), 40 J. P. 213.

**122. Poisoning fowls.]**—In an action of trespass it was proved that deft. had thrown poisoned barley upon both pltf.'s premises & his own in order to poison pltf.'s poultry, & that some of pltf.'s fowls had died in consequence:—*Held*: the jury were not confined as to damages to the mere amount of injury sustained, but might consider the intention with which deft.'s act was done, whether for insult or injury.—*SEARS v. LYONS* (1818), 2 Stark. 317.

**123. Poisoning dog—Rat poison in shop.]**—Deft., a confectioner, had a shop in which there was a counter of the ordinary kind running from one side of the shop to the other, from behind which counter the customers were served by deft. & his assistants, the space behind the counter being used exclusively by the latter for that purpose, the space in front of it being the part of the shop reserved for the accommodation of the customers. The counter was hollow underneath & open on the inside of it, & the outer side of it towards the shop was boarded up, from the floor to the level of the top where the confectionery was placed, from one side of the shop to the other, except a space of about 5 feet wide at the end farthest from the door of the shop. In the space beneath the counter, & inside the boarding which separated it from the outer part of the shop, deft. placed some bread & cheese covered with poison for the purpose of destroying rats & mice. Pltf.'s daughter & her governess went to the shop to make some purchases, accompanied by a dog of pltf., which, it appeared, had on previous occasions been with them in the shop, though there was no proof that deft. or his assistants ever saw the dog there. While they were waiting in the shop to be served the dog, on the day in question, passed through the opening at the end of the counter, & getting behind & underneath the counter, ate a portion of the poisoned bread & cheese & was thereby killed:—*Held*: deft. was not liable in an action at pltf.'s suit for damages for the loss of the dog. Deft. had a right to put the poison where he did for the purpose of destroying the rats & mice, & in doing it he did a lawful thing for a lawful purpose, nor was he bound to give notice of its being there to his customers. The dog had no business to be behind the counter: & without saying it had no right to be in the shop, yet, if pltf. or his servants chose to take it in with them, they were bound to look after it & prevent it from getting into mischief.—*STANSFELD v. BOLLING* (1870), 22 L. T. 799; 34 J. P. 406.

**124. — Poisoned flesh in garden.]**—Resp.'s dog was wont to stray into applt.'s garden, which

**124 i. Poisoning dog—Poisoned flesh on land.]**—Deft., in order to prevent dogs worrying his cattle, several of which had been killed, poisoned his lands by placing pieces of meat saturated with poison thereon. Pltf.'s dog, which was accustomed to go upon deft.'s land adjoining the lands of pltf., was poisoned. Deft. had previously been fined for not having complied with the provisions of Poisoned Flesh Prohibition Act, 1864 (c. 115):—*Held*: pltf. was entitled to recover damages for the loss of the dog, a conviction under the above Act not being a bar to an action for damages.—*LAWLER v. M'KENNA* (1905), 39 I. L. T. 159.—

**124 ii. — Laying poison.]**—The owner of land, who lays down poison on his lands, is bound to take reasonable

precautions against animals carrying the poison to a spot where it may become a trap to other animals going along a highway.—*DOUGAN v. ALLEN* (1912), 46 I. L. T. 221.—IR.

**124 iii. — Failure to give statutory notices.]**—Where a man laying poison fails to give the statutory notices, he remains liable under his common law liability to the owners of dogs, nor can he plead the absence of allurement.—*M'CANN v. CORRY* (1916), 50 I. L. T. 148.—IR.

#### PART III. SECT. 1, SUB-SECT. 1.—E.

**126 i. Insufficient fencing—Adjoining owner.]**—The owner in default in respect of maintenance of his part of line fence between two adjoining farms is responsible for loss of animals of his neighbour,

which, passing through a breach in the fence, reach a railway where they are killed by a train.—*PARADIS v. PARKS* (1907), Q. R. 32 S. C. 263.—CAN.

was fenced with a quickset hedge, in which were holes sufficiently large for the dog to get through. Applt. gave resp. notice to keep his dog out of the garden, & that he should place poisoned flesh there which would kill the dog. He did place poisoned flesh there, & the dog ate it & so was killed:—*Held*: applt. was not guilty of unlawfully & maliciously killing the dog within Malicious Damage Act, 1861 (c. 97), s. 41. *Seem*: he was liable to be convicted summarily under Poisoned Flesh Prohibition Act, 1864 (c. 115), s. 2.—*DANIEL v. JAMES* (1877), 2 C. P. D. 351; 41 J. P. 712.

*Annotations*:—*Dbtd.* but *Folld.* *Smith v. Williams* (1892), 9 T. L. R. 9, where *MATHEW, J.* regretted they could not give leave to appeal so that *Daniel v. James* might be reconsidered, which, as it stood, amounted to a licence to kill any animals found trespassing, but they had no choice but to follow it. *Dbtd.* *Armstrong v. Mitchell* (1903), 88 L. T. 870. *Refd.* *Miles v. Hutchings*, [1903] 2 K. B. 714; *Nye v. Niblett* (1917), 87 L. J. K. B. 590.

**125. Poisoning cat—Poison laid in pigeon-house.]**—Resp. placed some poisoned meat in a pigeon-house, situated on the ground in an enclosed garden attached to his house, for the purpose of killing cats which were in the habit of trespassing on his premises. A cat belonging to a neighbour ate some of the meat so placed & died:—*Held*: resp. had placed the poisoned meat "in or upon land" within Poisoned Flesh Prohibition Act, 1864 (c. 115), s. 2, & the case did not come within the exceptions in s. 3 of that Act as to occupiers placing poisoned flesh in buildings or enclosed gardens for the destruction of small vermin.—*ROGERS v. HULL* (1896), 60 J. P. 584; 12 T. L. R. 470.

#### D. By Animals belonging to Another.

*See* Nos. 160—163, 178, 180, 183, 189, 194, 265—268, 270, 272, 276, 301, 640, *post*.

#### E. Through Act, Neglect, or Default of Another.

**126. Insufficient fencing—Adjoining owner.]**—Declaration, that defts. were bound to repair a fence, but neglected so to do, & that a mare of pltf.s. went through the gap & fell into a ditch. Judgment for pltf.s.—*ANON.* (1675), 1 Vent. 264; 86 E. R. 176.

*Annotation*:—*Expld.* *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274.

**127. — — —.]**—Pltf. declared against deft. for not repairing his fences, *per quod* pltf.'s horses escaped into deft.'s close, & were there killed by the falling of a haystack:—*Held*: the damage was not too remote, & the action was maintainable.—*POWELL v. SALISBURY* (1828), 2 Y. & J. 391; 148 E. R. 970.

*Annotations*:—*Consd.* *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274; *Halestrap v. Gregory* (1895), 64 L. J. Q. B. 415. *Refd.* *Wilson v. Newport Dock Co.* (1866), L. R. 1 Exch. 177.

**128. — — —.]**—Trespass for driving pltf.'s sheep, & leaving them in a highway, by which they were injured. Plea, that they were wrongfully in deft.'s close depasturing, wherefore deft. drove them into a highway adjoining the close. Replica-

**126 ii. S. P. LEGAULT v. MONTREAL TERRA COTTA CO.** (1914), Q. R. 46 S. C. 143; 20 D. L. R. 388.—CAN.

**126 iii. — — —.]**—*MACLEAN v. RUDD* (1908), 9 W. L. R. 283; 1 Alta. L. R. 505.—CAN.

**126 iv. — — — Separated by highway.]**—Pltf.'s & deft.'s farms, both unfenced, were separated by a highway. Pltf.'s mare strayed on to deft.'s land, ate some poisoned wheat & died:—*Held*: deft. not liable for the loss of the mare.—*KRUSE v. ROMANOWSKI* (1910), 14 W. L. R. 696; 3 Sask. L. R. 274.—CAN.



**Sect. 1.—Rights: Sub-sect. 1, E.]**

tion that they escaped into deft.'s close from an adjoining close of pltf. through a defect in the fence between the two closes, which fence deft. was bound to repair. Rejoinder, traversing the escape of the sheep through defect in the fence. The issue being found for pltf.:—*Held*: the replication answered the plea.—*CARRUTHERS v. HOLLIS* (1838), 8 Ad. & El. 113; 3 Nev. & P. K. B. 246; 1 Will. Woll. & H. 264; 2 Jur. 871; 112 E. R. 778.

**129. ———.]**—Deft. was the occupier of a close adjoining a close occupied by pltf. Deft.'s close was woodland, & he sold the fallage of the timber to H., continuing himself to occupy the close. H. felled a tree in a negligent manner, so that it fell over the fence between the two closes, & made a gap in it. Two cows of pltf. soon afterwards got from pltf.'s close through the gap into deft.'s close, & fed on the leaves of a yew tree which had been felled there by H., & died in consequence. Deft. had had no notice of the fence having been broken down before the escape of pltf.'s cows. There was evidence that deft. & his predecessors had for more than forty years repaired the fence (which was on his land) between the two closes whenever repairs were necessary, & that, for the last nineteen years, the fence had been repaired by deft. & his predecessors upon notice by the occupier for the time being of pltf.'s close. Whenever the fence was so repaired, it was for the purpose of preventing cattle on pltf.'s close from escaping into deft.'s close:—*Held*: (1) the evidence showed a prescriptive obligation on the part of deft. to maintain the fence so as to keep in the cattle in pltf.'s close; (2) the obligation was absolute to keep up a sufficient fence at all times, the act of God or *vis major* only excepted, without any notice of want of repair; (3) the damage was not too remote, & deft. was liable to pltf. for the loss of the cows.—*LAWRENCE v. JENKINS* (1873), L. R. 8 Q. B. 274; 42 L. J. Q. B. 147; 28 L. T. 406; 37 J. P. 357; 21 W. R. 577.

*Annotations*:—*Appld.* *Sneesby v. L. & Y. Ry. Co.* (1874), L. R. 9 Q. B. 263. *Consd.* *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5. *Appld.* *Halestrap v. Gregory* (1895), 43 W. R. 507. *Refd.* *Corry v. G. W. Ry. Co.* (1880), 6 Q. B. D. 237. *Mentd.* *Coaker v. Willcocks*, [1911] 2 K. B. 124, C. A.

**130. ———.]**—Pltf. & defts. respectively occupied adjoining lands as tenants under the same landlord. By the terms of their lease defts. were bound to fence the land in their occupation for the benefit of the lessor & his tenants. About twenty years ago the predecessors of defts. had fenced their

land with wire rope, & defts. allowed this fence to remain, & from time to time partially repaired it. From long exposure the strands of the wires composing the rope decayed, & pieces of it fell to the ground & lay hidden in the grass of the adjoining pasture occupied by pltf. Pltf.'s cow grazing there swallowed one of these pieces & died in consequence:—*Held*: defts. were liable to compensate pltf. for the loss of the cow.—*FIRTH v. BOWLING IRON Co.* (1878), 3 O. P. D. 254; 47 L. J. Q. B. 358; 38 L. T. 568; 42 J. P. 470; 26 W. R. 558.

*Annotations*:—*Distd.* *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5. *Consd.* *Ponting v. Noakes*, [1894] 2 Q. B. 287. *Refd.* *Hawken v. Shearer* (1887), 3 T. L. R. 557; *Jones v. Llanrwst U. D. C.* (1910), 103 L. T. 751.

**131. ——— Gratuitous bailee.]**—A. sent his horse for the night to B., who turned it out after dark into his pasture field adjoining to & separated from a field of C. by a fence, which C. was bound to repair. The horse, owing to the bad state of the fence, fell from one field into the other, & was killed:—*Held*: B., though a gratuitous bailee, might maintain an action against C. & recover the value of the horse.—*ROOTH v. WILSON* (1817), 1 B. & Ald. 59; 106 E. R. 22.

*Annotations*:—*Consd.* *The Winkfield* (1901), 71 L. J. P. 21, C. A. *Refd.* *Barnes v. Ward* (1850), 9 C. B. 392; *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274. *Mentd.* *Sneesby v. L. & Y. Ry. Co.* (1874), L. R. 9 Q. B. 263; *Claridge v. South Staffordshire Tram Co.*, [1892] 1 Q. B. 422.

**132. ——— Trespassing animal falling in pit.]**—An action will not lie against the digger of a pit by the owner of a mare, which strays on a common without any right, & tumbles into the pit & perishes.—*BLYTH v. TOPHAM* (1608), Cro. Jac. 158; 79 E. R. 139.

*Annotations*:—*Consd.* *Deane v. Clayton* (1817), 1 Moore, C. P. 203; *Jordin v. Crump* (1841), 8 M. & W. 782. *Foll.* *Harcastle v. South Yorkshire Ry. & River Dun Co.* (1859), 4 H. & N. 67. *Consd.* *Hounsell v. Smyth* (1860), 7 C. B. N. S. 731; *Williams v. Groucott* (1863), 4 B. & S. 149.

*See, further, BOUNDARIES, FENCES, & PARTY WALLS.*

**133. ——— Mine owner—Open shaft.]**—A person entitled to the minerals under the land of another, with licence to make a mine shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle which may be upon it: & he is liable to an action for injury accruing to those cattle for want of such fencing.—*WILLIAMS v. GROUCOTT* (1863), 4 B. & S. 149; 2 New Rep. 419; 8 L. T. 458; 27 J. P. 693; 9 Jur. N. S.

**132 i. ——— Straying animal falling in open drain in street.]**—In a portion of a street, which was a *cul de sac* & was not much used for traffic, a municipal authority constructed an open drain. Pltf.'s horse having escaped from a paddock, wandered into this street, entered the drain at its shallow end, walked up it to the deepest part, & not being able to turn round, injured itself in its efforts to extricate itself, & died soon after being extricated. The deepest part of the drain was protected to a certain extent by fences, but the lower end was not fenced across. In an action to recover damages:—*Held*: the municipal authority was not shown to have been guilty of any breach of duty, & even if it were the injury complained of did not arise in consequence of such breach.—*BENALLA (SHIRE PRESIDENT) v. CHERRY* (1911), 12 C. L. R. 642.—AUS.

**132 ii. ——— Straying animal falling in open well.]**—A municipal bye-law provided that it should not be lawful to allow any animal, excepting dogs only, to run at large at any time of the year

within the limits of the municipality. Pltf.'s horse strayed upon deft.'s land, where the latter maintained an open well:—*Held*: (1) under the bye-law, pltf. was guilty of negligence in allowing his horse to run at large; (2) as pltf., knowing of the well & the danger to animals, allowed his horse to stray, in direct violation of the bye-law, deft. not liable, although owing a duty under Open Wells Act, N. S. Sask. (c. 124), s. 2, towards straying or trespassing animals.—*BALDREY v. FENTON* (1914), 29 W. L. R. 258; 6 W. W. R. 1441; 20 D. L. R. 677.—CAN.

**132 iii. ——— Animal falling in open trench in street.]**—*LYNCH & LES COMMISSAIRES DES CHEMINS A BARRIÈRES* (1889), 17 R. L. S. C. 366.—CAN.

**133 i. ——— Landowner permitting user of land—Open hole.]**—A horse belonging to a person using the ground of another for his own benefit, with the owner's permission, was killed by falling into a hole, the existence of which was manifest. The hole had formerly been fenced, but shortly before the accident a portion of

the fence had disappeared:—*Held*: in the absence of proof that portion of the fence had been removed by the owner, & that such removal had been the proximate cause of the accident, pltf. had failed to establish that the accident was due to deft.'s negligence & could not succeed.—*SKINNER v. JOHANNESBURG TURF CLUB* (1907), T. S. 852.—S. AF.

**133 ii. ——— Trustee of club—Open well.]**—Deft. held land as bare trustee for a club, which let the land to C., who entered into an arrangement to pasture pltf.'s horses upon the land. One of the horses fell into an uncovered well upon the land & died:—*Held*: deft. owed no duty to C. or pltf., & was not responsible for pltf.'s loss either at common law or under a municipal bye-law requiring wells to be kept covered.—*LOVE v. MACHREY* (1912), 20 W. L. R. 505; 1 W. W. R. 925; 1 D. L. R. 674; 22 Man. L. R. 52.—CAN.

*Liability of highway authority.]*—*See HIGHWAYS, STREETS & BRIDGES.*

*y. Dangerous fencing—Test of dangerous.]*—A horse, becoming

## PART III.—RIGHTS AND LIABILITY

1237; 11 W. R. 886; 122 E. R. 416; *sub nom.*  
GROUCOTT v. WILLIAMS, 32 L. J. Q. B. 237.

*Annotations*:—*Consd.* Great Laxey Mining Co. v. Clague (1878), 4 App. Cas. 115, P. C. *Distd.* Hawken v. Shearer (1887), 56 L. J. Q. B. 284.

*See, further*, MINES, MINERALS & QUARRIES.

Insufficient fencing by railway cos. under their statutory duty to fence, *see* RAILWAYS & CANALS.

Negligence of railway cos. resulting in injuries to animals at level crossings, *see* RAILWAYS & CANALS.

**184. Dangerous railing in market—Invitation to bring animals for sale.**—Defts. were the owners of a cattle-market, & in the market place they had erected a statue, round which they had placed a railing as a fence. Pltfs. attended the market with their cattle, & occupied a particular site, for which they paid a toll. A cow belonging to them, in attempting to jump the railing, injured herself, & subsequently died from the injuries. The jury found that the railing was dangerous:—*Held*: defts. having received toll from pltfs. & invited them to come to the market with their cattle, a duty was imposed on them to keep the market in a safe condition, & an action would lie against defts. for the loss sustained by pltfs.—*LAX v. DARLINGTON CORPN.* (1879), 5 Ex. D. 28; 49 L. J. Q. B. 105; 41 L. T. 489; 44 J. P. 312; 28 W. R. 221, C. A.

*Annotations*:—*Consd.* Yarmouth v. France (1887), 19 Q. B. D. 647; *Norman v. (I. W. Ry. Co., [1914] 2 K. B. 153.* *Reid.* Thomas v. Quartermaine (1887), 18 Q. B. D. 685, C. A.

**185. Exposure of horses to cold—Breach of contract for stabling.**—Deft., an innkeeper, contracted with pltf., a horsedealer, to provide him with stabling for a number of horses during a fair at which they were to be sold, but in consequence of deft., in breach of such contract, having let his stables to another person, pltf.'s horses, after they had been put into deft.'s stables on their arrival there from a railway journey, were turned out by that person,

frightened from some cause unexplained, dashed into a barbed wire fence placed by defts. along their railway line:—*Held*: defts. not liable, the test being whether the fence was dangerous to ordinary stock under ordinary conditions, & not whether it was dangerous to a bolting horse.—*PLATH & BALLARD v. GRAND FORKS & KETTLE RIVER RY. CO.* (1904), 10 B. C. R. 299.—CAN.

**z. — Animal "at large."**—A mare, allowed to run at large by her owner, strayed on to lands of deft. & was killed by coming into contact with a strand of barbed wire stretched about deft.'s property:—*Held*: pltf. could not recover damages from deft.—*MCLEAN v. RUDD* (1908), 1 Alta. L. R. 505; 9 W. L. R. 283.—CAN.

**a. Removal of fencing—By local authority.**—Pltf. having obstructed a road by locking a gate in a fence across the road where it entered his land, the municipality in whose district the land was removed the fence & gate. Before removing the fence & gate the municipality had threatened to enforce penalties against pltf. for obstructing the road. Pltf. did not replace the fence for a considerable period, during which cattle of pltf. strayed through the gap & were lost:—*Held*: the loss of the cattle was a reasonable consequence of the unlawful act of the municipality, for which damages might be recovered.—*NARRACAN (SHIRE PRESIDENT, ETC.) v. LEVISON* (1906), 3 C. L. R. 846.—AUS.

**b. Dangerous rail in street—Duty of street railway company.**—The charter of a street railway co. required the road between, & for two feet outside of, the rails to be kept constantly in good repair & level with the rails. A horse crossing the track stepped on a grooved

rail, & the caulk of his shoe caught in the groove, whereby he was injured. The rail was above the level of the roadway:—*Held*: the rail being a street obstruction unauthorised by stat. & a nuisance, the co. were liable.—*HALIFAX STREET RY. CO. v. JOYCE* (1893), 22 S. C. R. 258.—CAN.

**137 i. Train driven negligently—Animal frightened.**—Where a carter was taking a load of boxes, his horse & truck standing crosswise upon the street, & the horse, alarmed or struck by a passing tramway car, the conductor of which was not at the time keeping a vigilant watch to avoid accidents, suddenly backed & broke a plate glass window:—*Held*: the tram co. were responsible.—*RAMSAY v. MONTREAL ST. R. R. CO.* (1887), 11 L. N. 2.—CAN.

**137 ii. — — — — —**—A team of mares were frightened upon the highway by negligent operation of an electric car of defts., & injured:—*Held*: defts. were liable.—*MCCARTHY v. MOOSE JAW ELECTRIC RY. CO.* (1914), 29 W. L. R. 271.—CAN.

**137 iii. — — — — — By escape of steam.**—*CANADIAN PACIFIC RY. CO. v. CHATEAUVERT* (1887), 16 R. L. Q. B. 28.—CAN.

**137 iv. — — — — — Animals on track—Duty to avoid injury to.**—A railway co. is not charged with any duty in respect of avoiding injury to animals wrongfully upon its line of railway until such time as their presence is discovered.—*CANADIAN PACIFIC RY. CO. v. EGGLESTON* (1905), 36 S. C. R. 641; 6 Terr. L. R. 168; 1 W. L. R. 358.—CAN.

**137 v. — — — — —**—A train of applts. was coming down the line at 25 miles an hour. The line was straight,

*Annotations*:—*Reid.* Lilley v. Doubleday (1881), 7 Q. B. D. 510; *Lepia v. Rogers*, [1893] 1 Q. B. 31; *Jackson v. Watson*, [1909] 2 K. B. 193, C. A.

**136. Dog allowed to catch chill—Construction of contract as to liability.**—Pltf. placed a dog in a dogs' home belonging to defts. on the terms of a document, which stated that "every possible care & attention is given to animals," & that defts. "wish it clearly to be understood that they will not be responsible for . . . loss from . . . illness or death of any animal from whatever cause arising." The dog took a chill & was removed to another home, & it afterwards caught pneumonia & distemper, & died. In an action for negligence:—*Held*: under the above document the intention was that defts. should not be subject to any legal responsibility, & pltf. could not recover.—*BARTON v. RUISLIP DOG SANATORIUM, LTD.* (1917), 33 T. L. R. 458.

**137. Train driven negligently—Bull on line killed.**—In an action for damages for killing pltf.'s bull evidence was given that the bull, when being driven by pltf.'s servants, strayed into the yard, & thence through a fence on to the railway, where it was killed. The jury found that the fence between the yard & railway was sufficient for ordinary purposes, & that there was negligence on pltf.'s part in driving the bull, whereupon the judge directed a verdict to be entered for defts. with leave to move to enter it for pltf. On motion for a rule to show cause why

& resp.'s horses, which were on the line, were visible at a considerable distance. Applts.' train was provided with ordinary brakes, but not with "Westinghouse brakes," which would have stopped the train promptly. The horses were killed:—*Held*: the primary cause of the accident being on the facts the negligence of resp.'s employee, & the train being sufficiently provided with brakes, applts. were not liable.—*CIE. DU GRAND TRONC & BOURASSA* (1894), Q. R. 4 Q. B. 235.—CAN.

**137 vi. — — — — —**—*KEECH v. SANDWICH, WINDSOR & AMHERSTBURG RY. CO.*, 8 O. W. N. 96; 22 D. L. R. 784.—CAN.

**137 vii. — — — — — Animal not under control.**—*LUCAS v. TORONTO* (1915), 8 O. W. N. 253; 22 D. L. R. 601.—CAN.

**137 viii. — — — — — By slackening speed.**—Where horses escaped upon a railway track through a gate at a farm crossing, which the owner had left open, but, although they were seen by the engine driver, the speed was not slackened, & no precaution taken except sounding the whistle:—*Held*: the co. were liable.—*CAMPBELL v. GREAT WESTERN RY. CO.* (1857), 15 U. C. R. 498.—CAN.

**137 ix. — — — — —**—By the negligence of pltf.'s servants, his horses escaped upon defts.' line near a bridge on the track. While being driven back a train approached, which drew up for a time, & then the track being clear the engine driver sounded the whistle, & proceeded. The horses, alarmed by the whistle & motion of the train, ran towards & got on the bridge, & were killed or injured. There was ample space on each side of the track by which the horses might have passed. There was



**Sect. 1.—Rights: Sub-sect. 1, E. & F.]**

judgment should not be entered for pltf. upon the grounds (*inter alia*) that defts. were liable for their servant's negligence in not driving the train in such manner as to avoid an accident, the ct. granted a rule *nisi*.—*GOODE v. SOUTH WALES RY. CO.* (1859), 23 J. P. Jo. 724.

**138. Railroad trucks negligently handled—Herd of cattle broken—Some eventually killed on railway.]**—A herd of pltf.'s beasts were being driven at 11 o'clock p.m. along an occupation road to some fields. The road crossed a siding of defts.' railway on a level, & while the cattle were crossing the siding defts.' servants negligently sent some trucks

down an incline into the siding, which divided the cattle into two lots, & frightened them, & they rushed away with the drovers after them. The drovers succeeded in recovering most of the cattle, but they were unable to recover six of them, which were ultimately found at between 3.0 & 4.0 a.m. lying dead or dying on another part of the railway, & it appeared that they had gone along the occupation road up to a garden & orchard about a quarter of a mile from the level crossing, had got into the garden through defect in the fences, & so on to the line. There was no evidence as to when the train which ran over the cattle had passed:—*Held*: it being admitted that defts. had been guilty of negli-

no evidence that the engine driver had acted recklessly or wantonly in proceeding with the train:—*Held*: defts. not liable.—*HURD v. GRAND TRUNK RY. CO.* (1888), 15 A. R. 58.—CAN.

**137 x. ———.]**—When the employees in charge of the trains of a railway co. discover animals upon the track, they are bound to exercise proper care & prudence to prevent injury to them, & a mere slackening of speed will not be considered sufficient to relieve them from responsibility.—*PONTIAC PACIFIC JUNCTION RY. CO. & BRADY* (1888), 4 M. L. R. 346.—CAN.

**137 xi. ———.]**—Pltf.'s horses through his negligence got on the track & were killed by a train:—*Held*: assuming the engine-driver & crew of the train which frightened the horses saw them on the track, there was no duty cast upon the engine-driver & crew to stop the train & drive the horses from the track. *Semble*: even if there had been such a duty, the breach of it would impose only a common law liability, which could not be given effect to.—*SPORLE v. GRAND TRUNK PACIFIC RY. CO.* (1914), 28 W. L. R. 271; 17 D. L. R. 367; 7 Alta. L. R. 84; 6 W. W. R. 827; 17 Can. Ry. Cas. 71.—CAN.

**137 xii. ——— By keeping look-out.]**—A railway is not under any obligation to keep a look-out for trespassers on its tracks, & to enable a party to recover damages for loss of a horse killed by a street car, negligence must be proved to have existed after the presence of the horse was discovered.—*BONDY v. SANDWICH, WINDSOR & AMHERSTBURG RY. CO.* (1911), 19 O. W. R. 860; 2 O. W. N. 1476.—CAN.

**c. Animal negligently tied up—By innkeeper.]**—Pltf.'s horse was put up at deft.'s inn, & was strangled in the stable there, owing to the negligence of deft.'s servant in tying it up in the stall:—*Held*: pltf. might maintain an action therefor.—*WALKER v. SHARPE* (1871), 31 U. C. R. 340.—CAN.

**d. ——— Question for jury.]**—Deft., having charge of pltf.'s colt, took it to a blacksmith's shop to be shod for the first time, & having tied it there went out. The colt, pulling back, threw itself & received injuries, from which it died. Pltf. sued deft. for negligence in so tying the colt instead of having it held while being shod. The evidence as to whether defts.' action was proper or not was conflicting:—*Held*: not a case in which there should be a nonsuit, but the question was for the jury.—*HENDERSON v. BARNES* (1871), 32 U. C. R. 176.—CAN.

**e. Defective stabling of licensee — Implied warranty of safety.]**—By arrangement pltf.'s horses were stabled in a stable belonging to defts., who charged pltf. 50 cents per day per head for the stabling & feed of the horses. Pltf.'s men attended to & fed them, but there was no one on behalf of pltf. in charge of the horses at night. One of the horses broke through the flooring of the stall it occupied & died:—*Held*: (1) the relationship between the parties was that of licensor & licensee, & defts. impliedly warranted that the stable was reasonably fit & safe for the purpose;

(2) the floor was not in a reasonably safe condition, & defts. were liable; (3) although pltf.'s men noticed & reported defects in the stable floor, pltf. should not be fixed with knowledge of its condition & should not be taken to have assented to the risk.—*GUNN v. CANADIAN PACIFIC RY. CO.* (1912), 20 W. L. R. 219; 1 D. L. R. 232; 1 W. W. R. 804; 22 Man. L. R. 32.—CAN.

**f. Negligence of farrier — Defective flooring — Contributory negligence.]**—Where a horse received an injury while being shod by a farrier, & the accident was caused by the groom, who accompanied the animal, striking him with a whip, the farrier was relieved from liability, notwithstanding the unsafe condition of the floor of the smithy, but for which no damage to the horse would have resulted.—*ALLAN v. MULLIN* (1881), 4 L. N. 387.—CAN.

**g. ——— In returning horse — Treatment.]**—A blacksmith, who after having shod a horse sent it to its owner's under the care of a young boy & without bit or bridle:—*Held*: responsible (1) for an accident that happened to the horse through the negligence of his conductor, & (2) for negligence in that, without having consulted the owner, he had the horse attended to by an ignorant person, whose treatment rendered the horse unfit for all work.—*MCGUIRE v. GRANT* (1892), Q. R. 2 S. C. 267.—CAN.

**h. Wheat left unattended near way—Animal overeating.]**—Deft., for his own convenience, left upon a highway a wagon containing wheat in bags, which he covered over with a tarpaulin. Horses, the property of pltf., strayed from an adjoining paddock, belonging to pltf., ate some of the wheat & as the result died or were injured:—*Held*: (1) in so leaving his wheat upon the highway, deft. committed a public nuisance, for which pltf. could maintain an action in respect of the injury he had sustained; (2) pltf. having no duty towards deft. to prevent his horses from straying had not been guilty of contributory negligence so as to bar his claim.—*MCINTYRE v. HAMS* (1911), S. A. L. R. 16.—AUS.

**k. ———.]**—Deft. left a wagon loaded with bags of wheat, unattended & unprotected except by a dog, on the side of a country road. Pltf.'s horses were by his direction turned out on to the road to find their way unattended, as they were accustomed to do, to a paddock seven miles away. The horses tore open some of the bags & ate so much of the wheat that some of them died & others were injured. In an action based on public nuisance & on negligence, the trial judge found that wheat was so strong an allurements for horses that they would break through anything possible of being broken through to get at it, & that it was customary in country districts to leave wagon-loads of wheat on the roadside unprotected, & he gave judgment for pltf.:—*Held*: defts. entitled to judgment.—*HANNOW v. MCLARTY* (1914), 18 C. L. R. 575.—AUS.

**l. Dog prescribed for by ignorant chemist.]**—A druggist who sells for a

dog a drug suitable for increasing his productivity but composed of dangerous ingredients, without consulting a veterinary surgeon & without having the required knowledge so to prescribe, is answerable in damages towards the owner of the animal, if the latter succumbs to the effects of the drug.—*VAN CAMP v. FREEMAN* (1915), Q. R. 48 S. C. 410.—CAN.

**m. Vehicle driven negligently—Running over sheep unattended on highway.]**—Pltf.'s sheep, to the number of about half a dozen, were upon the public road without any one in charge of them. Deft. driving a car at a slow pace, & on his right side, ran over one of pltf.'s sheep & killed it:—*Held*: he was not liable.—*MURPHY v. KELLER* (1896), I. L. T. Jo. 205.—IR.

**n. ——— Running over dog using highway.]**—In an action of damages for negligence on the part of defts.' driver, who had run over pltf.'s dog while it was making stool by the side of the road close to pltf., pltf. admitted that he could not allege that the driver saw the dog, but he alleged that the driver failed to keep a proper look-out & that, if he had kept a proper look-out, he would have seen the dog in time to avoid the accident. Defts. contended that the above user of the road by the dog was unlawful & that, as the dog was not using the road as a means of passage at the time, they were not liable:—*Held*: action maintainable.—*GRAHAM v. EDINBURGH & DISTRICT TRAM CO., LTD.*, [1917] S. C. 7; 54 Sc. L. R. 42; 2 S. L. T. 195.—SCOT.

**o. ——— Frightening horse left unattended.]**—Pltf.'s milk sleigh was standing at the side of the street when a sleigh loaded with iron came along, the rattle of which frightened pltf.'s horse so that it ran away & did a great deal of damage:—*Held*: there was no fault on the part of deft., & if pltf.'s horse was so easily frightened, it should have been looked after.—*MCWILLIE & GOUDRON* (1885), 30 L. C. J. 44.—CAN.

**p. ——— Straying colt running upon reaping machine.]**—A reaping machine was being driven by deft. along the highway, the knife to the right side of the road, & pltf.'s colt, which was straying upon the road, ran upon the machine, notwithstanding deft.'s efforts to keep it off:—*Held*: pltf. not entitled to recover.—*CARR v. BLACK* (1887), 3 M. L. R. 350.—CAN.

**q. Mare ruptured by stallion — Duty of owner.]**—*BERGERON & BROSSARD* (1879), 10 R. L. N. S. 21.—CAN.

**r. ———.]**—*ROBIDOUX v. MCGERRIGLE* (1908), Q. R. 35 S. C. 174.

**s. Mare improperly served by stallion.]**—*BROUILLARD & COTE* (1885), 15 R. L. 715; 30 L. C. J. 269.—CAN.

**t. ———.]**—*RODRIQUE v. LEDUC* (1888), 16 R. L. N. S. 295.—CAN.

**u. ———.]**—*HICKEY v. GANNON* (1915), 22 R. L. N. S. 1.—CAN.

**w. Animals poisoned by substance in pasturage—Measure of damages.]**—*BRISBOIS v. VIAU* (1913), 19 R. de J. 757.—CAN.



gence which caused the drovers to lose control over the cattle, & it being also admitted that pltf.'s men had done all they could to recover control over the beasts & had not been able so to do before they were killed, their death was the consequence of defts.' negligence, & the damage was not too remote.—*SNIESBY v. LANCASHIRE & YORKSHIRE RY. CO.* (1875), 1 Q. B. D. 42; 45 L. J. Q. B. 1; 33 L. T. 372; 40 J. P. 36; 24 W. R. 99, C. A.

*Annotations*.—*Refd.* Victorian Ralls Comrs. v. Coultas (1888), 13 App. Cas. 222, P. C. *Mentd.* Bull v. Shoreditch Corpn. (1902), 67 J. P. 37, C. A.

**139. Dangerous slope in railway yard—Contributory negligence.**—The duty of a railway co. towards persons resorting to their stations & yards in the ordinary course of business is not higher than that of the occupier of private premises towards invitees resorting to such premises in the ordinary course of business, as laid down in *Indermaur v. Dames* (1866), L. R. 1 C. P. 274; *affd.* (1867), L. R. 2 C. P. 311. The duty of the railway co. in such a case may be stated to be a duty to take reasonable care that their premises are reasonably safe for persons using them in the ordinary & customary manner & with reasonable care.

A railway co. occupied a station yard with an approach thereto. Pltf. was in the habit of going himself or sending his driver to the station yard with a horse & cart to receive or deliver goods. The yard was bounded on one side by a sloping bank at the bottom of which was an open culvert. Both pltf. & his driver knew the place well. On the occasion in question the driver drove the horse & cart up to the door of the weighing office. The sloping bank was 40 feet behind the cart. He left the horse & cart unattended, as he & other drivers usually did, & went into the office, where he remained for a few minutes. The horse in his absence backed the cart over the bank & was dragged backwards into the culvert & injured. In an action in the ct. against the co. for negligence, the jury found a verdict for pltf. The ct. judge entered judgment in accordance with the verdict:—*Held*: there was no evidence of any breach of duty on the part of defts. causing the accident, & they were entitled to judgment.—*NORMAN v. GREAT WESTERN RY. CO.*, [1915] 1 K. B. 584; 84 L. J. K. B. 598; 112 L. T. 266; 31 T. L. R. 53, C. A.

*Annotations*.—*Consd.* Brackley v. Mid. Ry. Co. (1915), 14 L. G. R. 280. *Expld.* Brackley v. Mid. Ry. Co. (1916), 85 L. J. K. B. 1596, C. A. *Consd.* Maclean v. Scgar, [1917] 2 K. B. 325. *Refd.* Elliott v. Roberts (1915), 32 T. L. R. 71; Walker v. Crabb (1916), 33 T. L. R. 119; Cox v. Coulson, [1916] 2 K. B. 177, C. A.

**140. Animals poisoned by substance spread on field—Liability of landlord.**—On a demise of land or the vesture of land (as the eatage of a field) for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken.

Where A. agreed in writing to take the eatage of 24 acres of land from B. for seven months, at a rent of £40, & stocked the land with beasts, several of which died a few days afterwards from the effect of a poisonous substance, which had accidentally been spread over the field without B.'s knowledge:—*Held*: A. was not entitled to throw up the land, but continued liable for the whole rent.—*SUTTON v. TEMPLE* (1843), 12 M. & W. 52; 13 L. J. Ex. 17; 2 L. T. O. S. 150; 7 Jur. 1065; 152 E. R. 1108.

*Annotations*.—*Consd.* Hart v. Windsor (1843), 12 M. & W. 68. *Refd.* Manchester Bonded Warehouse Co. v. Carr (1880), 5 C. P. D. 507; *Cheater v. Cater*, [1918] 1 K. B. 247 C. A. *Mentd.* Readhead v. Mid. Ry. Co. (1867), L. R. 2 Q. B. 412; *Fowler v. Lock* (1872), L. R. 7 C. P. 272; *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336.

**141. Wrong quantity on poisonous dip tins—Cattle poisoned.**—Applts., who owned an estate in South Africa, ordered from resps., chemists & drug-

gists, 5 cwt. of arsenite of soda for the purpose of dipping cattle, & it was delivered in ten drums, on which were labels with the word "Poison," & the statement that the tin contained 8½ lbs. of 80 per cent. arsenite of soda, & that the whole contents of the tin were to be dissolved in 400 gallons of water to make the dip. Each drum in fact contained 56 lbs. of arsenite, & the labels were meant for tins & not for drums. The manager of applts.' estate, after communicating with resps., believed that each drum contained only 8½ lbs. of arsenite, mixed with something else, & the whole of the contents of the ten drums was placed in 4,350 gallons of water. The dip so made was too strong & some of applts.' cattle were killed & others injured. In an action by applts. against resps. for negligence resps. denied negligence & pleaded contributory negligence. The trial judge found in favour of applts.:—*Held*: there was evidence on which he could reasonably so find.—*BRITISH CHARTERED CO. OF SOUTH AFRICA v. LENNON, LTD.* (1915), 113 L. T. 935; 31 T. L. R. 585, P. C.

**142. Negligent repair of highway—Death of horse caused by overstrain—Contributory negligence.**—In an action to recover damages for the death of a horse, which had died after pulling a loaded waggon over a stretch of country road which was being laid with granite by defts., the particulars of negligence alleged were, (1) that the road was not closed; (2) that no warning notice was erected; (3) that the road had not been scarified; (4) that the road was not laid in halves; (5) that the road was laid with granite to so great a depth as 5 inches. There was evidence to support these allegations. It appeared also that the stretch of country road was about 130 feet in length, part of it rolled, but not rolled in, & the rest of it unrolled, or only rolled once. The waggoner put his horses to the task without asking for help from the men with the steam-roller that was there, or otherwise. The waggoner could not turn round in the lane. The jury found (1) that there was negligence on the part of defts.' servants; (2) that pltf. & his driver could not, by the exercise of reasonable care, have avoided the consequences of defts.' negligence; & (3) that the death of pltf.'s horse was the natural & necessary consequence of defts.' negligence:—*Held*: there was evidence of negligence to be left to the jury, but as the waggoner saw the condition of the road & elected to take the risk of drawing the waggon over it, the death of the horse was not the natural & necessary consequence of defts.' negligence, & pltf. was not entitled to recover damages.—*TORRANCE v. ILFORD URBAN DISTRICT COUNCIL* (1909), 73 J. P. 225; 25 T. L. R. 355; 53 Sol. Jo. 301; 7 L. G. R. 554, C. A.

**Injuries to owner through horse being frightened on highway.**—*See NEGLIGENCE.*

*See, further, HIGHWAYS, STREETS, & BRIDGES; NEGLIGENCE.*

#### F. In Questions of Insurance.

*See, generally, INSURANCE.*

**143. Animals killed in storm—Peril of sea.**—A policy was effected on living animals warranted free from mortality & jettison. In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed, & others, from the same cause, received such injury that they died before the termination of the voyage insured:—*Held*: this was a loss by a peril of the sea, for which the underwriters were liable.—*LAWRENCE v. ABERDEIN* (1821), 5 B. & Ald. 107; 106 E. R. 1133.

*Annotations*.—*Folld.* Gabay v. Lloyd (1825), 3 B. & C. 793. *Distd.* Taylor v. Dunbar (1869), L. R. 4 C. P. 206. *Folld.* St. Paul Fire & Marine Insee. Co. v. Morice (1906), 11 Com. Cas. 153. *Mentd.* A.-G. v. Cleobury (1849), 4 Exch. 65.

**Sect. 1.—Rights: Sub-sect. 1, F. G. & H.; sub-sects. 2 & 3. Sect. 2: Sub-sect. 1, A**

**144. S. P. GABAY v. LLOYD** (1825), 3 B. & C. 793; 5 Dow. & Ry. K. B. 641; 3 L. J. O. S. K. B. 116; 107 E. R. 927.

**Annotations:—Distd.** Taylor v. Dunbar (1869), L. R. 4 C. P. 206. **Mentd.** Bartlett v. Pentland (1830), 10 B. & C. 760; Allen v. Cameron (1833), 1 Cr. & M. 832; Robertson v. Jackson (1845), 2 C. B. 412; Bayliffe v. Butterworth (1847), 1 Exch. 425; Maxwell v. Deare (1854), 23 L. T. O. S. 1, P. C.; Sweeting v. Pearce (1861), 9 C. B. N. S. 534.

**145. Animal injured—Meaning of “walking.”]**

—By a policy of insurance a fox terrier dog, which had taken several prizes, was insured from the Mersey to Bombay & thence by rail to Lahore. The policy was in the form of an ordinary Lloyd's policy with the addition of the following written clause:—“This insurance is against all risks, including mortality from any cause, jettison, & washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival.” During the transit the dog was injured, & in consequence of the injury was unable upon arrival at Lahore to use one of its legs, being, therefore, only capable of locomotion upon three legs:—**Held:** (1) the risk of the injury was covered by the policy, inasmuch as the insurance against “all risks” was an addition to the ordinary perils; (2) the words “walking at Lahore, Punjab, to be deemed a safe arrival” did not merely qualify the risk of mortality, but had reference also to the other risks insured against, so that if the dog walked at Lahore within the policy, no claim under it could be made; (3) “walking” at Lahore meant that the dog must be capable of locomotion in the usual way upon four legs, & as it was unable to use one leg, the insurers were liable under the policy.—**JACOB v. GAVILLER** (1902), 87 L. T. 26; 50 W. R. 428; 18 T. L. R. 402; 7 Com. Cas. 116.

**Annotations:—Distd.** New York City Century Bank v. Mountain (1913), 30 T. L. R. 166. **Refd.** Schloss v. Stevens, [1906] 2 K. B. 665.

**146. Animal slaughtered on arrival—Meaning of “mortality.”]**—By a Lloyd's policy of marine re-insurance a bull was insured “against all risks including mortality, jettison & washing overboard.” The policy contained the clause “Warranted nevertheless free of capture, seizure & detention, & the consequences thereof, or any attempt thereat”:—**Held:** (1) the word “mortality” ought to be understood as meaning death from natural influences & diseases, & not violent death caused to the animal after its arrival at the port of destination by reason of local regulations which compelled its slaughter, in consequence of the existence of foot-&-mouth disease amongst the animals aboard the vessel; (2) even if “mortality” did mean such violent death, the underwriters of the Lloyd's policy were protected from liability in respect of it by the warranty.—**ST. PAUL FIRE & MARINE INSURANCE CO. v. MORICE** (1906), 22 T. L. R. 449; 11 Com. Cas. 153.

### PART III. SECT. 1, SUB-SECT. 1.—G.

**a. Sheep Protection Acts—Payment of compensation under.]—Held:** 32 Vict. c. 31 (O.), which required municipalities to provide compensation to the owners of sheep killed by dogs, for the damage they thereby sustained, was not confined to county municipalities & to municipalities within their jurisdiction, but applied also to towns which had withdrawn from the jurisdiction of the county.—**WILLIAMS v. PORT HOPE TOWN** (1877), 27 C. P. 548.—CAN.

**b. —.]** Pltf.'s sheep had been killed by dogs:—**Held:** there was no appeal from the valuation of defts.' inspector, & under Sheep Protection Act, s. 18, it was discretionary on defts. to pay two-thirds of that value or a

smaller sum.—**CRAIG v. MALAHIDE, LIDDLE v. MALAHIDE** (1909), 13 O. W. R. 686.—CAN.

**c. —.]** By Dog Tax & Sheep Protection Act, R. S. O., 1914 (c. 246), s. 18, a right of relief is given to sheep owners whose sheep have been killed by any dog, the owner of which is not known, on an application satisfactory to the council of the municipality, but nothing in the Act or otherwise makes the municipal corpn. liable in a ct. of law for the damage done; & a Divisional Ct. was prohibited from entertaining an action to recover from a township corpn. the value of sheep alleged to have been killed in the township by dogs of unknown owners.—**RE HOGAN v. TUDOR** (1915), 9 O. W. N. 142; 34 O. L. R. 571.—CAN.

### G. Statutory Provisions.

See cases *infra*.

### H. Measure of Damages.

See, generally, DAMAGES.

**147. Right of jury to assess same.]—**Where, in an action of trespass for shooting a dog, the witnesses called valued the dog at 50s. & they were contradicted:—**Held:** the jury had a right, nevertheless, to find a less sum as the amount of damages.—**CANN v. FACEY** (1835), 1 Har. & W. 482; 5 Nev. & M. K. B. 405; 5 L. J. K. B. 1.

**Annotations:—Mentd.** Richardson v. Barnes (1849), 4 Exch. 128; Palmer v. Richards (1851), 6 Exch. 335; Huxley v. London Extension Ry. Co., Hughes v. Morrett, Wood v. Madge (1886), 17 Q. B. D. 373.

**148. Loss of market value through exposure to cold.]—McMAHON v. FIELD**, No. 135, *ante*.

### SUB-SECT. 2.—RIGHT TO FOLLOW AND RECOVER STRAYING DOMESTIC ANIMALS.

**149. Escaping animals distrained by landlord on whose land they were found.]—**Two men being severally seised of two adjoining closes, the enclosure & fence between the closes belonging to one of them by prescription, the cattle of the other escaped out of one close into the other through a defect of the fence. Immediately, & before the owner of the cattle could drive them out into his own close, the lord distrained them for services. The case was that the distress was taken by a lessor for rent reserved on a lease for years, & not by a lord for his services:—**Held:** (1) no fault could be assigned in the owner of the cattle for their escape, nor did any law oblige him to keep his cattle in his own close; (2) there must be judgment for pltf.—**ANON.** (1572), 3 Dyer, 317b; 73 E. R. 719.

**150. Animal seized as estray.]—**In an action of trover & conversion of a cow, deft. pleaded that the Crown being seised in fee of a manor had demised it & all estrays therein to him, & that this cow came thither as an estray, whereupon he seized her & caused her to be proclaimed in two market towns next adjoining, & pltf. claimed property but refused on demand to pay for the feeding of the cow, & traversed that he was guilty of conversion at Salop. It was thereupon demurred, because (1) deft. alleged not the letters patents, nor that the proclamations were made in the parish church, (2) he traversed the vill:—**Held:** pltf. entitled to judgment.—**BROWNLOW v. LAMBERT** (1599), Cro. Eliz. 716; 78 E. R. 950.

**151. — Straying again from land where seised.]—**A man seised of a manor, to which he has stray appendant by prescription, seizes an ox as a stray within the manor & makes proclamations according to law, & within the year & day lets the manor with

**d. Animal at large shot by magistrate's order—Trespass.]—**In an action against a justice of the peace for ordering a goat, which was abroad & a public nuisance, to be shot, pltf. failed to support his declaration in an action of trespass by alleging property in the goat, he having forfeited same by breach of the municipal law.—**HANN v. CHAMBERS** (1881), 6 Nfld. L. R. 356.—NFLJ.

### PART III. SECT. 1, SUB-SECT. 2.

**e. Animals wrongfully detained.]—**In trespass for breaking & entering pltf.'s barn, deft. justified on the ground that his cattle had been wrongfully taken by pltf., who locked them up in his barn, & refused to give them up:—**Held:** sufficient.—**GRAHAM v. GREEN** (1862), 5 All. 330.—CAN.



all royalties, liberties, etc. After the year & day has passed, the lessee shall have the stray, forasmuch as the property of the stray is not altered nor changed before the year & day; & the lord of the manor until the year & day are past has but the custody, so that the owner may rehave it always within the year & day, if he will pay for the meat of it; nor can the ox be laboured, or used by the lord before the year & day &, therefore, he shall be paid for the meat, unless it be such a beast as of necessity ought to be used as a milch cow; & if one take a stray & within a year & a day it strays out of the manor, the lord may retake it by seizure.—ANON. (1612), 12 Co. Rep. 101; 77 E. R. 1375.

**152. Animals driven on right of way—Escaping into adjoining lands.]**—If a man has a way over the land of another for his cattle, & upon the way he scares his cattle, so that they run out of the way upon the land of the owner, & the party who drives the cattle freshly pursues them, etc., in trespass he who has the way may plead this special matter in justification (RICHARDSON, C.J.).—ANON. (1631), Het. 166; 124 E. R. 426.

**153. Sheep stolen—Entry on field of stranger.]**—If B.'s sheep are stolen & put upon A.'s field, B. has no right, unless he enters with the object of finding & apprehending the felon, to go upon A.'s land merely to search for his sheep, & B. has no right to take his sheep away without A.'s licence, for in that case A. would be left without remedy for the damage done by the sheep (ROLL, C.J.).—TOPLADYE v. STALYE (1649), Sty. 165; 82 E. R. 615.

**Right to follow bees swarming in another's trees.]**—See No. 50, *ante*.

**Right to follow game on to another's land.]**—See GAME.

**Right to follow foxes, hares, etc., on to another's land.]**—See TRESPASS.

#### SUB-SECT. 3.—OTHER RIGHTS.

Rights of owner turning on questions of property, see Part II., *ante*.

### SECT. 2.—LIABILITIES.

#### SUB-SECT. 1.—HARMLESS DOMESTIC ANIMALS.

##### A. Liability for Trespass.

**154. Obligation of owner.]**—Trespass with cattle. Plea that deft.'s land adjoined a place where deft.

#### PART III. SECT. 2, SUB-SECT. 1.—A.

**154 i. Obligation of owner.]**—At common law the owner of animals must keep them from trespassing on his neighbour's crops, though enclosed by no fence or by an insufficient fence.—WATT v. DRYSDALE (1907), 17 Man. L. R. 15; 6 W. L. R. 234.—CAN.

**154 ii. S. P. DALZIEL v. ZASTIE** (1910), 19 Man. L. R. 353; 13 W. L. R. 488.—CAN.

**154 iii. —.]**—Sheep broke into pltf.'s land & damaged his crops. There was no local law compelling land owners to erect any particular description of fence:—*Held*: it was the duty of the owners of animals to see they did not trespass on the soil of others.—DE GRISH v. MORRISSEY (1875), 6 Nfld. L. R. 107.—NFLD.

**154 iv. —.]**—Where cattle are permitted to trespass upon the public highway, the owner is liable for damage which they may cause upon the land of an adjoining proprietor into which they stray, & in such case it is not a sufficient defence that pltf.'s fence was not a

lawful fence, or that there was a custom among inhabitants of the district to fence against cattle.—SMITH v. BOUTILLIER (1907), 42 N. S. R. 1; 2 E. L. R. 212.—CAN.

**154 v. —.]**—Deft.'s cow, which was to the knowledge of deft. in the habit of breaking through fences, broke into pltf.'s pasture & killed pltf.'s cow:—*Held*: pltf. could recover the value of the cow.—MESSENGER v. STEVENS (1910), 9 E. L. R. 91.—CAN.

**154 vi. — Evicted farm.]**—The want of boundary fences is no defence to an action for trespass. Every man is bound to keep his cattle on his own land; &, in the case of an evicted farm, if the fences are levelled, the inference ought to be that they have been levelled for annoyance, & for the easy plunder of the land by the neighbours.—WALSH v. COAKLEY & SULLIVAN, 32 I. L. T. 356.—IR.

**154 vii. — To owner of turbary rights.]**—An action for trespass will lie for damage caused by the cattle of the owner of the soil & freehold of a bog to

had common; that the cattle strayed from the common, & deft. drove them back as soon as he could:—*Held*: a bad plea.

It behoves him to use his common so that he shall do no hurt to any man, & if the land in which he has common be not inclosed, it behoves him to keep the beasts in the common & out of the land of any other (BRIAN, C.J.).—ANON. (1480), Y. B., 20 Ed. 4, fo. 10, pl. 10.

*Annotation*:—Consd. Fletcher v. Rylands (1866), L. R. 1 Exch. 265.

**155. —.]**—If a man's beasts without his will or knowledge break into another's close, he is guilty of trespass, for a man is bound by law to keep his beasts without doing wrong to any one.—ANON. (1496), Keil. 3; 72 E. R. 156.

**156. —.]**—FLETCHER v. RYLANDS, No. 195, *post*.

**157. — Default of plaintiff leaving property unprotected—Licensee.]**—A. licensed P. to put a stack of hay upon the land of A. A. leased that land to W., & the hay remained there for two years. W. put in his cattle, who wasted the hay, & P. brought an action of trespass:—*Held*: the action did not lie, because the hay was not removed in reasonable time, & the licence was determined by the lease to W., & P. was bound to look that the beasts of A. or W. did not eat the hay. The damage came to him by his own fault.—PLUMMER v. WEBB (1619), Noy, 98; 74 E. R. 1064; *sub nom.* WEBB (WEBB, WEBBE) v. PATERNOSTER, Palm. 71; Poph. 151; Godb. 282; 2 Roll. 143, 152.

*Annotations*:—Apld. Craven v. Hanley (1736), 2 Com. 548. Refd. Pomfret v. Ricroft (1669), 2 Keb. 569; Wood v. Lake (1751), Say. 3; Taylor v. Waters (1816), 7 Taunt. 374; Liggins v. Inge (1831), 7 Bing. 682; Jones v. Tankerville, [1909] 2 Ch. 440. Mentd. R. v. Cotton (1751), Park. 112; Winter v. Brockwell (1807), 8 East, 308; Hewlins v. Shippam (1826), 5 B. & C. 221; Welsh v. Rose (1830), 6 Bing. 638; Wallis v. Harrison (1838), 4 M. & W. 538; Williams v. Morris (1841), 8 M. & W. 488; Wood v. Leadbitter (1845), 13 M. & W. 838; Taplin v. Florence (1851), 20 L. J. C. P. 137.

**158. — Tithe-owner.]**—Trespass for causing defts.' cattle to eat up & trample upon corn, grain & straw, which pltf. had set out for tithes:—*Held*: though the proprietor of tithes left them on the land more than a reasonable time after they were set out, & after he had notice thereof, the owner of the land could not justify, in trespass, turning in his cattle upon the land to depasture it in the usual course of husbandry, whereby the cattle consumed the tithes, but his remedy was either by distress or by action.—WILLIAMS v. LADNER (1798), 8 Term Rep. 72; 101 E. R. 1273.

*Annotation*:—Consd. Davies v. Ingram (1867), 17 L. T. 33.

turf, cut & spread on a plot of such bog (not fenced or divided from the residue) by the owner of other lands, who enjoys the right to cut & save turf on such plot, where such cattle are depastured by the owner of the soil upon the bog without provision by him for the prevention of such injury by his cattle to the turf. The depasturage of cattle by the owner of the soil of the servient tenement, without such provision against injury to the turf of the dominant tenant so situated, is, in such circumstances, a user by such owner of the soil of his natural rights, which is unreasonable in relation to the dominant tenant as prejudicing the value of the incorporeal hereditament in the nature of a *profit à prendre* enjoyed by the dominant tenant, by endangering the saving of the turf.—CRONIN v. CONNOR, [1913] 2 I. R. 119.—IR.

**154 viii. — Negligent act of third party.]**—A man whose field is properly fenced is not liable for the trespass of his cattle, caused by the negligent act of a stranger in using a right of way through the field.—M'GIBBON v. M'CURRY (1909), 43 I. L. T. 132.—IR.



**Sect. 2.—Liabilities: Sub-sect. 1, A.]**

**159. Enforceable by vendor—Having temporary property in soil.]—**Pltf. bought a crop of turnips in a field, with a proviso that half the crop should be consumed on the land, & deft. bought a crop of grass in an adjoining field from same vendor. Pltf. was alleged to have left the gate open, & some of the sheep went through it & ate some of the turnips. On subsequent days all the sheep went into the turnip field, but not by the gate. In an action for damages:—*Held*: (1) the proviso that half the turnips should be consumed on the land did not prevent pltf. from suing, as it did not prevent him from having the temporary property in the soil; (2) although, if pltf. left the gate open on the first day, he could not recover damages for that day, yet this would not alter the duty of deft. to keep his sheep from straying on the other days, & pltf. was entitled to damages in respect of the other days.—*WELLAWAY v. COURTIER*, [1918] 1 K. B. 200; 87 L. J. K. B. 299; 118 L. T. 256; 34 T. L. R. 115, D. C.

**160. Dog killing sheep—Consent or incitement of master.]—**If a dog hunts & chases sheep or kills them without his master setting him on thereto, & the master have an action for trespass brought against him, he may clearly plead not guilty.—*ANON.* (1537), 1 Dyer, 29a; 73 E. R. 64.

**161. ———.]—**The master of a dog, which has killed a sheep, the master not being aware of such a disposition on the part of the dog, shall not be punishable, otherwise if he had notice of the dog's disposition.—*ANON.* (1537), 1 Dyer, 25b; 73 E. R. 56.

**162. ———.]—**If a man's dog runs at sheep & kills them, not with his consent, there will no action lie. But otherwise if with his consent.—*BAKER v. WEBBERLY* (1631), *Het.* 171; 124 E. R. 429.

**163. ——— Mischievous act of third party.]—**If the owner of a dog keeps him properly secured, but another person improperly lets him loose & urges him to mischief, the owner is not liable. Proof, therefore, that A.'s dog has killed B.'s sheep will not entitle B. to recover compensation from A.; for consistently with such proof, the dog may have been properly secured by A., & may have been improperly let loose & urged to mischief by a third party, without the knowledge, & even against the express prohibition, of A.—*FLEEMING v. ORR* (1855), 2 Macq. 14; 25 L. T. O. S. 73; 19 J. P. 277, H. L.

**164. Common—Infringement of right.]—**A copyholder having a right of common may have an action against a stranger for putting beasts into the common, by which he cannot have his common of pasture in so beneficial a manner as before. But if the trespass be so small that the commoner sustains no loss, the commoner shall not have any action for the trespass. The lord of the soil, however, may have an action of trespass, be it greater or less.

If pltf. declare that deft. put in his cattle, etc., & it be found that he did not put them in, but that they came in by escape, pltf. shall have judgment, for the eating the grass is the substance.—*MARY'S CASE* (1612), 9 Co. Rep. 111b; 77 E. R. 895; *sub*

*nom.* *CROGAT v. MORRIS* (1610), 2 Brownl. 55; 123 E. R. 812.

*Annotations:—**Consd.* *Hall v. Harding* (1769), 1 Wm. Bl. 673; *Wells v. Watling* (1778), 2 Wm. Bl. 1233; *Robertson v. Hartopp* (1889), 43 Ch. D. 484, C. A. *Apld.* *King v. Brown Durant*, [1913] 2 Ch. 416. *Refd.* *Jeveson v. Moor* (1699), 12 Mod. Rep. 262; *Pindar v. Wandsworth* (1802), 2 East, 154. *Mentd.* *Crouther v. Oldfield* (1706), 1 Salk. 364; *Atkinson v. Teasdale* (1771), 2 Wm. Bl. 817; *Grinnell v. Wells* (1841), 2 Dow. & L. 610; *Pryce v. Belcher* (1846), 3 C. B. 58; *The Amerika* (1916), 13 Asp. M. L. C. 558, H. L.

**165. Rights of commoner.]—**A commoner cannot maintain an action for damage done by the rabbits of another upon the common, for they are then *feræ naturæ*, & they may kill them.—*HINSLEY (HINDLEY) v. WILKINSON* (1634), *Cro. Car.* 387; *W. Jo.* 356; 78 E. R. 938.

*See, further, COMMONS & RIGHTS OF COMMON.*

**166. Animal entering house or shop.]—**If a man is driving cows through a town, & one of them goes into another man's house, trespass does not lie for this, because it was involuntary, & a trespass ought to be done voluntarily, & so it is *injuria*, a hurt to another, & so it is *damnum* (*DODDRIDGE, J.*).—*MITTEN v. FAUDRYE* (1626), *Poph.* 161; *sub nom.* *MILLER (MILLER) v. FAWEN (FAWDRY, FAWTREY HAWERY)*, *Benl.* 171; *W. Jo.* 131; *Lat.* 13, 119. *in*

*Annotations:—**Refd.* *Beckwith v. Shordike* (1767), 4 Burrig 2092; *Deane v. Clayton* (1817), 7 Taunt. 489. *Mentd.* *King v. Rose* (1673), *Freem. K. B.* 347; *Mason v. Keeling* (1699), 1 *Ld. Raym.* 606; *Gundry v. Feltham* (1786), 1 *Term Rep.* 334; *Anthony v. Harvey* (1832), 8 Bing. 186.

**167. ——— ox belonging to deft., & while—**being driven by his servants through the streets of a country town, entered pltf.'s shop, which adjoined the street, through the open doorway & damaged his goods. No negligence on the part of the persons in charge of the ox was proved:—*Held*: deft. was not liable.—*TILLET v. WARD* (1882), 10 Q. B. D. 17; 52 L. J. Q. B. 61; 47 L. T. 546; 47 J. P. 438; 31 W. R. 197.

**168. ——— Negligence of drover's assistant.]—**A butcher employed a licensed drover to drive home a bullock, which he had purchased from a market. The drover's boy, by his negligent driving, allowed the bullock to run into a shop, whereby damage was done to goods in the shop:—*Held*: the owner of the bullock was not liable to be sued for the damage so done, although the drover was.—*MILLIGAN v. WEDGE* (1840), 12 Ad. & El. 737; 4 Per. & Dav. 714; *Arn. & H.* 73; 10 L. J. Q. B. 19; 5 J. P. 209; 113 E. R. 993.

*Annotations:—**Apld.* *Rapson v. Cubitt* (1842), 9 M. & W. 710. *Distd.* *The Agricola* (1843), 2 Wm. Rob. 10; *Martin v. Temperley* (1843), 4 Q. B. 298. *Apld.* *Allen v. Hayward* (1845), 7 Q. B. 960. *Consd.* *The Eden* (1846), 2 Wm. Rob. 442. *Apld.* *Reedie v. L. & N. W. Ry. Co., Hobbit v. L. & N. W. Ry. Co.* (1849), 4 Ex. 244. *Consd.* *Sadler v. Henlock* (1855), 4 E. & B. 570. *Refd.* *R. v. Hey* (1849), 2 Car. & Kir. 983, C. C. R.; *Tobin v. R.* (1864), 16 C. B. N. S. 310; *Steel v. Lester & Lilee* (1877), 37 L. T. 642.

**169. Injury by depastured cattle—Eating shoots of trees.]—**If one has a right of pasture over a close which in part consists of a wood, & the trees are cut down, & the roots dug out, the fact that the cattle eat the young shoots springing up in what was the wood does not afford ground for an action, since the cattle cannot depasture thereon without so doing.—*CLITHERO v. HIGGS* (1636), *W. Jo.* 338; 82 E. R. 203.

**160 i. Dog killing sheep—Evidence.]—**In an action to recover the value of sheep, alleged to have been killed & injured by deft.'s dog, the evidence showed that, after some sheep had been killed, a watch was kept, when deft.'s dog & another, owned by C., were found attacking a sheep, deft.'s dog having hold of the sheep at the time, & that the two dogs had been heard barking in the vicinity on several occasions, & that, after deft.'s dog was sent away, no more sheep were destroyed:—*Held*:

(1) there was evidence to support a finding that it was deft.'s dog which did the killing; (2) deft. was liable for the value of the sheep which his dog was found killing, & for one-half of the remaining damage.—*WILLIAMS v. WOODWORTH* (1899), 32 N. S. R. 271.—*CAN.*

**166 i. Animal entering house.]—**A cow, while being driven with several others along a public street in charge of a boy, suddenly bolted into the kitchen of a house. A woman who was in the kitchen

at the time, in an action of damages against the owner of the cow for negligence in employing an incompetent driver, averred that in consequence of the sudden appearance of the cow she had sustained a nervous shock, from the effects of which she had not recovered, & which she believed would be permanent:—*Held*: the action was relevant.—*GILLIGAN v. ROBB*, [1910] S. C. 856; 47 So. L. R. 733; 2 S. L. T. 77.—*SCOT.*

**170. — Barking trees—Exception of trees from lease.]**—A man who lets pasture land excepting the trees cannot maintain trespass against the lessee for letting his cattle bark the trees.—*GLENHAM v. HANBY* (1700), 1 Ld. Raym. 739; 91 E. R. 1395.

**171. — Roadside grazing—Disputed title.]**—Action claiming a declaration that H. was entitled as lord of the manor of T., or as owner of lands adjoining a way called W. Lane, to the lumbage & pasture in it, & for an injunction to restrain defts. from grazing cattle & sheep in that lane. By an award made under an Inclosure Act of 1774 certain lands were allotted & roads set out as public highways. From a short time after the passing of the Act the pasturage of the lane in question was let annually by the inhabitants in vestry assembled, & there had been no claim by the lords of the manor until this action. Deft. was tenant of the pasturage under the vestry, it being provided by his lease that he should not put sheep in the lane. There was no evidence in whom the soil of the road was vested before the passing of the above Act. No grant of the road was produced, nor any evidence of the enrolment of such grant:—*Held*: (1) a lawful origin must be presumed from the long usage, & the resumption was that the road was vested in some person as trustee for the inhabitants, & a presumption might also be made either that the grant of the road had been enrolled, or that it was made for some purpose which did not require it; (2) the churchwardens & overseers as trustees under Poor Relief Act, 1819 (c. 12), s. 17, of lands belonging to the parish, had acquired a good title to the road under Stat. Limitations, subject to the public right of way; (3) deft. was not a trespasser on the road as regards pltf., even if he had broken his agreement not to put sheep in the road, & if the sheep trespassed on pltf.'s land it was his own fault for not keeping up his fences as bound by the award.—*HAIGH v. WEST*, [1893] 2 Q. B. 19; 62 L. J. Q. B. 592; 69 L. T. 165; 57 J. P. 358; 4 R. 396, C. A.

*Annotations*:—*Apld.* *Neaverson v. Peterborough R. D. C.*, [1901] 1 Ch. 22. *Distd.* *Neaverson v. Peterborough R. D. C.*, [1902] 1 Ch. 557, C. A. *Mentd.* *Eliot v. Bristol Corpn.* (1894), 71 L. T. 659; *Wimbledon & Putney Commons Comrs. v. Nicol* (1894), 10 T. L. R. 247; *Eliot v. Bristol Corpn.* (1895), 72 L. T. 752, C. A.; *Brown v. Dunstable Corpn.*, [1899] 2 Ch. 378; *A.-G. & Spalding R. D. C. v. Garner*, [1907] 2 K. B. 480; *Chesterfield v. Harris*, [1908] 2 Ch. 397, C. A.; *Foley's Charity v. Dudley Corpn.* (1909), 8 L. G. R. 320, C. A.; *Central London Ry. Co. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467, C. A.; *A.-G. v. Horner*, [1913] 2 Ch. 140.

**172. Cattle driven into close of stranger—Mischievous act of third party.]**—He that drives my cattle into another man's land is the trespasser against him, & not I who am owner of the cattle (*ROLL, J.*).—*SMITH v. STONE* (1647), Sty. 65; 82 E. R. 533.

**174 i. Through defect of fences—Duty to fence.]**—Pltf. & deft., adjoining land-owners, agreed to keep in repair the line fence between their lots, which was less than five feet in height. Deft. allowing his portion to get into disrepair, his cattle got on pltf.'s land & damaged it, & ran at large on the highway, whence, by breaking down pltf.'s fences, they got on pltf.'s land & further damaged it. A township bye-law provided that no fence should be less than five feet high, & prohibited the running at large of all breachy cattle:—*Held*: deft. was liable for the damages sustained by pltf., & such liability was not affected by the bye-law.—*BARBER v. OLEAVE* (1901), 2 O. L. R. 213.—CAN.

**174 ii. — — —.]**—A. leased land to B. for the purpose of grazing his sheep, & covenanted to keep the fences in repair & look after the sheep. A. resided near the land, & B. lived at a distance. One of the boundary fences fell into disrepair, & B.'s sheep escaped & damaged

the crop of C., an adjoining owner. No notice of disrepair had at any time been given to A. C. sued B., who joined A. as third party. C. recovered damages & costs against B., & the judge gave judgment for B. against A. for the amount of the damages & costs ordered to be paid by B. to C.:—*Held*: (1) A. was liable for breach of covenant, notwithstanding no notice of disrepair had been given to him; (2) the damages were not too remote, & the judge was right in awarding as part of the damages the costs incurred by B. in defending the action brought by C.—*DUNLOP v. TROY*, [1915] V. L. R. 639.—AUS.

**176 i. Fence pulled down.]**—Deft. threw down a fence & entered on land in pltf.'s possession claiming it to be a highway, & in consequence of the fence being thrown down, deft.'s cattle went in upon pltf.'s field:—*Held*: this was not a "breaking into a field under lawful fence" by the cattle, & a justice of the peace had no jurisdiction to proceed against deft. in trespass under

**173. Through defect of fences.]**—If a man turn his cattle into Blackacre, where he has no right, & they escape & stray into my field for want of fences, he cannot excuse himself, or justify for his cattle trespassing in my field (*WILMOT, C.J.*).—*ANON.* (1770), 3 Wils. 126; 95 E. R. 970.

*Annotation*:—*Mentd.* *Cape v. Scott* (1874), L. R. 9 Q. B. 269.

**174. — Duty to fence—Limited to adjoining close.]**—A. is bound to fence his close against B., his neighbour, & B. against C., his neighbour. If A. does not so fence, nor B. either for want of fences, & C.'s cattle go on B.'s land & thence to A.'s land, A. may sue C. in trespass, for A. was only bound to fence against B., & every one ought to keep his cattle as well in open lands where there is no enclosure as in inclosed lands. Suppose, however, A. has Greenacre joining Whiteacre both belonging to him; A. is bound to fence Whiteacre against Blackacre which is B.'s land, for otherwise if B.'s cattle go into Whiteacre & thence into Greenacre it is no trespass against A., for it happened with A.'s fault.—*ANON.* (1482), Jenk. 161; 145 E. R. 103.

**175. — — —.]**—Three closes, B., G., & W., were contiguous to one another; the owner of W. was bound to maintain the fence between W. & G. & the owner of G. the fence between G. & B. Cattle strayed out of B. into G. from the defect of fences, & thence into W. from a like defect:—*Qu.*: whether the owner of W. could treat the cattle as trespassers.—*RIGHT v. BAYNARD* (1674), Freem. K. B. 379; 89 E. R. 283; *sub nom.* *SMITH v. BAYNARD*, 3 Keb. 388, 417.

**176. — — — Fence pulled down by adjoining owner.]**—If I inclose between my neighbour & myself, & my neighbour pull down this inclosure or part of it, whereby my cattle escape into the land adjoining & depasture there, I shall be excused of this trespass in the same manner as if he had licensed me to have occupied it, & whatsoever happens to this land adjoining by my neighbour's means shall be in the same degree as my neighbour's act, for what he does shall be to his own prejudice (*POPHAM, C.J.*).—*HAYES v. ALLEN* (1583), Poph. 13; 79 E. R. 1135.

**177. — — — How discharged.]**—In an action of trespass for breaking down pltf.'s fences & eating up his grass by hogs, deft. pleaded that the fences were out of repair:—*Held*: (1) a plea excusing a trespass by cattle from the defects of fences must show the fences to be pltf.'s & the closes to be contiguous; (2) the plea was bad.—*KING v. ROSE* (1673), Freem. K. B. 347; 89 E. R. 258.

**178. — — — Failure of plaintiff to keep in repair.]**—Pltf. & deft. occupied adjoining farms, which they rented from the same landlord, their tenancies having commenced on the same day. A fence upon pltf.'s farm which, under his agreement

1 Will. 4, c. 9, s. 6.—*COLWELL v. PURDY* (1831), N. B. Dig. 750 (2).—CAN.

**176 ii. — — — By plaintiff with defendant's consent.]**—Deft. leased land to pltf., & his cattle got in owing to the removal of a fence, which separated the road from the land leased, & which was removed by pltf., with deft.'s assent, if not by his directions:—*Held*: the removal of the fence by pltf. would *prima facie* excuse a trespass *extra viam*, & if deft.'s consent to such removal would prevent him from setting it up as a wrongful act, the consent should have been replied:—*PICKARD v. WIXON* (1865), 24 U. C. R. 416; *WIXON v. PICKARD*, 25 U. C. R. 307.—CAN.

**178 i. — — — How Failure of plaintiff to keep in repair.]**—In trespass by cattle, if deft. justify the entry of the cattle through defect of fences, it must be specially pleaded.—*GURWOLD v. HALLET* (1834), N. B. Dig. 594.—CAN.

**178 ii. — — —.]**—Trespass *q.c.f.* will lie by the owner of a close



## Sect. 2.

## Sub-sect. 1, A.]

of tenancy, he was liable, as between himself & the landlord, to keep & leave in good repair, & which divided the farms, became out of repair, with the result that two of deft.'s horses escaped from a field forming part of the farm occupied by pltf. & injured a colt belonging to him. Deft. entered into an agreement with the landlord, in terms similar to that of pltf. to keep in repair the fences on his holding:—*Held*: deft. was liable to pltf. in damages for the injuries caused to pltf.'s colt, inasmuch as the general principle that owners of animals must keep them upon their own land at their peril applied, & the mere fact that pltf. had committed a breach of the obligation he was under as between himself & the landlord to repair the fence was not enough to bring the case within the exception of damage caused by pltf.'s own default recognised in *Fletcher v. Rylands* (1866), L. R. 1 Ex. 265; *affd.* (1868), L. R. 3 H. L. 330.—*HOLGATE v. BLEAZARD*, [1917] 1 K. B. 443; 86 L. J. K. B. 270; 115 L. T. 788; 33 T. L. R. 116.

**179. — Prescriptive liability.**—Pltf. declared that he was possessed of a close adjoining deft.'s, & that the tenants & occupiers of that close had time out of mind made & repaired the fence between the two closes, & that for want of repair deft.'s cattle came into pltf.'s close, etc.:—*Held*: (1) either trespass or case lay, trespass because it was pltf.'s ground & not deft.'s, & case because the first wrong was a nonfeasance & neglect to repair, & that omission was the gist of the action & the trespass was only a consequential damage; (2) this was a charge upon deft. against common right; for the law bounds every man's property & is his fence, & this is obliging another to make a fence for him; (3) where a charge is imposed on another, & that against common right, & the charge is laid on him as owner of the soil or terre tenant, pltf. in his declaration must make himself a good title, but where he declares against deft. as a wrongdoer, it is sufficient for him to declare on his possession; (4) pltf. had sufficiently made out his title in the declaration by showing that deft. was bound to repair by prescription.—*STAR v. ROOKESBY* (1711), 1 Salk. 335; 91 E. R. 295.

*Annotations*:—**Folld.** (3) *Hardy v. Hollyday* (1765), 4 Term Rep. 718. **Apprvd.** *Ellis v. Loftus Iron Co.* (1874), 31 L. T. 483. **Refd.** *McMahon v. Lennard* (1858), 6 H. L. Cas. 970, H. L.; *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274.

**180. — Horse trespassing from adjoining land.**—Through defect of fences which it was deft.'s duty to repair, his mare strayed in the night-time from his close into an adjoining field, & so into a field of pltf.'s in which was a horse. From some

unexplained cause, the animals quarrelled, & pltf.'s horse received a kick from deft.'s mare, which broke his leg, & he was necessarily killed:—*Held*: (1) deft. was responsible for his mare's trespass, & it was unnecessary to give evidence that the mare was vicious to deft.'s knowledge, as it was through his negligence that the horse & the mare came together; (2) the damage was not too remote.—*LEE v. RILEY* (1865), 18 C. B. N. S. 722; 34 L. J. C. P. 212; 12 L. T. 388; 11 Jur. N. S. 527; 13 W. R. 751; 144 E. R. 629.

*Annotations*:—**Folld.** *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10. **Consd.** *Smith v. Cook* (1875), 1 Q. B. D. 79; *Bradley v. Wallaces & Thompson McKay*, [1913] 3 K. B. 629, C. A. **Refd.** *Tillett v. Ward* (1882), 47 L. T. 546; *Wright v. Hetton Downs Co-op. Soc.* (1883), Cab. & El. 200; *Hadwell v. Righton*, [1907] 2 K. B. 345. **Mentd.** *Fletcher v. Rylands* (1866), 14 W. R. 799, Ex. Ch.; *Theyer v. Purnell*, [1918] 2 K. B. 333.

**181. — Imposed by statute on third party.**—A railway co. let surplus land to a tenant, separating it from the adjoining land not taken by means of an open post-&-rail fence 4 feet high. The tenant planted his land with vegetables. Horses kept on the adjoining land of deft., by reason of the insufficiency of the fence, passed their heads through & over it & did damage to the tenant's crop:—*Held*: the duty of fencing being by Railways (Clauses Consolidation Act, 1845 (c. 20), s. 68, imposed upon the railway co., deft. was not responsible to their tenant for the trespass of his cattle.—*WISEMAN v. BOOKER* (1878), 3 C. P. D. 184; 38 L. T. 292; 42 J. P. 295; 26 W. R. 634.

*Annotation*:—**Expld.** *Coaker v. Willcocks* (1911), 80 L. J. K. B. 1026, C. A.

— **Imposed on railway companies.**—*See* RAILWAYS & CANALS.

**182. — Cattle straying from highway Reasonable time for removal.**—Where cattle passing along a public highway stray into an adjoining field, through defect of fences, the owner of the cattle is bound to remove them within a reasonable time; & what is a reasonable time is not to be determined by the judge, but is a question for the jury, with reference to all the surrounding circumstances.

In Nov., between 5 & 6 o'clock in the evening, pltf.'s drovers were driving thirty-six bullocks along a public highway, when thirteen of them strayed into deft.'s field through a gap in the fence. The drovers left them in the field & drove the other twenty-three to the nearest public-house, where they lodged them for the night. In about an hour the drovers returned to the field for the thirteen, but in the meantime deft. had impounded them. There had been nothing to prevent the drovers from immediately driving them out of the field except

into which a neighbour's pig may break & enter & do damage, against the owner of the pig, unless he can excuse the act for defect of fences, or upon some other special ground.—*BLACKLOCK v. MILLIKAN* (1854), 3 C. P. 34.—CAN.

**178 iii.**—**Boundary Lines Act, R. S. M. (c. 12), s. 4,** does not supersede the common law liability of an owner of cattle for all their trespasses except such as are due to defects in fences, which complainant is bound as between himself & such owner to keep up; & such owner will be liable for the trespasses committed by his cattle, unless it is shown that complainant was bound to keep up & repair the particular part of the fence through which the cattle entered. The common law rule is not displaced by a joint liability to keep up fences.—*GARRIOCH v. MCKAY* (1901), 13 Man. L. R. 404.—CAN.

**178 iv.**—**Action for trespass by deft.'s cattle on pltf.'s land, under a contract for the pasturage of deft.'s cattle.** The cattle, while on pltf.'s close, broke into his garden &

pleasure grounds, & destroyed cabbages. Deft. pleaded that while the cattle were so depasturing, in pursuance of the agreement, the trespass was committed in consequence of pltf.'s fences being insufficient. The jury found that the fences were insufficient, & for this reason found for deft.:—*Held*: where a person contracted to permit the cattle of another to graze on his land, he ought to point out the portion on which the cattle were to graze, & he was bound to provide that they did not go elsewhere.—*HICKEY v. COSGRAVE* (1861), 6 Ir. Jur. N. S. 251.—IR.

**178 v.**—**It is at common law a good defence to an action for trespass by cattle that the trespass was the result of the non-performance by pltf. of an obligation on his part to fence.**—*YOUNG v. WARD* (1901), 21 N. Z. L. R. 213.—N.Z.

**182 i.**—**Cattle straying from highway.**—The power of a municipal council, under Municipal Act, R. S. M., 1902 (c. 116), s. 644 (d), to pass a bye-

law limiting the right of a landowner to recover damages for any injury done by trespassing animals to cases in which the land is enclosed by a fence of the nature, kind & height required by the bye-law, is restricted to cases in which the animals go upon the land from some adjoining land where they have a right to be, & such bye-law is no protection to the owner of animals trespassing from a highway, if the council has not passed a bye-law under s. 643 (b), for allowing & regulating the running at large of animals in the municipality.—*JACK v. STEVENSON* (1910), 19 Man. L. R. 717; 13 W. L. R. 486.—CAN.

**1. Straying animal — Irritated by children—Injury to child.**—Deft.'s mule escaped from his enclosure, &, after several hours' ill-treatment from children of the neighbourhood, took refuge on the premises of pltf., whose child, who had tried to seize & mount it, although warned not to do so, was badly injured by the animal:—*Held*: deft. not liable.—*LACROIX v. JASMIN* (1894), Q. R. 6 S. C. 418.—CAN.



that they wished to take care of the others. In an action of trespass against deft. for impounding the bullocks, *Bramwell, B.*, ruled that as the drovers did not at once proceed to drive the bullocks out of deft.'s field, but left them there while they took the others to a place of safety, they did not remove them in a reasonable time, & directed a verdict for deft. :—*Held* : a misdirection.

If a person will neglect to fence he must put up with the inconveniences consequent upon it ; & one is that cattle being driven along the road will occasionally stray (*MARTIN, B.*).—*GOODWYN (GOODWIN) v. CHEVELEY* (1859), 4 H. & N. 631 ; 28 L. J. Ex. 298 ; 33 L. T. O. S. 284 ; 23 J. P. 487 ; 7 W. R. 631 ; 157 E. R. 989.

*Annotations* :—*Consd.* *Tillett v. Ward* (1882), 10 Q. B. D. 17. *Refd.* *Heath's Garage v. Hodges*, [1916] 2 K. B. 370, C. A.

**183. — Horse kicking through hedge.**—Defts.' horse having injured pltf.'s mare by biting & kicking her through the fence separating pltf.'s land from defts.' :—*Held* : there was a trespass by the act of defts.' horse, for which they were liable, apart from any question of negligence on their part.

In the case of animals trespassing on land, the mere act of the animal belonging to a man which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass (*BRETT, J.*).—*ELLIS v. LOFTUS IRON CO.* (1874), L. R. 10 C. P. 10 ; 44 L. J. C. P. 24 ; 31 L. T. 483 ; 39 J. P. 88 ; 23 W. R. 246.

*Annotations* :—*Distd.* *Hadwell v. Righton*, [1907] 2 K. B. 345. *Consd.* *Bradley v. Wallaces & Thompson McKay*, [1913] 3 K. B. 629, C. A. *Refd.* *Wiseman v. Booker* (1878), 3 C. P. D. 184 ; *Wright v. Hetton Downs Co.-op. Soc.* (1883), Cab. & El. 200 ; *Ponting v. Noakes* (1893), 70 L. T. 842, D. C.

See, further, BOUNDARIES, FENCES & PARTY WALLS.

**184. Dog trespassing Consent or incitement of master.**—Deft. had permission to sport on the right hand side of the road, but his dog crossed over the road & ranged over a field on the other side :—*Held* : (1) it was for the jury to say whether the dog had crossed over by incitement of deft. ; (2) if the dog had escaped against deft.'s will & he had no intention of sporting on the other side of the road, deft. was entitled to the jury's verdict.—*DIMMOCK v. ALLENBY* (1810), cited 2 Marsh. at p. 582.

**185. — Previous warning.**—Pltf. brought an action of trespass for breaking his close with dogs, etc., & trampling down his grass. Notice had been given to deft. not to trespass on the land.

**184 i. Dog trespassing.**—The owner of a dog is liable for injury done by it while trespassing upon the land of another, & not in its owner's presence.—*DOYLE v. VANCE* (1880), 6 V. L. R. 87.—AUS.

**g. Bull breaking into close — Who can sue.**—Deft.'s bull broke into pltf.'s field & killed a mare put there by pltf.'s father, who said he had given it to pltf. :—*Seemle* : pltf., even if only a bailee, could recover its value against a wrongdoer.—*MASON v. MORGAN* (1865), 24 U. C. R. 328.—CAN.

**h. — Absence of scienter.**—Cattle were landed by swimming them ashore, two men looking after them with a boat & receiving them on the beach. Several of them broke loose in an infuriated condition, & one broke into resp.'s garden & gored him. They were ordinarily tame & quiet cattle, & had never previously been known to become wild or injure any one :—*Held* : resp. could not recover for the personal injury to himself on the ground of

trespass, in the absence of negligence or scienter.—*PATERSON v. FLEMING* (1904), 23 N. Z. L. R. 676.—N.Z.

**i. Animals running "at large"**—*Colt.*—*Held* : a colt, five weeks old, following its dam which was led by a halter, was not running at large upon the highway, & it was not necessary to have a halter upon the colt, or to have carried it in a wagon, as calves were taken to market.—*HILLYARD v. GRAND TRUNK RY. CO.* (1885), 8 O. R. 583.—CAN.

**m. — Construction of bye-law.**—*Seemle* : a bye-law prohibiting under penalty certain animals from running at large does not impliedly allow other animals not named to do so, contrary to the common law.—*JACK v. ONTARIO, SIMCOE & HURON R. W. CO.* (1857), 14 U. C. R. 328.—CAN.

**n. — — —**—A municipal bye-law prohibited under penalty cattle from running at large between 7 p.m. & 6 a.m., but made no express provision as to whether or not they might so run

After the notice, & while deft. was walking on the turnpike road, his dog jumped into the field :—*Held* : the dog's jumping into the field, without the consent of its master, was no trespass upon which an action could be maintained.—*BROWN v. GILES* (1823), 1 C. & P. 118.

*Annotation* :—*Refd.* *Sanders v. Teape & Swan* (1884), 51 L. T. 263.

**186. — — —**—P. was in the day-time on a public road with a gun & a dog. The land on both sides was the property of B., & on one side was a cover in B.'s occupation. P., while standing in the road, incited the dog to enter the cover & upon a pheasant flying out he shot at it. P. was convicted of trespass in pursuit of game :—*Held* : (1) there was evidence to support the conviction ; (2) (*CAMPBELL, C.J., & CROMPTON, J.*) sending the dog into the close was a trespass.—*R. v. PRATT* (1855), 4 E. & B. 860 ; *Dears. C. C.* 502 ; 24 L. J. M. C. 113 ; 25 L. T. O. S. 65 ; 19 J. P. 578 ; 1 Jur. N. S. 681 ; 3 W. R. 372 ; 3 Ch. R. 686 ; 119 E. R. 319.

*Annotations* :—*Consd.* *Morden v. Porter* (1860), 7 C. B. N. S. 641. *Expld.* *Brown v. Turner* (1863), 13 C. B. N. S. 485. *Follid.* *Mayhew v. Wardley* (1863), 14 C. B. N. S. 550. *Expld.* *Read v. Edwards* (1864), 17 C. B. N. S. 245. *Distd.* *Kenyon v. Hart* (1865), 6 B. & S. 1188. *Consd.* *St. Mary, Newington v. Jacobs* (1871), L. R. 7 Q. B. 47. *Consd. & Expld.* *Harrison v. Rutland*, [1893] 1 Q. B. 142, C. A. *Expld.* *Pratt v. Martin*, [1911] 2 K. B. 90. *Refd.* *Allen v. Flood*, [1898] A. C. 1, H. L. ; *Hickman v. Maisey*, [1900] 1 Q. B. 752, C. A. *Mentd.* *Morant v. Chamberlain* (1861), 30 L. J. Ex. 299 ; *Ibbotson v. Peat* (1865), 12 L. T. 313.

**187.**—The declaration stated that deft. knowing that certain of his dogs were accustomed to hunt for & pursue game, & also knowing that pltf. preserved game in a certain wood of pltf., so negligently controlled, & restrained his dogs near to the wood that they entered the wood & hunted & destroyed the game therein. It was proved at the trial that deft. had a dog of a peculiarly mischievous disposition, being accustomed to chase & destroy game on its own account, & that that vice was known to deft., who notwithstanding allowed the dog to be at large in the neighbourhood of pltf.'s wood, & that the dog consequently entered the wood & did the damage complained of :—*Held* : the declaration was proved in an actionable sense, & was also good after verdict. *Qu.* : whether the owner of a dog is answerable in trespass for every unauthorised entry of the animal into the land of another.—*READ v. EDWARDS* (1864), 17 C. B. N. S. 245 ; 5 New Rep. 48 ; 34 L. J. C. P. 31 ; 11 L. T. 311 ; 144 E. R. 99.

*Annotation* :—*Refd.* *Lee v. Riley* (1865), 18 C. B. N. S. 722.

—Pltf. was digging a hole in the garden of a house adjoining that of deft. T. There was a low wall between these gardens belonging to

between 6 a.m. & 7 p.m. :—*Held* : the bye-law did not enact by implication that cattle expressly restrained from running at large between certain hours were permitted to run at large the rest of the day.—*DOBLE v. CAN. NORTH. RY.* (1916), 34 W. L. R. 298 ; 10 W. W. R. 427 ; 26 Man. L. R. 286 ; 27 D. L. R. 115.—CAN.

**o. — Animal escaping on to highway.**—Cattle that have escaped from their owner's premises to the highway, there being no default or negligence on the part of the owner, who makes suitable efforts to recover them, are not "running at large" within a municipal bye-law prohibiting under penalty cattle from running at large.—*SPURR v. DOMINION ATLANTIC RY. CO.* (1903), 40 N. S. R. 417.—CAN.

*Bye-law* *impound-*  
*ing.* *DISTRESS.*

—*Straying through defective fences on to railway track & injured.*—RAILWAYS & CANALS.

**Sect. 2.—Liabilities: Sub-sect. 1, A. B. & C.]**

T. Three dogs belonging to T. had been taken out by deft. S., & as S. was returning, the dogs ran through a gate into a garden adjoining the one where pltf. was at work. One of the dogs in play jumped the wall & fell into the hole where pltf. was working, causing injuries to his neck. T. had offered pltf. £2 as compensation, which was refused. In an action for injuries against T. as the owner of the dog, & against S. as having the dogs in charge:—**Held**: as the dogs were not shown to be mischievous to the knowledge of the owner, pltf. had no cause of action against either of defts., either as for a trespass or as for any breach of duty.—**SANDERS v. TEAPE & SWAN** (1884), 51 L. T. 263; 48 J. P. 757.

**Annotation**:—**Refd.** Hadwell v. Righton (1907), 76 L. J. K. B. 891.

**189. Dog worrying sheep—Evidence.**—L.'s dog was seen with another dog on a Welsh mountain worrying lambs. The same day the shepherd found near the place four lambs dead, & the next day ten more. L. being summoned for damage under Dogs Act, 1865 (c. 60):—**Held**: the evidence was sufficient to justify the justices in ordering L. to pay part of the value of the whole loss.—**LEWIS v. JONES** (1884), 49 J. P. 198; 1 T. L. R. 153.

**Trespass by diseased animals.**—**See** Nos. 657—660, *post*.

**190. Damages recoverable—Several actions for several trespasses.**—Where horses trespass, the owner of the land may have several actions of trespass for every horse, for every one of them does trespass.—**TUNBRIDGE'S CASE** (1582), Cro. Eliz. 8; 78 E. R. 274.

**191. — Jurisdiction of court leet.**—If one breaks his gates open & allows his cattle to escape to the injury of the inhabitants, he is not amercable in a ct. leet.—**EVINGTON v. BRIMSTON** (1593), Moore, K. B. 356; 72 E. R. 626.

**192. — — — — —**—**ANON.**, No. 26, *ante*.

**193. — Amount of — New trial.**—Defts. entered with guns & dogs into a close of pltf.'s adjoining his paddock, when one of their dogs escaping from them ran into the paddock & pulled down a deer belonging to pltf. The jury on these facts considered defts. had committed an intentional trespass & that it was not a mere involuntary accident, & granted pltf. 30s. damages. On a motion for a new trial:—**Held**: the damages were so small that it was not worth while to set the verdict aside & put the parties to the expense of a new trial.—**BECKWITH v. SHORDIKE** (1767), 4 Burr. 2092; 98 E. R. 91.

**Annotations**:—**Consd.** Deane v. Clayton (1817), 1 Moore, C. P. 203; **Sanders v. Teape & Swan** (1884), 51 L. T. 263.

**194. Remoteness of damage.**—The owner of a horse which escapes into a neighbour's field is liable, not only for ordinary damages for the trespass, but also for the loss occasioned by the violence of the trespassing horse, whereby another horse in the field was killed.—**LEE v. RILEY** (1865), 18 C. B. N. S. 722; 34 L. J. C. P. 212; 12 L. T. 388; 11 Jur. N. S. 527; 13 W. R. 751; 144 E. R. 629; *sub nom.* **RILEY v. LEE**, 6 New Rep. 147.

**Annotations**:—**Consd. & Apld.** Ellis v. Loftus Iron Co. (1874), L. R. 10 C. P. 10. **Expld.** Child v. Hearn (1874), L. R. 9 Exch. 176. What was said in *Lee v. Riley* qualifies *Cox v.*

**190 i. Damages recoverable—Malicious wrong.**—Defts. maliciously & from gross negligence allowed their cows to trespass on pltf.'s lands & to destroy the indigo plants thereon, knowing the value of the crops to pltf.:—**Held**: pltf. entitled not to the mere value of the growing plants destroyed as the actual loss sustained, but to substantial damages sufficient to compensate pltf. for the loss of profits which would have been obtained from the indigo plants.—

**SREEHUREE ROY v. HILL** (1867), 9 W. R. 156.—**IND.**

**195 i. — Natural consequences of trespass.**—In the absence of the owner of land, his wife directed her child to drive off a horse trespassing on such land, & the child, while so doing, was killed by the horse:—**Held**: the parents might recover against the owner of the horse, as the child might be regarded as agent of the owner of the land, acting under his instructions in

*Burbridge* to this extent, that where the animal is a trespasser on pltf.'s land, so that damages must be recovered, the fact that an injury done by it was due to the animal's vice may be immaterial with reference to the liability of the owner to damages (**BRAMWELL, B.**); **Smith v. Cook** (1875), 1 Q. B. D. 79; **Tillett v. Ward** (1882), 47 L. T. 546. **Distd.** **Wright v. Hetton Downs Co-op. Soc.** (1883), Cab. & El. 200; **Hadwell v. Righton**, [1907] 2 K. B. 345. **Consd.** **Bradley v. Wallaces & Thompson McKay**, [1913] 3 K. B. 629, C. A. **Mentd.** **Fletcher v. Rylands** (1866), 14 W. R. 799, Ex. Ch.; **Theyer v. Purnell**, [1918] 2 K. B. 333.

**195. Natural consequences of trespass.**—As to the obligation of the owner of cattle, which he has brought on his land, to prevent their escaping & doing mischief, the law is that the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape, that is, with regard to tame beasts, for the grass they eat & trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick or bulls to gore, but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too (**BLACKBURN, J.**).—**FLETCHER v. RYLANDS** (1866), L. R. 1 Exch. 265; 4 H. & C. 263; 35 L. J. Ex. 154; 14 L. T. 523; 30 J. P. 436; 12 Jur. N. S. 603; 14 W. R. 799, Ex. Ch.; *affd. sub nom.* **RYLANDS v. FLETCHER** (1868), L. R. 3 H. L. 330, H. L.

**Annotations**:—**Apld.** **Gordon v. St. James, Westminster, Vestry** (1865), 13 L. T. 511; **Jones v. Festiniog Ry. Co.** (1868), 18 L. T. 902. **Distd.** **The Thetis** (1869), L. R. 2 A. & E. 365; **Saxby v. M., S. & L. Ry. Co.** (1869), 38 L. J. C. P. 153; **Wilson v. Newberry** (1871), 41 L. J. Q. B. 31; **Carstairs v. Taylor** (1871), 19 W. R. 723; **Dunn v. Birmingham Canal Co.** (1872), L. R. 8 Q. B. 42, Ex. Ch.; **Ross v. Fedden** (1872), L. R. 7 Q. B. 661. **Apld.** **Smith v. Fletcher** (1872), 20 W. R. 987. **Distd.** **Smith v. Fletcher** (1874), L. R. 9 Exch. 64, Ex. Ch.; **Child v. Hearn** (1874), L. R. 9 Exch. 176. **Consd. & Apld.** **Crompton v. Lea** (1874), L. R. 19 Eq. 115. **Consd.** **Madras Ry. Co. v. Zemindar of Carvetinagaram** (1874), 30 L. T. 770, P. C.; **Cattle v. Stockton Waterworks Co.** (1875), L. R. 10 Q. B. 453. **Distd.** **Nichols v. Marsland** (1876), L. R. 2 Ex. D. 1. C. A. **Consd.** **Wilson v. Waddell** (1876), 2 App. Cas. 95, H. L.; **Humphries v. Cousins** (1877), 2 C. P. D. 239; **Hurdman v. N. E. Ry. Co.** (1878), 3 C. P. D. 168, C. A. **Distd.** **Nitro Phosphate & Odam's Chemical Manure Co. v. London & St. Katherine Docks Co.** (1878), 27 W. R. 267, C. A. **Consd. & Apld.** **Crowhurst v. Amersham Burial Board** (1878), 4 Ex. D. 5. **Distd.** **Box v. Jubb** (1879), 4 Ex. D. 76. **Apld.** **Powell v. Fall** (1880), 5 Q. B. D. 597, C. A. **Distd.** **Anderson v. Oppenheimer** (1880), 49 L. J. Q. B. 708, C. A. **Consd. & Apld.** **Dixon v. Metropolitan Board of Works** (1881), 7 Q. B. D. 418. **Apld.** **Snow v. Whitehead** (1884), 27 Ch. D. 588. **Consd.** **Whalley v. L. & Y. Ry. Co.** (1884), 13 Q. B. D. 131, C. A.; **Gas Light & Coke Co. v. St. Mary Abbots Kensington Vestry** (1884), Cab. & El. 368. **Distd.** **Snook v. Grand Junction Waterworks Co.** (1886), 2 T. L. R. 308. **Consd.** **Evans v. M., S. & L. Ry. Co.** (1887), 36 Ch. D. 626. **Distd.** **Abelson v. Brockman** (1889), 54 J. P. 119. **Apld.** **Filburn v. People's Palace & Aquarium Co.** (1890), 25 Q. B. D. 258, C. A. **Consd.** **National Telephone Co. v. Baker**, [1893] 2 Ch. 186. **Distd.** **Ponting v. Noakes**, [1894] 2 Q. B. D. 281; **Green v. Chelsea Waterworks Co.** (1894), 70 L. T. 547, C. A. **Consd.** **Grosvenor & West End Ry. Terminus & Hotel Co. v. Hamilton** (1894), 71 L. T. 362, C. A. **Distd.** **Price v. South Metropolitan Gas Co.** (1895), 65 L. J. Q. B. 126; **Greenhill v. Low Beechburn Coal Co.**, [1897] 2 Q. B. 165; **Blake v. Woolf**, [1898] 2 Q. B. 426. **Apld.** **Batcheller v. Tunbridge Wells Gas Co.** (1901), 84 L. T. 765. **Consd. & Distd.** **Eastern & South African Telegraph Co. v. Cape Town Tram. Co.**, [1902] A. C. 381, P. C. **Distd.** **Ely Brewery Co. v. Pontypridd U. D. C.** (1903), 2 L. G. R. 40, C. A. **Apld.** **Smith v. Giddy** (1904), 20 T. L. R. 596, D. C.; **Foster v. Warblington U. D. C.**, [1906] 1 K. B. 648, C. A.; **Hobart v. Southend-on-Sea Corp.** (1906), 4 L. G. R. 757. **Distd.** **Chichester Corp. v. Foster**, [1906] 1 K. B. 167; **Evans v. Liverpool Corp.**, [1906] 1 K. B. 160. **Consd. & Expld.** **Baker v. Snell**, [1908] 2 K. B. 825, C. A. **Apld.** **West v. Bristol Tram Co.**, [1908] 2 K. B. 14,

driving off the horse.—**WAUGH v. MONTGOMERY** (1882), 8 V. L. R. 290.—**AUS.**

**195 ii. — — — — —**—**Damages arising by reason of animals at large injuring animals & destroying goods of pltf. in endeavouring to escape from pltf., who was trying to drive them away, are not too remote, but general damages are.**—**MOON v. STEPHENS** (1915), 31 D. L. R. 832; 23 W. L. R. 223; 8 Sask. L. R. 218.—**CAN.**



C. A. **Expld. & Distd.** Whitmores (Edenbridge) v. Stanford, [1909] 1 Ch. 427. **Consd. & Expld.** Wing v. London General Omnibus Co., [1909] 2 K. B. 652, C. A. **Apld.** Lowery v. Walker, [1910] 1 K. B. 173, C. A.; Isgood Jones v. Llanrwst U. D. C. (1910), 27 T. L. R. 133. **Distd.** Barker v. Herbert (1911), 105 L. T. 349, C. A. **Consd. & Distd.** Rickards v. Lothian, [1913] A. C. 263, P. C. **Apld.** Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co., [1914] 3 K. B. 772, C. A. **Distd.** Goodbody v. Poplar B. C. (1914), 84 L. J. K. B. 1230. **Consd.** Heath's Garage v. Hodges, [1916] 2 K. B. 370, C. A.; Holgate v. Bleazard, [1917] 1 K. B. 443; Greenock Corpn. v. Cale. Ry. Co., Greenock Corpn. v. G. & S. W. Ry. Co., [1917] A. C. 556, H. L. **Apld.** Miles v. Forest Rock Granite Co. (1918), 34 T. L. R. 500, C. A. **Refd.** Smith v. L. & S. W. Ry. Co. (1870), L. R. 6 C. P. 14, Ex. Ch.; A.-G. v. Tomline (1879), 48 L. J. Ch. 593; Fleming v. Manchester Corpn. (1881), 44 L. T. 517; Tillott v. Ward (1882), 10 Q. B. D. 17; Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 127, H. L.; Ruddiman v. Smith (1889), 37 W. R. 528; Gill v. Edouin (1894), 71 L. T. 762; Bradford Corpn. v. Pickles (1894), 71 L. T. 793, C. A.; Prinsep v. Belgravia Estate (1895), 39 Sol. Jo. 381; St. Helen's Corpn. v. United Alkali Co. (1901), *Times*, June 19; Canadian Pacific Ry. Co. v. Roy, [1902] A. C. 220, P. C.; Ilford Gas Co. v. Ilford U. D. C. (1903), 67 J. P. 365, C. A.; Manchester Corpn. v. New Moss Colliery Co., [1906] 1 Ch. 278; Jones v. Lee (1911), 106 L. T. 123, D. C.; Remorquage à Hélice (Soc. Anon. de) v. Bennetts, [1911] 1 K. B. 243; Titterton v. Kingsbury Collieries (1911), 104 L. T. 569; Maxey Drainage Board v. G. N. Ry. Co. (1912), 76 J. P. 236, D. C.; Cheater v. Cater, [1917] 2 K. B. 516. **Mentd.** Woodall v. Hingley (1866), 14 L. T. 167; R. v. Stephens (1866), 7 B. & S. 710; Richards v. Jenkins (1868), 18 L. T. 437; Blake v. Land & House Property Corpn. (1887), 3 T. L. R. 667; Holliday v. Wakefield Corpn., [1891] A. C. 81, H. L.; Hanley v. Edinburgh Corpn. (1913), 77 J. P. 233, H. L.; A.-G. v. Cory, Kennard v. Cory (1918), 34 T. L. R. 621; Cheater v. Cater, [1918] 1 K. B. 247, C. A.

**196. — Action for damages barred by distraining damage feasant.]—**A pony went on to pltf.'s land & injured his filly; pltf. took possession of the pony, & while still retaining possession of it, brought an action to recover damages for the injury done to the filly:—**Held**: (1) pltf. must elect between the two remedies; (2) having seized the pony, he could not also sue for damages.—**BODEN v. ROSCOE**, [1894] 1 Q. B. 608; 58 J. P. 368; 42 W. R. 445; *sub nom.* ROSCOE v. BODEN (**BODEN**), 63 L. J. Q. B. 767; 70 L. T. 450; 10 T. L. R. 317; 38 Sol. Jo. 291; 10 R. 173.

**197. — Joint damage by dogs—Separate assessment of damages.]—**Pltf. was the owner of certain sheep, & each of two defts., who lived in one house, was the owner of a dog, neither of them being in control of the dog of the other. The dogs together attacked pltf.'s sheep without the knowledge of either deft. In an action by the sheep-owner against the owners of the dogs, the amount of the damages was not disputed, but there was no evidence to show which dog did the greater amount of damage, & the judge found that probably each dog had done half of it, & he awarded pltf. as against each deft. half the amount claimed:—**Held**: the mere fact that the dogs acted together without any connected action by their owners did not make their

**197 i. — Joint damage by dogs—Separate assessment of damages.]—**The owners of two dogs which had worried sheep:—**Held**: liable each for the whole damage, on the ordinary rule applicable to joint delinquents.—**MURRAY v. BROWN & PORTEOUS** (1881), 19 Sc. L. R. 253.—**SCOT**.

**197 ii. — Joint damage by cattle—Separate assessment of damages.]—**A. & B. were jointly interested in a station, but the cattle running on it were their separate property; each of them had his own distinct herd & stock-yard, with different brands & stockmen, but the separate herds intermixed habitually on joint land, & ran together:—**Held**: A. & B. were not jointly liable for the trespass of their respective cattle.—**OSBORNE v. RUDD** (1864), 3 N. S. W. S. C. R. 291.—**AUS**.

**197 iii. — — — — —.]—**Pltf.'s crops were damaged by sheep belonging to deft. & others:—**Held**: deft. not

liable for the whole amount of the damage.—**DE GRISH v. MORRISHEY** (1875), 6 Nfld. L. R. 107.—**NFLD**.

#### PART III. SECT. 2, SUB-SECT. 1.—C.

**200 i. Runaway horse.]—**If a person stops a runaway horse & is thereby injured, he may claim compensation from the owner for any injuries he may have sustained.—**LORTIE v. ADELSTEIN** (1914), Q. R. 46 S. C. 543.—**CAN**.

**201 i. — Negligence—Horse bolting from yard.]—**In an action of damages pursuer averred that her husband, while walking along a street, was knocked down & killed by a horse belonging to defenders, which bolted from their yard into the street, through the carelessness of defenders or their servants, in consequence of the animal not being properly attended while being yoked to a cart in a place in such close proximity to a busy thoroughfare, in respect that the animal was left

owners joint tortfeasors, & the judge was entitled to divide the damages as he had done.—**PIPER v. WINNIFRITH & LEPPARD** (1917), 34 T. L. R. 108.

#### B. Liability for Negligence.

*See Nos.* 198, 201—206, 208, 209, 211, 214, 217, 219, 227—230, 232, 233, 247, 257, *post*.

#### C. Liability for Injuries to Persons and Property on Highway.

**198. Unbroken horse—Breaking in—Negligence.]—**A master who sent his servant to break in two ungovernable horses into Lincoln's Inn Fields for the purpose of breaking in the horses, which ran over pltf.:—**Held**: liable.—**MICHELL (MICHAEL) v. ALLESTREE (ALESTREE)** (1676), 3 Keb. 650; 2 Lev. 172; 84 E. R. 932; *sub nom.* MITCHELL v. ALLESTREE, 1 Vent. 295.

*Annotations*:—**Consd.** Perkins v. Smith (1752), Say. 40; Bush v. Steinman (1799), 1 Bos. & P. 404; Whitmore v. Waterhouse (1830), 4 C. & P. 383. **Distd.** Manzoni v. Douglas (1880), 6 Q. B. D. 145. **Refd.** Scott v. Shepherd (1773), 2 Wm. Bl. 892; Leame v. Bray (1803), 3 East, 593; Lyons v. Martin (1838), 3 Nev. & P. K. B. 509; Piggot v. Eastern Counties Ry. Co. (1846), 3 C. B. 229; McManus v. Crickett (1880), 1 East, 106. **Mentd.** Hammack v. White (1862), 31 L. J. C. P. 129.

**199. — — — — — Owner not liable for default of agent.]—**The owner of a horse sent him to a breaker to break him into harness; the breaker drove him along a public road; the horse ran away, knocked down & damaged pltf.:—**Held**: an action would not lie against the owner for such damage, though it was averred in the declaration that the horse was in the possession of deft., & he pleaded only "Not guilty."—**SMITH v. THORPE** (1850), 16 L. T. O. S. 65.

**200. Runaway horse—Trespass & battery—Justification.]—**Action for trespass, assault & battery. Deft. pleaded that he rode a horse on the highway, & that the horse being frightened ran away with him, so that he could not stop it; that he called to pltf. who was in the road to take care, but pltf. did not get out of the way so that deft.'s horse ran against pltf. against deft.'s will, which was the trespass complained of. Pltf. demurred on the ground that the plea justified a battery which was in law no battery at all:—**Held**: there must be judgment on the demurrer for pltf., as deft. might have given this justification in evidence upon the general issue.—**GIBBONS (GIBBON) v. PEPPER** (1695), 1 Ld. Raym. 38; 2 Salk. 637; 4 Mod. Rep. 404; 91 E. R. 922.

*Annotations*:—**Expld.** Stanley v. Powell, [1891] 1 Q. B. 86. **Refd.** Scott v. Shepherd (1773), 3 Wils. 403.

**201. Negligence—Defective harness.]—**An accident happened in consequence of the chain-stay of a cart breaking, when the horse ran away & damage was done:—**Held**: the master was liable

entirely uncontrolled & with no one at its head in charge of same, more especially as the animal was known to be spirited:—**Held**: the action was irrelevant.—**SMITH v. WALLACE & Co.** (1898), 25 R. 761; 35 Sc. L. R. 583; 5 S. L. T. 356.—**SCOT**.

**201 ii. Defective harness.]—**Pursuer's daughter, aged five years, was run over by a horse & van, the accident being caused through the back-band giving way & the horse becoming frightened in consequence of the splash board falling on its hind quarters:—**Held**: (1) where a child was thus run over in broad daylight there was a presumption against the owner of the van at the outset; (2) the accident was caused by some latent defect in the harness, & the owner of the van was not in fault.—**SNEE v. DURKIE** (1903), 6 F. 42; 41 Sc. L. R. 39; 11 S. L. T. 397.—**SCOT**.



## Sect. 2.

## Sub-sect. 1, C.]

for his negligence, in not having the tackle good.—*WELSH v. LAWRENCE* (1818), 2 Chit. 262.

**202. ——— Defective cart.]**—In an action in a city. ct. for negligently driving a horse & cart, pltf. having simply proved the fact of a collision in circumstances which might or might not amount to negligence, deft. proved that the accident arose from the horse suddenly beginning to kick, whereby the shafts of the cart were broken, & the driver thrown out, when the horse started off, & ran against & injured pltf.'s horse. The judge, upon this evidence, ordered a verdict for pltf., "being of opinion that the breaking of the shafts, even under the circumstances stated by deft.'s witnesses, showed a defect in the cart, which raised a presumption of negligence in the owner"—*Held*: the verdict was right.—*TEMPLEMAN v. HAYDON* (1852), 12 C. B. 507; 19 L. T. O. S. 218; 16 J. P. 537; 138 E. R. 1005.

*Annotation*:—*Reid*. *Moffatt v. Bateman* (1869), L. R. 3 P. C. 115, P. C.

**203. ——— Evidence.]**—A. bought a horse at a public auction, & on the following day, when riding it in the public streets, it ran away, & rushing on to the pavement, knocked a man down, who died from the effects of the injuries he received. In an action by the widow under Fatal Accidents Act, 1846 (c. 93):—*Held*: neither the fact of deft.'s being on the pavement, nor that of his riding in the public streets a strange horse which he had only bought the previous day, was *prima facie* evidence of negligence.—*HAMMACK v. WHITE* (1862), 11 C. B.

**202 i. ——— Defective cart.]**—C., while riding along a road, was knocked down by a runaway horse, the property of F. The horse had been properly harnessed to a trap, & was being driven in a proper manner, when, owing to a latent defect, a bolt broke, in consequence of which a shaft became detached, frightening the animal & causing it to break away:—*Held*: it not having been proved that the accident was due either to negligence on the part of F., or to vicious or mischievous propensities or conduct on the part of the horse, C. could not succeed.—*COWELL v. FRIEDMAN & Co.*, 5 H. C. 22.—S. AF.

**203 i. ——— Evidence.]**—Deft. drove a horse at a rapid rate, & came in contact with pltf.'s carriage, in which the latter was driving with his wife:—*Held*: the owner was not responsible for the damage caused by the animal while running away, if he proved that the accident occurred without any fault or imprudence on the part of the person in charge thereof.—*GOUGEON v. CONTANT* 5 L. N. 182.—CAN.

**203 ii. ———.]**—*FRENCH v. MASSON* (1916), 22 R. de J. 384.—CAN.

**205 i. ———.]**—Upon proof given by pltf. that deft.'s horse, harnessed to a cart, was running away unattended along a highway, whereby pltf., being lawfully on the highway, was injured, there is *prima facie* evidence of negligence, & the judge should not withdraw the case from the jury by nonsuiting pltf.—*HEENAN v. IREDALE* (1901), 19 N. Z. L. R. 387.—N.Z.

**p. ——— Horse frightened by fortuitous event.]**—If a horse frightened by an unexpected occurrence, as the fall of a plank from the top of a house, which is being repaired, takes the bit in his teeth & causes damage, the owner will not be liable if he proves that the horse is of a kind & quiet disposition, & that he was leading it with ordinary care. To make him liable, it must be proved that the accident was his fault.—*LA CITE DE QUEBEC v. PICARD* (1898), Q. R. 14 S. C. 94.—CAN.

— — — — —.]—When a horse bolts & causes an injury, the owner relieves himself from liability by proving that a sudden letting off of steam by a steam roller, on the street, frightened the horse & made him bolt, the accident being thus the result, not of negligence, but of a fortuitous event.—*COLLIER v. LANGEVIN* (1911), Q. R. 40 S. C. 441.—CAN.

**206 i. Horse left unattended—Negligence.]**—Deft. left his horse, attached to a vehicle upon the public highway, without tying it up or putting any person in charge. The horse ran away & injured pltf., who was endeavouring to keep the horse from running into his sleigh:—*Held*: deft. liable.—*LAFLAMME v. STARNES* (1899), Q. R. 18 S. C. 105.—

**206 ii. ———.]**—Applt. drove a party to a place & left his horse & buggy in charge of two of the party, one of whom took the horse from the shafts & turned it out to graze, with the harness still upon it. The animal took fright, bolted & at a distance of five miles from the place where it had been released from the buggy, knocked down resp. & injured him:—*Held*: the persons in charge of the horse were applt.'s agents, & he was responsible for the natural consequence of their negligent act of turning the horse loose encumbered with its harness.—*LYSNAR v. BINNIE* (1904), 24 N. Z. L. R. 241.—N.Z.

**206 iii. ———.]**—Pursuer averred that the servant in charge of a horse & van belonging to deft. left same unattended in the street, & that the animal bolted & dashed into pursuer's shop window, causing considerable damage. Deft. contended that the mere averment that the horse was left unattended in the street did not necessarily imply fault:—*Held*: pursuer entitled to an issue.—*M'INTOSH v. WADDELL* (1896), 24 R. 80; 34 Sc. L. R. 53; 4 S. L. T. 126.—SCOT.

**206 iv. ———.]**—A carter, who had been ordered by his employer to deliver goods at a country shop, left his horse & cart at the door of the shop in order

N. S. 588; 31 L. J. C. P. 129; 5 L. T. 676; 8 Jur. N. S. 796; 10 W. R. 230; 142 E. R. 926.

*Annotations*:—*Apld.* *Scott v. London Dock Co.* (1864), 5 New Rep. 59. *Consd.* *Smith v. G. E. Ry. Co.* (1866), L. R. 2 C. P. 4; *Fowler v. Lock* (1872), L. R. 7 C. P. 272; *Manzoni v. Douglas* (1880), 6 Q. B. D. 145. *Reid*. *Byrne v. Boadle* (1863), 2 H. & C. 722; *R. v. Dant* (1865), Le. & Ca. 567, C. C. R.; *Fletcher v. Rylands* (1868), L. R. 1 Exch. 265, Ex. Ch.; *Giblin v. M'Mullen* (1868), L. R. 2 P. C. 317, P. C.; *The Maid of the Mist* (1873), 21 W. R. 310; *Holmes v. Mather* (1875), 44 L. J. Ex. 176; *Lilly v. Tilling & L. C. Co.* (No. 1) (1912), 57 Sol. Jo. 59, C. A.

**204. ———.]**—A horse being driven in a public thoroughfare, suddenly, & from no apparent or assignable cause, bolted, & notwithstanding the efforts of the driver, who was not shown to be lacking in skill, became totally unmanageable & caused injury to pltf.:—*Held*: (1) there was no evidence for the jury; (2) there was no evidence of negligence for the jury arising from the fact that the horse cast a shoe directly after he bolted, & that the driver did not call out or give any warning.—*MANZONI v. DOUGLAS* (1880), 6 Q. B. D. 145; 50 L. J. Q. B. 289; 45 J. P. 391; 29 W. R. 425.

**205. ———.]**—Upon proof being given by pltf. that deft.'s horse, harnessed to a cart, was running away unattended along a highway, whereby pltf. being lawfully thereon was injured, the judge cannot rightly nonsuit pltf., as such facts are more consistent with the absence of ordinary care in the superintending the horse than with such care having been used.—*WATSON v. WEEKES* (1887), cited 57 L. J. Q. B. 394; 52 J. P. 804.

**206. Horse left unattended—Negligence.]**—Pltf. employed deft. to deliver goods; deft. left his horse

to inquire where the goods were to be put. To accomplish this he had to pass into (or almost into) a back shop out of sight of his horse. The shop was in close proximity to a railway bridge, & while the carter was inside the shop, the horse was startled by a train passing below the bridge, ran off & knocked down a person on the road. The horse was in ordinary circumstances quiet & was accustomed to work near railways:—*Held*: the carter's employer was liable.—*M'EWAN v. CUTHILL* (1897), 25 R. 57; 35 Sc. L. R. 58; 5 S. L. T. 181.—SCOT.

**206 v. ———.]**—Deft.'s driver, after yoking a pony & loading a van in his private yard, opened the gate, & then went three or four yards behind the pony to get his coat. While he was doing so the pony ran off into the street. The driver ran after it, but was unable to reach the pony's head on account of the narrowness of the opening. The pony & van collided with another horse & cart, & seriously injured the horse. The practice in the yard was, immediately after the horses were yoked & the vans loaded, for some one other than the driver to open the gate, or for the driver himself to do so immediately before leading out the horse. The pony was a quiet animal, but had been only four days in deft.'s possession:—*Held*: deft. liable in damages.—*MILNE & Co. v. NIMMO* (1898), 25 R. 1150; 35 Sc. L. R. 883; 6 S. L. T. 115.—SCOT.

**206 vi. ———.]**—Pursuer having alleged that she was knocked down by a horse & lorry of defts., averred that the lorry was in charge of one of their carters, who carelessly & recklessly went away & left unattended the horse, which was known to defts. & their servant to be a high-spirited, nervous animal, & which suddenly started off; & that it was the custom throughout Glasgow for lorries delivering goods to have a man & a boy in charge, the boy to watch the horse while the carter was away, but defts. had no boy with the lorry, or the boy was not attending to his duty:—*Held*: the case was relevant, & issue approved.—*M'CAIRNS v.*

& cart unattended while he (deft.) & his son were carrying some of the goods upstairs. In their absence the horse took fright & ran away, & some of the pltf.'s goods were thrown out & injured:—*Held*: deft. had not been guilty of negligence & was not liable for the damages to the goods.—*HAYMAN v. HEWITT* (1798), 2 Peake, 170.

**207. ——— Mischievous act of third party.]—**If a horse & cart are left standing in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer-by, in striking the horse.—*ILLIDGE v. GOODWIN* (1831), 5 C. & P. 190.

*Annotations*:—*Expld.* Dansey v. Richardson (1854), 3 E. & B. 144. *Consd.* Clark v. Chambers (1878), 3 Q. B. D. 327. *Refd.* Lynch v. Nurdin (1841), 1 Q. B. 29; Engelhart v. Farrant, [1897] 1 Q. B. 240, C. A.; Latham v. Johnson, [1913] 1 K. B. 398, C. A.

**208. ——— Contributory negligence — Children playing.]—**Deft.'s servant left his cart & horse standing in a street thronged with children. Pltf., a child of six or seven years old, was climbing up & down the wheel of the empty cart. Other children drove the horse on & pltf. was thrown down, & the wheel went over his leg:—*Held*: on this evidence, the judge rightly left it to the jury to say whether there was negligence on the part of deft.'s servant, for if there was, the action was maintainable.—*LYNCH v. NURDIN* (1841), 1 Q. B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L. J. Q. B. 73; 5 J. P. 319; 5 Jur. 797; 113 E. R. 1041.

*Annotations*:—*Expld.* Davis v. Mann (1842), 7 J. P. 53. *Expld. & Distd.* Lygo v. Newbold (1854), 9 Exch. 302. *Distd.* Caswell v. Worth (1856), 5 E. & B. 849. *Dbtd.* Walte v. N. E. Ry. Co. (1859), 32 L. T. O. S. 334, Ex. Ch.; Francis v. Cockerell (1870), 10 B. & S. 950, Ex. Ch. *Consd.* Clark v. Chambers (1878), 3 Q. B. D. 327. *Dbtd.* Mann v. Ward (1892), 8 T. L. R. 699, C. A. *Distd.* Ponting v. Noakes, [1894] 2 Q. B. 281. *Consd.* Harrold v. Watney, [1898] 2 Q. B. 320, C. A.; Cook v. Mid. G. W. Ry. of

WORDIE & Co. (1901), 8 S. L. T. 354.—*SCOT*.

**206 vii. ——— By cab driver.]—**The driver of a cab had drawn up his cab on a stance in line with other vehicles, there being a van immediately in front of his horse, & other cabs behind his. The driver got down from his box, took a bag of oats from a place where it was kept at a distance of ten feet from the horse's head, filled his horse's nose-bag, & then took the bit out of his horse's mouth & put on its nose-bag. He then turned away to put back the bag of oats in its place. As his back was turned the horse, which was a quiet animal, for some unexplained cause ran off. There was a bye-law that the driver of a hackney carriage, when same was on a stance, should either sit on the box or stand at the horse's head:—*Held*: there was no culpa on the part of the driver inferring liability against him or his employers for damage done by the horse in its flight.—*SHAW v. CROALL & SONS* (1885), 12 R. 1186; 22 Sc. L. R. 792.—*SCOT*.

**206 viii. ——— Dropping reins.]—**It is not negligence *per se* for the driver of a horse of a quiet disposition, standing in the street, to let go the reins while he alights from the vehicle to fasten a head-weight, there being at the time little traffic & no noise or disturbance to frighten the animal; & the owner of the horse is not responsible for damages caused by the horse in running away when frightened by a sudden noise just after the driver has alighted.—*SULLIVAN v. MCWILLIAM* (1893), 20 A. R. 627.—*CAN*.

**206 ix. ———.]—**Deft., drawing a load of hay along a country road, had to get off his wagon to adjust the load, leaving the reins lying on the ground. While loosening the binder the team ran away & injured pltf.:—*Held*: deft. not guilty of negligence.—*RYAN v. MCINTOSH* (1909), 14 O. W. R. 482;

*affd.* 14 O. W. R. 1125; 1 O. W. N. 229.—*CAN*.

**r. ——— But tied up—Negligently.]—**Deft.'s horse escaped through not having been sufficiently tied by his son, & knocked down pltf.:—*Held*: deft., having failed to show that the escape was due to some agency over which he had no control, was liable.—*DOUGHTY v. DOBBS* (1903), 3 O. W. R. 19.—*CAN*.

**s. ——— Frightened by fortuitous event.]—**A horse of deft.'s team was tied to a telegraph pole, with a leather halter & a hemp rope of sufficient strength to hold the horse in ordinary circumstances. The team became frightened by some unknown cause, broke loose, ran away & injured pltf.:—*Held*: the accident occurred through fortuitous cause, & not through the negligence of deft.—*MOORE v. CROSLAND* (1907), 6 W. L. R. 199.—*CAN*.

**t. Horse not sufficiently under control—Negligence.]—**Deft. was taking two horses along a road on which motor traffic was common, leading one & allowing the other to follow at some distance. This second horse strayed on to a bank at the side of the road from which it suddenly jumped down, upset pltf.'s motor cycle & injured both it & pltf.:—*Held*: to take a horse along the road uncontrolled was negligent, without proof of *scienter* of vice in the horse, & the damage was not too remote.—*LIND v. STUMP* (1916), 12 Tas. L. R. 74.—*AUS*.

**w. ———.]—**Deft.'s horses & carriage met, opposite the gate of deft.'s stable yard, a horse & truck coming in the opposite direction, & attempted to pass on the side nearest the stable yard, when the horses suddenly turned in towards the yard, knocking down & injuring pltf., who was coming along the sidewalk near the gate:—*Held*: pltf. entitled to a verdict.—*LOWNDS v.*

*Ireland*, [1909] A. C. 229, H. L. *Distd.* Latham v. Johnson, [1913] 1 K. B. 398, C. A.; Rickards v. Lothian, [1913] A. C. 263, P. C. *Consd.* Crane v. South Suburban Gas Co., [1916] 1 K. B. 33. *Refd.* Barnes v. Ward (1850), 9 C. B. 392; Degg v. Mid. Ry. Co. (1857), 1 H. & N. 773; Alsop v. Yates (1858), 27 L. J. Ex. 156; Singleton v. Eastern Counties Ry. Co. (1859), 7 C. B. N. S. 287; Engelhart v. Farrant, [1897] 1 Q. B. 240, C. A.; McDowall v. G. W. Ry. Co., [1902] 1 K. B. 618; Lowery v. Walker (1909), 78 L. J. K. B. 874; Barker v. Herbert, [1911] 2 K. B. 633, C. A. *Mentd.* Hughes v. Macfie, Abbott v. Macfie (1863), 3 New Rep. 394; Mangan v. Atterton (1866), L. R. 1 Exch. 239; Ruoff v. Long (1915), 114 L. T. 186.

**209. ——— Direction to jury.]—**Pltf.'s horse & cart were standing unattended in front of his shop, & defts.' servant having occasion to go to the shop, drew up a horse & van of defts.' immediately behind pltf.'s cart, which he also left unattended. Shortly afterwards pltf.'s horse broke through the shop window, & there was evidence that defts.' horse had moved on & forced it to do so. In an action by pltf. against defts. the judge directed the jury that the question for them was whether defts.' van occasioned the accident, & whether same was brought about by the negligence of defts.' servant, & that there was no evidence of contributory negligence on the part of pltf.:—*Held*: (1) this direction was wrong; (2) there was clear evidence of negligence on the part of pltf., & the judge ought to have left it to the jury to say whether such negligence proximately contributed to the accident.

The proper question for a jury in such a case is that stated in the judgment of WIGHTMAN, J., in *Tuff v. Warman* (1858), 5 C. B. N. S. 573.—*WALTON v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1866), 1 Har. & Ruth. 424; 14 W. R. 395; *sub nom.* LONDON, BRIGHTON & SOUTH COAST RY. CO. v. WALTON, 14 L. T. 253.

*See, further, NEGLIGENCE.*

*ROBINSON* (1877), 2 R. & C. 364.—*CAN*.

**x. Horse driven at excessive speed—Negligence.]—**Action to recover damages for alleged negligence, in being struck by deft.'s horse & carriage while being driven at an excessive speed. Deft. alleged negligence on pltf.'s part, in view of his age, in riding a bicycle on a street overrun with cars, motors & other vehicles:—*Held*: pltf. entitled to damages.—*LESLIE v. MCKEOWN* (1909), 14 O. W. R. 846; 1 O. W. N. 106.—*CAN*.

**y. Horse shying—Negligence—Evidence.]—**Deft.'s horse, which was known to shy occasionally, whilst being driven in a public street, & after turning a corner, shied for no ostensible reason, with the result that the shaft of deft.'s cart ran into pltf.'s mule, causing injuries from which it died:—*Held*: the nature of the accident, & the fact that the horse was known to shy, afforded evidence of negligence, & pltf. entitled to recover damages.—*CAPE TOWN TOWN COUNCIL v. SOUTH AFRICAN BREWERIES* (1912), C. P. D. 307.—*S. AF*.

**z. Horse "resting"—Negligence.]—**Pursuer averred that when driving a lorry along a street, seated with his legs over the near side, & when about to overtake a two-horse lorry of defts. proceeding in the same direction at a walking pace, he looked back over his shoulder on hearing the bell of a tram-car; that while in the act of doing so he was injured by his legs coming against defts.' lorry, which had suddenly stopped owing to one of its horses having come to a standstill, in accordance with a vicious habit of "resting" known to defts. He further averred that defts. were in fault in using such a horse in their business:—*Held*: pursuer had not stated a relevant case of fault against defts.—*WATSON v. WORDIE & Co.* (1906), 8 F. 876; 43 Sc. L. R. 644; 14 S. L. T. 98.—*SCOT*.



**Sect. 2.—Liabilities: Sub-sect. 1, C.]**

**210. Collision—Plea of not guilty—Rejection of evidence.]**—In trespass for running with a cart against pltf.'s chaise, deft. cannot give in evidence under not guilty that the cart & the chaise were travelling on the high road in opposite directions, & that the collision between them happened from the negligence of pltf. or from inevitable accident.—*KNAPP v. SALSURY* (1810), 2 Camp. 500.

*Annotation:—***Consd.** *Boss v. Litton* (1832), 5 C. & P. 407.

**211. Horse out of control—Negligence—Absence of curb-chain.]**—In trespass for an injury done to pltf.'s horse in consequence of deft.'s driving a gig against it, it was proved that deft. drove a high-spirited horse unskilfully & without a curb-chain. Deft. pleaded, (1) not guilty; (2) that his horse took fright & became ungovernable, in consequence of a cart being driven furiously against it, which was not supported by evidence. The judge was of opinion that deft. was liable, although he might not have been guilty of an act of negligence, or want of caution, as his plea of justification did not cover the whole case. The jury found a verdict for pltf. The ct. refused to grant a new trial, as there was ample evidence that the accident was caused by deft.'s negligence.

The doctrine, as applied to actions of this description, is that no man can be excused of a trespass, unless he can justify that the act complained of arose entirely without his default. If a person drive a young horse through the public streets of London, & does not use a curb-chain, although he may not anticipate that any injury may arise from his so doing, he is still culpable (*DALLAS, C.J.*).—*WAKEMAN v. ROBINSON* (1823), 1 Bing. 213; 8 Moore, C. P. 63; 1 L. J. O. S. C. P. 70; 130 E. R. 86.

*Annotations:—***Expld.** *Cotterill v. Starkey* (1839), 8 C. & P. 691. **Consd.** *Hall v. Fearnley* (1842), 3 Q. B. 919. **Consd. & Expld.** *Stanley v. Powell*, [1891] 1 Q. B. 86.

**212. Pony frightened by showman.]**—In an action of trespass for injury done to a horse by a pony & chaise running against it, it was sworn on the part of deft. that his wife was holding the pony by the bridle, & a showman came by & frightened the pony, who ran off with the chaise:—*Held*: if true, this was a good defence on a plea of not guilty.—*GOODMAN v. TAYLOR* (1832), 5 C. & P. 410.

**213. Horse slipping—Accident—Amendment of pleading.]**—In an action on the case for an injury to pltf.'s omnibus by the negligent driving of deft.'s servant in deft.'s cart, it appeared that the injury was caused by the cart coming in contact with the omnibus, but the witnesses stated that the accident appeared to them to be caused by the slipping of deft.'s horse. Lord Abinger, C.B. proposing to nonsuit, leave was asked to amend by making the declaration conformable to the proofs:—*Held*: (1) a man was not liable for an accident of that kind at

all, unless he knowingly kept a horse which it was dangerous to drive in the public streets, & of that there was, in that instance, no evidence; (2) if there were such evidence no amendment could be allowed, as it could support only a completely different cause of action; (3) pltf. must be nonsuited.—*MORGAN v. SYMONDS* (1837), 1 Jur. 137.

**214. Injury to ass fettered on highway—Contributory negligence.]**—The general rule of law respecting negligence is that although there may have been negligence on the part of pltf., yet, unless he might by the exercise of ordinary care have avoided the consequences of deft.'s negligence, he is entitled to recover.

Deft. negligently drove his horses & waggon against & killed an ass. The ass had been left in the highway fettered in the fore-feet, & was thus unable to get out of the way of deft.'s waggon, which was going at a smartish pace along the road:—*Held*: the jury were properly directed that, although it was an illegal act on the part of pltf. so to put the animal on the highway, pltf. was entitled to recover.—*DAVIES (DAVIS) v. MANN* (1842), 10 M. & W. 546; 12 L. J. Ex. 10; 7 J. P. 53; 6 Jur. 954; 152 E. R. 588.

*Annotations:—***Apprvd.** *General Steam Navigation Co. v. Tonkin* (1844), 4 Moo. P. C. C. 314, P. C. **Appld.** *Colchester Corpn. v. Brooke* (1845), 7 Q. B. 339; *Dimes v. Petley* (1850), 15 Q. B. 276. **Distd.** *G. N. Ry. Co. v. Harrison* (1854), 2 C. L. R. 1136. **Consd.** *Dowell v. General Steam Navigation Co.* (1855), 5 E. & B. 195. **Appld.** *Tuff v. Warman* (1857), 2 C. B. N. S. 740; *Witherley v. Regent's Canal Co.* (1862), 12 C. B. N. S. 2. **Consd.** *Armstrong v. L. & Y. Ry. Co.* (1875), L. R. 10 Exch. 47. **Apprvd.** *Radley v. L. & N. W. Ry. Co.* (1876), 1 App. Cas. 754, H. L. **Expld.** *Swanison v. N. E. Ry. Co.* (1877), 37 L. T. 102. **Consd. & Expld.** *The Vera Cruz (No. 1)* (1884), 9 P. D. 88. **Consd.** *The Bernina* (1887), 12 P. D. 58, C. A.; *The Hornet*, [1892] P. 361, D. C.; *The Altair*, [1897] P. 105; *The Highland Loch*, [1911] P. 261, C. A. **Refd.** *R. v. Waters* (1849), 13 J. P. 69, Ex. Ch.; *Tuff v. Warman* (1858), 5 C. B. N. S. 573, Ex. Ch.; *North v. Smith* (1861), 10 C. B. N. S. 572; *Peck v. North Staffordshire Ry. Co.* (1863), 10 H. L. Cas. 473, H. L.; *The United States* (1865), 12 L. T. 33, P. C.; *Evison v. Marshall* (1868), 32 J. P. 691; *Spaight v. Tedcastle* (1881), 6 App. Cas. 217, H. L.; *Lee v. Nixey* (1890), 63 L. T. 285; *The River Derwent* (1891), 64 L. T. 509, H. L. **Mentd.** *Fordham v. L. & S. C. Ry. Co.* (1869), L. R. 4 C. P. 619, Ex. Ch.; *Dublin, Wicklow & Wexford Ry. Co. v. Slattery* (1878), 39 L. T. 365, H. L.; *The Monte Rosa* (1892), 68 L. T. 299; *Barnes U. D. C. v. London General Omnibus Co.* (1908), 7 L. G. R. 359; *Heath's Garage v. Hodges*, [1916] 2 K. B. 370, C. A.

**215. Dog frightening horse—Injury to horse—Liability of dog owner.]**—Pltf.'s horse took fright & damaged itself in consequence of deft.'s dogs running out & barking at it:—*Held*: pltf. entitled to damages.—*READ v. KING* (1858), *Oliphant's Law of Horses*, 4th ed., 351 (N. P. Guildhall); subsequent proceedings (1858), *REED v. KING*, 30 L. T. O. S. 290.

**216. — Horse running away & injuring pedestrian—Liability of horse owner.]**—Pltf. was walking along a public street when deft., seated on the box of his carriage, which was drawn by two horses & driven by a man then under his

**211 i. Horse out of control.]**—The proprietor of a horse, led by a person living at the proprietor's & taken without his permission or knowledge, is not responsible for the results of a fall caused by the horse to a passer-by.—*TRUDEL v. HOSSACK* (1894), Q. R. 4 Q. B. 370.—CAN.

**a. Dog killing ostrich.]**—Deft. took his dog upon the public road. The dog, without any fault on pltf.'s part, killed pltf.'s ostrich, which was lawfully on the commonage adjoining the road:—*Held*: deft. liable to pltf.—*LE ROUX v. FICK* (1879), Buch. 29.—S. AF.

**215 i. Dog frightening horse—Injury to person leading horse—Liability of dog owner.]**—Pltf. was leading two horses by a halter, the end of which he held round his hands. The horses, being startled

by the barking of dogs which ran out from a farm-house, jerked the rope suddenly, & pltf.'s hands were seriously injured:—*Held*: deft., being guilty of negligence in allowing his dogs to be at large upon a public road, was responsible.—*VITAL v. TETRAULT* (1888), 33 L. C. J. 20; 4 M. L. R. 204.—CAN.

**215 ii. — Injury to rider—Liability of dog owner.]**—The owner of a dog that runs & barks at a horse frightening it, & causing it to run away & throw its rider, is liable for the damages sustained by the latter.—*CARLSON v. McEWEN* (1912), Q. R. 41 S. C. 475.—CAN.

**b. Dog killing cats — Contributory negligence.]**—A dog running with its master's van in charge of the vanman killed a cat belonging to pursuer near the door of pursuer's shop:—*Held*: pursuer in permitting his cat to be

where animals of a hostile nature might legitimately be at large was negligent, & the owner of the dog was not liable.—*BROWN v. SOUTAR* (1914), 2 S. L. T. 399.—SCOT.

**c. Unmanageable horse—Negligence—Horse ridden by infant.]**—Pursuer, who had been injured by a horse ridden by a boy of fourteen, averred that the horse was powerful & spirited, that the father, the owner of the horse, carelessly or culpably authorised or allowed the boy to take out the horse, which he had neither the requisite strength nor experience to manage, & that he had on a former occasion been unable to manage it, & that this was known to the father:—*Held*: pursuer entitled to an issue against both father & son.—*BROWN v. FULTON* (1881), 9 R. 36; 19 Sc. L. R. 24.—SCOT.



control, came down a cross street. The horses, frightened by the barking of a dog, ran away. The driver was unable to hold them in, but told deft. to leave them to him. Deft. accordingly sat passive, while the driver, trying to turn the horses so as to prevent them from running into a shop window opposite, pulled them aside toward the spot where pltf. then happened to be, but on nearing her, endeavoured vainly to draw them away from her. They ran against her, & she being hurt, sued deft. for negligence & trespass. The jury found deft. free from negligence, & that the occurrence was a mere accident:—*Held*: he was not liable in trespass.—*HOLMES v. MATHER* (1875), L. R. 10 Exch. 261; 44 L. J. Ex. 176; 33 L. T. 361; 39 J. P. 567; 23 W. R. 869.

*Annotations*:—*Distd.* *Sadler v. South Staffordshire & Birmingham District Steam Tram Co.* (1889), 23 Q. B. D. 17, C. A. *Refd.* *Stanley v. Powell*, [1891] 1 Q. B. 86; *Dulieu v. White*, [1901] 2 K. B. 669; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38, H. L.

**217. Restive horse—Use of spur by rider—Negligence.**—Deft. & his groom, both on horseback, the latter riding a "spirited" horse, were passing a waggon & horses driven by pltf., who was in his proper place at the head of the second horse. The groom, when opposite & in close proximity to pltf., put spurs to his horse in order to keep pace with his master, the horse struck out & kicked pltf. in the face & inflicted a severe injury. Pltf. having obtained a verdict against deft.:—*Held*: the use of the spurs by the groom was evidence of negligence for the jury, & the verdict must not be disturbed.—*NORTH v. SMITH* (1861), 10 C. B. N. S. 572; 4 L. T. 407; 142 E. R. 576.

*Annotation*:—*Refd.* *Hammack v. White* (1862), 11 C. B. N. S. 588.

**218. Horse grazing—Kicking child—Natural propensity.**—Deft.'s horse, being on a highway, kicked pltf., a child who was playing there. There was no evidence to show how the horse came to the spot, or what induced him to kick the child, or that he was accustomed to kick:—*Held*: this was no evidence from which a jury would be justified in inferring that deft. had been guilty of actionable negligence.

The owner of a horse must be taken to know that the animal will stray if not properly secured, & may find its way into his neighbour's corn or pasture. For a trespass of that kind, the owner is of course responsible. But if the horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has; & everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway (*WILLES, J.*).—*COX v. BURBIDGE* (1863), 13 C. B. N. S. 430; 1 New Rep. 238; 32 L. J. C. P. 89; 9 Jur. N. S. 970; 11 W. R. 435; 143 E. R. 171.

*Annotations*:—*Distd.* *Cooke v. Waring* (1863), 32 L. J. Ex. 262; *Riley v. Lee* (1865), 6 New Rep. 147. *Consd.* *Fletcher v. Rylands* (1866), L. R. 1 Exch. 265, Ex. Ch. *Expld.* *Child v. Hearn* (1874), L. R. 9 Exch. 176. *Apld.* *Hadwell v. Righton*, [1907] 2 K. B. 345. *Distd.* *Higgins v. Searle* (1908), 72 J. P. 449. *Consd.* *Higgins v. Searle* (1909), 100 L. T. 280, C. A.; *Ellis v. Banyard* (1911), 106 L. T. 51, C. A. *Consd. & Apld.* *Bradley v. Wallaces & Thompson*

**218 i. Horse grazing—Kicking child.**—Deft.'s horse being on the highway, a young boy approached to catch him by taking hold of a rope around his neck, when the boy was kicked. There was no evidence that deft. knew that the horse was accustomed to stray or had any vicious propensity, nor was the horse shown to have such fault, & there was evidence that the horse had been interfered with by several boys, of whom the injured boy was one:—*Held*: the boy & his father could not recover.—*FLETT v. COULTER* (1903), 23 C. L. T. Occ. N. 111; 5 O. L. R. 375; 1 O. W. R. 775 2 O. W. R. 142. —CAN.

**221 i. Straying animals—Bull.**—One of the oxen drawing a wagon on a public road was suddenly gored by a bull which had strayed on to the road:—*Held*: the mere fact that the driver of the wagon did not drive the bull from the road did not amount to contributory negligence, it being no part of his duty to do so.—*HALL v. MASEA* (1906), 23 S. C. 746; 16 C. T. R. 1115.—S. AF.

**221 ii. — Dog—Cycling accident.**—Pltf. while riding on a motor bicycle in a public street, free from traffic, at the rate of twenty miles an hour, ran over deft.'s dog, which had been in the habit of running after & snapping at persons

*McKay*, [1913] 3 K. B. 629, C. A. *Consd. & Follid.* *Heath's Garage v. Hodges*, [1916] 2 K. B. 370, C. A. *Consd.* *Holgate v. Bleazard*, [1917] 1 K. B. 443. *Apld.* *Turner v. Coates*, [1917] 1 K. B. 670. *Consd.* *Theyer v. Purnell*, [1918] 2 K. B. 333. *Refd.* *Read v. Edwards* (1864), 17 C. B. N. S. 245; *Lee v. Riley* (1865), 18 C. B. N. S. 722; *Giblin v. McMullen* (1868), L. R. 2 P. C. 317, P. C.; *Ponting v. Noakes*, [1894] 2 Q. B. 281; *Jones v. Lee* (1911), 106 L. T. 123, D. C.; *White v. Steadman*, [1913] 3 K. B. 340; *Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.* (1914), 83 L. J. K. B. 1352, C. A. *Mentd.* *Smith v. Cooke* (1875), 24 W. R. 206; *Miles v. Forest Rock Granite Co.* (1918), 34 T. L. R. 500, C. A.

**219. Dogs coupled together—Evidence of negligence.**—Deft. exercised on a highway close to a town two greyhounds coupled together, it being nearly dark at the time. The dogs ran as fast as they could towards pltf., knocked him down & injured him. In arbn. proceedings:—*Held*: there was evidence of negligence upon which the arbitrator could properly find that deft. was liable in damages, although there was no evidence of *scienter*.—*JONES v. OWEN* (1871), 24 L. T. 587.

**220. Kicking horse—Injury to passenger in omnibus—Evidence.**—In an action against an omnibus proprietor for injury to a passenger, it was proved, on behalf of the latter, that he was sitting inside the omnibus & was injured by one of the horses kicking the front panel constituting the back of his seat, & that on a subsequent examination marks of other kicks were seen:—*Held*: there was evidence of negligence of defts. to go to the jury.—*SIMSON (SIMPSON) v. LONDON GENERAL OMNIBUS CO.* (1873), L. R. 8 C. P. 390; 42 L. J. C. P. 112; 21 W. R. 595; *sub nom.* *SMITH v. LONDON GENERAL OMNIBUS CO.*, 28 L. T. 560.

*Annotations*:—*Consd. & Distd.* *Manzoni v. Douglas* (1880), 6 Q. B. D. 145. *Refd.* *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652, C. A.

**221. Straying animals—Blind dog—Cycling accident.**—Pltf., while cycling in a public street, was thrown down by coming into contact with deft.'s blind dog:—*Held*: the fact that deft. let the dog run in the street was no evidence of negligence.—*MILLNS v. GARRATT* (1906), *Times*, March 6.

**222. — Fowls—Cycling accident—Proximate cause.**—Pltf. was riding carefully a bicycle on a highway, upon the footpath of which were some fowls belonging to deft., who occupied premises on the side of the road opposite to the footpath. As pltf. got abreast of the fowls a dog belonging to a third party frightened the fowls, one of which flew into the spokes of the machine, causing it to upset, whereby pltf. suffered personal injury & the bicycle was damaged. Deft. knew the fowls were in the habit of straying on to the road:—*Held*: (1) even if the fowls were not lawfully on the highway, the damage which happened was not of such nature as was likely to result from their unlawful presence there, & such damage was too remote; (2) pltf. could not recover. *Qu.*: whether it is unlawful for the occupiers of land adjoining a highway to allow their poultry to stray upon the highway.

Cases in which pltf. was the owner of the soil on which the trespass was committed are not in point; for here the cyclist had no interest in the soil of the

riding on motor bicycles, but there was no evidence that deft. was aware of this habit. Pltf.'s bicycle having been damaged:—*Held*: pltf. not entitled to recover damages from the owner of the dog.—*ROBERTSON v. BOYCE* (1912), A. D. 367.—S. AF.

**222 i. — Turkey.**—The owner of a turkeycock, which without negligence strays upon the highway contrary to a bye-law of the municipality, is not liable for damages resulting from a horse taking fright & running away at the sight of the bird acting as turkeycocks usually do.—*ZUMSTEIN v. SHURUMM* (1895), 22 A. R. 263.—CAN.

**Sect. 2.—Liabilities: Sub-sect. 1, C.]**

highway (BRAY, J.).—HADWELL v. RIGHTON, [1907] 2 K. B. 345; 76 L. J. K. B. 891; 97 L. T. 133; 71 J. P. 499; 23 T. L. R. 548; 51 Sol. Jo. 500; 5 L. G. R. 881.

**Annotations:**—**Apld.** Higgins v. Searle (1909), 100 L. T. 280, C. A.; Heath's Garage v. Hodges, [1916] 1 K. B. 206. **Distd.** Turner v. Coates (1916), 33 T. L. R. 79. **Mentd.** Parkinson v. Garstang & Knott End Ry. Co., [1910] 1 K. B. 615.

**223. — Sow—Highway risk.]**—A sow belonging to deft. strayed on the highway, & caused a horse to shy as it was passing a motor car belonging to pltf., with the result that a collision occurred & the motor car was damaged. The jury found that deft. was not guilty of negligence in allowing the sow to be on the road, that the probable result of the sow being on the road was that the horse would shy, & that they could not agree as to whether the driver of the car was guilty of contributory negligence:—**Held:** upon these findings deft. was entitled to judgment.—HIGGINS v. SEARLE (1909), 100 L. T. 280; 73 J. P. 185; 25 T. L. R. 301; 7 L. G. R. 640, C. A.

**Annotations:**—**Consd.** Ellis v. Banyard (1911), 104 L. T. 460. **Apld.** Heath's Garage v. Hodges, [1916] 1 K. B. 206. **Consd. & Apld.** Heath's Garage v. Hodges, [1916] 2 K. B. 370, C. A.

**224. Horse—Defective fence—Remoteness of damage.]**—A young horse, which deft. had placed in a field, escaped on to the highway owing to a defective hedge. Pltfs., who were riding a tandem bicycle along the highway, on seeing the horse, slowed down, but the horse turned round suddenly & ran across the road, coming into contact with the bicycle. The horse fell down, & then jumping up lashed out & injured the bicycle & one of pltfs. In an action by pltfs. claiming damages from deft., the ct. judge found that there was no evidence that the horse was vicious, or in the habit of trespassing or attacking bicycles or any one on the high road. He also found that deft. was guilty of negligence in turning the horse into a field of which the hedges were defective, but that as the act of the horse was not one which it was in the ordinary nature of a horse to commit, deft. was not liable:—**Held:** as the injury to pltfs. was not the natural consequence of deft.'s negligence, pltfs. were not entitled to recover.

The ct. judge was wrong in law in holding that deft. had been guilty of negligence in turning the horse into a field with defective hedges, inasmuch as

**224 i. — Horse—Defective fence.]**—Deft.'s horse strayed from his field to the highway, the fence being defective, & being frightened, ran upon the sidewalk & knocked down & injured pltf.:—**Held:** deft. liable.—PATTERSON v. FANNING (1901), 21 C. L. T. 549; 2 O. L. R. 462.—CAN.

**224 ii. — Mob turned loose on highway.]**—If a man turns a mob of horses into a public road, & allows them to proceed along that road without proper control or guidance, he is guilty of negligence, especially where the road is in an inhabited district & is frequented by the public; & if, in consequence of this negligence, one of the public lawfully using the road sustains an injury, the person, through whose negligent conduct the horses doing such injury have been allowed to pass along the road, is *prima facie* responsible for such injury.—PAUL v. ROWE (1904), 24 N. Z. L. R. 641.—N.Z.

**224 iii. — Dashing out of yard.]**—While M. was riding a motor-cycle two quiet horses belonging to deft. dashed out from his yard, the gate of which was open, on to the road & collided with M., who was knocked off his cycle, & run over by a motor-car:—**Held:** as there was nothing that could have led anyone

to believe that a horse not vicious but quiet would, if straying on a road, collide with a bicycle, deft. had incurred no liability.—MILLAR v. O'DOWD (1917), N. Z. L. R. 716.—N.Z.

**225 i. — Cattle.]**—A calf straying on the highway frightened a horse, causing him to shy & upset the vehicle to which he was harnessed:—**Held:** the owner of the calf liable for the damages thereby occasioned.—CHARENTE v. HUNEAULT (1910), Q. R. 39 S. C. 88.—CAN.

**225 ii. — ]**—Pltf.'s ox was injured by deft.'s oxen, which were on the highway in violation of a bye-law:—**Held:** without proof of *scienter* deft. not liable.—NAAS v. EISENHauer (1907), 41 N. S. R. 424; 3 E. L. R. 109.—CAN.

**d. Animal driven through street negligently—Bull—Liability of vendee.]**—After a bull had been sold to deft., but while the vendor was in charge of it on his way to deliver it to deft., it caused injury to pltf. There was negligent management of the bull, but the jury could not agree as to whether the animal was in charge of deft.'s servants:—**Held:** a new trial should be granted, as there was no finding as to whether

at common law the owner or occupier of land adjoining a highway has no duty to keep his animals off the highway (BANKES, J.).—JONES v. LEE (1911), 106 L. T. 123; 76 J. P. 137; 28 T. L. R. 92; 56 Sol. Jo. 125.

**Annotations:**—**Consd.** Heath's Garage v. Hodges, [1916] 2 K. B. 370, C. A. **Refd.** Ellis v. Banyard (1911), 106 L. T. 51, C. A.

**225. Cattle — Open gate — Negligence.]** Pltf. was riding on a bicycle at 10.30 p.m. along a highway adjoining a field, in which deft. kept a hundred cows. The field communicated by a gate with the highway, & at the time when pltf. was passing the gate was open & she saw some cows coming through it. A little further along were other cows which had come from the field, some of which threw pltf. down & injured her. At the trial no evidence was given as to by whom the gate had been opened. The ct. judge held in the circumstances the fact that deft.'s gate was open, & his cows had strayed on to the road through it & had caused the accident to pltf., afforded evidence of negligence, & it was for deft. to displace this evidence by showing that the gate was not left open by any negligence on his part or on that of his servants. Upon the evidence he held deft. had not displaced this *prima facie* case, & gave judgment for pltf.:—**Held:** there was no evidence upon which the ct. judge could find that deft. either by an act of his own or by neglect of a duty which he owed to the public produced an obstruction of the highway by his cattle, & judgment should be entered for deft.

A farmer is not entitled to turn out untended cattle on pasture adjoining a highway without a fence, to such a number that they are likely to obstruct the highway by day or night, without being liable to an action by those who using the highway are injured by the obstruction (VAUGHAN WILLIAMS, L.J.).

There is at common law no obligation on the part of the owner or occupier of land, who depastures cattle near a highway, to provide any fences so as to prevent the cattle from getting into the highway (BUCKLEY, L.J.).—ELLIS v. BANYARD (1911), 106 L. T. 51; 28 T. L. R. 122; 56 Sol. Jo. 139, C. A.

**Annotations:**—**Consd.** Poulton v. Moore (1913), 109 L. T. 976, D. C.; Turner v. Coates (1916), 115 L. T. 766. **Apld.** Heath's Garage v. Hodges, [1916] 2 K. B. 370, C. A.

**226. — Sheep—Defective fence—Natural propensity.]**—An owner or occupier of land adjoining an ordinary highway (i.e., putting aside cases

the animal was in charge of deft.'s servants.—BUCKLEY v. FITZGERALD (1881), 15 I. L. T. Jo. 118.—IR.

**e. — Becoming irritated.]**—A bull was being led through the streets in a town, secured in the ordinary manner by a ring in its nose & a rope attached thereto, & by a halter upon its head. It was irritated by boys in the street, & struggled with the men in charge, so that the ring in its nose broke through a latent defect, & it escaped from the halter & injured a pedestrian on the street:—**Held:** the animal having been secured in a usual & reasonably safe manner neither the owner nor the carrier, in whose charge it was, was responsible.—HARPERS v. GREAT NORTH OF SCOTLAND Ry. Co. (1886), 13 R. 1139; 23 Sc. L. R. 814.—SCOT.

**f. — Cow—Liable to get excited.]**—Where the owner of a cow, which was being taken through the public streets in circumstances under which it might have been expected to become excited & furious, had not taken special precautions for the safety of the passers-by:—**Held:** he was liable in damages to a person who had been injured by the cow.—PHILLIPS v. NICOLL (1884), 11 R. 592; 21 Sc. L. R. 419.—SCOT.



where, either by a local Inclosure Act, or by prescription, or otherwise, a duty to fence is imposed) is not bound to fence so as to prevent harmless animals like sheep straying upon the highway.

While pltf.'s motor car was being driven along a highway in the daylight at the rate of sixteen to twenty miles an hour, the driver saw in front of him on the road a number of sheep untended; he put on his brakes & almost immediately thereafter two sheep, which had apparently been left behind by the others, jumped from the bank on the near side, & one of them ran in the front of the car & broke part of the steering gear, in consequence of which the driver lost control, & the car ran into the bank & was damaged. The sheep were the property of deft., who was subsequently prosecuted & fined under Highway Act, 1864 (c. 101), s. 25, for having allowed them to stray on the highway. In an action against deft. by pltf. in respect of the damage to the car, the ct. judge found (1) the sheep escaped on to the highway from deft.'s field owing to a defective hedge; (2) it was the natural tendency of sheep which were untended to run across or otherwise endanger vehicles in a road, & it was common knowledge that when sheep find themselves separated from the flock they have almost a mania for rejoining it, regardless of intervening traffic; (3) deft. had been guilty of negligence, or had committed a nuisance, in allowing sheep to stray on to the highway, & the accident was the natural consequence thereof: & he held deft. was liable. On appeal:—*Held*: (1) whether the action was sought to be based on negligence or on a nuisance to the highway, it was no breach of duty by deft. not to keep his sheep from straying on to the highway; (2) an animal like a sheep, by nature harmless, could not fairly be regarded as likely to collide with a motor car, & deft. could not be held liable on that footing; (3) (AVORY, J., in D. C.) the tendencies of sheep as found by the ct. judge were not a vicious or mischievous propensity within the decided cases.—*HEATH'S GARAGE, LTD. v. HODGES*, [1916] 2 K. B. 370; 85 L. J. K. B. 1289; 115 L. T. 129; 80 J. P. 321; 32 T. L. R. 570; 60 Sol. Jo. 554; 14 L. G. R. 911, C. A.

*Annotation*:—*Consd.* *Turner v. Coates*, [1917] 1 K. B. 670.

**227. Sheep driven by night—Drover without light—Negligence.**—There is no duty on the driver of a flock of sheep driven along the highway at night to carry a light, & the failure so to do is no evidence of negligence.—*CATCHPOLE v. MINSTER* (1913), 109 L. T. 953; 30 T. L. R. 111; 12 L. G. R. 280.

**228. Cow with calf—Insufficient control—Negligence.**—Deft. through an agent bought a cow & calf, & by deft.'s instructions the agent employed a drover to drive them to deft.'s farm. The drover got another man, who was about to drive bullocks in the same direction, to drive the cow & calf along

with them. On the way the cow tossed a dog & afterwards tossed pltf., who suffered injury thereby. In an action for negligence there was evidence that a cow with a calf might become dangerous if it met a dog, & the judge found (1) that the drover was negligent as it was his duty to see that the cow was under control; (2) that deft. was negligent in employing one man to perform a dangerous operation for which his powers were inadequate; & (3) that even if the drover was an independent contractor this was not a defence; & the judge awarded pltf. damages:—*Held*: there was evidence to support the judge's findings of negligence, & he was entitled to hold that the drover was employed to do a dangerous thing on a highway, & therefore, even if the drover was an independent contractor, deft. was liable.—*PINN v. REW* (1916), 32 T. L. R. 451.

*Annotation*:—*Consd.* *Turner v. Coates*, [1917] 1 K. B. 670.

**229. Cows driven at night—Licensed drover.**—A widow sued, under Fatal Accidents Act, 1846 (c. 93), for damages caused by the negligence of deft.'s servant. Pltf.'s late husband, while in a motor car at night-time, was thrown out & fatally injured upon the car colliding with a cow which, with one other, was under the charge of a licensed drover employed by deft. Deft. denied negligence, & alleged that the licensed drover was an independent contractor, for whom he was not liable. The jury returned a verdict for pltf.:—*Held*: (1) a drover of cattle was not necessarily an independent contractor because he had a licence; (2) in a place where a drover did not require a licence he was the servant of the employer, & not an independent contractor, & in such a case the employer was liable for the drover's negligence.—*TURNBULL v. WIELAND* (1916), 33 T. L. R. 143.

**230. Colt driven without halter—Natural propensity.**—A young unbroken colt belonging to deft., a farmer, was being taken along a highway on a dark night. It was allowed to go loose behind a mare which was being led & in front of a trap being driven by deft. Pltf., who was riding a bicycle, was coming from the opposite direction when the colt, being startled by the light on the bicycle, suddenly ran across the road & collided with & injured pltf. No warning was given by deft. to pltf. of the presence of the colt. In an action to recover damages the ct. judge found that it was well known, especially to a farmer, that a young unbroken colt when loose on the highway is apt, when startled, to rush about & kick, & that there is grave risk of danger to the public in allowing such a colt to go loose on the highway in the dark; & he held that deft. was guilty of negligence in allowing the colt to be on the highway in the dark without being under proper control, & in failing to give warning to pltf. of the presence of the colt:—*Held*: the ct. judge was right in so holding.—*TURNER v. COATES*, [1917] 1 K. B. 670; 86 L. J. K. B. 321; 115 L. T. 766; 33 T. L. R. 79.

#### PART III. SECT. 2, SUB-SECT. 1.—D.

**g. Spectator entering stall at market—Contributory negligence.**—Pltf., a butcher, desiring to examine a cow offered for sale by deft. at a public market, entered the stall where there was also a bull belonging to deft. The bull kicked pltf.:—*Held*: deft. not liable.—*MARTIN v. HOGG* (1907), 3 K. L. R. 209; Q. R. 31 S. C. 529.—*CAN.*

**h. Passenger on railway platform—Bitten by dog.**—Pltf. passing along the platform of defts.' railway station came into contact with a chain that he had not observed, & was immediately bitten by a dog. The dog was attached by the chain to a luggage barrow, which was being drawn by a porter in the employment of defts.:—*Held*: no question of scienter arose, & pltf. entitled to damages.—*MAILLOU v. GREAT SOUTHERN*

& WESTERN RY. CO. (1893), 27 I. L. T. 125.—*IR.*

**i. Servant in master's field—Bull.**—A dairymaid was injured while removing cows from a field where there was also a bull belonging to defender, which attacked & trampled upon her:—*Held*: it was not proved that the bull was vicious, & the master not liable.—*CLARK v. ARMSTRONG* (1862), 24 D. 1315; 34 Sc. Jur. 640.—*SCOT.*

**m. Gardener in public garden—Dog escaping from carrier's control.**—A dog was delivered to a railway co. for carriage, the guard being told that it was a quiet animal. On being led to the train it at first went quietly, but soon showed a disposition to bite, & finally broke away from the porter who was leading it, & escaped from the station to a public garden at some distance, where

it was secured by a gardener, whom it bit:—*Held*: there was no evidence of fault by the railway co., & in any case the injury was too remote.—*GRAY v. N. B. RY. CO.* (1890), 18 R. 76; 28 Sc. L. R. 81.—*SCOT.*

**n. Animal in rented stall—by animal put in a joinin' stall without permission.**—Pltf. rented a stall in a stable & put his horse into it. Deft. also rented a stall adjacent to pltf. Pltf. having put his horse into his stall, deft. came in with two horses, putting one into the stall he had rented, & the other without permission into a stall adjacent on the other side to that occupied by pltf.'s horse. Pltf.'s horse was badly injured by the latter horse:—*Held*: deft. was liable, not having had permission to occupy the stall.—*BERUBE v. OUELLET* (1881), 4 L. N. 343.—*CAN.*



**Sect. 2.—Liabilities: Sub-sect. 1, D.; sub-sect. 2, A.]****D. Liability for Injuries to Persons and Property on Lawful Business but not on Highway.**

**231. Platelayer on railway trolley—Pigs straying on railway—Duty of company to fence.]—**Pltf., a platelayer in the employment of a railway co., was returning from his work along their line upon a trolley propelled by hand, when deft.'s pigs got through the fence of his field, which adjoined the railway, on to the line in front of the trolley; the trolley ran over the pigs & was upset, & pltf. was injured. Deft. was owner of the adjoining land; the fence erected by the co. under Railways Clauses (Consolidation Act, 1845 (c. 20), s. 68, was sufficient against horses, oxen, & sheep, but there was enough space between the lowest rail of the fence & the ground for pigs to crawl through, & deft.'s pigs had in fact (as the jury found) crawled under the fence. There was evidence to show that deft. had been warned on a former occasion of his pigs being on the line, but there was no evidence to show how the pigs got from deft.'s farmyard, where they were last seen, into the field adjoining the railway. In an action against deft. for the injury sustained by pltf.:—**Held:** (1) the word "cattle" in the above sect. included pigs, & the fence was insufficient; (2) assuming there was negligence in deft., pltf. could not recover, for he was identified with the co. whose line he was using for their purposes, & through whose neglect to erect & maintain a sufficient fence the accident was caused.—**CHILD (CHILDS) v. HEARN** (1874), L. R. 9 Ex. 176; 43 L. J. Ex. 100; 22 W. R. 864.

**Annotations:—****Consd.** The Bernina (1887), 12 P. D. 58, C. A.; Coaker v. Willcocks, [1911] 1 K. B. 649.

**232. Spectator in sale yard—Horse exhibited for sale—Negligence of groom.]—**Deft. was the proprietor of a yard & premises used for the sale of horses. Pltf. attended a sale & was walking up the yard behind a row of spectators who were watching a horse then on sale. In order to show the horse's pace, a servant of deft. led it with a halter down a lane formed by the spectators on one side & a blank wall on the other. There was no barrier between the horse & the spectators, & when the horse was about ten yards from pltf. another servant of deft. struck it with a whip in order to make it trot. On being struck the horse swerved into & through the crowd, & kicked & injured pltf. It was a usual thing for a man to be stationed with a whip at the particular point when horses were brought out for sale. There was no evidence as to the kind of blow that was given nor the character of the horse nor how it was being led, nor that it was customary to put a barrier for the protection of the public in yards where horses were being sold. Pltf. sued deft. to recover damages for injuries caused by the negligence of deft.'s servant:—**Held:** there was no evidence upon which the jury could reasonably find negligence on the part of deft.—**ABBOTT v. FREEMAN** (1876), 35 L. T. 783, C. A.

**233. ——— Negligence of auctioneer.]—**Deft. employed an auctioneer to hold a sale of horses in deft.'s yard, & pltf. attended the sale & was kicked by one of the horses. Pltf. alleged that this was due to the negligence of the auctioneer in running the horses up & down in too narrow a space. There was no evidence of such unsuitability of the premises as might have made deft. liable:—**Held:** deft. was not responsible for the negligence (if any) of the auctioneer, as he was not deft.'s servant.—**WALKER v. CRABB** (1916), 33 T. L. R. 119.

**234. Guest in private yard—Runaway horse**

**entering premises.]—**Deft.'s horse, by the negligence of deft.'s servant, ran away with a cart, & turned from a highway into the yard of deft.'s house, which opened on to the highway. Pltf.'s wife, who happened to be paying a visit at deft.'s house, ran out into the yard to see what was the matter when she was met & knocked down by the horse & cart, receiving serious injuries:—**Held:** in the circumstances there was no duty on the part of deft. to use ordinary care towards pltf.'s wife, & the action was not maintainable.—**TOLHAUSEN v. DAVIES** (1888), 58 L. J. Q. B. 98; 5 T. L. R. 18, C. A. **Annotations:—****Mentd.** Berg v. Rotterdamsche Lloyd (1918), 34 T. L. R. 272.

**235. Customer in shop—Cat rearing kittens—Natural propensity.]—**Pltf., accompanied by her husband & carrying a pet dog, entered a tea-shop by permission of defts., the proprietors thereof. On the premises was a cat which had kittens. The cat had been shut up in a store room, but had escaped. Pltf. put her dog on the floor. The cat sprung on the dog & bit it. Pltf. picked up the dog & handed it to her husband. The cat sprung on her & bit her arm. Evidence was given that cats rearing kittens are inclined to be savage & in a vicious state, even if gentle otherwise, & that if such a cat smelt the clothing of a person who had been carrying a dog, it might attack that person. In an action for injuries to pltf. & to her dog:—**Held:** (1) defts. were not liable, either (a) as keepers of an animal *feræ naturæ*, or of an animal *mansuæ naturæ* but known to be vicious towards mankind, or (b) as licensors; (2) defts. were not bound to contemplate the injuries as the consequence of keeping the cat.—**CLINTON v. LYONS & CO., LTD.**, [1912] 3 K. B. 198; 81 L. J. K. B. 923; 106 L. T. 988; 28 T. L. R. 462.

**236. Workman in employer's yard—Horse brought in by third party—Remoteness of damage—Workmen's Compensation Act, 1906 (c. 58), s. 6.]—**A workman was killed by an accident arising out of & in the course of his employment through the kick of a horse belonging, not to W., his employers, but to M. & Co., which had been brought into the employers' yard by M. & Co.'s servant for his employers' own purposes & left unattended. The workman in the course of his employment passed behind the horse & was kicked. The horse was not known to be vicious. The dependants of the workman applied for & were awarded compensation, & it was further held by the ct. judge that M. & Co. were liable to indemnify the employers under the above sect. on the ground that their servant had been guilty of trespass & negligence in bringing & leaving the horse upon the employers' premises:—**Held:** (1) it was not the natural consequence of bringing a horse, not known to be vicious, upon the employers' premises & leaving it unattended that it should kick a man; (2) the accident was not the natural consequence of the trespass & negligence, & there was no evidence to support the finding of the ct. judge.—**BRADLEY v. WALLACES, LTD.**, [1913] 3 K. B. 629; 82 L. J. K. B. 1074; 109 L. T. 281; 29 T. L. R. 705; 6 B. W. C. C. 706, C. A.

**Annotations:—****Appld.** Heath's Garage v. Hodges, [1916] 1 K. B. 206. **Consd.** Heath's Garage v. Hodges, [1916] 2 K. B. 370, C. A.

**237. ——— Jumped on by dog.]—****SANDERS v. TEAPE**, No. 300, *post*.

**SUB-SECT. 2.—ANIMALS NATURALLY VICIOUS**  
**DOMESTIC ANIMALS KNOWN TO BE VICIOUS.**

**A. Animals naturally Vicious.**

**238. Animals generally—Dangerous animals—Criminal liability.]—**There is a difference between

**PART III. SECT. 2, SUB-SECT. 2. -A.**

**238 i. Animals**  
*feræ naturæ.*]—Where

of pheasants & rabbits bred & kept on lands is not abnormal or out of proportion to the extent of the demesne, & they are not kept in such a way as to deprive them of their character of *feræ naturæ*, the owner is not liable for damage done by

beasts that are *feræ naturæ*, as lions & tigers, which a man must always keep up at his peril, & beasts that are *mansuetæ naturæ*, & break through the tameness of their nature, such as oxen & horses. In the latter case an action lies, if the owner has had notice of the quality of the beast: in the former case an action lies without such notice. As to the point of felony, if the owner have notice of the mischievous quality of the ox, etc., & he uses all proper diligence to keep it up, & it happens to break loose, & kills a man, it would be very hard to make the owner guilty of felony. But if through negligence the beast goes abroad, after warning or notice of its condition, it is the opinion of Hale that it is manslaughter in the owner. And if he did purposely let it loose, & wander abroad, with a design to do mischief, though only to fright people & make sport, & it kills a man, it is murder in the owner.—*R. v. HUGGINS* (1730), 17 State Tr. 309; 2 *Ld. Raym.* 1574; 1 *Barn. K. B.* 396; *Fitz-G.* 177; 2 *Stra.* 883; 92 *E. R.* 518.

**Annotations:**—*Consd.* *Scott v. Shepherd* (1773), 3 *Wills.* 403; *May v. Burdett* (1846), 16 *L. J. Q. B.* 64. *Mentd.* *R. v. Francis* (1735), *Cun.* 165; *R. v. Bray* (1737), *Lee temp. Hard.* 358; *Jones v. Nicholls* (1829), 3 *Moo. & P.* 12; *R. v. Lea, Parry, Rea, Jones & Wright* (1837), 2 *Mood. C. C.* 9; *Campbell v. R.* (1846), 11 *Q. B.* 799; *R. v. Evans* (1856), 7 *Cox, C. C.* 151; *R. v. Winsor* (1865), 10 *Cox, C. C.* 276; *Winsor v. R.* (1866), *L. R.* 1 *Q. B.* 289; *R. v. Murphy* (1869), *L. R.* 2 *P. C.* 535, *P. C.*

**239. Duty of owner.]**—The rule of law is that the person, who for his own purposes brings on his lands & collects & keeps there anything likely to do mischief if it escapes, must keep it in at his peril, & if he does not do so is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to pltf.'s default, or, perhaps, that the escape was the consequence of *vis major* or the act of God. This is the law whether the things so brought be beasts, or water, or filth, or stench (BLACKBURN, J.).—*FLETCHER v. RYLANDS* (1866), *L. R.* 1 *Exch.* 265; 4 *H. & C.* 263; 35 *L. J. Ex.* 154; 14 *L. T.* 523; 30 *J. P.* 436; 12 *Jur. N. S.* 603; 14 *W. R.* 799, *Ex. Ch.*; *affd.* *RYLANDS v. FLETCHER* (1868), *L. R.* 3 *H. L.* 330, *H. L.*

**Annotations:**—*Apld.* *Gordon v. St. James, Westminster, Vestry* (1865), 13 *L. T.* 511. *Consd.* *Jones v. Festiniog Ry. Co.* (1868), *L. R.* 3 *Q. B.* 733. *Distd.* *The Thetis* (1869), *L. R.* 2 *A. & E.* 365; *Saxby v. M. S. & L. Ry. Co.* (1869), 38 *L. J. C. P.* 153; *Wilson v. Newberry* (1871), *L. R.* 7 *Q. B.* 31; *Carstairs v. Taylor* (1871), *L. R.* 6 *Exch.* 217; *Dunn v. Birmingham Canal Navigation Co.* (1872), *L. R.* 8 *Q. B.* 42, *Ex. Ch.*; *Ross v. Fedden* (1872), *L. R.* 7 *Q. B.* 661. *Apld.* *Smith v. Fletcher* (1872), *L. R.* 7 *Exch.* 305. *Distd.* *Smith v. Fletcher* (1874), *L. R.* 9 *Exch.* 64, *Ex. Ch.*; *Child v. Hearn* (1874), *L. R.* 9 *Exch.* 176. *Apld.* *Crompton v. Lea* (1874), *L. R.* 19 *Eq.* 115. *Consd.* *Madras Ry. Co. v. Zemindar of Carvetinagarum* (1874), 30 *L. T.* 770, *P. C.*; *Cattle v. Stockton Waterworks Co.* (1875), *L. R.* 10 *Q. B.* 453. *Distd.* *Nichols v. Marsland* (1875), *L. R.* 10 *Exch.* 255. *Consd. & Distd.* *Nichols v. Marsland* (1876), 2 *Ex. D.* 1, *C. A.* *Consd.* *Wilson v. Waddell* (1876), 2 *App. Cas.* 95, *H. L.*; *Humphries v. Cousins* (1877), 2 *C. P. D.* 239; *Hurdman v. N. E.*

them to adjoining lands.—*FOLEY v. BERTHOUD* (1903), 37 *I. L. T.* 123.—*IR.*

**o. Bees—Duty of owner.]**—Pltf.'s horse died in consequence of being stung by bees belonging to deft.:—*Held*: (1) the owner of bees kept them near a public way at his peril, & he must so keep them as not to interfere with the liberties of others or to cause any injury; (2) deft. liable.—*TELLIER v. PELLAND* (1873), 5 *R. L. N. S.* 61.—*CAN.*

**p. ———.]**—Deft. placed a large number of hives of bees upon his own land within 100 feet of pltf.'s land. While pltf. was at work with two horses upon his own land, the bees attacked & stung the horses, so that they died, & also stung & injured pltf. The bees were in ordinary flight at the time, & deft. had reasonable grounds for believing that his bees were, by reason of the

situation of his hives, or their numbers, dangerous to persons or horses upon the highway or elsewhere than on deft.'s premises:—*Held*: the doctrine of *scienter* had no application, & deft. liable.—*LUCAS v. PETTIT* (1906), 12 *O. L. R.* 448; 8 *O. W. R.* 315.—*CAN.*

**q. ———.]**—Pltf. & deft. resided on adjacent farms. Deft. kept twenty beehives at the boundary fence beside pltf.'s yard & haggard. The bees swarming from these hives frequently gave rise to complaints from the inhabitants of the farm upon which pltf. resided. Deft. having smoked the hives with a "smoker," numbers of bees, irritated by the smoking operation, swarmed upon pltf. who was tackling his horse. The horse, stung by the bees, dragged pltf. & threw him violently against a wall, causing severe injuries. The jury found that the bees were kept on

*Ry. Co.* (1878), 3 *C. P. D.* 168, *C. A.* *Distd.* *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co.* (1878), 27 *W. R.* 267, *C. A.* *Apld.* *Crowhurst v. Amersham Burial Board* (1878), 4 *Ex. D.* 5. *Distd.* *Box v. Jubb* (1879), 4 *Ex. D.* 76. *Apld.* *Powell v. Fall* (1880), 5 *Q. B. D.* 597, *C. A.* *Distd.* *Anderson v. Oppenheimer* (1880), 5 *Q. B. D.* 602, *C. A.* *Apld.* *Dixon v. Metropolitan Board of Works* (1881), 7 *Q. B. D.* 418; *Snow v. Whitehead* (1884), 27 *Ch. D.* 588. *Consd.* *Whalley v. L. & Y. Ry. Co.* (1884), 13 *Q. B. D.* 131, *C. A.*; *Gas Light & Coke Co. v. St. Mary Abbots, Kensington, Vestry* (1884), *Cab. & El.* 368. *Distd.* *Snook v. Grand Junction Waterworks Co.* (1886), 2 *T. L. R.* 308. *Consd.* *Evans v. M. S. & L. Ry. Co.* (1887), 36 *Ch. D.* 626. *Distd.* *Abelson v. Brockman* (1889), 54 *J. P.* 119. *Apld.* *Filburn v. Peoples' Palace & Aquarium Co.* (1890), 25 *Q. B. D.* 258, *C. A.* *Consd.* *National Telephone Co. v. Baker*, [1893] 2 *Ch.* 186. *Distd.* *Ponting v. Noakes*, [1894] 2 *Q. B.* 281; *Green & Haydon v. Chelsea Waterworks Co.* (1894), 10 *T. L. R.* 259, *C. A.* *Consd.* *Grosvenor & West End Ry. Terminus & Hotel Co. v. Hamilton* (1894), 71 *L. T.* 362, *C. A.* *Distd.* *Price v. South Metropolitan Gas Co.* (1895), 65 *L. J. Q. B.* 126; *Greenhill v. Low Beechburn Coal Co.* [1897] 2 *Q. B.* 165; *Blake v. Woolf*, [1898] 2 *Q. B.* 426. *Apld.* *Batcheller v. Tunbridge Wells Gas Co.* (1901), 84 *L. T.* 765. *Distd.* *Eastern & South African Telegraph Co. v. Cape Town Tram. Co.*, [1902] *A. C.* 381, *P. C.*; *Ely Brewery Co. v. Pontypridd U. D. C.* (1903), 68 *J. P.* 3, *C. A.* *Apld.* *Smith v. Giddy*, [1904] 2 *K. B.* 448; *Foster v. Warblington U. D. C.*, [1906] 1 *K. B.* 648, *C. A.*; *Hobart v. Southend-on-Sea Corp.* (1906), 94 *L. T.* 337. *Distd.* *Chichester Corp. v. Foster*, [1906] 1 *K. B.* 167; *Evans v. Liverpool Corp.*, [1906] 1 *K. B.* 160. *Consd. & Expld.* *Baker v. Snell*, [1908] 2 *K. B.* 825, *C. A.* *Apld.* *West v. Bristol Tram. Co.*, [1908] 2 *K. B.* 14, *C. A.* *Expld. & Distd.* *Whitmores (Edenbridge) v. Stanford*, [1909] 1 *Ch.* 427. *Expld.* *Wing v. London General Omnibus Co.*, [1909] 2 *K. B.* 652, *C. A.* *Apld.* *Lowery v. Walker*, [1909] 2 *K. B.* 433. *Consd.* *Lowery v. Walker*, [1910] 1 *K. B.* 173, *C. A.* *Apld.* *Jones v. Llanrwst U. D. C.*, [1911] 1 *Ch.* 393. *Distd.* *Barker v. Herbert*, [1911] 2 *K. B.* 633, *C. A.*; *Rickards v. Lothian*, [1913] *A. C.* 263, *P. C.*; *Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.*, [1914] 3 *K. B.* 722, *C. A.* *Distd.* *Goodbody v. Poplar B. C.* (1914), 84 *L. J. K. B.* 1230. *Consd.* *Heath's Garage v. Hodges*, [1916] 2 *K. B.* 370, *C. A.*; *Holgate v. Bleazard*, [1917] 1 *K. B.* 443; *Greenock Corp. v. Cale. Ry. Co.*, *Greenock Corp. v. G. & S. W. Ry. Co.* [1917] *A. C.* 556, *H. L.* *Apld.* *Miles v. Forest Rock Granite Co.* (1918), 34 *T. L. R.* 500, *C. A.* *Refd.* *Smith v. L. & S. W. Ry. Co.* (1870), *L. R.* 6 *C. P.* 14, *Ex. Ch.*; *A -G v. Tomline* (1879), 12 *Ch. D.* 214; *Fleming v. Manchester Corp.* (1881), 44 *L. T.* 517; *Tillett v. Ward* (1882), 10 *Q. B. D.* 17; *Darley Main Colliery Co. v. Mitchell* (1886), 11 *App. Cas.* 127, *H. L.*; *Ruddiman v. Smith* (1889), 37 *W. R.* 528; *Gill v. Edouin* (1894), 71 *L. T.* 762; *Bradford Corp. v. Pickles* (1894), 71 *L. T.* 793, *C. A.*; *Prinsep v. Belgravia Estate* (1895), 39 *Sol. Jo.* 381; *St. Helen's Corp. v. United Alkali Co.* (1901), *Times*, June 19; *Canadian Pacific Ry. Co. v. Roy*, [1902] *A. C.* 220, *P. C.*; *Iford Gas Co. v. Iford U. D. C.* (1903), 67 *J. P.* 365, *C. A.*; *Manchester Corp. v. New Moss Colliery Co.*, [1906] 1 *Ch.* 278; *Jones v. Lee* (1911), 106 *L. T.* 123, *D. C.*; *Remorqueur a Hélice (Soc. Anon. de) v. Bennetts*, [1911] 1 *K. B.* 243; *Titterton v. Kingsbury Collieries* (1911), 104 *L. T.* 569; *Maxey Drainage Board v. G. N. Ry. Co.* (1912), 76 *J. P.* 236, *D. C.*; *Cheater v. Cater*, [1917] 2 *K. B.* 516. *Mentd.* *Woodall v. Hingley* (1866), 14 *L. T.* 167; *R. v. Stephens* (1866), *L. R.* 1 *Q. B.* 702; *Richards v. Jenkins* (1868), 18 *L. T.* 437; *Blake v. Land & House Property Corp.* (1887), 3 *T. L. R.* 667; *Holliday v. Wakefield Corp.*, [1891] *A. C.* 81, *H. L.*; *Hanley v. Edinburgh Corp.* (1913), 77 *J. P.* 233, *H. L.*

**240. Monkey—Known to be mischievous—Duty of owner.]**—Whoever keeps a mischievous animal (either domestic or *feræ naturæ*) with knowledge of

deft.'s land negligently, in unreasonable numbers, at an unreasonable place, & with appreciable danger to the inhabitants of the adjoining farm, that the bees were, to the knowledge of deft., of a dangerous & mischievous nature, & accustomed to sting mankind & domestic animals, & returned a general verdict for the pltf.:—*Held*: the verdict ought not to be disturbed.—*O'GORMAN v. O'GORMAN*, [1903] 2 *I. R.* 573; 36 *I. L. T.* 237.—*IR.*

**240 i. Monkey—Tied up—Duty of owner.]**—An infant was bitten by a trained & performing monkey, which was tied up in a yard adjoining the premises of defts., in the interval between performances given in defts.' theatre:—*Held*: defts. did not keep or harbour the monkey, & were not responsible for its misconduct or mischief.—*CONNER v. "THE PRINCESS THEATRE"* (1912), 27



**Sect. 2.—Liabilities: Sub-sect. 2, A. & B.**

its mischievous propensities is bound to keep it secure at his peril, & is *prima facie* liable to an action on the case, at the suit of any person attacked or injured by the animal, without any averment of negligence or default in the securing or taking care of it. The negligence is the keeping such an animal after notice.

A declaration in case stated deft. wrongfully kept a monkey, well knowing it was of a mischievous & ferocious nature, & used & accustomed to attack & bite mankind, & that it was dangerous to allow it to be at large, & that the monkey, whilst deft. kept same, did attack, bite & injure pltf. whereby, etc. :—**Held**: sufficient.—**MAY v. BURDETT** (1846), 9 Q. B. 101; 16 L. J. Q. B. 64; 7 L. T. O. S. 253; 10 Jur. 692; 115 E. R. 1213.

**Annotations**:—**Appld.** Jackson v. Smithson (1846), 15 M. & W. 563. **Consd.** Card v. Case (1848), 5 C. B. 622. **Distd.** Hill v. Balls (1857), 2 H. & N. 299; Filburn v. People's Palace & Aquarium Co. (1890), 25 Q. B. D. 258, C. A. **Consd.** Baker v. Snell, [1908] 2 K. B. 825, C. A. **Refd.** Cooke v. Waring (1863), 2 H. & C. 332; Fletcher v. Rylands (1866), L. R. 1 Exch. 265, Ex. Ch.; Smith v. Cook (1875), 1 Q. B. D. 79; Marlow v. Ball (1900), 16 T. L. R. 239, C. A.; Jones v. Lee (1911), 106 L. T. 123; Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co. (1914), 83 L. J. K. B. 1352, C. A. **Mentd.** Vaughan v. Taff Vale Ry. Co. (1860), 6 Jur. N. S. 899, Ex. Ch.

**241. Bear—Chained—Injury to passer-by.]—**Deft. was owner of a bear, which he kept fastened by a chain six feet long on premises accessible to persons frequenting his house. Pltf. was one of an excursion party visiting deft.'s house. While walking past the bear's house pltf. was seized by the bear & seriously injured. There was no notice or caution to visitors, but the bear had previous to this occurrence always been tame & docile in its habits:—**Held**: (1) knowledge on the part of deft. of the bear's fierce nature must be presumed, & a person who kept such an animal was bound to keep it that it should do no damage; (2) if pltf. with knowledge that the bear was there put herself in a position to receive the injury, she could not recover.—**BESOZZI v. HARRIS** (1858), 1 F. & F. 92.

**242. — Confined in cage—Contributory negligence.]—**Pltf. was a visitor at defts.' public pleasure gardens. Defts. there kept as an attraction a bear in a den, the front of which was protected by iron bars. Pltf. went to the iron bars to feed the bear, which thereupon put its paw through the bars & seized pltf.'s arm, causing him permanent injury:—**Held**: (1) defts. kept the bear at their peril, & it did not matter whether they knew that it was savage or whether they were negligent or not, & if

O. L. R. 466; 4 O. W. N. 502; 10 D. L. R. 143.—**CAN.**

**r. Boar — Duty of owner.]—**The owner of a boar is bound to secure it, & is responsible for any damage that may result from his precautions proving inadequate.—**HENNIGAN v. M'VEY** (1882), 9 R. 411; 19 Sc. L. R. 334.—**SCOT.**

**241 i. Bear.]—**A bear belonging to A. escaped from premises, the separate property of B., his wife, where it had been confined by A. without objection from B., & attacked & injured pltf. on a public street:—**Held**: B. liable.—**SHAW v. MCCREARY** (1890), 19 O. R. 39.—**CAN.**

**s. Bull — Natural propensity — To attack other bulls.]—**A bull, which was being herded with other cattle by an old man & a boy, broke away from the herd, & after running a distance of about a mile & crossing two streams in spite of efforts by the herd boys to prevent it, attacked another bull, overthrew it & dislocated its hip. On previous occasions deft.'s bull had attacked animals belonging to transport riders, but there was no evidence of

knowledge on the part of the owner that the attacking bull was of a savage nature:—**Held**: (1) the natural propensity of a bull was to attack any strange bull coming into the neighbourhood of its own herd, & it was the duty of the owner of the bull to prevent it from indulging in that natural propensity at the expense of others; (2) the owner having failed in that duty was liable.—**LUJOKO v. SYMMONDS** (1911), 32 N. L. R. 326.—**S. AF.**

—**also**, Nos. 246, 246 i., 246 ii., *per*

**243 i. Elephant—Liability of owner & person in possession.]—**In India the elephant belongs to a dangerous class of animals, & a person who keeps an animal belonging to a class that is dangerous takes the risk of any damage it may do. The absolute liability of a person for any harm done by his animal independently of any intent or negligence on his part does not depend on the manner or extent to which such animals are employed, but upon the nature of the class to which such animal belongs or the particular kind of mischief committed. Liability for damage done by

the bear caused injury to any one, defts. were liable; (2) if pltf. was guilty of contributory negligence, defts. were entitled to a verdict.—**WYATT v. ROSHERVILLE GARDENS CO.** (1886), 2 T. L. R. 282.

**243. Elephant—Natural propensity—Ignorance of owner.]—**In an action to recover damages for personal injuries sustained from an elephant exhibited by defts., the jury found that defts. did not know the elephant to be dangerous:—**Held**: defts. were liable, as the animal did not belong to a class which, according to the experience of mankind, is not dangerous to man, & the owner kept such an animal at his own risk, & his liability for damage done by it was not affected by his ignorance of its dangerous character.—**FILBURN v. PEOPLE'S PALACE & AQUARIUM CO., LTD.** (1890), 25 Q. B. D. 258; 59 L. J. Q. B. 471; 55 J. P. 181; 38 W. R. 706; 6 T. L. R. 402, C. A.

**Annotations**:—**Consd.** Marlor v. Ball (1900), 16 T. L. R. 239, C. A.; West v. Bristol Tram. Co., [1908] 2 K. B. 14, C. A.; Baker v. Snell, [1908] 2 K. B. 825, C. A. **Refd.** Jones v. Lee (1911), 106 L. T. 123; Clinton v. Lyons, [1912] 3 K. B. 198. **Mentd.** Harper v. Marcks (1894), 42 W. R. 605; Norman v. G. W. Ry. Co., [1914] 2 K. B. 153.

**244. Zebra—Properly secured—Contributory negligence.]—**Deft. was the proprietor of pleasure grounds, in which he kept zebras. The zebras were kept in a stable, each in a separate stall & properly tied up by a halter. Pltf., having paid for admission to the grounds, found the door of the stable open, & went in. He stroked one of the zebras, when the animal kicked out, & pltf. fell into the next stall, where another zebra bit his hand:—**Held**: (1) deft. kept the zebras, which were dangerous animals, at his peril, subject to this, that the person who complained of injury must not have brought the injury on himself; (2) pltf. had done so by entering the stable & stroking the animal; (3) defts. were not liable.—**MARLOR v. BALL** (1900), 16 T. L. R. 239, C. A.

**Annotation**:—**Refd.** Norman v. G. W. Ry. Co., [1914] 2 K. B. 153.

**B. Domestic Animals known to be Vicious.****(a) In General.**

**245. Vicious animals in general—Duty to keep under control—Criminal liability for failure so to do.]—****R. v. HUGGINS**, No. 238, *ante*.

**246. Bull known to be vicious—Improperly secured.]—**In an action for an injury by a vicious bull, pltf. recovered, although it appeared that the bull was attracted by a cow, in a particular state, which pltf. was driving past the field in which the bull was, & that pltf. first struck the bull on the

an elephant attaches to the owner of the elephant, as well as to a person in whose possession the elephant happens to be when it commits such damage.—**VEDAPURATTI v. KAPPAN NAIR** (1912), 1 L. R. 35 Mad. 708.—**IND.**

**t. Raccoon.]—**A raccoon is an animal *feræ naturæ*, & a person who keeps one in a town is liable in damages for any injury inflicted by it on a neighbour upon escaping from captivity, although the animal has been kept in deft.'s house for a long time & was supposed to have been tame.—**ANDREW v. KILGOUR** (1910), 19 Man. L. R. 545; 13 W. L. R. 608.—**CAN.**

**PART III. SECT. 2, SUB-SECT. 2.—**  
**B (a).**

**246 i. Bull known to be vicious—Contributory negligence on part of person injured.]—**M., who had on his farm a dangerous bull, advertised a sale of stock, etc., to take place on his farm, & F., a policeman, who had been for some time stationed in the district & had often visited the farm, attended. On the day of the sale, a board usually fixed to one of the gates at the entrance





**Sect. 2.—Liabilities: Sub-sect. 2, B. (a), (b) & (c).]**

**251. ——— Railway station.]**—Pltf. was bitten by a stray dog at a railway station, while waiting for a train. It was proved that at 9 a.m. the dog flew at & tore the dress of another female on the platform & the co.'s servants then tried to remove it, that at 10.30 it attacked a cat in the signal-box near the station, & was then ejected by a porter, who saw no more of it, & reappeared at 10.40 on the platform, where it bit pltf.:—*Held*: no evidence to warrant a jury in finding that the co. had been guilty of any negligence in keeping the station reasonably safe for passengers.—*SMITH v. GREAT EASTERN RY. CO.* (1866), L. R. 2 C. P. 4; 36 L. J. C. P. 22; 15 L. T. 246; 15 W. R. 131.

*Annotation*:—*Consd.* North v. Wood (1914), 83 L. J. K. B. 587.

**252. ——— Warning to person injured—No proof of contributory negligence.]**—In an action for not sufficiently securing a fierce dog kept by deft., & by which pltf. was bitten, pltf. may recover, notwithstanding he had on a previous day been warned against going near the dog, if the jury think that the accident was not occasioned by pltf.'s own carelessness & want of caution.—*CURTIS v. MILLS* (1833), 5 C. & P. 489.

*Annotation*:—*Consd.* May v. Burdett (1846), 16 L. J. Q. B. 64.

**253. ——— Allowing same to be at large in kitchen.]**—*MANSFIELD v. BADDELEY*, No. 263, *post*.

**254. ——— Mischievous act of third party.]**—The owner of a dog, known by him to be savage, intrusted it to the care of a servant, who incited it to attack pltf., & thereupon the dog bit pltf., who brought an action against the owner in the cty. ct. for damages. The cty. ct. judge having nonsuited pltf.:—*Held*: (1) the question whether the servant was acting within scope of his employment ought to have been left to the jury; (2) a person keeping an animal *feræ naturæ*, or an animal *mansuetæ naturæ* which is known to him to be savage, is answerable in damages for any harm done by the animal, even though the immediate cause of the injury is the intervening voluntary act of a third person; (3) the action must go down for a new trial.—*BAKER v. SNELL*, [1908] 2 K. B. 825; 77 L. J. K. B. 1090; 99 L. T. 753; 24 T. L. R. 811; 52 Sol. Jo. 681; 21 Cox, C. C. 716, C. A.

*Annotations*:—*Refd.* Lowery v. Walker (1909), 78 L. J. K. B. 874; Clinton v. Lyons, [1912] 3 K. B. 198.

**255. Dog known to attack other dogs—Allowing same to be at large—Property of & under sole control of defendant's infant daughter.]**—Deft.'s daughter, aged seventeen, was the owner of a dog, for which she took out a licence in her own name, & the food for which she paid for out of her own earnings, deft. consenting to the dog living in his house. The dog, which had previously attacked other

dogs to the knowledge of deft. & his daughter whilst so kept, killed a valuable dog belonging to pltf. The cty. ct. judge found as a fact that the daughter had control of the dog:—*Held*: as the daughter was of a sufficient age to & did exercise control over the dog, deft. was not liable for the loss of pltf.'s dog.—*NORTH v. WOOD*, [1914] 1 K. B. 629; 83 L. J. K. B. 587; 110 L. T. 703; 30 T. L. R. 258.

**256. Horse known to be unruly—Breaking same in, in public place.]**—If a man has an unruly horse in his stable & leaves open the stable door whereby the horse goes forth & does mischief, an action lies against the master.

In an action on the case for that defts. in Lincoln's Inn Fields, a place which people frequented for their business, brought a coach with two ungovernable horses & negligently drove them to make them tractable & fit them for a coach, & the horses because of their ferocity, being not to be managed, ran upon pltf. & hurt & grievously wounded him, defts. were found guilty, but in arrest of judgment it was argued that no *sciens* had been laid of the horses being unruly, but *e contra* that the horses were ungovernable:—*Held*: it was defts.' fault to bring a wild horse into such a place.—*MICHELL (MICHAEL) v. ALLESTRY* (1676), 3 Keb. 650; 2 Lev. 172; 84 F. R. 932; *sub nom.* MITCHELL v. ALLESTREE, 1 Vent. 295.

*Annotations*:—*Distd.* Manzoni v. Douglas (1880), 6 Q. B. D. 145. *Refd.* Perkins v. Smith (1752), Say. 40; Scott v. Shepherd (1773), 2 Wm. Bl. 892; Piggot v. Eastern Counties Ry. Co. (1846), 3 C. B. 229. *Mentd.* Bush v. Steinman (1799), 1 Bos. & P. 404; *McManus v. Crickett* (1800), 1 East, 106; *Leame v. Bray* (1803), 3 East, 593; *Whitmore v. Waterhouse* (1830), 4 C. & P. 383; *Lyons v. Martin* (1838), 3 Nev. & P. K. B. 509; *Hammack v. White* (1862), 31 L. J. C. P. 129.

**257. Horse known to be vicious—Allowing same on common.]**—Prisoner turned a vicious horse upon a common on which he had a right of pasture. He knew that the horse had kicked & injured several persons & also that the public were in the habit of frequenting the common. A child, which had strayed a short distance from one of the paths which intersected the common, was kicked by the horse & killed:—*Held*: prisoner was properly convicted of causing the death of the child by his culpable negligence.—*R. v. DANT* (1865), Lo. & Ca. 567; 6 New Rep. 72; 34 L. J. M. C. 119; 12 L. T. 396; 29 J. P. 359; 11 Jur. N. S. 549; 13 W. R. 663; 10 Cox, C. C. 102, C. C. R.

*Annotation*:—*Distd.* Lowery v. Walker (1909), 79 L. J. K. B. 297, C. A.

**258. ——— Allowed to bite when in charge of groom.]**—Deft., a trainer, kept in his stables a horse, the property of a third party, who paid him on that account a weekly sum. Deft. knew the horse was accustomed to bite. While being taken from deft.'s stables to a railway station, in charge of one of deft.'s grooms, but by order of the owner,

**257 i. Horse known to be vicious—Duty of owner.]**—Deft.'s horse leaped over into a securely enclosed field of pltf. & seriously injured one of his horses. Deft. was aware of his horse's vicious propensities:—*Held*: deft. liable.—*LEYDEN v. CORAM* (1877), 3 V. L. R. 94.—AUS.

**257 ii. ———.]**—Pltf. in trying to protect his horse was bitten by deft.'s horse, which deft. had let loose as was his wont. The jury found that the horse was a vicious animal & bit pltf., but that deft. was not guilty of negligence:—*Held*: if the horse was a vicious animal & that fact was known to deft., deft. was liable, notwithstanding that he was not guilty of negligence.—*GANDA SINGH v. CHUNI LAL SHAHA* (1915), 19 C. W. N. 916.—IND.

**257 iii. ——— Allowing same on land**

**open to public.]**—The owner of a horse, which he knows to be vicious, is liable for injuries inflicted by it while upon the owner's land which is open to the public. The owner is also liable though he does not know the horse to be vicious, if he turn it loose to go on such open land, in so negligent a manner as to endanger the safety of persons passing across it.—*SOUTHALL v. JONES* (1879) 5 V. L. R. 402.—AUS.

**257 iv. ——— Omission to muzzle.]**—The owner of a vicious horse is responsible for injuries from a bite of the horse, which he should have caused to be muzzled.—*MATTE v. MELDRUM BROTHERS CO.* (1908), Q. R. 33 S. C. 396.—CAN.

**n. Ram known to be mischievous—Liability of persons other than owner.]**—A person who keeps about his premises, & to a certain extent under his control,

a domesticated ram which he knows to be mischievous is answerable for injuries done by it, even though he be not its owner.—*DAWSON v. WARREN* (1884), 2 N. Z. L. R. 255.—N.Z.

**o. Stallion.]**—It is not necessary to prove *scienter* in an action against a blacksmith for damages to a horse received from the kick of a stallion, while both animals were in his possession for the purpose of being shod, the act of the blacksmith in leading the horse within reach of the stallion's hind feet without taking precaution to avoid danger constituting negligence, it being common knowledge to persons accustomed to horses that stallions, although in a sense domestic animals, are dangerous.—*LAYZELL v. PROCTOR* (1914), 30 W. L. R. 121; 7 W. W. R. 916.—CAN.



it bit pltf.:—*Held*: deft. was liable, as he had control of the horse.—*WALKER v. HALL* (1876), 40 J. P. 456.

(b) *Where the Person injured is a Trespasser.*

**259. Bull—Known to be dangerous.**—Pltf. having been injured by a bull, known to deft. to be dangerous:—*Semble*: if at the time he had been going where he had no right to go, it would have been an answer to the action (*TINDAL, C.J.*).—*BLACKMAN v. SIMMONS* (1827), 3 C. & P. 138.

**260. — Natural propensity of—Trespasser wearing red.**—*Semble*: if a bull be in an enclosed field & a party wearing red enter it without permission, the owner of the bull would not be liable, notwithstanding evidence of *scienter* as to the bull's propensity to attack persons wearing red (*ALDERSON, B.*).—*HUDSON v. ROBERTS* (1851), 20 L. J. Ex. 299.

*Annotations*:—*Consd.* *Clinton v. Lyons*, [1912] 3 K. B. 198. *Refd.* *Cooke v. Waring* (1863), 2 H. & C. 332; *Cox v. Burbidge* (1863), 13 C. B. N. S. 430. *Mentd.* *Applebee v. Percy* (1874), L. R. 9 C. P. 647; *Hadwell v. Righton* (1907), 76 L. J. K. B. 891.

**261. Horse known to be vicious—Allowing same in field which public habitually crossed.**—Resp. owned a savage horse, which to his knowledge was dangerous to mankind. Without giving any warning, he put it into a field of which he was the occupier, but which, as he knew, the public were in the habit of crossing without leave on their way to a railway station. Applt. in crossing the field was attacked, bitten, & stamped on by the horse. The ct. judge found as a fact that resp. was guilty of negligence in putting a horse, which he knew to be habitually savage, in a field crossed by the public:—*Held*: (1) the effect of the judge's finding being that applt. was in the field without express leave but with the permission of resp., applt. was entitled to recover; (2) having acquiesced in the public crossing the ground, resp. was bound to take the ordinary precautions to prevent persons going into a dangerous place where he knew they were going.—*LOWERY v. WALKER*, [1911] A. C. 10; 80 L. J. K. B. 138; 103 L. T. 674; 27 T. L. R. 83; 55 Sol. Jo. 62, H. L.

*Annotations*:—*Consd.* *Grand Trunk Ry. Co. of Canada v. Barnett*, [1911] A. C. 361, P. C.; *Latham v. Johnson*, [1913] 1 K. B. 398, C. A. *Consd. & Distd.* *Pritchard v. Torkington* (1914), 7 B. W. C. C. 719, C. A. *Refd.* *Clinton v. Lyons*, [1912] 3 K. B. 198; *Norman v. G. W. Ry. Co.*, [1914] 2 K. B. 153; *Brackley v. Mid. Ry. Co.* (1916), 80 J. P. 369, C. A.; *Hayward v. Drury Lane Theatre & Moss' Empires*, [1917] 2 K. B. 899, C. A. *Mentd.* *Mowlem v. Dunne*, [1912] 2 K. B. 136, C. A.; *Tofts v. Pearl Life*

### PART III. SECT. 2, SUB-SECT. 2. B. (b).

**p. Dog—Stepping from road to avoid mud.**—In an action of damages for having been bitten by deft.'s dog, deft. pleaded trespass, & that the person bitten was on deft.'s land at the time:—*Held*: as she had only stepped out of the road & walked near deft.'s barn to escape from the mud, there was no trespass, the *animus* being wanting.—*DANDURAND v. PINSONNEAULT* (1851), 7 L. C. J. 131.—CAN.

**262 i. Dog kept in private yard—Warning by notice board—Injured party unable to read.**—Pltf., a carter, having delivered packages to deft., went into the latter's stable, to satisfy a call of nature, & was bitten by a vicious dog which deft. had shut up there. Deft., although he had not barred the door of his stable, had affixed there a warning of the danger from the dog, but pltf., who entered without permission, could not read:—*Held*: deft. not responsible.—*PRUDHOMME v. VINCENT* (1896), Q. R. 11 S. C. 27.—CAN.

**262 ii. — Special warning.**—Deft. kept a dog in a yard, closed on all sides, & to which the public was not admitted.

J.—VOL. II.

*Assco.* (1913), 110 L. T. 190; *Wilson, Sons v. Barry Ry. Co.* (1916), 116 L. T. 71, C. A.

**262. Dog kept in private yard—Warning by notice board.**—A party, who is bitten by a dog, in consequence of being himself in the owner's land on which he is not entitled to go, can maintain no action for the injury; nor if the injury arises from his own carelessness, with knowledge of the danger. But if he has no means of knowing the danger, & is not otherwise in fault, he may recover, although the owner has attempted to give notice: therefore, it is no answer to such an action that a printed notice was put up, if it appears that pltf. could not read.—*SARCH v. BLACKBURN* (1830), 4 C. & P. 297; *Mood. & M.* 505.

(c) *Injuries to Servants.*

**263. Ferocious dog—Risks of service.**—Pltf. was employed by deft. as a dressmaker. It was no part of her duty to go down into the kitchen, but on one occasion she went down there at the request of deft. to fetch something up. As she was leaving the kitchen a savage dog, which was generally tied up, rushed from under the table & bit her leg. Pltf. was aware that a dog of this kind was kept on the premises. The ct. judge nonsuited pltf. on the ground that as pltf. was a servant, & knew the disposition of the dog, no action was maintainable:—*Held*: (1) this was a case of a savage dog known to be vicious, & which had before bitten persons, being suffered to be at large; (2) the nonsuit was wrong, as the risk was not incidental to the service, & there was evidence to go to the jury of the liability of deft. for the injury sustained by pltf. through the former's negligence.—*MANSFIELD v. BADDELEY* (1876), 34 L. T. 696; 40 J. P. 646.

**264. Vicious horse—Horse as "plant"—Vice as "defect"—Employers Liability Act, 1880 (c. 42).**—In an action to recover compensation under the above Act, it appeared that pltf. was in the employment of deft., a wharfinger, & for the purposes of his business, the owner of carts & horses. It was pltf.'s duty to drive the carts & to load & unload the goods which were carried in them. Among the horses was one vicious & unfit to be driven even by a careful driver. Pltf. objected to drive it & told the stable foreman that it was unfit to be driven, to which he replied that pltf. must go on driving it, & if any accident happened, his employer would be responsible. Pltf. continued to drive the horse, & while sitting on his proper place in the cart was kicked by the animal, & his leg was broken:—*Held*: (1) the horse which injured pltf. was

Pltf., although specially warned by deft.'s manager that the place was forbidden to the public, nevertheless entered the yard without permission, there being no business to justify his going there, & was bitten by the dog which was chained up:—*Held*: the accident was due entirely to pltf.'s imprudence.—*MAINVILLE & HUTCHINS* (1887), 31 L. C. J. 59.—CAN.

### PART III. SECT. 2, SUB-SECT. 2.— B. (c).

**263 i. Ferocious dog—Risks of service.**—Pltf. was employed by deft. in his bakery, & after his duties were over, proceeded to leave deft.'s premises, & in doing so had to traverse deft.'s yard, in which was a dog at large, known to be ferocious & disposed to bite. The other workmen before leaving the bakery warned pltf. of the character of the dog, & that he had better not leave until he was chained up. Pltf. left the bakery & while traversing the yard was bitten by the dog:—*Held*: as pltf. was engaged in the business of his master & there was no provocation on his part of the dog, he was entitled to damages.—*AUPRIX v. LAFLEUR* (1880), 15 L. C. J. 251.—CAN.

**263 ii. — Contributory negligence on part of person bitten.**—A workman unnecessarily went within reach of a dog belonging to his employers, & known by them to be of a vicious disposition, which was chained to a kennel in the work yard. He was bitten by the dog.—*Held*: he was not entitled to damages, as the injury was due solely to his own negligence.—*DALY v. ARROL BROTHERS* (1886), 14 R. 154; 24 Sc. L. R. 150.—SCOT.

**264 i. Vicious horse—Disposition well known to servant.**—A servant in the course of his duties was kicked by a horse belonging to his master. The servant well knew from experience the animal's habits & disposition, & had taken the horse voluntarily without any constraint on the part of the master:—*Held*: master not liable.—*BROSSEAU v. BOULANGER* (1894), Q. R. 6 S. C. 75.—CAN.

**264 ii. — Horse as "plant"—Employers Liability Act, 1880 (c. 42).**—A stableman was ordered by his master to tie up a horse which had got loose in the stall. While doing so he was bitten by the horse & severely injured:—*Held*: a horse used by a carting con-



## Sect. 2.

2,

"plant" used in deft.'s business & the vice in it was a "defect" in the condition of such plant within s. 1 of the above Act; (2) upon the facts a jury might find deft. liable, for there was evidence of negligence on the part of his foreman & the circumstances did not conclusively show that the risk was voluntarily incurred by pltf.—*YARMOUTH v. FRANCE* (1887), 19 Q. B. D. 647; 57 L. J. Q. B. 7; 36 W. R. 281; 4 T. L. R. 1.

*Annotations*:—*Consd.* *Amos v. Duffy* (1890), 6 T. L. R. 339, C. A. *Distd.* (1) *London & Eastern Counties Loan & Discount Co. v. Creasey*, [1897] 1 Q. B. 768, C. A.; (1) *Re Squier (Creasey)* (1897), 41 Sol. Jo. 243. *Consd.* (1) *Thompson v. City Glass Bottle Co.*, [1901] 2 K. B. 483. *Reid.* *Osborne v. L. & N. W. Ry. Co.* (1888), 21 Q. B. D. 220; *Thruswell v. Handyside* (1888), 20 Q. B. D. 359; *Walsh v. Whiteley* (1888), 21 Q. B. D. 371; *Sanders v. Barker* (1890), 6 T. L. R. 324; *Smith v. Baker*, [1891] A. C. 325. *Mentd.* *Membery v. G. W. Ry. Co.* (1888), 4 T. L. R. 265; *Bound v. Lawrence* (1891), 60 L. J. M. C. 137; *Hunt v. G. N. Ry. Co.*, [1891] 1 Q. B. 601; *Corbett v. Pearce*, [1904] 2 K. B. 422; *Smith v. Associated Omnibus Co.* (1907), 96 L. T. 675.

(d) *Averment and Proof of Scienter.***265. What must be averred—Dog worrying sheep.]**

—Action on the case, for that deft. knowingly kept a certain dog accustomed to bite sheep. Assignment for error that the declaration was bad because it did not show that deft. "knowing the dog to be accustomed to bite sheep, knowingly kept it," for it might be that he knowingly kept the dog & yet knew not that he was used to worry sheep:—*Held*: the declaration was bad, & a rule nisi given to reverse judgment.—*KINNION v. DAVIES* (1837), Cro. Car. 487; 79 E. R. 1021.

*Annotation*:—*Consd.* *Cropper v. Mathews* (1658), 2 Sid. 127.

**266.** —.]—An averment in a declaration that deft.'s dogs were accustomed to worry & bite sheep & lambs is not supported by proof that the dogs were of a ferocious & mischievous disposition,

tractor in his business was "plant" within s. 1 of the above Act, but, the horse being vicious to pursuer's knowledge, his action for damages was irrelevant.—*FRASER v. HOOD* (1887), 15 R. 178; 25 Sc. L. R. 164.—*SCOT*.

**264 iii.** — *Infant employed casually.* —Pursuer averred that his son, aged twelve, was occasionally employed by defender & was ordered by him to help in yoking horses to a threshing machine driven by horse power, & to yoke a certain horse to a beam, for which purpose it was necessary to stoop between the horse's heels & the beam; that in performing this operation the boy was killed by a kick from the horse; that defender knew the horse was addicted to kicking; that defender in ordering deceased to yoke the horse was negligent, & deceased was killed owing to defender's negligence:—*Held*: pursuer's averment of negligence though in general terms was relevant, & issue approved.—*CLELLAND v. ROBB*, [1911] S. C. 253; 48 Sc. L. R. 205; (1910) 2 S. L. T. 407.—*SCOT*.

**PART III. SECT. 2, SUB-SECT. 2.—**  
B. (d).

**265 i. What must be averred—Dog worrying sheep.]**—A declaration in trespass alleged that deft. wrongfully & injuriously kept a dog, well knowing that the dog was accustomed to hunt, chase, bite, worry, & kill sheep & lambs, which dog did hunt, chase, bite, & worry divers of pltf.'s sheep & lambs, by means whereof divers of them died:—*Held*: the declaration was good, although it did not in direct terms aver that the dog was vicious.

A declaration averred that deft. was possessed of a dog which was very fierce, wild, & savage, & that he had the care,

government, management, & direction of the dog, yet so badly, negligently, & carelessly managed & conducted himself in that behalf, & so badly, etc., managed the dog, & took so little care of it, that for want of due care & conduct, & through his mere default & negligence, & for no other cause whatsoever, the dog did hunt, bite, & worry divers sheep & lambs of pltf., by means whereof divers of them died:—*Held*: a dog not being an animal *feræ naturæ*, the declaration was bad for want of a *scienter*.—*KELLY v. WADE* (1848), 12 L. L. R. 424.—*IR*.

**265 ii.** —.]—*Semble*: in an action under 26 & 27 Vict. c. 100, s. 1, it is necessary for pursuer to aver fault on the part of the owner of the dog.—*MURRAY v. BROWN & PORTEOUS* (1881), 19 Sc. L. R. 253.—*SCOT*.

**269 i.** — *Dog biting—Dog Act, 1884, s. 20.*—In an action at common law in the Supreme Ct. to recover damages in respect of injuries inflicted by a dog, it is still necessary to allege *scienter*, the above sect. applying only to proceedings before justices for a penalty, or to recover compensation for the actual damage done.—*LANE v. CASEY* (1886), 12 V. L. R. 380.—*AUS*.

**q.** — *Vicious dog—Disturbance of right of way.*—In an action for disturbance of a right of way, the plaintiff stated that "deft. wrongfully & injuriously kept & continued to keep a certain vicious & dangerous dog upon his lands & close to the way, so that pltf. & his family, etc., could not safely or securely, or without dread or apprehension, pass or repass along such way, whereby pltf. was greatly disturbed in the use of same":—*Held*: bad, for not averring that deft. knew that the dog

& that they had frequently attacked men. *Semble*: an averment that the dogs were of a ferocious & mischievous disposition would be sufficient in an action brought for an injury to pltf.'s sheep, without alleging specifically that they were accustomed to bite & worry sheep.—*HARTLEY v. HARRIMAN* (1818), 1 B. & Ald. 620; 106 E. R. 228.

*Annotations*:—*Consd.* *Gething v. Morgan* (1857), Saund. & M. 192; *Osborne v. Chocqueel*, [1896] 2 Q. B. 109.

**267.** —.]—In case for injury done to pltf.'s sheep by a ferocious dog kept by deft., he knowing it to be of ferocious & mischievous disposition, "not guilty," puts in issue the ferocity of the dog & the *scienter*, those matters forming the substance of the charge. The allegation of duty in deft. to use due & reasonable care & precaution in keeping the animal is an immaterial allegation.—*CARD v. CASE* (1848), 5 C. B. 622; 17 L. J. C. P. 124; 10 L. T. O. S. 416; 12 Jur. 247; 136 E. R. 1022.

*Annotation*:—*Mentd.* *Kenrick v. Horner* (1857), 26 L. J. Q. B. 214.

**268.** —.]—A foxhound belonging to F. went into O.'s field, & worried O.'s sheep. O. sued F. for the damage, but did not aver that the dog was of vicious propensities which were known to F. & that F. negligently allowed it to be at large:—*Held*: this allegation was essential to the right to recover.

Blame can only attach to the owner of a dog when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits.—*FLEEMING v. ORR* (1855), 2 Macq. 14; 25 L. T. O. S. 73; 19 J. P. 277, H. L.

**269.** — *Dog biting men—Meaning of "knowingly."*—Declaration that deft. did knowingly retain & keep a bitch accustomed to bite men:—*Held*: "knowingly" ought to be referred to deft.'s knowledge of the dog's habit of biting, & not merely

was of a vicious & mischievous nature, or that he kept it upon the way or in such circumstances as to cause reasonable danger or apprehension in the user of the way.—*GRAINGER v. FINLAY* (1858), 7 I. C. L. R. 417; 3 Ir. Jur. N. S. 175.—*IR*.

**r.** — *Vicious horse.*—A summons & plaint averred that deft. was possessed of a vicious horse knowing it to be vicious, & knowing that by reason of its viciousness it could not be ridden along a public highway without great danger, & that deft. negligently, by his servant, rode the horse, whereby the horse kicked:—*Held*: bad for duplicity, as there were therein contained two causes of action—namely, the riding of a vicious horse knowing it to be vicious, & negligence.—*REDMOND v. CLARKE* (1870), 4 C. L. 316; 4 I. L. T. Jo. 475.

**s.** — *At large.*—Declaration that deft. was possessed of a wild, vicious, & mischievous horse, & it was unsafe & improper to permit the horse to go or run at large on any public highway, yet deft. wrongfully & negligently permitted & suffered the horse, so being vicious, etc., to go at large on the public highway, where pltf. then lawfully was, whereby the horse ran at & jumped upon pltf., & broke his leg:—*Held*: bad, for knowledge of the animal's nature was not averred, & the allowing it to be at large on the highway was not a breach of any duty due from deft. to pltf.—*CHASE v. McDONALD* (1875), 25 O. P. 129.—*CAN*.

**t.** — *Cow injuring horse.*—In an action of trespass for an injury to pltf.'s horse by deft.'s cow:—*Held*: the declaration was bad for not alleging negligence or knowledge of vice.—

to the retaining & keeping it, otherwise the word would be surplusage.—*CROPPER v. MATTHEWS* (1659), 2 Sid. 127; 82 E. R. 1293.

**270. — Horse biting mare.]**—A declaration for keeping deft.'s horse so negligently that it broke pltf.'s close & bit his mares must allege a *scienter*.—*SCETCHET v. ELTHAM* (1681), 1 Freem. K. B. 534; 89 E. R. 400.

**271. — Bull running at men.]**—Pltf. declared that deft. kept a bull that used to run at men, but did not say *sciens* or *scienter*, etc.:—*Held*: ill after verdict, for the action would not lie unless the owner knew of this quality, & it could not be intended this was proved at the trial, for pltf. need not prove more than was in his declaration, & judgment for pltf. arrested.—*BUXENTINE v. SHARP* (1696), 3 Salk. 12; 91 E. R. 661; *sub nom.* *BAYNTINE v. SHARP*, 1 Lut. 90.

*Annotations*:—*Distd.* *Jenkins v. Turner* (1695), 1 Ld. Raym. 109. *Appld.* *R. v. Alderton* (1756), Say. 280; *Jackson v. Pesked* (1813), 1 M. & S. 234. *Consd.* *May v. Burdett* (1846), 10 Jur. 692. *Mentd.* *Piggot v. Eastern Counties Ry. Co.* (1846), 3 C. B. 229; *Smith v. Cooke* (1875), 24 W. R. 206.

**272. — Boar biting mare.]**—If a man keeps an animal after it has within his knowledge done any mischief, if it afterwards does any other mischief though of a different kind, an action will lie against him. In such action pltf. ought to state the particular mischief the animal had done before. But if he merely states that deft. kept a boar (or other animal, not by nature used to bite any other animal) which he knew was accustomed to bite animals, no objection can be taken after verdict.—*JENKINS v. TURNER* (1696), 1 Ld. Raym. 109; 2 Salk. 662; 91 E. R. 969.

*Annotations*:—*Consd.* *Jackson v. Pesked* (1813), 1 M. & S. 234. *Appld.* *Hartley v. Harriman* (1817) Holt, N. P. 617.

**273. — Ram butting men.]**—A declaration in case stated that deft. wrongfully & injuriously kept a ram, well knowing that it was prone & accustomed to attack, butt, & injure mankind, & that the ram, while deft. so kept same, attacked, butted, & threw down, & thereby hurt pltf. On motion in arrest of judgment:—*Held*: the declaration was sufficient, without averring that deft. negligently kept the ram.

*ELLIOTT v. DOAK* (1903), 36 N. B. R. 328.—CAN.

**w. What must be proved—Dog biting—Dog Act, 1884, No. 809, s. 20.]**—In an action at common law in the Supreme Ct. to recover damages in respect of injuries inflicted by a dog, it is still necessary to prove *scienter*, the above sect. applying only to proceedings before justices for a penalty, or to recover compensation for the actual damage done.—*LANE v. CASEY* (1886), 12 V. L. R. 380.—AUS.

**x. — Dog biting child.]**—In an action for damages caused to an infant by the bite of a dog:—*Held*: it was not incumbent on pltf. to prove the dog was a vicious dog.—*HADKS v. EDMUNDSON* (1901), 21 C. L. T. 441.—CAN.

**y. —.]**—A dog tied up to a wall of an auction mart bit a child who was passing:—*Held*: to render the owner liable it was not necessary to prove that the dog ever bit any person before, but it was enough to show that the owner had some reason to believe the animal might do mischief in the circumstances in which it was placed.—*RENWICK v. VON ROTBERG* (1875), 2 R. 855.—SCOT.

**z. —.]**—Action to recover damages for the death of a child, bitten by a dog belonging to defender. Pursuer averred that the child died from shock in consequence of the injuries inflicted by the dog, & that the dog was

known to defender to be vicious & to have bitten & attacked other persons on previous occasions, two instances being specified. The sheriff having allowed pursuer to amend his record by adding the averment that the child's death was caused by "shock or cerebral meningitis," & found that it was known to defender that the dog had bitten children on two previous occasions, & awarded damages:—*Held*: (1) the sheriff was right in allowing the amendment of the record; (2) it was not necessary for pursuer to prove that the dog was a vicious animal.—*M'DONALD v. SMELLIE* (1903), 11 S. L. T. 140; 2 F. 955; 40 Sc. L. R. 702.—SCOT.

**a. — Dog worrying sheep.]**—*Semble*: in an action under 26 & 27 Vict. c. 100, s. 1, it is necessary for pursuer to prove fault on the part of the owner of the dog.—*MURRAY v. BROWN & PORTEOUS* (1881), 19 Sc. L. R. 253.—SCOT.

**b. — Dog injuring cyclist.]**—A dog belonging to defender, or for which he was responsible, having come suddenly from behind defender's wagonette, which it was accompanying, passed in front of pursuer, who was cycling past the wagonette, causing her to fall, receiving injury. Pursuer failed to prove that the dog was vicious, but there was evidence that it was frolicsome, being about ten months old, though it had not thereby ever before caused any trouble:—*Held*: there being no *scientia* of evil propensity defender

There is no distinction between the case of an animal which breaks through the tameness of its nature & is fierce & known by the owner to be so, & one which is *feræ naturæ* (ALDERSON, B.).—*JACKSON v. SMITHSON* (1846), 15 M. & W. 563; 4 Dow. & L. 45; 15 L. J. Ex. 311; 7 L. T. O. S. 231; 153 E. R. 973.

*Annotations*:—*Folld.* *Card v. Case* (1848), 5 C. B. 622. *Consd.* *Smith v. Cook* (1875), 1 Q. B. D. 79. *Appld.* *Bake v. Snell*, [1908] 2 K. B. 825, C. A. *Refd.* *Cox v. Burbidge* (1863), 13 C. B. N. S. 430.

**274. What must be proved—Dog doing mischief.]**—An action will not lie against a man for mischief done by his dog, unless he knew that it had done mischief before or was of a mischievous nature, though the dog was a mongrel mastiff & permitted to go at large without a muzzle.—*MASON v. KEELING* (1699), 1 Ld. Raym. 606; 12 Mod. Rep. 332; 91 E. R. 1305.

*Annotations*:—*Consd.* *May v. Burdett* (1846), 9 Q. B. 101; *Cox v. Burbidge* (1863), 13 C. B. N. S. 430. *Folld.* *Sanders v. Teape & Swan* (1884), 51 L. T. 263. *Refd.* *Read v. Edward* (1864), 17 C. B. N. S. 245. *Mentd.* *Filburn v. People's Palace & Aquarium Co.* (1890), 25 Q. B. D. 258, C. A.

**275. — Horse straying on road kicking child.]**—A person lawfully upon the highway, being kicked by a horse which had strayed there, cannot maintain an action against the owner of the horse, there being no evidence of any negligence on his part. *Semble*: negligence must be affirmatively proved in such a case, the ordinary rule being that the owner of an animal *mansuetæ naturæ* is not liable for mischief done by it, unless it be shown that the animal had a vicious propensity to commit the mischief complained of & that the owner was aware of it.—*COX v. BURBIDGE* (1863), 13 C. B. N. S. 430; 1 New Rep. 238; 32 L. J. C. P. 89; 9 Jur. N. S. 970; 11 W. R. 435; 143 E. R. 171.

*Annotations*:—*Distd.* *Lee v. Riley* (1865), 18 C. B. N. S. 722. *Consd.* *Child v. Hearn* (1874), L. R. 9 Exch. 176. *Apprvd.* *Smith v. Cook* (1875), 33 L. T. 722. *Appld.* *Hadwell v. Righton*, [1907] 2 K. B. 345. *Distd.* *Higgins v. Searle* (1908), 72 J. P. 449. *Appld.* *Higgins v. Searle* (1909), 100 L. T. 280, C. A.; *Jones v. Lee* (1911), 106 L. T. 123; *Ellis v. Banyard* (1911), 106 L. T. 51, C. A. *Folld.* *Bradley v. Wallaces & Thompson McKay*, [1913] 3 K. B. 629, C. A.; *Heath's Garage v. Hodges*, [1916] 1 K. B. 206. *Consd.* *Heath's Garage v. Hodges*, [1916] 2 K. B. 370, C. A.; *Theyer*

was not liable.—*MILLIGAN v. HENDERSON* (1915), 52 Sc. L. R. 813.—SCOT.

**c. What defendant may prove—Dog biting—Dog Act, 1884, No. 809, s. 20.]**—In proceedings before justices under the above sect., to recover compensation for actual damage sustained by being attacked by a dog, evidence tendered by deft. is inadmissible to show that the dog was of a quiet disposition, or that he was ignorant of the mischievous propensity of the animal. Proceedings under the above Act to recover a penalty must be taken by an information, proceedings to recover compensation for actual damage by complaint.—*R. v. HARE, Ex p. SCHNEIDER* (1888), 14 V. L. R. 89.—AUS.

**d. — Mischievous Animals Act (C. S. 1888, c. 5), s. 30.]**—In an action for damages for injuries caused by the bite of a dog, the above sect. does not preclude deft. from showing the peaceful character of the dog, or his ignorance of its vicious disposition, but only raises a rebuttable presumption against him.—*NEVILL v. LAING* (1892), 2 B. C. R. 100.—CAN.

**e. Effect of plea of payment.]**—Payment by defts., & acceptance by pltf. from them, of the sum awarded by a Dublin police magistrate to be paid by defts.' servant, as amends for the injury occasioned by the servant's neglect in permitting a dangerous bull of defts., which was under his charge, to gore pltf., is a good plea to an action therefor.—*M'NULTY v. HOPE* (1870), 1 R. 4 C. L. 377; 4 I. L. T. Jo. 739.—IR.



**Sect. 2.—Liabilities: Sub-sect. 2, B. (d), (e), (f) &**

*v. Purnell*, [1918] 332 K. B. 333. **Redf.** *Cooke v. Waring* (1863), 32 L. J. Ex. 262; *Holgate v. Bleazard*, [1917] 1 K. B. 443; *Turner v. Coates*, [1917] 1 K. B. 670. **Mentd.** *Read v. Edwards* (1864), 17 C. B. N. S. 245; *Fletcher v. Rylands* (1866), L. R. 1 Exch. 265; *Giblin v. McMullen* (1868), L. R. 2 P. C. 317, C. A.; *Ponting v. Noakes*, [1894] 2 Q. B. 281, D. C.; *White v. Steadman*, [1913] 3 K. B. 340; *Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.* (1914), 83 L. J. K. B. 1352, C. A.; *Miles v. Forest Rock Granite Co.* (1918), 34 T. L. R. 500, C. A.

**(e) Who may be Liable as Owner.**

See Nos. 250, 251, 255, *ante*.

**(f) Where Notice to or Knowledge of Parties other than Owner sufficient.**

See Nos. 291—299, *post*.

**(g) Evidence of Scienter.**

**276. Boar killing mare—Previous injury to a child.]—**Deft. knowingly kept a boar accustomed to bite & gash animals, & it struck & killed pltf.'s mare. The evidence was that the boar had previously bitten a child of which deft. had notice. It was moved in arrest of judgment that the word "animals" was too general & that the usage to bite must be the usage to bite same species as that of pltf.'s animal:—**Held:** judgment must be for pltf.—*JENKINS v. TURNER* (1896), 1 Ld. Raym. 109; 2 Salk. 662; 91 E. R. 969.

**Annotations:—****Consd.** *Jackson v. Pesked* (1813), 1 M. & S. 234. **Appld.** *Hartley v. Harriman* (1817), Holt, N. P. 617.

**277. Bull attacking man—Admission by owner that red annoyed bull.]—**In an action against the owner of a bull for an injury inflicted upon pltf. by the animal whilst it was being driven along a public highway, it appeared that pltf., who was passing along the road, wore a red handkerchief which irritated the animal & caused the attack upon him, & that after the accident deft. had said that the red handkerchief caused the injury as he knew that a bull would run at anything red:—**Held:** this was evidence to go to the jury in support of the averment in the declaration that deft. had a knowledge of the mischievous propensities of the animal.—

**PART III. SECT 2, SUB-SECT. 2.—B. (g).**

**i. Bull killing mare—Vicious disposition known to owner.]—**In an action to recover damages for injuries inflicted upon a mare owned by pltf. by deft.'s bull, the evidence to connect the bull with the injuries inflicted upon the mare was that he was running at large in the neighbourhood, & was of a vicious disposition, & shortly after the mare was injured had blood on one of his horns. There was also evidence that deft. had prior knowledge of the character of the bull:—**Held:** pltf. entitled to judgment.—*ARNOLD v. DIGNON* (1887), 20 N. S. R. 303; 8 C. L. T. 448.—CAN.

**277 i. Bull attacking man—Admissions & offer of compensation.]—**Count in case, for injuries done by deft.'s bull, alleging deft.'s knowledge of the bull's vicious propensity:—**Held:** the fact that deft. had once admitted that his bull had done the injury, & offered pltf. \$10, was properly submitted to the jury as evidence of such knowledge, with a caution as to its weight.—*MASON v. MORGAN* (1865), 24 U. C. R. 328.—CAN.

**277 ii. — Statement by owner's agent as to bull's liveliness.]—**Action to recover damages for bodily injuries caused by a bullock. It was proved that deft.'s agent said that "the bullock looked lively coming down, but he thought that he was safe when he was past Stitt's":—**Held:** this was sufficient evidence that deft. knew the mischievous propensities of the animal.—*SUISTED v. CARAHAR*, 4 J. R. N. S. 96.—N.Z.

**g. Sow killing cow—Previous attacks no fowls.]—**In an action for damages

for the death of a cow, through its having been attacked & torn by deft.'s sow, evidence was given that the sow had some time previously attacked & killed certain cocks & hens to the knowledge of deft.:—**Held:** sufficient evidence of *scienter*.—*QUIN v. QUIN* (1905), 39 I. L. T. 163.—IR.

**h. Dog attacking mare—Statement by owner & offer to settle.]—**Trespass for injury done to pltf.'s mare by deft.'s dog. It was proved that the dog rushed into the street, & seized & lacerated the mare, that deft. afterwards said "he was sorry for what had happened, that the dog had slipped out of his yard," & that deft. went to pltf.'s residence to settle the matter, & before declaration filed, lodged £10 in ct., in discharge of the action:—**Held:** these observations, the conduct of deft., & the transaction itself, were evidence to go to the jury both of the ferocity of the dog & of deft.'s knowledge of it.—*SAYERS v.* (1848), 12 I. L. R. 434.—IR.

**278 i. Dog biting man—Complaints made to person harbouring dog.]—**In an action for injuries committed by a dog owned or harboured by V., the defence was that V. did not own the dog, & had no knowledge that he was vicious. The dog was formerly owned by a man in V.'s employ, who lived & kept the dog at V.'s house. When this man went away from the place he left the dog behind with V.'s son, to be kept until sent for, & afterwards the dog lived at the house, going every day to V.'s place of business with him, or his son, who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one & his son at the

*HUDSON v. ROBERTS* (1851), 6 Exch. 697; 20 L. J. Ex. 299; 17 L. T. O. S. 158; 155 E. R. 724.

**Annotations:—****Consd.** *Cox v. Burbidge* (1863), 13 C. B. N. S. 430; *Clinton v. Lyons*, [1912] 3 K. B. 198. **Redf.** *Cooke v. Waring* (1863), 2 H. & C. 332; *Applebee v. Percy* (1874), L. R. 9 C. P. 647; *Hadwell v. Righton* (1907), 76 L. J. K. B. 891.

**278. Dog biting man—Previous biting on single occasion.]—**To maintain an action for biting by deft.'s dog, it must be proved that he knew his dog to be used to bite, but one instance is sufficient.—*ANON.* (1701), 12 Mod. Rep. 555; 88 E. R. 1515.

**279. — Common report of dog having been bitten by mad dog—Owner keeping dog tied up.]—**In an action for keeping a mischievous dog, by which pltf.'s child was bitten, common report of the dog having been bitten before by a mad dog is evidence to go to the jury that deft. knew the dog was mischievous & ought to be confined, particularly if deft., by tying the dog up though insufficiently, showed some knowledge or suspicion of the fact (*LORD KENYON, C.J.*).—*JONES v. PERRY* (1796), 2 Esp. 482.

**Annotations:—****Redf.** *Thomas v. Morgan* (1835), 5 Tyr. 1085. **Mentd.** *Jackson v. Watson* (1909), 100 L. T. 799, C. A.

**280. — Fierce & savage disposition—Owner keeping dog tied up—Offer of compensation.]—**In an action on the case for keeping a dog which bit pltf., it is not sufficient to show that the dog was of a fierce & savage disposition, & usually tied up by deft., & that deft. promised to make a pecuniary satisfaction to pltf. after the latter had been bitten by the dog.—*BECK v. DYSON* (1815), 4 Camp. 198.

**281. — Owner warning man to keep away from dog.]—**In an action for negligently keeping a dog, proof that deft. had warned a person to beware of the dog lest he should be bitten is evidence to go to a jury of the allegation that the dog was accustomed to bite mankind.—*JUDGE v. COX* (1816), 1 Stark. 285.

**Annotations:—****Redf.** *Hartley v. Harriman* (1818), 1 B. & Ald. 620; *Worth v. Gilling* (1866), L. R. 2 C. P. 1.

**282. — Owner keeping dog tied up—No evidence that dog had previously bitten any one.]—**In

other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial:—**Held:** there was ample evidence for the jury that V. harboured the dog with knowledge of its vicious propensities.—*VAUGHAN v. WOOD* (1890), 18 S. C. R. 703.—CAN.

**278 ii. — Knowledge of savage disposition.]—**It is not necessary in order to sustain an action against a person for keeping a ferocious dog, to show that the animal has actually bitten another person before biting pltf. It is sufficient to show that the dog has, to the knowledge of the owner, evinced a savage disposition.—*DORRINGTON v. BOWDEN* (1914), 14 E. L. R. 154.—CAN.

**278 iii. — Previous biting on single occasion.]—**Deft.'s dog was left in a yard to watch the premises, & in charge of the family, during which time V. was bitten by the dog, in presence of deft.'s family. In an action for subsequent biting of pltf. by same dog, the biting of V. was proved, & also the fact that V. had told deft. of it. Deft. offered to prove the account his family had given him of the way in which the dog came to bite V., but the evidence was rejected:—**Held:** the evidence was properly rejected.—*WILMOT v. VANWART* (1877), 1 P. & B. 456.—CAN.

**278 iv. — — —.]—**A dog while in the custody of two persons, not the owners, bit a man on the public road. Both the owners & custodiers were aware that the dog had previously bitten another man, to whom the owner had given *solatium*:—**Held:** the custodiers were liable.—*COWAN v. DALZIEL* (1877), 5 R. 241; 15 Sc. L. R. 151.—SCOT.



an action for keeping a ferocious & mischievous dog, deft. knowing him to be so, it was proved that deft. had a dog usually kept chained up in his yard. Upon pltf. going there, the dog came out with a chain hanging from its neck & bit pltf. There was no evidence that the dog had bitten any one before :—*Held* : pltf. must be nonsuited, as deft. never knew the dog bite any one before.—*HOGAN v. SHARPE* (1837), 7 C. & P. 755.

**283. — Biting on three previous occasions—Owner's knowledge of one occasion only.**—A dog had, in the course of five years, bitten three people at different times, but the owner knew only of the last ; he still permitted the dog to be at large, & a child who went up to it & put its arm round the dog's neck was bitten by it :—*Held* : the owner was liable. To entail liability on the owner, it is not necessary that the dog should be generally prone to bite.—*CHARLWOOD v. GREIG* (1851), 3 Car. & Kir. 46 ; 18 L. T. O. S. 186.

**284. — Habit of jumping on & seizing men without biting—Production of dog in court.**—In an action for knowingly keeping a fierce & mischievous dog, which has bitten or wounded pltf., it is necessary to prove that he has injured pltf. & is used to injure people, & a mere habit of bounding upon & seizing persons, without injury to them, though causing annoyance & trivial damage to clothing, will not sustain the action. In such action the dog may be brought into ct. & shown to the jury to assist them in judging of his temper & disposition.—*LINE v. TAYLOR* (1862), 3 F. & F. 731.

**285. — Savage disposition evinced by attempt to bite.**—It is not necessary, in order to sustain an action against a person for negligently keeping a ferocious dog, to show that the animal had actually bitten another person before it bit pltf. ; it is enough to show that it has, to the knowledge of its owner, evinced a savage disposition by attempting to bite.—*WORTH v. GILLING* (1866), L. R. 2 C. P. 1. *Annotation* :—*Refd.* *Osborne v. Chocqueel*, [1896] 2 Q. B. 109.

**286. — Attempt to bite boy who fed dog.**—A large dog belonging to deft. was kept chained up in a yard, & had flown at the boy who fed it & who afterwards was obliged to take precaution in approaching it. Ten weeks later the dog was one night locked up in the yard, & the next morning, on the gate of the yard being opened, it rushed out, having broken its chain, & escaped, & as he went along bit deceased, who died of hydrophobia. In an action by the widow to recover compensation for the loss of deceased :—*Held* : pltf. entitled to damages.—*WYLDE v. GREGSON* (1872), 36 J. P. Jo. 52.

**287. — Same man bitten again within half an hour.**—Pltf. was employed at a public-house. Deft. came to the house with a dog which flew at

pltf. & bit him slightly. Deft. left the house with his dog ; pltf. followed him within half an hour, & the dog, which was then at large & unmuzzled, again flew at pltf. & bit him more severely. The ct. judge held that there was no evidence of *scienter*, as the bites were so close together as to be virtually on the same occasion, & he nonsuited pltf. :—*Held* : the judge was wrong, the action being for the second bite, & half an hour having elapsed between the two bites, it was the duty of deft. in the meantime to have properly secured the dog.—*PARSONS v. KING* (1891), 8 T. L. R. 114.

**288. — Previous biting of goat.**—In order to support an action for damages for the bite of a dog it is necessary to show that the dog had to deft.'s knowledge bitten or attempted to bite some person before it bit pltf. ; it is not sufficient to show that it had to deft.'s knowledge attacked & bitten a goat.—*OSBORNE (OSBORN) v. CHOCQUEEL*, [1896] 2 Q. B. 109 ; 65 L. J. Q. B. 534 ; 74 L. T. 786 ; 44 W. R. 575 ; 12 T. L. R. 437 ; 40 Sol. Jo. 532.

*Annotation* :—*Refd.* *Clinton v. Lyons*, [1912] 3 K. B. 198.

**289. — Statement by owner that dog disliked strangers.**—In an action for damages caused by the bite of deft.'s dog, the only evidence as to deft.'s knowledge that the dog was of a ferocious disposition was that, when pltf. had been to deft.'s house on a previous occasion, the dog had been taken from the room by a servant, & that upon deft. being asked for the reason of its removal he told pltf. that the dog did not like strangers. There was evidence on behalf of deft. that the dog was of a peaceable disposition & had never previously bitten any one :—*Held* : deft. entitled to judgment.—*PULLIPS v. PATTERSON* (1907), *Times*, Jan. 16.

**290. — Intermittent ferocity against men.**—In order to render the owner of a dog liable for a bite by the dog it is not necessary to show that the dog has to the knowledge of its owner actually bitten or attempted to bite anybody. It is sufficient to prove that the dog is to the knowledge of its master ferocious in regard to human beings. Such ferocity may be of an intermittent character, as, for instance, when a bitch has pups.—*BARNES v. LUCILLE, LTD.* (1907), 96 L. T. 680 ; 23 T. L. R. 393.

*Annotation* :—*Refd.* *Clinton v. Lyons*, [1912] 3 K. B. 198.

**291. — Knowledge of owner's servant.**—S., on going to a steamboat co.'s premises for his luggage, found the door locked & then went to a gate at the back near to some stables, when a dog sprang upon him & bit him. It was proved that some servants of the co. had previously heard of the dog attacking other persons twice, but it did not appear what the duties of those servants were nor whether they were there to manage the place or the dog on behalf of the co. :—*Held* : in the circumstances, pltf. was pro-

**283 i. — Biting on three previous occasions.**—In an affidavit sworn for the purpose of opposing a motion to remit an action for damages for injuries caused by a bite of a dog, pltf. deposed that he was informed, & believed, that at the trial he would be able to produce evidence to the effect that, on three occasions prior to the date of the occurrence complained of, deft.'s dog had, to the knowledge of deft., attacked other individuals, but that pltf. objected to stating the names of his witnesses lest deft. should tamper with them :—*Held* : pltf.'s affidavit was insufficient to satisfy the ct. that he had a cause of action, especially as the action had been remitted on the ground that pltf. had not alleged *scienter*, & that the affidavit had been sworn with the object of curing this defect.—*DALY v. HAGARTY* (1905), 40 I. L. T. 26.—*IR.*

**1. — Previous attempt to bite & habit of jumping on men.**—In an action

to recover damages from the owner of a dog, which had bitten pltf., the jury found that the dog had attempted to bite B., & deft. had knowledge of this before pltf. was bitten, that the dog had never, before the injury to pltf., evinced a savage disposition, to the knowledge of deft., that the dog was in the habit of jumping upon or against people, & in such acts scratching them, & deft. knew this before pltf. was injured, & that the dog did not do it playfully :—*Held* : deft. had kept the dog after he had knowledge that he was apt to do injury to mankind, & the verdict for pltf. should stand.—*PRICE v. WRIGHT* (1899), 35 N. B. R. 26.—*CAN.*

**m. — Biting on subsequent occasions.**—In an action of damages for injury caused by the bites of a dog :—*Held* : pursuer entitled to lead evidence of attacks made by the dog on other persons subsequent to the raising of the action, in order to show that the dog

was of a vicious disposition.—*GORDON v. MACKENZIE*, [1913] S. C. 109 ; 50 Sc. L. R. 64 ; (1912) 2 S. L. T. 334.—*SCOT.*

**291 i. — Knowledge of owner's servant.**—The *scienter* of a servant of the mischievous propensities of a dog must be that of a servant specially in charge of the dog.—*KENIERY v. LYNCH* (1897) 31 I. L. T. 404.—*IR.*

**291 ii. —**—Deft.'s dogs, which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation, were taken by such servant to a public recreation-ground. Pltf., a child of seven years of age, became frightened at the dogs & cried, whereupon the dogs attacked & bit him severely :—*Held* : deft. liable.—*PRAKASH KUMAR MUKERJI v. HARVEY* (1909), I. L. R. 36 Calc. 1021.—*IND.*

**.2.—Liabilities: Sub-sect. 2, B. (g): sub-sect. 3.]**

perly nonsuited, there being no evidence of *scienter* in any person whose knowledge was the knowledge of defts.—**STYLES (STILES) v. CARDIFF STEAM NAVIGATION CO.** (1864), 4 New Rep. 483; 33 L. J. Q. B. 310; 10 L. T. 844; 28 J. P. 646; 10 Jur. N. S. 1199, 12 W. R. 1080.

**Annotations:—****Consd.** Baldwin v. Casella (1872), L. R. 7 Exch. 325; Applebee v. Percy (1874), L. R. 9 C. P. 647.

**292.** ———.]—Deft. owned a mischievous dog, which was kept at his stables under the care & control of his coachman, who knew the dog to be mischievous. Deft. supposed the dog to be quite harmless. Pltf. having been bitten by the dog, & having brought an action for the injuries:—**Held:** there was evidence of the *scienter*, since the knowledge of such servant was enough to make deft. liable.—**BALDWIN v. CASELLA** (1872), L. R. 7 Exch. 325; 41 L. J. Ex. 167; 26 L. T. 707; 21 W. R. 16.

**Annotations:—****Expld.** Applebee v. Percy (1874), L. R. 9 C. P. 647. **Distd.** Cleverton v. Uffernel (1887), 3 T. L. R. 509. **Refd.** Colget v. Norris (1886), 2 T. L. R. 414; Clinton v. Lyons, [1912] 3 K. B. 198.

**293.** ———.]—In an action for damages for the bite of a dog, the jury found (1) that the dog was dangerous to mankind, (2) that deft., a publican, did not know of it, (3) that R., deft.'s brother-in-law employed as his potman, did know it. The answer of the jury to (2) was directed by the judge:—**Held:** (1) the judge misdirected the jury in directing them as to how they should answer; (2) the real question for decision was whether R. had charge of the dog in such a way as to make his knowledge notice to deft.—**CLEVERTON v. UFFERNEL** (1887), 3 T. L. R. 509.

**294.** ——— **Complaint to owner's servant—Servant managing business.]**—In an action against a publican for knowingly keeping a ferocious dog, a witness deposed that, having been attacked by the dog at a previous time, he complained to the barmen, who were serving deft.'s customers. Another witness also proved that, having been attacked on a different occasion by the dog, he likewise complained to the barmen. At the trial pltf. was nonsuited, on the ground that the foregoing circumstances did not amount to knowledge in deft. of the dog's ferocity:—**Held:** as complaints had been made to persons who, in deft.'s absence, were managing his business, there was *prima facie* evidence of knowledge in deft. of the dog's ferocity, & the nonsuit must be set aside.—**APPLEBEE v. PERCY** (1874), L. R. 9 C. P. 647; 43 L. J. C. P. 365; 30 L. T. 785; 38 J. P. 567; 22 W. R. 704.

**Annotation:—****Refd.** Colget v. Norris (1886), 2 T. L. R. 414.

**295.** ——— **Domestic servant.]**—In an action for damages for the bite of a dog, it was proved that previous complaints of the dog's ferocity had been made to a domestic servant of deft., but there was no evidence that these complaints had been communicated to deft. or his wife, who only admitted that they had heard of the dog fighting with other dogs. In an action in the ct. ct. the judge found as a fact that the servant had not communicated the complaints to deft., but that the knowledge of the servant was that of the master, & he

gave judgment for pltf.:—**Held:** (1) there was no evidence of *scienter* in deft.; (2) the judgment must be set aside.—**COLGET v. NORRIS** (1886), 2 T. L. R. 471, C. A.

**296.** ——— **Servant not controlling dog nor communicating complaint.]**—Evidence of attempts by a dog to bite men, where it is not shown that the servants who saw the occurrences & to whom complaints were made had control over the dog, or that they told their master, would be insufficient. But where complaint has been made to the owner, the case should be left to the jury (**COLLINS, J.**).—**DUNCAN v. CARLETON** (1895), 11 T. L. R. 524.

**297.** ——— **Complaint to owner's wife.]**—In an action for an injury inflicted by the bite of a dog, in order to establish the *scienter* it was proved that the wife of deft. occasionally attended to his business, which was carried on upon the premises where he kept the dog, & that a person had gone there, & made a formal complaint to the wife, for the purpose of its being communicated to her husband, of the dog having bitten such person's nephew:—**Held:** there was evidence of the husband's knowledge of the dog's propensity to bite.—**GLADMAN v. JOHNSON** (1867), 36 L. J. C. P. 153; 15 L. T. 476; 15 W. R. 313.

**Annotation:—****Expld.** Applebee v. Percy (1874), L. R. 9 C. P. 647.

**298.** ———.]—A complaint to the owner's wife is evidence to go to a jury (**COLLINS, J.**).—**DUNCAN v. CARLETON** (1895), 11 T. L. R. 524.

**299.** ——— **Notice to owner's husband—Person bitten after husband's death.]**—Although, in an action for injuries resulting from the bite of a dog, notice to the wife of the savage nature of the dog will be sufficient evidence of the *scienter* to fix the husband, yet the converse does not hold, & a notice to the husband will not (taken alone) be sufficient proof of the *scienter* to render the wife liable after her husband's death.—**MILLER v. KIMBRAY** (1867), 16 L. T. 360.

**300.** **Dog jumping on man—Offer of compensation.]**—Deft.'s dog, a large Newfoundland, in a moment of playfulness, jumped over a small wall into a garden in which pltf. was digging a hole, falling heavily on pltf. & injuring his back:—**Held:** (1) it was not proof of *scienter* that deft. had offered pltf. a couple of sovereigns as compensation; (2) no action lay.—**SANDERS v. TEAPE & SWAN** (1884), 51 L. T. 263; 48 J. P. 757.

**Annotation:—****Refd.** Hadwell v. Righton (1907), 76 L. J. K. B. 891.

**301.** **Dog biting horse—Previous biting of sheep.]**—If a man knowingly keeps a dog which is accustomed to bite sheep, etc., & it afterwards bites a horse, this is actionable (**POWELL, J.**).—**JENKINS v. TURNER** (1696), 1 Ld. Raym. 109; 2 Salk. 662; 91 E. R. 969.

**Annotations:—****Consd.** Jackson v. Pesked (1813), 1 M. & S. 234. **Apprvd.** Hartley v. Harriman (1817), Holt, N. P. 617.

**302.** **Dog worrying sheep—Ferocious & mischievous disposition.]**—**HARTLEY v. HARRIMAN**, No. 266, *ante*.

**303.** ——— **Biting child four years previously.]**—In ordinary cases one previous act of ferocity on the part of a dog is sufficient to place upon its

**302 i. Dog worrying sheep—Chasing sheep five years previously—Admissions.]**—In an action to recover damages for injuries done by deft.'s dog in biting & worrying pltf.'s sheep, the only evidence to prove *scienter* was of admissions made by deft. some years previously, & that on one occasion four or five years previously deft.'s dog had been seen with another dog chasing or following sheep:—**Held:** there was not sufficient evidence of knowledge on the part of deft.—**MCKENZIE v. BLACKMORE**

(1886), 7 R. & G. 203; 7 C. L. T. 270.—**CAN.**

**o. Wild cattle goring pedestrian—Knowledge of owner's servants.]**—Deft.'s servants were driving a mob of cattle along the highway, when one of the mob rushed & gored pltf. The cattle were sold as "wild or bush cattle." One of deft.'s servants, who tarred these animals in the yards & delivered them to the drover, stated that they were "not more than usually fierce" & that "the majority of them would rush man-

kind." The drovers stated that the cattle "would rush any one if they had a chance." One of the drovers, whilst driving them on the road, told a policeman to warn the passers-by, as they had a wild bullock in their charge, & that "it & the others would rush people if they came too close":—**Held:** this constituted knowledge on the part of deft. of the mischievous propensities of the cattle, & she was liable.—**SCOTT v. EDINGTON** (1888), 14 V. L. R. 41.—**AUS.**



owner the necessity of being on his guard, & if he afterwards permit the animal to run about with a ticket of leave, as it were, he must be responsible for any further damage it may do.

Where in an action against M., for the value of sheep destroyed by M.'s dog, there was evidence that four years previously it had attacked & bitten a child, & that it was known to M.:—*Held*: M. was liable for the damage caused by the destruction of the sheep.—*GETTING (GETTRING) v. MORGAN* (1857), Saund. & M. 192; 29 L. T. O. S. 106; 21 J. P. 696; 5 W. R. 536.

**304. Horse running away—Horse not reasonably fit to be driven.]**—Deft. owned a cabhorse, which he had had for some years, & there was no evidence that it was otherwise than quiet. The horse suddenly ran away & knocked down & injured pltf., who was walking in the street. The jury found that the accident was not caused by the driver's negligence, but that the horse was not reasonably fit to be driven in the public streets. The ct. judge gave judgment for pltf.:—*Held*: (1) there was no evidence that deft. knew that the horse was dangerous or unfit to be driven, or that there was any negligence on his part in not knowing; (2) the judgment must be set aside.—*VILLIERS v. AVEY* (1887), 3 T. L. R. 812, D. C.

**305. Horse kicking servant—Knowledge of foreman—Not communicated.]**—*YARMOUTH v. FRANCE*, No. 264, ante.

**306. Interrogatories to ascertain persons bitten.]**—In an action brought by pltf. to recover damages in respect of personal injuries occasioned to him through being bitten by a dog belonging to deft., which was alleged by pltf. to have been, to the knowledge of deft., accustomed to bite mankind, an order was made that, if pltf. intended to give evidence of any specific occasion or occasions on which the dog had bitten persons, he should give particulars thereof, & pltf. accordingly gave particulars stating that a person was bitten by deft.'s dog in a certain street in or about June or July, 1908, & another person was bitten by the dog in another street in or about July or Aug., 1908. Deft. thereupon applied for leave to administer interrogatories asking the names of the persons alleged in pltf.'s particulars to have been so bitten:—*Held*: the interrogatories were inadmissible, on the ground that they were put merely with the object of ascertaining the names of witnesses by whom pltf. proposed to establish his case.—*KNAPP v. HARVEY*, [1911] 2 K. B. 725; 80 L. J. K. B. 1228; 105 L. T. 473, C. A.

#### SUB-SECT. 3.—POSITION OF DOG OWNERS UNDER DOGS ACTS & ORDERS.

**307. Dogs Act, 1865 (c. 60), s. 1—"Cattle" included horses.]**—The word "cattle" as used in the above sect. included horses.—*WRIGHT v. PEARSON* (1869), L. R. 4 Q. B. 582; 10 B. & S. 723; 38 L. J. Q. B. 312; 20 L. T. 849; 33 J. P. 534; 17 W. R. 1099.

**308. — Knowledge of owner's infant son.]**—Pltf.'s coachman was driving a horse when deft.'s dog without provocation frightened it. The horse ran away & was injured. Deft.'s son, a boy aged eleven, was with the dog at the time & knew it was

mischievous, but deft. had not that knowledge:—*Held*: deft. was liable for the injury to the horse.—*ELLIOTT v. LONGDEN* (1901), 17 T. L. R. 648.

**309. Dogs Act, 1865, s. 2—Innkeeper as "owner."]**—An innkeeper is, by virtue of the above sect., deemed to be the owner of a dog living in his hotel & is liable for injuries to cattle caused by it, notwithstanding the dog was at the time of the injuries complained of under the control of a person staying at the hotel, to whose care it had been committed by the real owner.—*GARDNER v. HART* (1896), 44 W. R. 527; 12 T. L. R. 347; 40 Sol. Jo. 460, D. C.

**310. Dogs Act, 1871 (c. 56), s. 2—Powers of justices—To order destruction without giving owner option of keeping dog under proper control.]**—Under the above sect. justices may order a dangerous dog to be destroyed without giving the owner the option of keeping it under proper control.—*PICKERING v. MARSH* (1874), 43 L. J. M. C. 143; 38 J. P. 678; 22 W. R. 798.

*Annotations*:—*Folld. R. v. Dymock, R. v. Moger* (1901), 49 W. R. 618. *Consd. Lockett v. Withey* (1908), 99 L. T. 838.

**311. —.]—Appets. obtained rules nisi for a certiorari to quash two orders that had been made by justices under the above sect., the first order being for the destruction of two dogs & the second imposing a fine for disobedience of the first order. The grounds of the application for certiorari were (1) justices could, under the sect., only make an alternative order either to destroy, or to keep under proper control, the dogs in question; (2) the first order was bad in form, since there was no adjudication that the dogs were not under proper control; (3) the second order was bad, as it wrongly recited the first order:—*Held*: (1) an order for the destruction of a dangerous dog need not contain an adjudication by justices that the dog was not under proper control, it being sufficient to follow the words of the sect.; (2) by the sect. justices need not give the owner of the dog the option of keeping the animal under proper control before ordering its destruction.—*R. v. DYMCK, R. v. MOGER* (1901), 49 W. R. 618; 17 T. L. R. 593; 45 Sol. Jo. 597.**

**312. — — — Scilenter unnecessary.]**—Resp. was summoned for not keeping a dangerous dog under control. The complaint was dismissed by justices on the ground that there was no evidence that resp. knew that the dog was dangerous:—*Held*: they were wrong, as knowledge that the dog was dangerous was not required by the Act.—*PARKER v. WALSH* (1885), 1 T. L. R. 583.

**313. — — — Res judicata.]**—Applt. was charged with non-compliance on Aug. 21, 1889, & ten days thereafter, with an order made by justices under the above sect. requiring him to keep a dangerous dog under proper control. No evidence was given to support the charge except as to Aug. 21, & the charge was dismissed on the ground that the offence had not been made out. Subsequently applt. was charged with not keeping the dog under proper control on Aug. 21 simply; this charge was proved & applt. convicted:—*Held*: as applt. was put in peril & might have been convicted on the first hearing, the matter was *res judicata* on the second hearing, & the maxim "*Nemo bis vexari debet*" applied.—*RYLEY v. BROWN* (1890), 54 J. P. 486; 62 L. T. 458; 17 Cox, C. C. 79.

**314. — — — "Dangerous" animal—Evidence.]**—In order that a dog may be dealt with as

#### PART III. SECT. 2, SUB-SECT. 3.

**314 i. Dogs Act, 1871 (c. 56), s. 2—Powers of justices — "Dangerous" animal—Evidence.]**—The above sect. is not limited in its operation to dogs which are dangerous to human beings, but extends to dogs dangerous to sheep.

—*HENDERSON v. M'KENZIE* (1876), 3 R. 623; 13 Sc. L. R. 393.—*SCOT*.

**p. — — — To order dog to be kept under control subject to penalty.]**—A person was charged with "an offence" under the above Act, as being the owner of a dog which was dangerous & not

kept under proper control, & an order was craved directing him to keep it under proper control. The magistrate convicted the owner of the offence charged, & pronounced the order craved, "under a penalty not exceeding 20s. for every day during which he fails to comply with this order":—*Held*:



**Sect. 2.—Liabilities: Sub-sect. 3.]**

"dangerous" under the above sect. it is not necessary to prove that it is dangerous to man. Evidence that the dog has attacked & worried sheep is admissible to show that it is "dangerous" within the sect.—**WILLIAMS v. RICHARDS**, [1907] 2 K. B. 88; 76 L. J. K. B. 589; 96 L. T. 644; 71 J. P. 222; 23 T. L. R. 423.

**315. ——— To specify manner of control—Refusal of justices to state case—Mandamus or certiorari.]**—Justices made an order under the above sect. that a certain dog, being dangerous, "should be kept under proper control & led by a leash by day & chained up by night." On motion to make absolute a rule for a mandamus to the justices to state a case as to whether they had power to specify the manner of control, the ct., considering that the point could have been more conveniently raised by *certiorari*, discharged the rule.—**R. v. OWEN**, *Ex p. SCOVELL* (1907), 72 J. P. 60; 52 Sol. Jo. 132.

**316. ——— To order destruction of dog removed from jurisdiction.]**—Justices have jurisdiction under the above sect. to make an order that a dog is to be destroyed, where such dog has been moved from within their jurisdiction before the date of the information or complaint, & where there has been no *bonâ fide* disposal of the dog by its owner.

Applt. was summoned under the above sect. for not keeping a dangerous dog under proper control on Mar. 20. On that day the dog bit a child, & it had previously bitten other persons within the jurisdiction of the ct. After Mar. 20, but before the date of the information, the dog was removed to a place outside the jurisdiction of the justices, but they found as a fact that applt. was the owner of the dog at the date of the offence, & that there had been no *bonâ fide* disposal of the dog. They convicted applt.:—*Held*: the conviction was right. *Qu.*: whether the justices had power to make an order, if the dog were *bonâ fide* got rid of.

The words "any cts." in the sect. mean any ct. within a reasonable distance (**LORD ALVERSTONE**, C.J.).

Evidence that a dog is dangerous is not confined to evidence as to its behaviour within the jurisdiction. If the owner of the dog being within the jurisdiction of the justices fails to keep it under proper control, they may make an order even though the dog is out of their jurisdiction (**WALTON**, J.).—

**LOCKETT v. WITHEY** (1908), 99 L. T. 838; 72 J. P. 492; 25 T. L. R. 16; 21 Cox, C. C. 748.

**317. Dogs Act, 1871 (c. 56), s. 8—Control—Evidence.]**—Justices made an order that all dogs should be kept under the control of some person or persons. The chief constable gave notice of this order, & that all dogs should be kept under the control of some person, & not allowed to be at large. A dog was found following W.'s children, & it had been seen about W.'s premises a fortnight before, though W. proved he had ordered it to be sent away some months previously. The justices held that W. unlawfully suffered the dog to be at large:—*Held*: there being some evidence to justify the conviction, the ct. could not interfere.—**WREN v. POCOCK** (1876), 34 L. T. 697; 40 J. P. 646.

**318. ———.]**—Whether a dog is under the control of any person, so as to be exempt from a muzzling order under the above Act, is a question of fact, not one of law.—**R. v. HUNTINGDON JJ.** (1879), 4 Q. B. D. 522; 43 J. P. 767.

*Annotation*:—**Mentd.** **R. v. Handsley** (1881), 8 Q. B. D. 383.

**319. ———.]**—Appct. was summoned for allowing a dog to be in a thoroughfare & not under control in contravention of an order made under the above sect. The dog was at the time neither muzzled nor led, but applt. contended that it was nevertheless under his control. The magistrate having convicted:—*Held*: in the absence of positive evidence to the contrary, the fact that a dog had neither been muzzled nor led was sufficient to prove that it had not been under proper control; (2) the conviction was right.—*Re APPLICATION FOR MANDAMUS*, *Ex p. HAY* (1886), 3 T. L. R. 24.

**320. ——— Interest of justices—Notice of order.]**—Three justices, who were members of a town council of a borough, & as such had taken an active part in the making of an order under the above Act, sat to hear a complaint of non-observance of the order:—*Held*: (1) they had no such interest in the subject-matter as to oust their jurisdiction; (2) in the absence of any special provision for the mode of publication of the order, it was enough to show that it had been posted up in five or six places within the borough.—**R. v. HUNTINGDON JJ.** (1879), 4 Q. B. D. 522; 43 J. P. 767.

*Annotation*:—**Appld.** **R. v. Handsley** (1881), 8 Q. B. D. 383.

**321. Muzzling order—Insufficient muzzle—Discretion of justices.]**—By a muzzling order of a local

the conviction must be quashed, as the procedure for obtaining an order was civil & not criminal, & no offence could be committed until the order had been disobeyed.—**WHITE v. MAIN** (1897), 24 R. 90; 35 Sc. L. R. 10; 5 S. L. T. 121.—**SCOT**.

**q. Dogs Act, 1906 (c. 32), s. 1—“Injury.”]**—Pltf. was driving home two foals along the public road past deft.'s farm, when a young dog belonging to deft. rushed out of deft.'s house & barked at the foals, which broke away from pltf.'s brother, & were not recovered till the next day. Both foals died from injuries received that night:—*Held*: this was not an "injury" within the above sect. *Semble*: the above Act does not exclude the defence of contributory negligence.—**CAMPBELL v. WILKINSON** (1909), 43 I. L. T. 237.—**IR**.

**321 i. Muzzling order—Unmuzzled dog on public road.]**—On the hearing of a summons brought against F. under Summary Jurisdiction (Ireland) Act, 1851 (c. 92), s. 10 (7), it appeared that F. had allowed a dog, not a dangerous dog, to be at large on the public road, unmuzzled & without a log of wood fastened to the dog's neck. The magistrate dismissed the summons:—*Held*: the magistrate was right in

his decision, on the grounds (1) the above sub-sect. did not apply to the case of a dog on the public road (**CHERRY** (C.J. & **MOLONY**, J.); (2) it applied to dangerous dogs only (**MADDEN**, J.).—**DEVANEY v. FIELD**, [1915] 2 I. R. 180.—**IR**.

**r. Dog with rabies—Police shooting.]**—Policemen, who shoot a dog which the municipal veterinary inspector declares is suffering from rabies, are not liable.—**OLIFFE v. RUTTLE** (1897), 31 I. L. T. Jo. 614.—**IR**.

**s. Dog Act (39 Vict. No. 6), s. 9—Liability of persons other than owner.]**—In an action under the above sect. it was proved that two dogs, which had entered pltf.'s land & killed his sheep, had been seen tied up on deft.'s land & that they followed deft. & his wife. Deft. proved that the dogs had been lent by E. to B. for hunting near deft.'s land; that, after the break-up of the hunting party, the dogs were left with B. who remained to fulfil a contract with deft. to scrub his land:—*Held*: the keeper of a dog was liable to be sued in damages for injuries caused by it, whether kept for his own use or for that of another.—**STRACHAN v. MCLEOD** (1884) 5 N. S. W. L. R. 191.—**AUS**.

**t. Dog Act, 1890 (No. 1084), s. 20—Authority to lay information.]**—In a proceeding under the above sect. to recover a penalty, it was shown that the informant, the person attacked by the dog, had no interest in the penalty, & was not an officer authorised to prosecute by the municipality in which the alleged offence occurred:—*Held*: the information should have been struck out as being without jurisdiction.—**LOFT v. WADE** (No. 2) (1898), 24 V. L. R. 216.—**AUS**.

**w. ——— “Owner” —“Actual damage.”]**—Where a dog attacks a horse on which a person is riding, such attack is an attack on the rider, for which he can recover damages under the above sect.

The word "owner" in the sect. includes a bailee.

The words "actual damage" in the sect. include compensation for personal injury, necessary expenses incurred by reason of the injury, & loss of wages, but not a *solatium* for pain & suffering.—**McKINNON v. DWYER**, [1905] V. L. R.

**x. Dog Act, 1903 (No. 6 of 1903), s. 29—Police shooting wrong dog.]**—A police constable, accompanied by other constables & civilians, in the course of a periodical "raid" against aborigines' dogs carried out by the

## PART III.—RIGHTS AND LIABILITIES OF OWNERS OF ANIMALS.

authority, no dog was allowed to be in any public place unless muzzled with a strong wire muzzle of a kind specified in the order. Two dogs belonging to R. were in a street & were at the time wearing such muzzles, but they nevertheless bit three persons. Upon the hearing of a summons for infringing the order, the facts having been stated to the magistrate, he dismissed the information on the ground that the dogs had been so muzzled as to comply with the order, & in the exercise of his discretion he declined to hear the evidence of complainant. On an application for a rule to the magistrate to show cause why he should not hear & determine the information, the ct. granted a rule upon the ground that, although the magistrate had a discretion, there was evidence that he had exercised it improperly.—*Ex p. FITZGERALD* (1897), 41 Sol. Jo. 188.

**322. Order for control—Stray foxhound puppy.]**—The proviso to the Dogs Ord., 1906, art. 1, which allows local authorities to make regulations as to the wearing of collars by dogs, that "this regulation shall not apply to any pack of hounds," applies to a foxhound puppy registered, but not entered as a

member of a pack of hounds, & branded in the ear with the letter of the hunt & the number of the litter. Such puppy therefore need not wear a collar on a highway.—*BURTON v. ATKINSON* (1908), 98 L. T. 748; 72 J. P. 198; 24 T. L. R. 498; 21 Cox, C. C. 575, D. C.

*Annotation:—Distd. Rasdall v. Coleman* (1909), 100 L. T. 934.

**323. ———.]**—A regulation made by a local authority in exercise of the powers vested in them under Diseases of Animals Acts, 1894 to 1903 & Dogs Act, 1906 (c. 32), provided that "Every dog shall at the times between one hour after sunset & one hour before sunrise be kept by the owner thereof under control by being (1) confined in a kennel or other inclosure from which it cannot escape, or (2) secured to some premises by a collar & chain. Provided that the foregoing regulation shall not apply to any pack of hounds or any dog under the control of the owner or some other person." A foxhound was found at 12.45 a.m. straying without being under the control of the owner or some other person. Applt. was the person for the time being in charge

police authorities, shot several dogs in the streets of a town, including two dogs belonging to applt., one of which had, & the other had not, been duly registered. The only evidence which could have suggested to the constable that the dogs were the property of aboriginals was that he had gone to certain premises in a street in the town, & found two aboriginal women camped there, who, when he asked them as to the ownership of seven dogs there, instead of replying commenced to hunt the dogs away from the camp. Applt. having proceeded against the constable by complaint upon a charge framed under Criminal Code, 1902, s. 438, of having wilfully & unlawfully killed the two dogs:—*Held*: the shooting of the dogs was unlawful, & the constable ought to have been convicted.—*PERCY v. PENNEFATHER* (1914), 16 W. A. L. R. 49.—AUS.

**y. Injuries to Sheep Act, 1863 (27 Vict., No. 12), s. 1—Jurisdiction.]**—Under the above sect. the local ct. has jurisdiction to entertain a claim for damages not exceeding £10 for injuries done to sheep by a dog.—*TORRY v. HART* (1915), 11 T. L. R. 6.—AUS.

**z. Police Offences Act, 1915 (No. 2708), s. 17 (9)—"Permitting" dog to worry.]**—Evidence that deft. had a dog, which he knew was in the habit of worrying poultry, that he let the dog loose, & that it did, without his knowledge, worry a turkey, is not proof of his "permitting" the dog to worry the turkey within the above sub-sect. A turkey is an "animal" within the sub-sect.—*TENNANT v. HARRIS* (1916), V. L. R. 557.—AUS.

**a. Sheep Protection Acts—Recovery of damages under—Procedure.]**—The right of action given by R. S. O., 1887 (c. 214), s. 15, to the owner of sheep killed by dogs, is to be prosecuted with the usual procedure of the appropriate forum. If an action be properly brought in the ct. ct., it may be tried before a jury, & where it is so tried, they, & not the judge, should apportion the damages if an apportionment be required.—*FOX v. WILLIAMSON* (1893), 20 A. R. 610.—CAN.

**b. ——— Scienter.]**—The owner of sheep killed or injured by a dog can, under R. S. O., 1887 (c. 214), s. 15, recover the damage occasioned thereby without proving that the dog had a propensity to kill or injure sheep; & the Act applies to a case where the dog has been set upon the sheep.—*R. v. PERRIN* (1888), 16 O. R. 446.—CAN.

**c. ———.]**—In an action, under Consolidated Statutes (c. 111), against the owner of a dog for killing a sheep, it is not necessary to allege a scienter.—*SMITH v. BUCK* (1890), 29 N. B. R. 268.—CAN.

**d. ——— Jurisdiction of justices.]**—Under Sheep Protection Act, R. S. O., 1897 (c. 271), a justice of the peace for A. county ordered deft.'s two dogs, which had injured two sheep, to be destroyed:—*Held*: the offence under s. 11 was the having in possession a dog which, wherever the act was done, had worried, injured, or destroyed sheep, & the offence was committed at B. town, where deft. lived, & the magistrate had no jurisdiction, there being a police magistrate for the town, & it not appearing that the convicting magistrate was acting for or at the request of such police magistrate.

Upon the same information the same magistrate made an order, under s. 15 of the above Act, for payment by deft. to the owner of the sheep of the value of the sheep & costs:—*Held*: the magistrate had no power to award damages for the injury to the sheep, without a separate complaint.—*R. v. DUERING* (1901), 21 C. L. T. 588; 2 O. L. R. 593.—CAN.

**e. Shooting dogs at large—Power to authorise bye-law—4 Will 4, c. 23, s. 21.]**—*Held*: the corporation of the city of Toronto had power under the above sect. to make bye-laws, by which dogs found running at large within the limits & liberties of the city, after proclamation of such bye-laws, might be shot.—*MCKENZIE v. CAMPBELL* (1845), 1 U. C. R. 241.—CAN.

**f. ——— Wanton act.]**—Deft. shot pltf.'s dog while at large. He saw the owner of the dog within call, & the dog was doing no injury, & deft. did not apprehend that he would:—*Held*: R. S. N. S., 1900 (c. 61), s. 2, as amended by 1908 (c. 63), exonerated deft., but as his act was one of wanton cruelty, costs were refused deft.—*FRASER v. SINCLAIR* (1900), 8 E. L. R. 3.—CAN.

**g. ——— is "at large."]**—Action to recover damages against deft. for shooting pltf.'s dog. The defence was that the dog was at large without its owner or other person in charge, & was not licensed or collared as the law directed. The jury having found a verdict for pltf., the ct., although of opinion that the preponderance of evidence was in favour of deft., refused to overrule the decision of the jury within whose province the determination of matters of fact lay.—*GRAHAM v. PYNNE* (1873), 5 Nfld. L. R. 515.—NFLD.

**h. ———.]**—A dog, though on its master's door step, is "at large" within Consolidated Statutes (c. 113), & is liable to be shot.—*WOODS v. SWEENEY* (1878), 6 Nfld. L. R. 160.—NFLD.

**i. ———.]**—A dog running home alone on the highway, at the bidding of his master's wife, whom he is following, but without a metallic ticket fastened on his neck, as required by 34 Vict. c. 21 (Man), is not at large & is not liable to be shot.—*ALLAN v. MCKAY*, temp. Wood, 111; Man. Digest, 345.—CAN.

**m. ———.]**—*SPENCE v. ST. CATHERINES CITY*, 23 C. L. J. 167.—CAN.

**n. ———.]**—Pltf.'s dog was killed on deft.'s premises, unaccompanied by its owner, but the evidence conflicted as to whether it was killed before or after sundown, or whether it was "found" a half-mile from the premises of its owner. Defts. relied on R. S. O., 1897 (c. 271), s. 9 (c), permitting the killing of any dog found "straying between sunrise & sundown on any farm whereon any sheep & lambs are kept," & on a bye-law of the township permitting the killing of any dog found running at large at a greater distance than one-half mile from the premises of its owner unaccompanied by such owner or a resident ratepayer, as defences to the action:—*Held*: deft. liable.—*MCKNAIR v. COLLINS* (1912), 22 O. W. R. 891; 3 O. W. N. 1639; 27 O. L. R. 44; 6 D. L. R. 510.—CAN.

**o. Injuries by Dogs Act, 1865, s. 5—Destroying dog worrying sheep.]**—*Held*: the above sect. (see, since, Dog Registration Act, 1880, ss. 14–19), did not extend to the case of a dog captured chasing sheep, locked up for four hours & then shot.—*WEBBER v. FINNIMORE*, O. B. & F. 150.—N.Z.

**p. Dog Registration Act, 1880, s. 13—Destroying dog worrying sheep.]**—Under s. 17 of the above Act the right to destroy a dog which has been worrying sheep ceases when the dog desists from such worrying.

A person having the right to depasture sheep at so much per head on the land of another is not the agent of such other person within the meaning of s. 13.—*CRAW v. PALMER* (1888), 6 N. Z. L. R. 408.—N.Z.

**q. ——— Destroying unregistered dog.]**—An owner of land, who finds an apparently unregistered dog on his land, may take possession of such dog & destroy it at once.

Leading the dog before shooting it across a public road intersecting the farm in which the dog was found does not take away the owner's right to destroy.—*WRIGHT v. SHARPE* (1901), 20 N. Z. L. R. 629.—N.Z.



**Sect. 2.—Liabilities: Sub-sects. 3 & 4.]**

of such foxhound, which was registered as one of a pack of hounds of a hunt. He had "walked" it, & it was wearing a collar with the name of the hunt thereon, & in the right ear the letter of the hunt & the number of the litter was marked:—*Held*: applt. was rightly convicted for a breach of the regulation, as the proviso did not apply to the foxhound in question.—*RASDALL v. COLEMAN* (1909), 100 L. T. 934; 73 J. P. 377; 25 T. L. R. 638.

**324. Remoteness of damage.]**—In an action to recover damages for injuries caused by deft.'s dog, which had bitten pltf.'s mare, causing the mare to kick & injure pltf.'s carriage & harness, the mare also being thrown down & injured, & pltf. also being injured & losing employment:—*Held*: notwithstanding there was no evidence that deft. knew the dog was savage, pltf. was entitled to recover damages, but only in respect of items of injury to the mare.—*COWELL v. MUMFORD* (1886), 3 T. L. R. 1.

**SUB-SECT. 4.—LIABILITY FOR NUISANCE.**

**325. Conies—Damage to adjoining crops.]**—An action for a nuisance will not lie against a man who has an adjoining warren, for damage done by conies.

Pltf. was seized of certain lands in fee & deft. was seised of other lands adjoining. Deft. made two coney burrows in his lands adjoining & put conies in them, which increased to a great number & went into pltf.'s land & destroyed his corn:—*Held*: (1) conies were *feræ naturæ*; (2) the action for nuisance would not lie.—*BOWLSTON (BOULSTON) v. HARDY* (1597), Moore, K. B. 453; Cro. Eliz. 547; 78 E. R. 794; *sub nom.* *BOULSTON'S CASE*, 5 Co. Rep. 104b.

*Annotations*:—**Consd.** Northumberland's Case (1617), Poph. 141. **Dbtd.** Dewell v. Sanders (1619), Cro. Jac. 490. **Consd.** Hannam v. Mockett (1824), 2 B. & C. 934. **Refd.** Pelling v. Langden (1601), Owen, 114; Blades v. Higgs (1863), 32 L. J. C. P. 182. **Mentd.** Ashby v. White (1703), 2 Ld. Raym. 938; Morris v. Dimes (1831), 1 Ad. & El. 654; Pannell v. Mill (1846), 3 C. B. 625.

*See, further*, GAME.

**326. Cockpit—Unlawful gaming—Penalties.]**—Deft. being convicted of keeping a common cockpit six days, the ct. conceived it an unlawful game & took their measures by 33 Hen. 8, c. 9, of 40s. a day, though the indictment were at common law, & he was fined £12.—*R. v. HOWEL* (1676), 3 Keb. 465, 510; 84 E. R. 826, 849.

**327. ——— Common law nuisance.]**—The keeping of a cockpit is indictable as a nuisance at common law; & cock-fighting for lucre in a common gaming-house is an unlawful game within

33 Hen. 8, c. 9, s. 11.—*R. v. MEDLOR* (1679), 2 Show. 36; 89 E. R. 777.

*Annotation*:—**Refd.** Godman v. Morley (1741), 7 Mod. Rep. 438, 439.

**328. Swine—Keeping—Alternative penalties by statute & common law.]**—Deft. was indicted for keeping hogs in a back street in a town *contra formam statuti*. It was moved to quash the indictment on the ground there was a particular statutory penalty for this offence, viz., forfeiture of the swine to the use of the poor of the parish where they were kept:—*Held*: (1) where a new penalty was appointed by Act of Parliament for a matter that was an offence at common law, there one might either take that remedy which was given by the Act of Parliament, or proceed by way of indictment as before, & the keeping of swine in the city was a nuisance at common law; (2) where the stat. made the offence, there one must pursue that.—*R. v. WIGG* (1705), 2 Ld. Raym. 1163; 2 Salk. 460; 92 E. R. 269.

*Annotations*:—**Refd.** *R. v. Mallard* (1728), 1 Barn. K. B. 108; *R. v. Hill* (1729), 1 Barn. K. B. 259.

**329. ——— Public Health Act, 1848 (c. 63).]**—Deft.'s pigs were kept in a manner which constituted a nuisance & was injurious to the health of the occupiers of the houses in the vicinity of deft.'s premises; the pigs could have been kept without being a nuisance. The justices convicted deft. in the penalty of 40s. & 5s. for every day during which the offence was continued, the grounds of their determination being that keeping swine & pigstyes in the manner set forth in the evidence constituted a nuisance within s. 59 of the above Act, & rendered deft. liable to the penalties therein mentioned:—*Held*: the conviction was good.—*DIGBY v. WEST HAM LOCAL BOARD OF HEALTH* (1858), 22 J. P. 304; 6 W. R. 468.

**330. ——— Bye-laws—Validity.]**—A bye-law was made by a town council, pursuant to 5 & 6 Will 4, c. 76, s. 90, by which bye-law a fine was imposed on every person who should keep or cause to be kept any swine within the borough. Applt., a butcher, kept swine within the borough in breach of the bye-law & a penalty of 5s. & costs was imposed on him:—*Held*: the bye-law ought to have been restricted to the keeping of swine so as to be a nuisance, & it was bad.—*EVERETT v. GRAPES* (1861), 3 L. T. 669; 25 J. P. 644.

**331. ——— Whether unreasonable.]**—By a bye-law of a local board, duly confirmed by the Secretary of State, the keeping of pigs was forbidden within 100 yards of a dwelling-house; another bye-law ordered certain drainage to be provided wherever pigs were kept. An information was laid against resp. for breach of each of such bye-laws, but the justices refused to convict on the ground that no nuisance was proved & that the bye-laws

**PART III. SECT. 2, SUB-SECT. 4.**

**r. Cattle at large in street.]**—It is a nuisance for cattle to be at large in the streets of a borough.—*PRICE v. GODFREY* (1884), 2 N. Z. L. R. 300.—N.Z.

**s. ——— Police Offences Act, 1865 (No. 265), s. 16 (7).]**—Wilfulness is an essential element in the offence under the above sub-sect. of allowing cattle to wander in a public street; mere negligence is not sufficient. Where deft. has been convicted of such offence, without any evidence of wilfulness, a rule, under Prohibition Act, No. 571, s. 2, to prohibit further proceedings is a proper remedy.—*R. v. SHUTER, Ex p. WALKER* (1883), 9 V. L. R. 204.—AUS.

**t. ——— Summary Jurisdiction (Ireland) Act, 1851 (c. 92), s. 10.]**—A fine was imposed upon a man for herding cattle along the public road.—*GEARON v.*

*RESTRICK* (1877), 11 I. L. T. Jo. 309.—IR.

**w. Horse killed on highway—Failure to remove carcase or notify danger.]**—Appls.' mare was killed on a public road at night, & the carcase was removed to the side of the road. The darkness made it impracticable to take the carcase away that night, but applts. arranged that O., who resided within half a mile of the place, should do so next morning. While he was on his way thither about four hours after daylight on the following day the horses in resp.'s coach, which was being driven along the road at the usual hour, shied at the sight of the dead mare & bolted. In an action for negligence:—*Held*: applts. had knowledge that their dead animal was causing a nuisance on the public road, & they had ample time to remove it, & not having done so were liable. *Semble*: Police Offences Act,

1908, s. 3 (d), imposed a statutory duty on applts. to remove the body, & the neglect of a duty in respect of a highway gave cause of action to any member of the public who suffered damage thereby.—*PERCY BROTHERS v. FLY & YOUNG* (1917), N. Z. L. R. 451.—N.Z.

**330 i. Swine — Keeping — Bye-laws — Validity.]**—An urban sanitary authority, under the powers conferred by Public Health (Ireland) Act, 1878 (c. 52), made a bye-law as follows: "No swine shall be kept in any yard within a distance of twenty-one feet from a dwelling-house, or public building, or any building in which any person may be, or may be intended to be, employed in any manufacture, trade, or business, except with the special permission of the sanitary authority":—*Held*: the bye-law was valid.—*LUTTON v. DOHERTY* (1835), 16 L. R. Ir. 493.—IR.



were unreasonable:—*Held*: the bye-laws were not unreasonable, & it was not necessary to prove that the infraction of either bye-law caused a nuisance.—**WANSTEAD LOCAL BOARD OF HEALTH v. WOOSTER** (1873), 38 J. P. 21.

*Annotations*:—**Folld.** Tong Street L. B. v. Seed (1874), 39 J. P. 278. **Consd.** Heap v. Burnley Union Rural Authority (1884), 12 Q. B. D. 617. **Refd.** Kruse v. Johnson, [1898] 2 Q. B. 91; Gentel v. Rapps (1901), 85 L. T. 683.

**332.** ————*]*—A rural sanitary authority, purporting to act under the powers of Public Health Act, 1875 (c. 55), ss. 44 & 276, made a bye-law prohibiting the keeping of swine within the distance of 50 feet from any dwelling-house within their district. Swine were kept by applt. within the distance of 50 feet from his dwelling-house. Justices imposed a penalty of 10s. & costs:—*Held*: the bye-law was unreasonable & bad, & the conviction must be quashed.—**HEAP v. BURNLEY UNION SANITARY AUTHORITY** (1884), 12 Q. B. D. 617; 53 L. J. M. C. 76; 48 J. P. 359; 32 W. R. 661.

*Annotations*:—**Refd.** Rudland v. Sunderland Corpn. (1884), 52 L. T. 617; Da Prato v. Partick Corpn., [1907] A. C. 153, H. L.

**333.** ————**Construction.**—A bye-law made by an urban authority imposed a penalty for keeping swine within 50 yards of a dwelling-house. M., in course of business, used to sell swine elsewhere in the morning, & bring them within 50 yards, etc., & keep them until the evening, when they were sent off by railway. The justices held that, because the pigs were not fed & kept all night, this could not be a keeping within the bye-law:—*Held*: they were wrong, & keeping them all night was not necessary to the offence.—**STEERS v. MANTON** (1893), 57 J. P. 584.

**334.** ————**Public Health Act, 1875 (c. 55), s. 47—Injury to health.**—It is an offence under the above sect. to keep swine in a dwelling-house so as to be a "nuisance" in the common law meaning of the term. It is not necessary to such offence that there should be any injury to health.—**BANBURY URBAN SANITARY AUTHORITY v. PAGE** (1881), 8 Q. B. D. 97; 51 L. J. M. C. 21; 45 L. T. 759; 46 J. P. 184; 30 W. R. 415.

*Annotations*:—**Folld.** Bishop Auckland L. B. v. Bishop Auckland Iron & Steel Co. (1882), 10 Q. B. D. 138.

**335.** ————**Noxious smell—Injunction.**—Defts. kept some hundreds of pigs in a farmstead contiguous to a village street, feeding them partly on wash from London hotels. Residents within 200 yards of the farmstead having complained of noxious smells alleged to arise from the pigs & their food, an action to restrain a public nuisance was brought, on the relation of the local authority. Witnesses for the defence, some of whom lived on the premises, attributed the smells wholly to defects in the sewer in the street, & experts testified to the careful manner in which, since action brought, the pigs had been kept:—*Held*: (1) a public nuisance had been created by defts., but had been abated; (2) no injunction, nor leave to apply for one in case of recurrence, should be granted.—**A.-G. v. SQUIRE** (1906), 5 L. G. R. 99.

**336. Horses—Glanders—Pleading—Defect cured by verdict.**—To bring a horse infected with the glanders into a public place to the danger of infecting the Crown's subjects is a misdemeanour at common law, & an indictment which stated that deft. knew that a mare which he brought into a fair was glandered:—*Held*: good after verdict, without an averment that deft. knew that the glanders was a disease communicable to man by infection.—**R. v. HENSON** (1852), Dears. C. C. 24; 20 L. T. O. S. 63; 16 J. P. 711.

*Annotations*:—**Distd.** Hill v. Balls (1857), 2 H. & N. 299, 303. **Refd.** Ward v. Hobbs (1877), 2 Q. B. D. 331, 334.

**337.** ————**Noise from stables.**—The occupier of a house in a street in London had, many years ago, converted the ground floor into a stable. In 1871 a new occupier altered the stable so that the noise of the horses was an annoyance to the next door neighbour, & prevented him from letting his house as lodgings:—*Held*: the fact of horses having been previously kept in the stable, but so as not to be an annoyance, did not deprive the neighbour of his right to have the nuisance restrained.—**BALL v. RAY** (1873), 8 Ch. App. 467; 28 L. T. 346; 37 J. P. 500; 21 W. R. 282.

*Annotations*:—**Folld.** Broder v. Saillard (1876), 2 Ch. D. 692. **Appld.** Howland v. Dover Harbour Board (1898), 14 T. L. R. 355, C. A. **Consd.** Sanders Clark v. Grosvenor Mansions Co. & D'Allessandri, [1900] 2 Ch. 373. **Refd.** Byass v. Bettam (1885), 2 T. L. R. 88; Reinhardt v. Mentastl (1889), 42 Ch. D. 685; Harrison v. Southwark & Vauxhall Water Co., [1891] 2 Ch. 409; Rushmer v. Polsue & Alfieri, [1906] 1 Ch. 231, C. A.; Odell v. Cleveland House (1910), 26 T. L. R. 410. **Mentd.** A.-G. v. Cole, [1901] 1 Ch. 205.

**338.** ————*]*—In a suit by the owner & occupier of a house against the occupier of an adjoining house, complaining of noise from deft.'s stable:—*Held*: pltf. were entitled to an injunction to prevent deft. from keeping horses in his stable so as to be a nuisance.—**BRODER v. SAILLARD** (1876), 2 Ch. D. 692; 45 L. J. Ch. 414; 40 J. P. 644; 24 W. R. 1011.

*Annotations*:—**Refd.** Humphries v. Cousins (1877), 2 C. P. D. 239; Reinhardt v. Mentastl (1889), 42 Ch. D. 685; Gill v. Edouin (1894), 71 L. T. 762; Colwell v. St. Pancras B. C., [1904] 1 Ch. 707; Maxey Drainage Board v. G. N. Ry. Co. (1912), 76 J. P. 237. **Mentd.** Hurdman v. N. E. Ry. Co. (1878), 3 C. P. D. 168, C. A.; House Property & Investment Co. v. H. P. Horse Nail Co. (1885), 29 Ch. D. 190; Prinsep v. Belgravia Estate (1895), 39 Sol. Jo. 381; Lyons v. Wilkins, [1899] 1 Ch. 255, C. A.

**339.** ————**Unreasonable obstruction—Private nuisance.**—Pltf. kept a coffee-house in a narrow street near Covent Garden. Defts. carried on an extensive business as auctioneers in same neighbourhood, having an outlet at the rear of their premises next adjoining to pltf.'s house, where they were constantly loading & unloading goods into & from vans. The vans intercepted the light from pltf.'s coffee-shop to such an extent that he was obliged to burn gas nearly all day, & access to the shop was obstructed by the horses standing in front of the door, & the stench arising from their frequent staling there rendered pltf.'s dwelling incommo-  
dious & uncomfortable:—*Held*: the evidence disclosed such a direct & substantial private & particular damage to pltf. beyond that suffered by the rest of the public, as to entitle him to maintain an action.—**BENJAMIN v. STORR** (1874), L. R. 9 C. P. 400; 43 L. J. C. P. 162; 30 L. T. 362; 22 W. R. 631.

*Annotations*:—**Consd.** Martin v. L. C. C. (1898), 79 L. T. 170. **Refd.** Lyon v. Fishmongers' Co. (1875), 10 Ch. App. 681, n.; Fritz v. Hobson (1880), 14 Ch. D. 542; Barber v. Penley, [1893] 2 Ch. 447; Martin v. L. C. C. (1899), 80 L. T. 866, C. A.; Boyce v. Paddington B. C., [1903] 1 Ch. 109; Malone v. Lasky, [1907] 2 K. B. 141, C. A.; Heath's Garage v. Hodges (1915), 14 L. G. R. 195. **Mentd.** Boyce v. Paddington B. C., [1903] 2 Ch. 556, C. A.

**340.** ————**Smell from stables—Statutory powers of company.**—Defts. were a tramway co., who were empowered by their Act to lay down & construct two lines of tramway according to deposited plans, together with the works & conveniences connected therewith. The Act gave no compulsory powers for taking lands, & made no special mention of building stables. Defts. constructed the lines, & built some large blocks of stables near pltf.'s house for the horses employed in drawing the cars. Pltf. complained of the smell caused by the stables, & brought an action for an injunction to restrain defts. from using the stables so as to cause a nuisance:—*Held*: although horses were necessary for the working of the tramways, the co. were not justi-

**Sect. 2.—Liabilities:**

5.

fied by their statutory powers in using the stables so as to be a nuisance to their neighbours, & it was no sufficient defence to say that they had taken all reasonable care to prevent it.—**RAPIER v. LONDON TRAMWAYS CO.**, [1893] 2 Ch. 588; 63 L. J. Ch. 36; 69 L. T. 361; 9 T. L. R. 468; 37 Sol. Jo. 493; 2 R. 448, C. A.

*Annotation*:—**Refd.** National Telephone Co. v. Baker, [1893] 2 Ch. 186.

**341. Bees—Interference with reasonable comfort.**—Pltf. sought to restrain a nuisance caused by

bees, kept by deft. near pltf.'s house:—**Held**: (1) if pltf., owing to the bees, could not live at home without his reasonable comfort being substantially interfered with, a nuisance was created; (2) an injunction should be granted.—**PARKER v. REYNOLDS** (1906), *Times*, Dec. 17.

**SUB-SECT. 5.—ANIMALS DAMAGE FEASANT.**

See **DISTRESS**.

**Part IV.—Agistment.**

**342. Contract of agistment—Not an interest in land—Statute of Frauds.**—A verbal contract was made between pltf. & deft., by which it was agreed "that deft. should give £45 for some crops of wheat, barley, & potatoes, growing on pltf.'s land, & the profit of the stubble afterwards, & whatever lay grass was in the field; deft. to harvest the corn & dig the potatoes; pltf. to have liberty for his cattle to run with deft.'s & to pay the tithes:—**Held**: this was not a contract for the sale of an interest in land, within Stat. Frauds, because, as to the growing crops, these were chattels, & with regard to the grass, the more reasonable view of the intention of the parties appeared to be that it was a contract for the agistment of deft.'s cattle by pltf.—**JONES v. FLINT** (1839), 10 Ad. & El. 753; 2 Per. & Dav. 594; 9 L. J. Q. B. 252; 113 E. R. 285.

*Annotations*:—**Consd.** McManus v. Cooke (1887), 35 Ch. D. 681. **Refd.** Mogr v. Yatton Overseers (1880), 50 L. J. M. C. 17; Met. Ry. Co. v. Fowler, [1892] 1 Q. B. 165, C. A.

**343. No common law duty on agister to make redelivery.**—In a declaration on the case, one count stated that pltf., at the request of deft., had

caused to be delivered to him certain boars, pigs, etc., to be taken care of by deft. for pltf. for reward to him, deft., & in consideration thereof deft. undertook & then & there agreed with pltf. to take care of the boars, etc., & to redeliver same on request:—**Held**: the count in alleging that deft. agreed not only to take care of the pigs, but also to redeliver them to pltf., required something to be done beyond the common law duty.—**CORBETT (CORBET) v. PACKINGTON** (1827), 6 B. & C. 268; 9 Dow. & Ry. K. B. 258; 5 L. J. O. S. K. B. 142; 108 E. R. 451.

*Annotations*:—**Distd.** Callendar v. Oelricks (1838), 8 L. J. C. P. 25. **Consd.** Courtenay v. Earle (1850), 10 C. B. 73; Turner v. Stallibrass, [1898] 1 Q. B. 56, C. A. **Mentd.** Corner v. Shew (1838), 4 M. & W. 163; Tattan v. G. W. Ry. Co. (1860), 2 E. & E. 844.

**344. Agister liable to owner for negligence—Agister not insurer.**—A person, who takes in horses to agist, does not, like an innkeeper, insure their safety; he is answerable only in case of negligence.—**BROADWATER v. BLOT** (1817), Holt, N. P. 547.

*Annotation*:—**Consd.** Searle v. Laverick (1874), L. R. 9 Q. B. 122.

**PART IV.**

**342 i. Contract of agistment—Not an interest in land.**—Pltf., an annual lessee of Crown lands, sued to recover money advanced to deft., who had applied for a settlement lease. The money was advanced upon an agreement that if deft. obtained the land as a settlement lease, he would allow pltf. to agist his stock upon it, & that if he was unsuccessful in obtaining the land, he would refund the money advanced by pltf.:—**Held**: as a right of agistment would give pltf. no interest in the land, appct. if successful would have held the land for his own exclusive benefit, as required by Crown Lands Act, 1893 (No. 18), s. 42.—**JEFFREY v. HOLLEY** (1906), 6 S. R. N. S. W. 375.—**AUS.**

**342 ii.** —.—Deft., by parol agreement with pltf., took a portion of his land for grazing, pltf. undertaking to take charge of deft.'s cattle, & reserving to himself the grazing of a horse:—**Held**: this was a mere contract for agistment, & the possession of the land did not thereby pass to deft.—**MULLIGAN v. ADAMS** (1845), 8 I. L. R. 132.—**IR.**

**a.** —.—*Circumstances creating.*—Pltf. sold two horses to deft., who sent them back as not agreeing with an alleged warranty. Pltf. gave him repeated notice to take them again, or that she should charge him for their keep. Pltf. having sued upon common counts for agistment & pasturage, the jury found that the horses belonged to deft.:—**Held**: pltf. could not recover, for the evidence as to deft.'s conduct, etc., tended to negative any implied request or promise to pay.—**HALLIDAY**

v. **WHITE** (1864), 23 U. C. R. 593.—**CAN.**

**b.** —.—*Mortgagor & mortgagee.*—Sheep of resps. were mtgd. to appts. Resps. made default, & gave the mtgees. notice to take possession of the sheep, & afterwards gave them notice that they would charge for agistment. The mtgees. gave no answer to those notices, but at a later period they sold the sheep. In an action for the agistment of the sheep after the default & notice to the mtgees. up to the sale:—**Held**: there was no contract to be implied from the circumstances for the mtgees. to pay the mtgors. for depasturing the sheep after the fault of the latter. *Seemle*: there might be circumstances in which a wilful or malicious delay by mtgees. in realising their security would give the mtgors. a right of action against them.—**WARR v. BUCHANAN** (1871), 1 N. Z. L. R. 437.—**N.Z.**

**c.** —.—*Liability of agister for escaping cattle.*—A. let grazing land for the season to B., who put on it a number of cattle, one of which escaped & was lost. A. undertook no express liability for the loss of any of the animals:—**Held**: in the absence of agreement, there was no law or usage by which A. could be rendered liable for the loss.—**THOMPSON v. COOK** (1880), 6 Nfld. L. R. 203.—**NFLD.**

**d.** —.—*How determined.*—The permission given by the owner to pasture cattle on his land is a personal right, which ceases with the loss of ownership & is not binding upon the purchaser of the land.—**METROPOLITAN CREDIT CO.**

v. **CLERK** (1914), Q. R. 46 S. C. 392.—**CAN.**

**344 i. Agister liable to owner for negligence.**—Pltf.'s mare, while in charge of deft. under a contract of agistment, was killed through falling through the plank covering of a well in deft.'s yard, the existence of which was known to deft. but not to pltf., & to which yard the mare, with other horses of deft., had access from a field in which they were at pasture:—**Held**: pltf. had given sufficient *prima facie* evidence of negligence to cast the *onus* on deft., & non-suit set aside.—**PEARCE v. SHEPPARD** (1893), 24 O. R. 167.—**CAN.**

**344 ii.** —.—**ROBIN & BRIERE** (1890), 19 R. L. Q. B. 270.—**CAN.**

**344 iii.** —.—A horse was drowned in a pond or quagmire existing, to pltf.'s knowledge, on the pasture ground, & the sole imprudence charged against deft. was not having fenced around it, it appearing that such places were not usually fenced:—**Held**: as an agister engages, by his contract to pasture cattle, to exercise ordinary care & prudence in the keeping of them, he was not liable for the loss.—**McKEAGE v. POPE** (1896), O. R. 10 S. C. 459.—**CAN.**

**344 iv.** —.—Although one who takes animals to pasture them should give them the care of a "*bon père de famille*," the extent of this obligation is, nevertheless, dependent on the price paid for such pasturage, & the custom of the locality. It is unreasonable to expect that for a moderate price a man should watch the animals constantly; & if one of them disappears, it is the owner who should bear the loss—at least, unless he



**345. — Doctrine of scienter not applied.]—**Deft., an agister of cattle, placed pltf.'s horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field, & that there was no sufficient fence to keep it out. He did not, however, know that the bull was of a mischievous disposition. The horse was gored by the bull & killed, & in an action against deft. for breach of contract to take reasonable care, the jury found for pltf.:—*Held*: the fact that deft. had no knowledge of the mischievous disposition of the particular bull was no ground for disturbing the verdict, as such knowledge was not essential to his liability under his contract as an agister to take reasonable care of pltf.'s horse.—*SMITH v. COOK* (1875), 1 Q. B. D. 79; 45 L. J. Q. B. 122; 33 L. T. 722; 40 J. P. 247; 24 W. R. 206.

*Annotation*:—*Mentd.* *Turner v. Stallibrass* (1897), 67 L. J. Q. B. 52, C. A.

**346. — Damage caused by act of third party—Remoteness of damage.]—**Deft. owned a field in which he took horses in for agistment. This field was separated from another, let to a cricket club, by a wire fence, & there was a gate between the two fields. Pltf. delivered a mare to deft. for agistment. Deft.'s servant negligently, as it was alleged, left the gate open, & the mare strayed into the cricket field. The cricketers tried to drive her back through the gate, using proper care & precaution, but she ran against the wire fence & sustained injuries:—*Held*: upon a question as to remoteness of damage, deft. was liable, as the natural consequence of the gate being left open was injury to the mare.—*HALESTRAP v. GREGORY*, [1895] 1 Q. B. 561; 64 L. J. Q. B. 415; 72 L. T. 292; 43 W. R. 507; 15 R. 306.

**347. — Owner's remedy in tort.]—**Pltf. delivered a horse to defts. to be agisted in consideration of a daily payment, & defts negligently turned the horse into a field in which there was a barbed wire fence covered with long grass, whereby the horse was injured. In an action to recover damages the jury found a verdict for pltf. for £30:—*Held*: as the negligence relied upon was a breach of the common law duty arising out of the bailment, the action was founded on tort within Cty. Cts. Act, 1888 (c. 43), s. 116, & pltf. was entitled to costs upon the

can prove negligence on the part of the owner of the land.—*NADON v. PESANT* (1904), Q. R. 26 S. C. 384.—CAN.

**344 v. —.]—**A horse belonging to pltf. was taken by deft. to pasture & escaped from deft.'s pasture, got into a ditch & died:—*Held*: deft. liable, having accepted responsibility & fixed his remuneration, & having failed to exercise ordinary supervision.—*FERRARA v. BIGH* (1908), 8 W. L. R. 245.—CAN.

**344 vi. —.]—**Where a horse is given into the sole custody of an agister, & the horse dies during the agistment, the onus lies upon the agister to show circumstances negating negligence on his part.—*PYE v. McCURE* (1915), 8 W. W. R. 538; 21 B. C. R. 114; 22 D. L. R. 543.—CAN.

**344 vii. — Failure to discover subsidence.]—**A farmer took in a horse to graze for hire in one of his fields, which was over old mineral workings, & failed, through not having examined the field, to discover that there was in it a subsidence of the ground, through the existence of which an accident happened to the horse & caused its death:—*Held*: liable.—*M'LEAN v. WARNOCK* (1883), 10 R. 4052; 20 Sc. L. R. 712.—SCOT.

**344 viii. — Effect of exception as to death from disease.]—**Deft. agreed to "feed & winter" forty-seven young cattle for pltf. & to be responsible for the loss of any of the cattle through getting lost or killed or any other way, except dying from ordinary disease. While in

deft.'s charge twenty-nine of the cattle died. He housed them in a building so low & small that there was not sufficient ventilation, & they were so crowded at night that they became overheated, & were chilled when turned out & contracted colds, which caused their deaths. Deft. was warned by a veterinary surgeon that the building was not large enough:—*Held*: the above exception from liability could not apply to disease resulting directly from deft.'s own mismanagement.—*MCLENAGHAN v. HOOD* (1905), 25 C. L. T. Occ. N. 19; 1 W. L. R. 422.—CAN.

**344 ix. — Exposure to cold.]—**Pltf. delivered to deft., for agistment, a healthy colt, ten months old. The colt died on the night of the same day or early the next morning. Pltf. alleged that it was improper to leave the colt in a shed for the night. There were 5 degrees of frost that night:—*Held*: accepting expert evidence that 5 degrees of frost would not affect a ten months old colt, there was no negligence on deft.'s part.—*O'CONNOR v. REID* (1910), 13 W. L. R. 401.—CAN.

**344 x. — Unless owner aware of dangerous defect.]—**Deft. was owner of an out-farm having on it a quarry used by road contractors. Pltf. contracted for the agistment of a heifer thereon, knowing the state of the field. Subsequent quarrying undermined the edge of the quarry, which gave way with the heifer, & so injured her that she died:—*Held*: deft. not liable.—*REID v.*

High Ct. scale.—*TURNER v. STALLIBRASS*, [1898] 1 Q. B. 56; 67 L. J. Q. B. 52; 77 L. T. 482; 46 W. R. 81; 42 Sol. Jo. 65, C. A.

*Annotations*:—*Consd.* *Sachs v. Henderson*, [1902] 1 K. B. 612, C. A.; *Davies v. Hood* (1903), 88 L. T. 19; *Stelljes v. Ingram* (1903), 19 T. L. R. 534.

**348. Owner may sue agister in trover—Where agister converts animal to his own use.]—**In an action of trover for a horse, evidence was given that pltf. agisted a horse to deft. to grass:—*Held*: (1) if a man puts his horse to grass, & the other guarantees that he will be answerable if the horse is taken, an action lies, but not otherwise; (2) although he may not have so guaranteed, yet if the bailee has converted the horse to his own use, he is chargeable in an action.—*ANON.* (1573), Ben. & D. 102 (38); 123 E. R. 308.

**349. — Where agister refuses to allow removal—Measure of damages.]—**Pltf. placed some cows with deft. to agist; a third party ordered deft. not to give them up, & deft., upon being asked for them by pltf., mentioned his orders, & said that he could not give them up:—*Held*: (1) a conversion; (2) in assessing damages pltf. was not entitled to the value of the milk which the cow had yielded while in the possession of deft., in addition to the value of the cow itself.—*SKINNER v. LAMBERT* (1850), 16 L. T. O. S. 244.

**350. Criminal proceedings by owner against agister—Sale by agister—Not larceny.]—**Prisoner received prosecutor's horse to be agisted & after a short time sold it:—*Held*: this was not larceny, as prosecutor had parted with the possession of the horse.—*R. v. SMITH* (1836), 1 Mood. C. C. 473.

*Annotations*:—*Expld.* *R. v. Stear* (1848), T. & M. 11, Exch. *Refd.* *R. v. Middleton* (1873), L. R. 2 C. C. R. 38.

**351. — Unless animal sold without authority.]—**On an indictment against a farmer for stealing sheep intrusted to him by prosecutor for agistment & which he had sold, concealing for upwards of a month the fact of sale, there being some evidence that he had, or might have supposed that he had, some implied authority to sell, or that prosecutor would not object to it if he realised a good price:—*Held*: if prisoner sold the sheep without authority, & without any reason to suppose that he had authority to sell them, he was guilty,

*CALDERWOOD* (1911), 45 I. L. T. 139.—IR.

**344 xi. — But not for accidental loss.]—**A horse, while being grazed for hire by a farmer, received an injury in consequence of which it lost the sight of one eye. In an action by the owner against the grazier:—*Held*: as pursuer had based his action upon fault, which he had failed to prove, defender was entitled to *absolvitor*.

The risk of accidental loss in such a case lies upon the owner & not upon the custodian, & in order to make the latter liable he must be shown to have been in fault (*LORD YOUNG*).—*SUTHERLAND v. HUTTON* (1896), 23 R. 718; 33 Sc. L. R. 769.—SCOT.

**346 i. — Damage caused by act of third party.]** Where a beast is agisted for reward, & through defects in fences it escapes into other land of the same owner, & there falls into a hole & is killed, the owner of the land is liable to the owner of the beast, although the hole had been securely covered, & the cover removed without the knowledge of the owner of the land.—*MING QUONG v. CUNNINGHAM* (1899), 17 N. Z. L. R. 797.—N.Z.

**348 i. Owner may sue agister in trover.]—**In an action for the value of cattle taken by deft. to winter for pltf. & not returned, & for damages for detention of the cattle, judgment was given for pltf. unless deft. returned the cattle within thirty days.—*STILL v. WATSON* (1908), 7 W. L. R. 466.—CAN.



otherwise not.—*R. v. LEPPARD* (1864), 4 F. & F. 51.

**352. Owner may sue third party—In trespass.]—**The owner of agisted animals may sue in trespass for their wrongful removal by a third party.—*ANON.* (1374), Y. B., 48 Edw. 3, fo. 20, pl. 8.

**353. — On guarantee for proper agistment—Consideration.]—**The declaration alleged that in consideration that pltf. gave to C. 3s. for every hog well masted by C., deft. promised that the hogs should be well fattened & redelivered to pltf., upon the credit of which promise pltf. delivered to C. one hundred & fifty hogs to be masted, but fifty of them were not redelivered to pltf. Deft. contended that there was no consideration to charge him as he received no benefit:—*Held*: there was a sufficient consideration.—*KIRBY & ECCLES CASE* (1589), 1 Leon. 186; 74 E. R. 171; *sub nom. KIRKBY v. COLES*, Cro. Eliz. 137.

**354. — For negligence—In regard to goods supplied to agister as agent of owner.]—**Pltf.'s father agreed to take pltf.'s mare to graze on his farm at a fixed weekly rate; pltf.'s father was also to get some blistering ointment & blister the mare's legs, which he did, buying the ointment of deft., a chemist. This ointment injured pltf.'s mare:—*Held*: pltf. could maintain an action against deft. on an implied contract made with his father as his agent that the ointment was fit for the purpose.—*PHILLIPS v. WOOD* (1833), 1 Nev. & M. K. B. 434; 2 L. J. K. B. 100.

**355. — In trover—Animals retained by third party against debt due to him by agister.]—**T. received sheep from an agister & claimed to retain them as against the owner for a debt due from the agister:—*Held*: T. liable to the owner in trover.—*PRENTICE v. TAYLOR* (1859), 1 F. & F. 469.

**356. Agister has no lien apart from special agreement.]—**If a man take in cattle to depasture on a contract at so much a head per week, he cannot detain them against the vendee of the owner for the value of the agistment, unless there is a special agreement to that effect.—*CHAPMAN v. ALLEN* (1631), Cro. Car. 271; 79 E. R. 836.

*Annotations*:—*Consd.* Chase v. Westmore (1816), 5 M. & S. 180; Jackson v. Cummins (1839), 5 M. & W. 342. *Refd.* Judson v. Etheridge (1833), 1 Cr. & M. 743.

**357. —.]—**An agister of cattle, generally, has no lien over the cattle, because they do not derive any additional value either by his skill, labour, or attention bestowed on them by him. An agister of milch kine has, furthermore, no such right, because it is essentially inconsistent with the due exercise of the owner's rights over them, he being *ex necessitate rei* empowered to remove them out of the agister's possession & control for the purpose of milking them.—*JACKSON v. CUMMINS* (1839), 5 M. & W. 342; 8 L. J. Ex. 265; 3 J. P. 451; 3 Jur. 436; 151 E. R. 145.

*Annotations*:—*Consd.* Forth v. Simpson (1849), 13 Q. B. 680. *Expld.* Castellain v. Thompson, Thompson v. Castellain (1862), 13 C. B. N. S. 105. *Refd.* The Alan Ker, How v. Kirchner (1857), 30 L. T. O. S. 296, P. C.

**358. — Effect of special agreement.]—**Pltf. having a cow at grass in deft.'s field, & being indebted for the agistment, agreed with him that the

cow should be a security, that he would not remove her till debt. was paid, & that, if he did, deft. might take her wherever she might be, & keep her till he was paid. Pltf. removed the cow, not having paid the debt, & deft. seized her in the high road. In an action of trespass for the taking:—*Held*: the agreement might be set up as a defence under a plea that the cow was not pltf.'s.—*RICHARDS v. SYMONS* (1845), 8 Q. B. 90; 15 L. J. Q. B. 35; 6 L. T. O. S. 124; 10 Jur. 6; 115 E. R. 808.

*Annotation*:—*Refd.* Rogers v. Kennay (1846), 11 Jur. 14.

**359. — Agreement a question for jury.]—**Where an agister refused to deliver cows to the owner, pleading an agreement that he should hold them for a debt:—*Held*: (1) it should be left to the jury to find as to the agreement; (2) the agreement, if established, would be an answer to an action of trover for the cows; (3) the agister could not afterwards set up a lien to justify the refusal.—*SKINNER v. LAMBERT* (1850), 16 L. T. O. S. 244.

**360. Agister may sue third party—In trespass.]—**An agister may sue in trespass for the wrongful removal of the agisted animals.—*ANON.* (1374), Y. B., 48 Edw. 3, fo. 20, pl. 8.

*Annotation*:—*Refd.* R. v. Vincent & West (1852), 21 L. J. M. C. 109.

**361. — In trover.]—**An agister may bring trover (*CHAMBRE, J.*).—*SUTTON v. BUCK* (1810), 2 Taunt. 302; 127 E. R. 1094.

*Annotations*:—*Consd.* Burton v. Hughes (1824), 2 Bing. 175. *Refd.* The Winkfield, [1902] P. 42, C. A. *Mentd.* Dunwich Corp'n. v. Sterry (1831), 1 B. & Ad. 831; The Gas Float Whitten, No. 2, [1895] P. 301; Daniel v. Rogers, [1918] 2 K. B. 228, C. A.

**362. — For negligence—Failure to fence—Injury to agisted animal.]—**A. sent his horse for the night to B., who turned it out after dark into his pasture field adjoining to & separated from a field of C. by a fence which C. was bound to repair; the horse from the bad state of the fence fell from one field into the other & was killed:—*Held*: B., though a gratuitous bailee, might maintain an action against C. & recover the value of the horse.—*ROOTH v. WILSON* (1817), 1 B. & Ald. 59; 106 E. R. 22.

*Annotations*:—*Consd.* Lawrence v. Jenkins (1873), L. R. 8 Q. B. 274; The Winkfield, [1902] P. 42, C. A.; Holgate v. Bleazard, [1917] 1 K. B. 443. *Refd.* Barnes v. Ward (1850), 9 C. B. 392. *Mentd.* Sneesby v. L. & Y. Ry. Co. (1874), L. R. 9 Q. B. 263; Claridge v. South Staffordshire Tram. Co., [1892] 1 Q. B. 422.

**363. Agister may take criminal proceedings—Indictment for killing sheep.]—**W. was indicted & convicted for feloniously killing sheep, the property of D., who had only taken in the sheep for agistment:—*Held*: the property was well laid in the agister, & the conviction was good.—*R. v. WOODWARD* (1796), 2 East, P. C. 653.

**364. Agister may sue owner in trespass—For removing animals without payment—No right of distress.]—**When one takes in cattle to agist on his land for a certain sum he cannot distrain upon the cattle for arrears thereof, but if the owner drives them away without paying for the agistment, the agister may bring an action of trespass.—*ANON.* (undated), 1 Bro. Abr. 251, pl. 67.

**356 i. Agister has no lien apart from special agreement.]—***Held*: deft. had no lien upon certain cattle for their keep, the ownership not being disputed, as (1) there was no express lien; (2) there is no common law lien in favour of agisters, nor any lien by implication of law.—*MORRISON v. BRYAN* (1909), 12 W. L. R. 415.—*CAN.*

**356 ii. —.]—**Defts., boarding stable keepers, detained two heifers belonging to pltf., & asserted they had a lien on them for their keep & care:—*Held*: (1) no such lien existed at common law;

(2) as defts. had not pleaded "Livery Stable Ordinance," pltf. was justified in pleading a denial of the lien & thereby throwing the *onus* of proving it on the parties setting it up.—*ELLIOT v. GIBSON* (1904), 7 Terr. L. R. 96.—*CAN.*

**361 i. Agister may sue third party—In trover.]—**Pltf., an agister of cattle, sued deft. for unlawfully entering upon pltf.'s premises & unlawfully taking & converting to his own use a steer, the property of pltf., & unlawfully detaining same. Deft. by his plea denied that he

unlawfully took or converted to his own use or unlawfully detained pltf.'s steer. Pltf. had paid the owner for the missing animal:—*Held*: (1) pltf. as agister had such a special property in it as to enable him to maintain the action; (2) deft. could not set up a defence of right of property under his plea.—*SIMPKINSON v. HARTWELL* (1899), 6 Terr. L. R. 473.—*CAN.*

**361 ii. —.]—**An agister of cattle may maintain trover for them.—*CLARKE v. ROE* (1854), 4 I. C. L. R. 1; 6 Ir. Jur. Q. S. 369.—*IR.*

**365. Liability of owner & agister—For tithes.]—**Tithe of agisted cattle, if unprofitable, shall be paid by the owner of the ground; if profitable, by the owner of the cattle.—ANON. (1679), 1 Freem. K. B. 329; 89 E. R. 244.

**366. Reputed ownership of agisted animals—Bankruptcy of agister.]—**H. placed certain stock upon the lands of W. upon an agreement whereby the stock remained the property of H., who at the end of a fixed period was to sell the stock, & after deducting the original price & a percentage for profit, to hand over the balance to W. During the continuance of the agreement W. became bkpt., & the trustee claimed the stock as being within the reputed ownership of bkpt.:—*Held*: the custom of agistment was notorious & that being the case, no reputation of ownership could arise in the case of stock upon the lands of a farmer.—*Re* WOODWARD, *Ex p.* HUGGINS (1886), 54 L. T. 683; 3 Morr. 75.

**367. ——— Bill of sale.]—**Bkpt., a farmer,

on Nov. 19, 1906, gave appts. a bill of sale for £200 on (*inter alia*) his cattle, sheep & pigs, but he remained in possession as before. On Dec. 8, 1906, a bkpcy. petition was filed against him, & in Jan. 1907 the goods & stock comprised in the bill of sale were sold. Appls. claimed the proceeds upon the ground that bkpt. was agisting the livestock on their behalf, & that there was a well-known custom apart from agreement for a purchaser at a sale of stock & crops to leave them on the farm in the care of the tenant. The trustee claimed the money as the proceeds of stock of which bkpt. was reputed owner:—*Held*: appls. were entitled to the proceeds, as the transaction was within the custom of agistment, & it was wholly irrelevant that there was in fact no agistment, & when cattle were found in a place where they might or might not be agisted the presumption of reputed ownership was defeated.—*Re* JAMES, *Ex p.* SWANSEA MERCANTILE BANK, LTD. (1907), 24 T. L. R. 15, C. A.

## Part V.—Hiring.

*See, generally, BAILMENT; LIEN.*

**368. Rights of bailor—Injury to animal hired.]—**The owner of chaises & horses let out to hire may maintain trespass *vi et armis* against the person who has hired them for an injury done to his horses

& carriage while so employed.—*DEAN v. BRANTHWAITE* (1803), 5 Esp. 35.

*Annotation*:—*Mentd.* *Laugher v. Pointer* (1827), 5 B. & C. 547.

**369. ——— Negligence.]—**In an action for not taking proper care of a hired horse, whereby its

### PART V.

**368 i. Rights of Bailor—Injury to animal hired.]—**A person who hires a horse to perform a journey is not liable for the value of the horse, if it dies on the road without the fault of the hirer.—*DICKIE v. CAMPBELL* (1827), N. B. Dig. 404.—CAN.

**368 ii. ———.]—**Pltf. charged deft. with taking his mare on loan, & using her improperly, whereby she died, & deft. pleaded that he obtained the mare on a contract for hire, not on loan:—*Held*: a good answer.—*ROBERTSON v. BROWN* (1845), 1 U. C. R. 345.—CAN.

**368 iii. ———.]—***Assumpsit* for the immoderate riding of a mare loaned to deft., & not returning her, with a breach that she was not restored to pltf., but was so injured that she died. Deft. pleaded one plea as to returning her only:—*Held*: the plea was a good answer to that part of the breach it professed to cover.—*CAMPBELL v. BOULTON* (1846), 2 U. C. R. 202.—CAN.

**368 iv. ———.]—**The owner of a yard into which cattle were taken on fair days for payment is liable as a bailee for hire for the safe custody of them, although he had a notice to the contrary hung up in the yard, which was not brought to the knowledge of the owner of the cattle.—*WILLIAMSON v. GRAY* (1867), 1 I. L. T. Jo. 476.—IR.

**368 v. ———.]—**A stabler received a young horse for the purpose of being trained, into a stable, under which he was aware that a railway co. were forming a tunnel by blasting rock, but did not communicate that circumstance to the owner of the horse:—*Held*: liable for injury to the horse through fright occasioned by an explosion in the tunnel.—*LAING v. DARLING* (1850), 12 D. 1279; 22 J. 593.—SCOT.

**369 i. ——— Negligence.]—**A horse, hired by deft. to drive along a road known to pltf. to be in a bad condition, was returned to pltf. with a deep-seated fracture on the hip & had to be destroyed. In an action for damages pltf. called no positive evidence of negligence. Deft. & a witness who had been with him gave evidence to show that while driving without negligence, they came to a bad portion of road,

with deep wheel ruts, & while going at about four miles an hour & sometimes at a walk, the horse suddenly went lame as they thought from slipping in a rut, & had to be left some few miles further on. Pltf., in rebuttal, called a veterinary surgeon, who said that the injury to the horse could not have been sustained by a slip such as that described:—*Held*: the injury was the result of an accident, & judgment entered for deft.—*WATTS v. CUTHBERT* (1912), 14 W. A. L. R. 205.—AUS.

**369 ii. ———.]—**Action against a bailee for killing a horse hired to him by careless driving, & breaking the buggy & harness, & not returning them. Pleas: that the horse was a runaway horse, & the damage occasioned thereby; that pltf. hired the horse knowing it to be a runaway, & that it ran away without the fault of deft.; that deft. offered to return the buggy & harness after they were broken:—*Held*: pleas bad.—*McKAY v. CAMERON* (1850), 6 U. C. R. 340.—CAN.

**369 iii. ———.]—**Deft. hired two horses & a buggy from pltf. Deft. drove the horses down a grade on the trot, & the knobs attaching the braces to the top of the buggy caught in the wheel. On trying to unfasten the top, the top came off with a snap, & the horses bolted & were killed:—*Held*: the defect in the buggy did not constitute contributory negligence, & the locking being due to trotting the horses down the grade, deft. was liable.—*KLASSEN v. WRIGHT* (1905), 1 W. L. R. 158.—CAN.

**369 iv. ———.]—**Defts. hired a team of horses & drove them for about seventy-one miles. One of the horses died from exhaustion, the result of negligence & want of care, & the other suffered for some time from exhaustion by reason of the distance travelled & lack of proper care:—*Held*: defts. liable.—*BEATTY v. HODSON* (1912), 19 W. L. R. 823; 7 D. L. R. 821.—CAN.

**369 v. ———.]—**An action was brought against a party, who had hired a horse & gig, to recover damages on account of injury sustained by them while in the possession of defender. The injury was caused by the horse backing:—*Held*: the injury was not

imputable to any want of care, skill, strength, or attention on the part of defender, who was assoilized with expenses.—*MILNE'S TRUSTEE v. PYPER* (1843), 15 J. 256; 5 D. 498; 15 Sc. Jur. 256.—SCOT.

**369 vi. ———.]—**A riding horse hired at the ordinary rate for a day's ride was ridden at a gallop in a grass field. While there it split its pastern bone, & six weeks after, when almost recovered, it died of inflammation caused by a twist in the bowels:—*Held*: the galloping the horse in the grass field was a departure from the implied conditions of the contract, & the rider was liable for the death of the horse.—*SETON v. PATERSON* (1880), 8 R. 236; 18 Sc. L. R. 132.—SCOT.

**369 vii. ——— Overloading.]—**Where a person hiring from another a horse & waggon, with seats for two persons, places three therein, & the horse on the journey sickens & dies, he will be liable because of the misuser.—*CASEY v. ARCHIBALD* (1856), 2 Thom. 4.—CAN.

**369 viii. ——— Riding near railway.]—***Semble*: it is negligence on the part of a bailee for hire to exercise a horse so near to a railway that it may be frightened by the railway whistle.—*SMITH v. BLOWER* (1882), 1 N. Z. L. R. —N.Z.

**369 ix. ——— Onus of proof.]—**The hirer of a horse & carriage from a livery stable keeper who returns them in a damaged condition, & who, being the only person with full knowledge of the circumstances causing the damage, fails to give any explanation of same, is presumed to have been negligent.—*GREMLEY v. STUBBS* (1908), 39 N. B. R. 21; 6 E. L. R. 33.—CAN.

**369 x. ———.]—**Pltfs. lent a team of horses to deft. for ploughing stubble only, & deft. agreed if they were not in as good condition when he returned them as when he received them, that he would pay for them. When pltfs. got back the horses they were not in as good condition as when deft. received them, being very thin & weak, with bad sores on their shoulders, necks, & backs. Deft. had used the horses occasionally for road work,



knees were broken, pltf. must give some positive evidence of negligence; & it is not enough to prove that the animal was returned by deft. with its knees broken, although it had often been let out to hire before without having fallen down.—**COOPER v. BARTON** (1810), 3 Camp. 5, n.

**370.** ———. ———.]—If, upon a hired horse being taken ill, the hirer calls in a farrier, he is not answerable for any mistakes which the latter may commit in the treatment of the horse; but if instead of that he prescribes for the horse himself, & from unskilfulness gives it a medicine which causes its death, although acting *bonâ fide* he is liable to the owner of the horse as for gross negligence.—**DEAN v. KEATE** (1811), 3 Camp. 4.

**371.** ———. ———. **Over riding by infant.**]—Where pltf. declared that at deft.'s request he had delivered a mare to deft. to be moderately ridden, & that deft. maliciously intending, etc., wrongfully & injuriously rode the mare, so that she was damaged, etc.:—**Held**: deft. might plead his infancy in bar, the action being founded on a contract.—**JENNINGS v. RUNDALL** (1799), 8 Term Rep. 335; 101 E. R. 1419.

**Annotations**:—**Consd.** **Cranch v. White** (1835), 1 Bing. N. C. 414. **Expld.** **Bartlett v. Wells** (1862), 1 B. & S. 836. **Distd.** **Burnard v. Haggis** (1863), 14 C. B. N. S. 45. **Consd.** **Fawcett v. Smethurst** (1914), 84 L. J. K. B. 473. **Refd.** **Stikeman v. Dawson** (1847), 1 De G. & Sm. 90; **Liverpool Adelphi Loan Assn. v. Fairhurst** (1854), 9 Exch. 422; **Re King, Ex p. Unity Joint Stock Mutual Banking Assn.** (1858), 31 L. T. O. S. 124; **Morgan v. Ravey** (1861), 30 L. J. Ex. 131; **Walley v. Holt** (1876), 41 J. P. 56; **Earle v. Kingscote**, [1900] 1 Ch. 203. **Mentd.** **Green v. Greenbank** (1816), 2 Marsh. 485; **Pozzi v. Shipton** (1838), 8 L. J. Q. B. 1; **Leslie v. Sheill**, [1914] 3 K. B. 607, C. A.

**372.** ———. ———. **Improper use of horse by infant.**]—An infant, a Cambridge under-graduate, hired a mare for a ride along the road, being expressly told that she was not fit for leaping. The mare was put to a fence, & in taking it fell upon a stake & was so injured that she died:—**Held**: the infant was guilty of an actionable wrong, & liable irrespective of any question of the horse being a necessary.—**BURNARD v. HAGGIS** (1863), 14 C. B. N. S. 45; 2 New Rep. 126; 32 L. J. C. P. 189; 8 L. T. 320; 9 Jur. N. S. 1325; 11 W. R. 644; 143 E. R. 360.

**Annotations**:—**Consd.** **Walley v. Holt** (1876), 35 L. T. 631; **Fawcett v. Smethurst** (1914), 84 L. J. K. B. 473. **Refd.** **Earle v. Kingscote**, [1900] 1 Ch. 203; **Leslie v. Sheill**, [1914] 3 K. B. 607, C. A.

*See, generally, INFANTS & CHILDREN.*

contrary to his bargain:—**Held**: (1) pltf. having made a claim for the hire of the horses, the contract ceased to be a gratuitous loan, & became a bailment for hire; (2) the onus was on deft. to show that the damage was not caused by any negligence on his part, or by any unauthorised use of the animals by him; (3) on the facts deft. had discharged that onus & was only liable for the depreciation due to his negligence arising from the sores on the horses' shoulders, necks, & backs.—**WRIGHT v. SMITH** (1911), 18 W. L. R. 709; 4 Sask. L. R. 253.—**CAN.**

**369 xi.** ———. ———.]—Action to recover the price of a horse, loaned by pltf. to deft. Pltf. alleged that the horse was overworked & underfed whereby it died. The evidence did not show the exact cause of death:—**Held**: the onus was on deft. to show that he was guilty of no negligence, & having failed, he was liable.—**PRATT v. WADDINGTON** (1911), 18 O. W. R. 725; 2 O. W. N. 746; 23 O. L. R. 178.—**CAN.**

**369 xii.** ———. ———.]—A person hired a serviceable horse, & returned it in a useless state:—**Held**: (1) liable for its value; (2) the proprietor of the horse not obliged to prove actual maltreatment when the horse was out of his possession.—**ROBERTSON v. OGLE** (1809), June 23, F. C.—**SCOT.**

**369 xiii.** ———. ———.]—A horse, sound when hired by deft., was returned with its leg broken above the knee:—**Held**: deft. liable, having failed to show that the injury was occasioned by that for which he was in no respect to blame.—**MARQUIS v. RITCHIE** (1823), 2 S. 386.—**SCOT.**

**xiv.** ———. ———.]—Action by the owner of a horse against a farmer, to whom it had been lent or hired for its keep. The horse had died from the effects of a blow on the shoulder, which had been received while the horse was in defender's custody. There was no evidence as to how the injury happened:—**Held**: it was for defender to show the cause of injury, & at least produce *prima facie* evidence that the cause was one for which he was not responsible, & having failed to do so he was liable.—**WILSON v. ORR** (1879), 7 R. 266; 17 Sc. L. R. 132.—**SCOT.**

**e.** ———. ———. **Misconduct of bailee's guest.**]—**BFLIVEAU & MARTINEAU**, 2 M. L. R. 133; 9 L. N. 202.—**CAN.**

**373 i.** ———. ———. **Misconduct of bailee's servant.**]—Pltf. placed a horse with deft., a livery stable keeper, with a view to finding a purchaser for it. The horse, with pltf.'s consent, was taken to a meet by deft.'s groom for the purpose of showing it off, & was over-ridden by

**373.** ———. ———. **Misconduct of bailee's servant.**]—Deft. hired a carriage & horse from pltf. Deft.'s coachman, instead of taking them, as was his duty, to the stable, drove for his own purposes in another direction. While he was thus engaged, the carriage & horse were injured, owing to his negligent driving:—**Held**: there had been a breach of deft.'s contract as bailee for which he was liable.—**COUPÉ Co. v. MADDICK**, [1891] 2 Q. B. 413; 60 L. J. Q. B. 676; 65 L. T. 489; 56 J. P. 39.

**Annotations** —**Consd. & Distd.** **Sanderson v. Collins**, [1904] 1 K. B. 648, C. A. In that case, as I understand it, the act done by the coachman was admittedly within the scope of his authority; he had received an order to drive the horse in a particular direction; he did drive the horse, but instead of doing so in the direction ordered he drove in another direction; still he was intrusted with the carriage & horse for the purpose of driving them, & they were injured owing to his negligent driving (**COLLINS, M.R.**). **Expld.** **Cheshire v. Bailey** (1904), 74 L. J. K. B. 176, C. A.

**374.** ———. ———. **Sale by bailee—Bonâ fide purchaser for value.**]—A. let a horse on hire to B., for one month. B. kept it for two months & then sold it to C.:—**Held**: A. might recover the value of the horse from C., although C. had acted *bonâ fide* & had paid B. the full value.—**SHELLEY v. FORD** (1832), 5 C. & P. 313.

**375.** ———. ———. **Liabilities of bailor—Implied warranty—Horse hired for particular journey.**]—When a horse is let out on hire for a particular journey, the party letting impliedly warrants that the animal is fit for such journey, & if, being then unsound & unfit, the horse falls lame on the journey, & is unable to proceed, the party hiring may leave it at the inn, & give notice to the owner, whose duty it is to send for it.

In such case the party hiring is not liable to the owner for the price agreed on for the journey, nor can he, after such notice, be required to make any compensation for the loss of the animal's services, the owner having neglected to send for the horse for several months.

This is not a case of a bailee, but of a contract in which pltf. impliedly warrants that his horse is fit to do a certain journey. The selection of the animal by deft. in the stable has nothing to do with the case, for the owner is still supposed to warrant the horse so selected fit & competent for the journey (**POLLOCK, C.B.**).—**CHEW v. JONES** (1847), 10 L. T. O. S. 231, 308.

**Annotation**:—**Refd.** **Fowler v. Lock** (1872), L. R. 7 C. P. 272.

the groom, so that it died:—**Held**: deft. liable.—**HAGART v. INGLIS** (1832), 10 S. 506.—**SCOT.**

**f.** ———. ———. **Misconduct of third parties.**]—A person who hires a horse is not responsible for the culpa of those (hostlers of inns, etc.) to whom, in the course of a journey, he properly entrusts it.—**SMITH v. MELVIN** (1845), 8 D. 264.—**SCOT.**

**374 i.** ———. ———. **Sale by bailee—Liability of purchaser for value without notice.**]—Where a person lends his cattle to the proprietor of a station with authority to use them for stocking purposes, & such proprietor afterwards sells the cattle with the station to a third person, who pays for them without notice of the true owner's claim, & in the *bonâ fide* belief that they are the property of the vendor, the true owner is not estopped from recovering the cattle or their value from the purchaser.—**SLY v. CAMPBELL** (1887), 2 Q. L. J. 192.—**AUS.**

**g.** ———. ———. **Contract—Lease of racehorse—Death of lessee.**]—An agreement to lease two racehorses for a term of two years to a horse trainer:—**Held**: a contract for personal services & terminated by the death of the lessee during the term of agreement.—**NEWELL v. MOULDEN** (1911), 11 S. R. N. S. W. 539.—**AUS.**



**376.** —.—.—.]—Where a cab-driver hires from a cab proprietor a horse & cab at a certain sum per day, the relationship of master & servant does not exist between the proprietor & the driver so as to deprive the driver of his remedy by action for personal injuries sustained by him, by reason of the proprietor hiring out to him a horse not reasonably fit & safe to drive.—*GIBBONS v. STANDON* (1867), 16 L. T. 497.

**377.** —.—.—.]—Pltf., a cabdriver, obtained from deft., a cab proprietor, a horse & cab upon the terms that the driver on bringing them back at the end of the day should hand over to the proprietor 18s., retaining for himself all the day's earnings over that sum, the day's food for the horse being supplied by the owner, & the latter having no control over the driver after leaving the yard. The horse with which pltf. was furnished, which was fresh from the country & had never before been harnessed to a cab, overturned the cab & injured the driver. In answer to questions put to them by the judge, the jury found (1) the horse was not reasonably fit to be driven in a cab; (2) pltf. did not take upon himself the risk of its being reasonably fit to be so driven; (3) deft. did not take reasonable precautions to supply pltf. with a reasonably fit horse; (4) the horse & cab were intrusted to pltf. as bailee, & not as servant:—*Held*: pltf. entitled to a verdict.—*FOWLER v. LOCK* (1874), L. R. 10 C. P. 90; 43 L. J. C. P. 394, n.; 31 L. T. 844; 23 W. R. 415.

*Annotations*:—*Consd.* *Steel v. Lester* (1877), 3 C. P. D. 121; *Venables v. Smith* (1877), 2 Q. B. D. 279; *Hyman v. Nye* (1881), 6 Q. B. D. 685; *King v. London Improved Cab Co.* (1889), 23 Q. B. D. 281, C. A.; *Gates v. Bill*, [1902] 2 K. B. 38, C. A.; *Smith v. General Motor Cab Co.*, [1911] A. C. 188, H. L. *Refd.* *Robertson v. Amazon Tug & Lighterage Co.* (1881), 7 Q. B. D. 598, C. A.; *Doggett v. Waterloo Taxi Cab Co.*, [1910] 2 K. B. 336, C. A.

Relationship between cabdriver & cab proprietor, *see, further*, BAILMENT.

**378.** —.—.—.]—*Injury to bailee's wife.*—Male pltf. hired from deft., a livery stable keeper, a landau with a horse & driver for the purpose of taking a drive. His wife accompanied him in the carriage. The horse showed considerable signs of restiveness when meeting motor cars, & when passing a traction engine shied & became unmanageable, & the carriage was upset, & both the husband & wife were injured. In an action by the husband & wife to recover damages for the injuries the jury found that deft. ought to have known, if he had used proper care, that the horse was unsafe to be sent out with the carriage, but that the driver was not negligent. Deft. upon these findings, while admitting liability to the husband, contended that he was not liable to the wife:—*Held*: (1) as deft. ought to have known of the vicious propensity of the horse, he was in the same position as if he had known, & it was his duty to the wife, whom he must have contemplated would use the carriage, to warn her of the dangerous character of the horse; (2) his duty arose independently of contract, & deft. was liable to the wife; (3) deft. was liable to the wife upon the ground that, as he kept control of the carriage & accepted her as a passenger therein, he was under a duty to use reasonable care to carry her safely & for that purpose to provide a proper horse.—*WHITE v. STEADMAN*, [1913] 3 K. B. 340; 82 L. J. K. B. 846; 109 L. T. 249; 29 T. L. R. 563.

*Annotation*:—*Expld.* *Bates v. Batey*, [1913] 3 K. B. 351. I do not think that Lush, J. in *White v. Steadman* can have intended to decide that where a thing not dangerous in itself becomes dangerous through a defect occasioned by breach of contract in its manufacture or delivery, the person handing it over must be held liable to a third party because, although he did not know, he might by the exercise of reasonable care have known its condition; in any case

the decision was not a decision with regard to a defect arising from breach of contract, but had reference to a vicious horse (*HORRIDGE, J.*).

**Liability for accident to third party—Whether driver servant of bailor or bailee.**—*See* BAILMENT; MASTER & SERVANT.

**379. Contract—Milking of cows.**—The declaration stated that pltf. agreed to let, & A. agreed to take, the milking of thirty cows, for the sum of £7 10s. per annum per cow, from Feb. 14, the rent to be paid quarterly in advance, on Feb. 14, May 14, Aug. 14, Nov. 14, & deft. agreed to pay the rent at the times therein mentioned. Pltf. then averred performance of the agreement by him, & that A. took the milking of the thirty cows, & alleged as a breach of the agreement non-payment by deft. of the rent, which became due on Nov. 14. It appeared in evidence that in May it was agreed between pltf. & A., the latter having then thirty-two cows, that pltf., instead of taking away two at that time, should be at liberty to take four at the fall of the year, & it appeared that between Oct. 4 & Oct. 20 pltf. did take away four cows, leaving A. after that period less than thirty. It was proved that this alteration in the mode of using the cows made no substantial difference as to profit or loss:—*Held*: (1) this was an entire contract for the letting of thirty cows, neither more nor less; (2) pltf. in an action against a surety was bound to prove a literal performance of that contract, & he had not done so, inasmuch as he had shown that during part of the year he had allowed A. to have the milking of twenty-eight cows only.—*WHITCHER v. HALL* (1826), 5 B. & C. 269; 8 Dow. & Ry. K. B. 22; 4 L. J. O. S. K. B. 167; 108 E. R. 101.

*Annotations*:—*Expld.* *Gordon v. Rae* (1858), 8 E. & B. 1065. *Consd.* *Sanderson v. Aston* (1873), L. R. 8 Exch. 73. *Refd.* *The Harriett* (1841), 1 Wm. Rob. 182; *Bonser v. Cox* (1844), 13 L. J. Ch. 260. *Mentd.* *Hollier v. Eyre* (1842), 9 Cl. & Fin. 1, H. L.; *Bonar v. McDonald* (1850), 3 H. L. Cas. 226, H. L.; *Holme v. Brunskill* (1878), 3 Q. B. D. 495, C. A.

**380. Covering mare—Lien.**—S. sent a mare to M., a farmer, to be covered by a stallion belonging to him. The mare was taken to M.'s stables, & covered accordingly, upon a Sunday. The charge for covering not being paid, M. detained the mare. A demand of her was afterwards made, but M. refused to deliver her, claiming a lien not only for the charge on that occasion, but for a general balance due to him on another account:—*Held*: (1) M. was entitled to a specific lien on the mare for the charge for covering her; (2) the claim made by M. to retain the mare for the general balance was not a waiver of his lien for the charge on the particular occasion, & did not dispense with the necessity of a tender of that sum; (3) such contract was not void within Sunday Observance Act, 1677 (c. 7), s. 1, on the ground of its having been made & executed on a Sunday, it not being made by M. in the exercise of his ordinary calling, but even if it were, the contract having been executed, the lien attached.—*SCARFE v. MORGAN* (1838), 4 M. & W. 270; 1 Horn & H. 292; 7 L. J. Ex. 324; 2 Jur. 569; 150 E. R. 1430.

*Annotations*:—*Consd.* *Jackson v. Cummins* (1839), 5 M. & W. 342. The general rule as laid down by this ct. in *Scarfe v. Morgan* is that by the general law, in the absence of any special agreement, whenever a party has expended labour & skill in the improvement of a chattel bailed to him he has a lien upon it; now the case of agistment does not fall within that principle, inasmuch as the agister simply takes in the animal to feed it (*PARKE, B.*). *Distd.* *Dirks v. Richards* (1842), 6 Jur. 562. *Consd.* *Beaumont v. Brengeri* (1847) 5 C. B. 301. *Distd.* *Skinner v. Lambert* (1850), 16 L. T. O. S. 244. *Consd.* *Kerford v. Mondel* (1859), 28 L. J. Ex. 303. *Distd.* *Weeks v. Goode* (1859), 6 C. B. N. S. 367. *Mentd.* *Short v. Mercier* (1851), 20 L. J. Ch. 289; *Rumsey v. N.-E. Ry. Co.* (1863), 14 C. B. N. S. 641; *Taylor v. Chester* (1869), 10 B. & S. 237.

## Part VI.—Sale and Exchange of Animals.

### SECT. 1.—IN GENERAL.

Sale of horses & other animals in markets & fairs & in market overt: see AUCTION & AUCTIONEERS; MARKETS & FAIRS; SALE OF GOODS.

**381. Condition for return—Continuing contract—Pleading.]**—In an action for money had & received by deft. to pltf.'s use, it was proved deft. had sold to pltf. for 70 guineas a pair of horses, which he undertook to take back if pltf. disapproved of them & returned them within a month. Pltf. returned them within that time & took another pair from deft. without making any fresh agreement. These he also returned within a month, & received a third pair on Dec. 23 without any fresh bargain. Pltf. disapproved of the third pair because they were restive & would not draw, & offered to return them on Jan. 5, but deft. refused to take them back:—*Held*: (1) the action would not lie as pltf. should have declared on the special contract which continued between the parties through all their subsequent dealings; (2) pltf. was properly nonsuited.

If pltf. had demanded the 70 guineas & brought his action on the return of the first pair of horses & no second pair had been sent, the action would have lain, but here the contract was continued (ASH-HURST, J.).—WESTON v. DOWNES (1778), 1 Doug. K. B. 23; 99 E. R. 19.

*Annotations*:—**Distd.** Towers v. Barrett (1787), 1 Term Rep. 133. **Appld.** Hulle v. Heightman (1802), 2 East, 145; Payne v. Whale (1806), 7 East, 274; Cross v. Bartlett (1829), 3 Moo. & P. 537; Street v. Blay (1831), 3 B. & Ad. 456; Gompertz v. Denton (1832), 1 Dowl. 623; Edwards v. Bates (1844), 7 Man. & G. 590. **Refd.** Dawson v. Collis (1851), 10 C. B. 523. **Mentd.** Baylis v. London, [1913] 1 Ch. 127, C. A.; Sinclair v. Brougham, [1914] A. C. 398, H. L.

**382. — Effect of.]**—Pltf. bought a horse by public auction at a repository warranted to be a good worker, subject to the condition that "horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty must be returned before 5 o'clock of the day after the sale; shall then be tried by a person to be appointed by the auctioneer, & the decision of such person shall be final." The horse was not returned within the stipulated time. In an action on the warranty:—*Held*: pltf.'s only remedy was under the condition, & he could not maintain the action.—HINCHCLIFFE v. BARWICK (1880), 5 Ex. D. 177; 49 L. J. Q. B. 495; 42 L. T. 492; 44 J. P. 615; 28 W. R. 940, C. A.

**383. — —.]**—On July 22, pltf. bought a horse at deft.'s horse repository, it being a condition of sale that, if any horse did not comply with the warranty, it might be returned up to 5 p.m. on the second day after the sale, & that, if not returned by

that time, the purchaser should have no claim for any defect. On July 24 the horse was found to be suffering from influenza, & pltf. sent it on that day to the repository, but it did not arrive until 5.2 p.m., when the gates were closed, & the horse was refused admittance. It was alleged that the horse was so unwell that it was impossible to send it back sooner:—*Held*: the failure of pltf. to comply with the condition as to the time for returning the horse was an answer to an action on the warranty.—BUSH v. FREEMAN (1887), 3 T. L. R. 449.

— **Limiting duration of warranty.]**—See Nos. 456—458, *post*.

**384. — Death of animal before return—Action by vendor for price.]**—A horse was sold by pltf. to deft., upon condition that it should be taken away by deft. & tried by him for eight days & returned at the end of eight days, if deft. did not think it suitable for his purposes. The horse died on the third day after it was placed in deft.'s stable, without fault of either party:—*Held*: pltf. could not maintain an action for the price as for goods sold & delivered.—ELPHICK v. BARNES (1880), 5 C. P. D. 321; 49 L. J. Q. B. 698; 44 J. P. 651; 29 W. R. 139.

*Annotation*:—**Refd.** Jamesich v. Attenborough (1910), 102 L. T. 605.

— **Effect on proceedings relating to warranty.]**—See Nos. 481—484, *post*.

**385. Agreement to exchange animals for money consideration—Breach of warranty—Recovery of money & animals.]**—POWER v. WELLS, No. 462, *post*.

**386. — — —.]**—GOMPERTZ v. DENTON, No. 463, *post*.

**387. — Refusal to pay money on alleged breach of warranty—Recovery of money.]**—A. agreed to give a horse, warranted sound, in exchange for a horse of B. & a sum of money. The horses were exchanged, but B. refused to pay the money, pretending that A.'s horse was unsound:—*Held*: it might be recovered on an *indebitatus* count for horses sold & delivered.—SHELDON v. COX (1824), 3 B. & C. 420; 5 Dowl. & Ry. K. B. 277; 107 E. R. 789.

*Annotation*:—**Appld.** Bull v. Parker (1842), 2 Dowl. N. S. 345.

**388. Contract—Made on Sunday.]**—A horse-dealer cannot maintain an action upon a contract for the sale & warranty of a horse made by him upon a Sunday. Such contract is void under Sunday Observance Act, 1667 (c. 7), & it is of no consequence whether the act be done openly or concealedly or whether it be an act of work & labour or not.—FENNELL v.

### PART VI. SECT. 1.

**382 i. Condition for return—Refusal of seller to take animal back—Liability of buyer.]**—A. sold a mare to B. with the right to return her if not satisfied by a certain date, but refused to accept her when tendered within the time allowed. B. put the mare in a livery stable, telling A. that she was at his charge, & subsequently removed the mare to his own farm, where she was kept for some time & afterwards sold at a reduced price:—*Held*: B. entitled to return the mare without incurring liability for deterioration unless imputable to his own act or gross negligence.—GRAHAM v. WILSON (1839), 1 D. 407.—SCOT.

**h. Sale on trial—Death during time limited for.]**—A horse died in the hands of an intending purchaser on trial. It had been overwrought a day or two previously, but the overworking, although proved to have a tendency to

produce the disease of which it died, was not proved to be the cause of that disease:—*Held*: the onus lay upon the intending purchaser of proving that the horse had perished from a cause unconnected with the misuse, & as he had failed to discharge this onus, he must bear the loss.—PULLARS v. WALKER (1858), 20 D. 1238.—SCOT.

**1. — — —.]**—Pltf. & deft. each left a horse with the other for three days' trial with the view of exchanging horses. There was no definite agreement as to the terms of the proposed exchange. On the last day deft.'s horse was injured in pltf.'s stable & died the next day. After the horse was injured pltf. offered the horse to deft. & asked for his own in return. Deft. refused:—*Held*: pltf. entitled to judgment in an action for *replevin*.—CAPELLINI v. BELLANGER (1911), 18 O. W. R. 93.—CAN.]

**m. — Expiry of time limited for.]**—CHARLEBOIS v. CLARKE (1914), 21 R. de J. 14.—CAN.

**n. Contract—Failure to deliver full number of sheep sold—Clean sheep.]**—Under a contract for sale of sixteen thousand sheep at 5s. per head, only eight hundred & thirty were delivered, some of them being legally scabby:—*Held*: (1) pltf. could only recover on a *quantum valebant*; (2) the measure of value was the price agreed on in the contract, taking that price to be for clean sheep, & a reduction being made, to be ascertained by a jury, on account of the flock being unclean, & the cost of dipping the sheep twice. *Qu.*: whether a contract for the sale of sheep means a sale of clean sheep, & whether, if the sixteen thousand sheep had been delivered & delivery accepted, deft. could have insisted on any reduction.—SMITH v. JOHNSTON (1881), 3 N. Z. L. R. 270.—N.Z.



RIDLER (1826), 5 B. & C. 406; 8 Dow. & Ry. 204; 4 L. J. O. S. K. B. 207; 108 E. R. 151.

*Annotations*:—**Folli.** Smith v. Sparrow (1827), 4 Bing. 84.  
**Consd.** Begbie v. Levi (1830), 1 Cr. & J. 180.

**389. — Completion—Authority of agent.]—In assumpsit** for a mare sold & delivered, to which deft. pleaded *non assumpsit*, it appeared that deft., having seen & ridden the mare, wrote to pltf.: "I will take the mare at 20 guineas, of course warranted; & as she lays out, turn her out my mare." Pltf. agreed to sell her for the 20 guineas. Deft. subsequently wrote again to him: "My son will be at the World's End [a public-house] on Monday, when he will take the mare & pay you; send anybody with a receipt, & the money shall be paid; only say in the receipt, sound, & quiet in harness." Pltf. wrote in reply: "She is warranted sound, & quiet in double harness; I never put her in single harness." The mare was brought to the World's End on the Monday, & deft.'s son took her away without paying the price, & without any receipt or warranty. Deft. kept her two days, & then returned her as being unsound. The trial judge stated to the jury that the question was whether deft. had accepted the mare, & directed them to find for deft., if they thought he had returned her within a reasonable time, & desired them also to say whether the son had authority to take her without the warranty. The jury found that deft. did not accept the mare, & that the son had not authority to take her away:—**Held**: (1) there was

**390 i. — Repudiation—Mutual mistake as to title.]—Defts.** bought cattle from pltf., gave her promissory notes for the price, & took & kept the cattle, all parties believing that pltf. had an absolute title to them. It was subsequently ascertained that pltf. had only a life interest in the cattle. After learning this fact, defts. paid a year's interest on the notes, & neither returned nor offered to return the cattle:—**Held**: there was no fraud & no total failure of consideration, & defts. were bound to repudiate the transaction at once on learning of the defect in pltf.'s title, if they wished to object, & must by their conduct be held to have elected, with knowledge of the facts, to affirm their purchases.—**PRIMEAU v. MOUCHELIN**, **PRIMEAU v. PANTEL** (1905), 15 Man. L. R. 360; 1 W. L. R. 434.—**CAN.**

**o. — Refusal to take delivery of sheep sold—Tender of sufficient number.]—Pltfs.** agreed to sell to deft. "22,000 about more or less full-mouthed breeding ewes," deft. to have the right to reject one thousand sheep from the number mustered. When the time for delivery arrived pltf., if deft. had exercised his right to reject one thousand sheep, would only have been able to deliver eighteen thousand. Deft. refused to accept delivery of these. In an action for non-acceptance of the sheep:—**Held**: it was for the jury to say whether the tender was a compliance with the contract.—**MAACK v. McPHILLAMY** (1889), 10 N. S. W. L. R. 187.—**AUS.**

**p. — Failure to perform material part—Splint.]—A splint** in a horse, not causing lameness, does not constitute "a failure to perform a material part of a contract of sale," within Sale of Goods Act, 1894, s. 11, such as would entitle purchaser to repudiate the bargain.—**FEWSON v. GEMMELL** (1904), 11 S. L. T. 153, 697.—**SCOT.**

**q. — Refusal to deliver sheep sold.]—By a contract** for sale of a specific flock of sheep, of a specified number at a certain price per head of those delivered & accepted, it was provided that the sheep should be delivered at a place between two hundred & three hundred miles from where the sheep then were, & to which the sheep would have to travel on foot, & that the purchaser should

no complete contract in writing between the parties, & the direction of the judge was right; (2) deft. was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent, & pltf. was not entitled to recover.—**JORDAN v. NORTON** (1838), 4 M. & W. 155; 1 Horn & H. 234; 7 L. J. Ex. 281; 150 E. R. 1382.

**390. — Repudiation—Entire contract.]—Deft.** bought of pltf. two dogs at a price of £19, of which £10 was stated to be the value of the one & £9 that of the other dog. The evidence of delivery & acceptance was a letter from deft. to pltf., beginning "I did not receive the dogs till last night." Deft. kept one dog, & wrote to pltf. stating he should return the other as not agreeing with the warranty. It did not appear that the dog had been returned. Deft. paid into ct. £10, the value of the dog approved of, & disputed his liability for the remainder:—**Held**: the contract being entire, & no evidence having been given of a return, deft. was liable for the full amount.—**CLARKE v. HUNT** (1849), 14 L. T. O. S. 131.

**391. — Conditional on certificate of soundness—Corrupt certificate.]—Deft.** agreed to purchase a pair of horses from pltf., provided they were passed as sound by a veterinary surgeon employed by deft. to examine them. The horses were certified as sound by the veterinary surgeon, & deft. sent a cheque for the price. The horses were delivered & found to be unsound, & thereupon they were

have the option of rejecting all sheep unfit to travel. The destination of the sheep was unknown to the vendor, but it was within the contemplation of the parties that they would have to travel a considerable distance. The purchaser paid a deposit of £250. The vendor refused to deliver any of the sheep unless the purchaser would agree to accept & pay for sheep which were in fact unfit to travel more than one day's stage:—**Held**: (1) this amounted to a breach of contract by the vendor entitling the purchaser to a return of the deposit; (2) a refusal by the purchaser to accept some of the sheep which he should have accepted, which refusal the purchaser was willing to reconsider, did not entitle the vendor to refuse to deliver the sheep which the purchaser was willing to accept; (3) even had the refusal been absolute & unjustifiable provided that it was not of such a number as to go to the foundation of the contract, the vendor would not have been entitled to refuse to deliver those sheep which the purchaser was willing to accept, his remedy being under Sale of Goods Act, 1896 (Q.), s. 339.—**FRANCIS v. LYON** (1907), 4 C. L. R. 1023.—**AUS.**

**r. — Failure to take delivery of cattle sold—Time of essence.]—Pltfs.** bought cattle from deft. to be delivered on a future day. Pltfs. not taking delivery at the agreed date, deft. served notice that unless pltfs. took delivery by a specified date, they would forfeit the deposit paid on account. Pltfs. had not taken delivery at the date specified, but subsequently demanded delivery, which was refused:—**Held**: deft.'s notice made time of the essence, & deft. entitled to rescind the contract.—**RATNER BROTHERS v. PORTER** (1911), 1 W. W. R. 236.—**CAN.**

**s. — Death of horse after—Passing of property.]—Pltf.** sold deft. two horses for \$375, agreeing to ship them three days later. The night of the sale one horse threw itself & was found dead next morning. Deft. refused to pay the \$375, but paid pltf. \$210 & took the one horse away. Pltf. sued for the balance:—**Held**: the title, & with it the risk of loss, was in the purchaser from the time of the sale, & deft. liable.—**MAY v. CONN** (1911), 18 O. W. R. 141; 31 C. L. T. 66; 2 O. W. N. 604; 23 O. L. R. 102.—**CAN.**

**t. — Delivery of wrong animal—User after knowledge—Action by purchaser for rescission.]—The horse** delivered to pltf. upon a sale was not the horse he bought, but pltf., on discovering this, did not at once return it or notify deft. that he rejected it, but used the horse:—**Held**: pltf. not entitled to rescission of the contract & return of the money paid, or to damages.—**MOACHON v. BLAIR** (1913), 23 W. L. R. 59; 3 W. W. R. 831; 9 D. L. R. 396.—**CAN.**

**w. — Sale en bloc.]—A man,** who buys *en bloc* a fixed number of animals, cannot be compelled to accept the same sale for a number smaller than that which was the immediate object of the sale.—**WARK v. CLANCEY** (1904), Q. R. 25 S. C. 199.—**CAN.**

**x. — Evidence.]—A.** being in possession of a horse, the property of another, said he would buy him, & promised to pass his note for the money. He did not pass his note, but there was a subsequent admission by him that he had bought the horse:—**Held**: this was sufficient to complete the contract.—**EVANSON v. PARKER** (1794), Ridg. L. & S. 283.—**IR.**

**y. — —.]—A. & B.** bought cattle from deft. & placed them in a field rented from P. A. & B. sold pltf. the cattle & delivered them by going to the field where they were & saying, "Now the cattle belong to you & you have got to look after them." On the same day A. & B. assigned the lease of the field to K., & pltf. obtained K.'s permission to leave the cattle in the field, & thereafter pltf. & K. looked after the cattle. Deft., who had not been paid in full for the cattle by A. & B., afterwards went to the field & took the cattle away:—**Held**: pltf. entitled to bring trespass against deft.—**McNICHOL v. BRUCKS** (1905), 1 W. L. R. 478; 6 Terr. L. R. 184.—**CAN.**

**z. — —.]—Pltf.** was employed to look after A.'s horses. A. agreed to buy a horse from deft., & the horse was handed over to pltf. to look after. Subsequently A. rejected the horse:—**Held**: there was no ground of action *quasi e contractu* against deft. for keep of the horse, as pltf. must show that deft. was still owner of the horse.—**RICHARD v. STEVENSON** (1905), Q. R. 28 S. C. 188.—**CAN.**



*Sect. 1.—In General. Sect. 2: Sub-sect. 1.]*

returned & the cheque stopped. In the course of the trial of an action on the cheque it was elicited that the veterinary surgeon had accepted a bribe from pltf. :—*Held*: the offer & acceptance of the bribe invalidated the certificate, & pltf. could not recover under the contract, which depended on the validity of the certificate.—*SHIPWAY v. BROADWOOD*, [1899] 1 Q. B. 369; 68 L. J. Q. B. 360; 80 L. T. 11; 15 T. L. R. 145, C. A.

*Annotations*:—*Apld.* Rowland v. Chapman, Rowland v. Corrie, Rowland v. Brandreth (1901), 17 T. L. R. 669. *Refd.* Hovenden v. Millhoff (1900), 83 L. T. 41, C. A. *Mentd.* Kregor v. Hollins (1913), 109 L. T. 225, C. A.

## SECT. 2.—WARRANTY.

Authority of agent to warrant. *See* AGENCY, Vol. I., pp. 381, 832.

## SUB-SECT. 1.—WHAT AMOUNTS TO A WARRANTY.

*See, generally*, CONTRACT; GUARANTEE; SALE OF GOODS.

**392. Representation—Distinguished from warranty.**—If a horse is sold with a warranty, any fraud at the time of the sale will avoid the sale, though it is not on any point included in the warranty.

Deft. warranted in writing a horse sound & free from vice, which it was. He also verbally represented that the horse was five years old, which pltf. alleged was untrue :—*Held*: this was admissible as general evidence of fraud.—*STEWART v. COESVELT* (1823), 1 C. & P. 23.

**393.** — — —.]—There is a difference between a warranty & a representation, because the latter must be known to be wrong. No particular words are necessary to constitute a warranty. If a man says this horse is sound, that is a warranty. If this occurred at the time of the sale & without any qualification, it is a warranty; if before, & if it was qualified, it must be taken to be a representation & not a warranty (*BEST, C.J.*).—*SALMON v. WARD* (1825), 2 C. & P. 211.

## PART VI. SECT. 2, SUB-SECT. 1.

**a. General rule.**—Whatever the vendor represents at the time of the sale of a horse is a warranty, but often there must be discrimination between language merely of expectation, estimate or praise, & that which constitutes a representation or warranty.—*IRVINE v. PARKER* (1904), 40 N. S. R. 392.—*CAN.*

**b.** —.]—To make a seller liable in express warranty, it is not necessary that he shall use the words "I warrant"; it is sufficient if he make representations which the purchaser has given him to understand are essential to his buying. The fact that a purchaser tried a horse the day he bought him does not relieve the seller from responsibility for representation he may make after such a trial.—*SCOTT v. STEEL* (1857), 20 D. 253.—*SCOT.*

**392 i. Representation — Distinguished from warranty.**—The purchaser of horses alleged that they were sold under an oral warranty in addition to a written one :—*Held*: the alleged oral warranty was nothing more than a representation of belief not intended as a warranty.—*CAMPBELL v. HENDERSON* (1886), 23 Sc. L. R. 712.—*SCOT.*

**396 i.** — *Held to be warranty.*—Pltf. told deft., at the time of sale of a horse, that the horse was a good one to pull & that its age was eleven years :

—*Held*: this was a warranty.—*WINTERBURN v. BOON* (1913), 23 W. L. R. 556; 3 W. W. R. 1068; 10 D. L. R. 621.—*CAN.*

**396 ii.** — — —.]—Pltf. bought from deft. twenty swarms of bees, upon the representation that they had been inspected, & "were clean & all right." The bees turned out to be diseased :—*Held*: the representations amounted to a warranty, & deft. liable for the breach.—*MCKAY v. DAVEY* (1913), 28 O. L. R. 322; 4 O. W. N. 903; 12 D. L. R. 458.—*CAN.*

**396 iii.** — — —.]—At the time of the sale of a horse, deft., the owner, said: "The horse is all right, & I know nothing wrong about him." The horse shortly after purchase died of glanders :—*Held*: the above words amounted to a warranty of the soundness of the horse at the time of the sale.—*M'GUINNESS v. HUNTER* (1853), 6 Ir. Jur. O. S. 103.—*IR.*

**396 iv.** — — —.]—On the negotiation for the purchase of a horse the purchaser asked the vendor whether the horse was a qualified hunter. The vendor replied "Yes," & that he had ridden it at certain races. The term "qualified hunter" meant, amongst horse-dealers, a horse qualified to run in a Hunter's Race according to the rules of the New Zealand Hunt Clubs Association. The horse had, in fact, been qualified at the date of the races mentioned by

**394.** —.]—A receipt on the sale of a colt contained the following words after the date, name, & sum, "for a grey four years old colt, warranted sound in every respect" :—*Held*: such part as related to the age was a representation only, & not a warranty.—*BUDD v. FAIRMANER* (1831), 8 Bing. 48; 5 C. & P. 78; 1 Moo. & S. 74; 1 L. J. C. P. 16; 131 E. R. 318.

*Annotations*:—*Consd.* Mallan v. Radloff (1864), 17 C. B. N. S. 589. *Folld.* Anthony v. Halstead (1877), 37 L. T. 433.

**395.** — — —.]—A. sent his horse to Tattersall's for sale by public auction, where it was to be sold without a warranty. On the day prior to the intended sale, meeting B. at the stable, & seeing him in the act of examining the horse's legs, A. said: "You have nothing to look for; I assure you he is perfectly sound in every respect," whereupon B. replied, "If you say so I am perfectly satisfied," & upon the faith of the representation so made to him by A.—which was admitted to have been made in perfect good faith—became the purchaser :—*Held*: there was no evidence of warranty to go to a jury—the representation made by A. on the day preceding the auction forming no part of the contract of sale. *Qu.* (MAULE, J.): as to the legality of such a secret bargain for a warranty, where third persons attending the sale are bidding upon the supposition that the sale is without warranty.—*HOPKINS v. TANQUERAY* (1854), 15 C. B. 130; 23 L. J. C. P. 162; 23 L. T. O. S. 144; 18 Jur. 608; 2 W. R. 475; 2 C. L. R. 842; 139 E. R. 369.

*Annotations*:—*Apld.* Stuckey v. Bailly (1862), 1 H. & C. 405. *Refd.* Carter v. Crick (1859), 28 L. J. Ex. 238.

**396.** *Held to be warranty.*—A verbal representation by the seller of a horse to the buyer, in the course of dealing, that he may "depend upon it the horse is perfectly quiet & free from vice" is a warranty.—*CAVE v. COLEMAN* (1820), 3 Man. & Ry. K. B. 2; 7 L. J. O. S. K. B. 25.

*Annotations*:—*Refd.* Hopkins v. Tanqueray (1854), 15 C. B. 130; Heilbut, Symons v. Buckleton, [1913] A. C. 30, H. L.

**397.** — — —.]—Deft., who had a horse for sale at a commission stable, meeting pltf. at Tattersall's, & being informed by him that he had been looking at the horse, said, "It is a good harness

the vendor, but was not qualified at the date of the negotiation & sale :—*Held*: there was a warranty & a breach of warranty.

After an agreement had been concluded between the vendor & purchaser, but before payment of the price, the purchaser informed the vendor that he wanted to race the horse at a certain meeting, & that it would not be worth £5 to him if it was not a qualified hunter. The vendor replied, "You may rely on his being a 'qualified hunter'; I will get a certificate for you." The parties then agreed upon an alteration of the price (in favour of the purchaser) as regards a payment to be made out of the first winnings of the horse, & the purchase-money was paid over & delivery of the horse taken :—*Held*: the mere change of one of the terms of the sale would not reopen the whole bargain, & it was doubtful whether the statement when made would be a warranty.—*LOUGHNAN v. McDONNELL* (1903), 23 N. Z. L. R. 14.—*N.Z.*

**396 v.** — — —.]—Representations as to the steadiness of a horse before & with a view to a sale :—*Held*: binding as a warranty, & purchaser entitled to recur, on the animal turning out after sale not to be steady, notwithstanding the purchaser had had the animal on trial previous to completing the bargain.—*STEEL v. SCOTT* (1857), 30 J. 129.—*SCOT.*

horse. It belonged to R., who sold it because he could not match it." Pltf. went again to the stable, &, after having had the horse put into a break, agreed to purchase it for £65. There was no suggestion that deft. had intentionally misrepresented the horse, but it turned out to be a kicker. The jury found that the representation made at Tattersall's was part of the contract, & amounted to a warranty that the horse was quiet in harness; the ct. refused to disturb the verdict.—*PERCIVAL v. OLDACRE* (1865), 18 C. B. N. S. 398; 144 E. R. 499.

**398.** ———.]—To the name of a mare in a printed catalogue of horses to be sold by auction were appended the words, "In foal to Warlock." Other mares in the same catalogue were described as having been "served by" or "stinted to" certain horses:—*Held*: looking to the expressions used with respect to the other mares, & to the nature of the fact represented, the words in question must be taken as intended by the parties to amount to a warranty.—*GEE v. LUCAS* (1867), 16 L. T. 357.

**399.** ———.]—Applt. was proceeding to examine a stallion with a view to purchasing it (which he in fact did) for stud purposes, when the seller told him he need not look for anything, the horse was perfectly sound &, if it was not, he, the seller, would have told him, whereupon applt. ceased his examination. The horse was in fact unsound. The jury at the trial of an action for damages for breach of warranty found that the representation had been made by the seller. The C. A. refusing to draw the inference from the facts that such representation was made as a warranty, directed a new trial:—*Held*: the finding was a finding of warranty.—*SCHAWEL v. READE* (1912), 46 I. L. T. 281, H. L.

**400.** ——— **Offering for sale in public market.**]—Where the owner of an animal takes it to a public market for sale, this furnishes evidence of a representation on his part that the animal is not, so far as he knows, suffering from any infectious disease (*BLACKBURN, J.*).—*BODGER v. NICHOLLS* (1873), 28 L. T. 441; 37 J. P. 597.

*Annotation*:—*Reid*. Ward v. Hobbs (1878), 4 App. Cas. 13, H. L.

**401.** ———.]—Deft. sent pigs to market, & sold them to pltf., the pigs being then affected with typhoid fever, an infectious disease. The sale was "with all faults" & without warranty, & there was no verbal representation as to the health of the pigs. Some of them died & they infected other pigs belonging to pltf., which also died. Pltf. sued to recover the value of the pigs which he had lost:—*Held*: although deft. might have been guilty of an offence against Contagious Diseases (Animals) Act, 1869 (c. 70), s. 57, he was not liable to pltf., for the exposing of the pigs in the market did not amount to a representation by him that they were free from

infectious disease, when he had expressly stated that the purchaser was to take them with all their faults.

Although a man states upon a sale that he gives no warranty & that the animals must be taken with all their faults, but says also (untruly to his knowledge) that so far as he knows or believes the animals are free from disease, an action for deceit lies against him for the false representation. *Qu.*: whether in the absence of any statement or negation by the seller, the sending of diseased animals for sale at a public market is such a representation by conduct that they are free from disease as to make the seller liable (*LORD CAIRNS, C.*).—*WARD v. HOBBS* (1878), 4 App. Cas. 13; 48 L. J. Q. B. 281; 40 L. T. 73; 43 J. P. 252; 27 W. R. 114, H. L.

*Annotations*:—*Consd.* Peters v. Planner (1895), 11 T. L. R. 169. *Reid*. Clarke v. Army & Navy Co-op. Soc., [1903] 1 K. B. 155, C. A. *Mentd.* Dunn v. Currie (1902), 71 L. J. K. B. 963, C. A.

**402. Patent defects—Blind horse—No examination by buyer.**]—If from the confidence which I have in you I buy a horse from you in another place than that in which the horse is, & you warrant it sound in all its members, whereas in fact it is blind, I shall have a good action of deceit against you (*THIRNING, J.*).—*DREWE v. E.* (1412), Y. B., 13 Hen. 4, fo. 1 B.

**403.** ——— **Duty of buyer to inspect.**]—If a man sells me a horse & warrants he has two eyes, if he has not, an action of deceit will not lie, for I could have had knowledge of that from the commencement (*BRIAN, J.*).

Perhaps you did not see him at the time, & the bargain is good (*LITTLETON, J.*).—*ANON.* (1471), Y. B., 11 Edw. 4, fo. 6, pl. 70.

*Annotation*:—*Mentd.* Burnby v. Bollett (1847), 16 M. & W. 644.

**404.** ——— **Warranty as part of contract.**]—In an action for breach of warranty of a horse as sound wind & limb, whereas it had but one eye, there having been a verdict for pltf. it was objected in arrest of judgment that the want of an eye was a visible thing whereas the warranty only extended to secret infirmities:—*Held*: this might be so & must be intended to be so since the jury had found that deft. warranted.

It was also objected in arrest of judgment that as the warranty was set forth it might be after the sale, whereas it ought to be part of the contract:—*Held*: the payment was afterwards & it was that which completed the bargain which was imperfect without it.—*BUTTERFIELD v. BURROUGHS* (1706), 1 Salk. 211; 91 E. R. 189.

**405.** ——— **Horse with splint—Direction to jury.**]—In an action for the breach of a written warranty upon the sale of a horse, there was evidence that the horse had a splint at the time of the sale, & that it

**400 i.** ——— **Offering for sale in** *et.*]—Complainants were accustomed to sell cattle in the open market, & it was their practice to have all cattle examined by a Govt. inspector before sale. Deft. was a butcher, & bought the cattle for the purpose of selling the carcasses in the market for human consumption:—*Held*: the facts did not justify the inference of an implied warranty under Sale of Goods Act, 1896 (No. 1422), s. 19.—*POWERS, RUTHERFORD & CO. v. GLENDENNING* (1897), 23 V. L. R. 144.—*AUS.*

*c. Agreement to give written warranty.*]—Deft. agreed to give a written warranty of soundness but refused to do so:—*Held*: the real cause of action was on the warranty of soundness necessarily implied in the agreement to give a written warranty, & it was of no importance that the warranty was not actually reduced to writing.—*CAMERON*

*v. MCINTYRE* (1915), 9 O. W. N. 305; 26 D. L. R. 638; 35 O. L. R. 206.—*CAN.*

**402 i. Patent defects—Four-year-old horse—No examination by buyer.**]—Appls. placed a horse in the hands of an auctioneer for sale, believing it to be & stating that it was four years old, though in reality it was five years old. The horse was put up at auction as a "four-year-old gelding," & was sold to resp. Before purchasing it he saw the horse & had an opportunity of inspecting it, & had he done so he could have discovered it was more than four years old. He did not inspect the horse, but paid for it, accepted delivery of it, & took it away. Afterwards he discovered that it was more than four years old, & at once repudiated the contract:—*Held*: the condition as to the horse's age had sunk to the level of a warranty, & resp. could not repudiate the contract.—*CUFFS BROTHERS v. SMITH* (1906), 26 N. Z. L. R. 580.—*N.Z.*

**402 ii.** ——— **Horse warranted against hidden defects.**]—Where a colt is sold with warranty against hidden defects, which could not be discovered after examination by a veterinary surgeon, such warranty does not extend to defects which are revealed at a trial of the horse.—*WIZER v. BONNAMI* (1915), Q. R. 49 S. C. 170.—*CAN.*

*d. Heifer in calf—Custom.*]—On a sale of cattle in county Tipperary pltf. bought from deft. some yearling heifers, believing them not to be in calf. No express warranty was asked for or given at the time of sale, & shortly after the sale one of the heifers proved to be in calf, & its value was thereby greatly deteriorated:—*Held*: in the absence of express warranty or warranty implied by local custom or common understanding, a purchaser could not make the seller liable, & pltf. could not recover.—*KENNEDY v. HENNESSY* (1906), 40 I. L. T. 84.—*IR.*



**Sect. 2.—Warranty: Sub-sects. 1 & 2**

was the subject of conversation between pltf. & deft.:—*Held*: (1) the trial judge was not bound to ask the jury whether, if the subsequent lameness of the horse was, in their opinion, caused by the splint, that splint was patent at the time of sale, & if they so found, to direct a verdict for deft.; (2) the direction of the judge to find for pltf., if they were of opinion that the horse had the splint at the time of the sale, & that that splint caused the lameness, was right.—*WESTON v. POTTER* (1846), 8 L. T. O. S. 137.

**406.** ———.]—*MARGETSON v. WRIGHT*, No. 441, *post*.

**407. Fitness for intended use—Grounds for action of deceit.**—If I sell to a man twenty sheep to be killed, if they are rotten, yet even if I warranted them he shall not have an action of deceit on the warranty, for until they are dead I cannot know that they are rotten. But if I sell a man mutton to eat which is bad, he shall have an action of deceit (*BRIAN, J.*).—*ANON.* (1471), Y. B., 11 Edw. 4, fo. 6, pl. 10.

*Annotation*:—*Mentd.* *Burnby v. Bollett* (1817), 16 M. & W. 644.

*See, further*, FOOD & DRUGS; SALE OF GOODS.

**408. ——— Horse for riding—Injured shoulder.**—In an action for breach of warranty of the soundness of a horse sold by deft. to pltf., it appeared the horse had "shoulder-pight" (a diseased or injured shoulder). Judgment having been given for pltf., it was moved in arrest of judgment that the action did not lie as the "shoulder-pight" was a visible infirmity:—*Held*: (1) fraud was apparent, for pltf. wished to ride the horse & deft. said he would warrant that the horse was well; (2) the motion must be refused.—*DORRINGTON v. EDWARDS* (1621), 2 Roll Rep. 188; 81 E. R. 741.

**409. ——— Seller's knowledge of buyer's requirements.**—If a man sells a horse generally where the buyer puts no question, he warrants no more than that it is a horse. But if the buyer asks for a carriage horse, or a horse to carry a female or a timid & infirm rider, he who knows the quality of the animal & sells undertakes that it is fit for the purpose indicated. Selling upon a demand for a horse with particular qualities is an affirmation that he possesses those qualities (*BEST, C.J.*).—*JONES v. BRIGHT* (1829), 5 Bing. 533; 3 Moo. & P. 155; 7 L. J. O. S. C. P. 213; 130 E. R. 1167.

*Annotations*:—*Distd.* *Chalmers v. Harding* (1868), 15 L. T. 571. *Refd.* *Chanter v. Hopkins* (1838), 4 M. & W. 399. *Mentd.* *Gower v. Von Dadelzen* (1837), 6 L. J. C. P.

**407 i. Fitness for intended use—Dairy cows.**—A farmer bought from a cattle-dealer a number of milch cows for dairy purposes. Two proved unfit for the purpose:—*Held*: dairy purposes being the usual use to which milch cows were put, the cows had not been "expressly sold for a specified & particular purpose" within Mercantile Law Amendment Act, 1856 (c. 60), s. 5, & the buyer was liable for the price.—*DUNLOP v. CRAWFORD* (1886), 13 R. 973.—*SCOT*.

**409 i. ——— Seller's knowledge of buyer's requirements—Stud bulls.**—An agricultural society sent their agent to deft. to purchase a bull for breeding purposes. Deft. gave him the choice of two, & the agent chose one on his own judgment, & deft. gave no express warranty except as to pedigree, but he was aware that the bull was purchased for the purpose of getting stock:—*Held*: there was no implied warranty of the bull's fitness for the purpose for which he was required.—*SIMCOE (COUNTY OF) AGRICULTURAL SOCIETY v. WADE* (1855), 12 U. C. R. 614.—*CAN.*

**410 i. ——— Horse required for particular purpose.**—A horse was sold for breeding purposes:—*Held*: there

was an implied warranty of fitness for breeding.—*TAYLOR v. GARDINER* (1892), 8 Man. L. R. 310.—*CAN.*

**410 ii. S. P. WOOD v. ANDERSON** (1914), 4 O. W. N. 101, 731; 33 O. L. R. 143; 21 D. L. R. 217. *CAN.*

**410 iii. ———.]—Held**: an oral statement, by a dealer in horses, to a purchaser who said that he wished to buy a horse quiet to ride & drive, that a horse would suit him, did not imply a warranty.—*WILSON v. TURNBULL & Co.* (1896), 23 R. 714; 33 Sc. L. R. 556.—*SCOT*.

**e. Sale of cattle by description—Merchantable quality.**—Dealers in cattle entered into an agreement with pltf. for the sale to him of "a mob of Buckingham Downs cattle (about 756) containing approximately 586 bullocks & 170 cows. J. Mackenzie in charge, travelling to Hergott Springs, & at Cooper on or about 13th inst. at the rate per head of £8 sterling for bullocks & cows. Terms cash. Delivery to be taken at Tidnacordininna on arrival of mob (due about 21st inst.):—*Held*: (1) there was a contract for the sale of the goods by description, within Sale of

198; *Brown v. Edgington* (1841), 2 Man. & G. 279; *Shepherd v. Pybus* (1842), 3 Man. & G. 868; *Pettman v. Kehle* (1850), 9 C. B. 701; *Thorn v. Bigland* (1853), 21 L. T. O. S. 62; *Turner v. Mucklow* (1862), 6 L. T. 690; *Mallan v. Radloff* (1864), 17 C. B. N. S. 589; *Readhead v. Mid. Ry. Co.* (1867), L. R. 2 Q. B. 412; *Jones v. Just* (1868), L. R. 3 Q. B. 197; *Randall v. Newson* (1877), 2 Q. B. D. 102, C. A.; *Drummond v. Van Ingen* (1887), 12 App. Cas. 284, H. L.; *Jones v. Padgett* (1890), 24 Q. B. D. 650.

**410. Horse required for particular purpose.**—Suppose a party offered to sell me a horse of such a description as would suit my carriage, he could not fix on me a liability to pay for it, unless it were a horse fit for the purpose it was wanted for; but if I describe it as a particular bay horse, in that case the contract is performed by his sending that horse (*PARKE, B.*).—*CHANTER v. HOPKINS* (1838), 4 M. & W. 399; 1 Horn & H. 377; 8 L. J. Ex. 14; 3 Jur. 58; 150 E. R. 1484.

*Annotations*:—*Mentd.* *Shepherd v. Pybus* (1842), 3 Man. & G. 868; *Oliphant v. Bayley* (1843), Dav. & Mer. 373; *Camac v. Warriner* (1845), 1 C. B. 356; *Pacific Steam Navigation Co. v. Lewis* (1847), 16 M. & W. 783; *Parson v. Sexton* (1847), 4 C. B. 899; *Pott v. Flather* (1847), 11 Jur. 735; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Prideaux v. Bunnett* (1857), 1 C. B. N. S. 613; *Ripley v. Lordan* (1860), 2 L. T. 154; *Bannerman v. White* (1862), 31 L. J. C. P. 28; *Emmerton v. Mathews* (1862), 7 II. & N. 586; *Stucley v. Bailly* (1862), 1 H. & C. 405; *Turner v. Mucklow* (1862), 6 L. T. 690; *Azémar v. Casella* (1867), L. R. 2 C. P. 677; *Chalmers v. Harding* (1868), 17 L. T. 571; *Jones v. Just* (1868), 9 B. & S. 141; *Redhead v. Mid. Ry. Co.* (1869), 9 B. & S. 519, Ex. Ch.; *Osborn v. Hart* (1871), 23 L. T. 851; *R. v. Middleton* (1873), L. R. 2 C. C. R. 38; *Lloyd v. Sturgeon Falls Pulp Co.* (1901), 85 L. T. 162; *Watts v. Stevens*, [1906] 2 K. B. 323; *Bristol Tram., etc., Carriage Co. v. Fiat Motor*, [1910] 2 K. B. 831, C. A.

**411. Limited warranty.**—If a man sell a horse & warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, & the horse, though sound, proves to be unfit for that particular purpose, this would be no breach of the warranty (*MAULE, J.*).—*DICKSON v. ZIZINIA* (1851), 10 C. B. 602; 20 L. J. C. P. 73; 16 L. T. O. S. 366; 15 Jur. 359; 138 E. R. 238.

**412. Warranty of title—Innocent misrepresentation.**—In an action for falsely & fraudulently selling to pltf. a horse as the proper horse of deft., whereas it was the property of some one else, pltf. was unable to prove that deft. knew the horse was not his own, deft. having bought it in Smithfield, though it had not been legally tolled:—*Held*: pltf. must be nonsuited.—*SPRIGWELL v. ALLEN* (1648), Aleyn, 91; 82 E. R. 931.

*Annotations*:—*Refd.* *Early v. Garrett & Lankester* (1829), 4 Man. & Ry. K. B. 687; *Morley v. Aftenborough* (1849), 3 Exch. 500.

Goods Act, 1895, s. 14 (11), & there was an implied condition that the cattle should be of merchantable quality; (2) in alleging a warranty of the cattle as units & not as a mob, the claim set up a warranty, for breach of which defts. were liable.—*KIDMAN v. FISKEN BUNNING & Co.* (1907), S. A. L. R. 101.—*AUS.*

**412 i. Warranty of title.**—Pltf. alleged that deft. was guilty of breach of warranty by selling him a mare to which he had no title, & that in consequence thereof pltf. was obliged to return the mare to her lawful owner, incurring thereby a loss, for which he claimed damages:—*Held*: there was an implied warranty of title, & judgment for pltf.—*DICKIE v. DUNN* (1887), 1 Terr. L. R. 83.—*CAN.*

**412 ii. ——— Sale by poundkeeper.**—E. purchased a horse at a poundkeeper's sale, & C., also a bidder, purchased it from him immediately after the horse had been knocked down to E. The horse was subsequently repossessed by M., the owner:—*Held*: there was no warranty of title from E. to C.—*CLARK v. ENGLAND & MORTON* (1916), 34



**413. Stolen horse — Evidence.]**—In an action to recover the price of a mare sold or exchanged by deft. to or with pltf., which mare pltf. had been obliged to deliver up to the rightful owner, from whom she had been stolen, it appeared that deft. had been asked at the time of sale whose horse it was, & he once or twice repeated it was his own, & that he had bought it in Bristol at L.'s Repository. The jury having given a verdict for pltf. :—*Held*: there was evidence of warranty of title to go to the jury.—*MACKAY v. MOORE* (1857), 28 L. T. O. S. 258.

**414. — — —.]**—On Aug. 26 a horse was stolen, on Aug. 29 it was sold at a horse repository to deft., who almost immediately afterwards resold it to pltf. for £15. Pltf., having been obliged to return the horse to the person from whom it had been stolen, brought an action to recover the £15 from deft. :—*Held*: although there was no express warranty of the title to the horse, there was an implied warranty by deft. that he had a right to sell it.—*EDWARDS v. PEARSON* (1890), 6 T. L. R. 220.

**415. As to whom property of animal in.]**—G. purchased a horse from P., who represented that it had been sent to him for sale by a gentleman in England, whereas in fact he had purchased it in Scotland from A. :—*Held*: the misrepresentation as to the place from which the horse came did not invalidate the sale, the horse having been held to answer the warranty, but it was a material consideration with respect to costs which deft. could not recover.—*GEDDES v. PENNINGTON* (1817), 5 Dow. 159; 3 E. R. 1287.

**416. — — —.]**—At a sale by auction a horse was described in the catalogue as the property of J. D., Esq., & one of the conditions of sale was as follows: "Should any horse not answer to the description given it must be returned before 2 on Thursday the 14th with a notice in writing," etc. On the morning of the sale the horse was privately sold to P. about an hour before the auction. The horse was, however, not struck out of the catalogue, as P. thought he might make a profit if the sale by auction went through, & the horse was put up as the property of J. D. with his consent. Pltf. then bought it, seeing, as he said, that the horse was the property of a gentleman :—*Held*: pltf. entitled to damages against J. D. for breach of warranty, because the statement in the catalogue that the horse was the property of a particular person was a material representation, since it was to a certain extent a guarantee as to the character of the sale upon the faith of which pltf. had acted, & J. D. was estopped from denying that the representation

was made on his behalf.—*WHURR v. DEVENISH* (1904), 20 T. L. R. 385.

**417. By servant.—As to age of horse.]**—In an action for a breach of warranty on the sale of a horse, the purchaser produced the following receipt signed by the seller: "Received £10 for a grey four year old colt, warranted sound" :—*Held*: the warranty was confined to soundness, the age being mere matter of representation or description which was no ground of action, without proof that it was false within deft.'s knowledge.—*BUDD v. FAIRMANER* (1831), 8 Bing. 48; 5 C. & P. 78; 1 Moo. & S. 74; 1 L. J. C. P. 16; 131 E. R. 318.

*Annotations*:—*Consd.* *Mallan v. Radlogg* (1864), 17 C. B. N. S. 589. *Fold.* *Anthony v. Halstead* (1877), 37 L. T. 433.

*See, further*, SALE OF GOODS ACT, 1893 (c. 71), s. 12. Sale of horses & other animals in markets & fairs & in market overt. *See* AUCTION & AUCTIONEERS; MARKETS & FAIRS; SALE OF GOODS.

#### SUB-SECT. 2.—EVIDENCE OF WARRANTY.

**418. Sound price given.]**—A warranty extends to all faults known & unknown to the seller. Selling for a sound price without warranty may be a ground for an *assumpsit*, but in such a case it ought to be laid that deft. knew of the unsoundness (*LORD MANSFIELD, C.J.*).—*STUART v. WILKINS* (1778), 1 Doug. K. B. 18; 99 E. R. 15.

*Annotations*:—*Apld.* *Parkinson v. Lee* (1802), 2 East, 314. *Mentd.* *Williamson v. Allison* (1802), 2 East, 446; *Brown v. Crump* (1815), 1 Marsh. 567; *Edwards v. Bates* (1844), 3 L. T. O. S. 203.

**419. — — —.]**—A sound price given for a horse is not tantamount to a warranty of soundness; there must either be an express warranty of soundness or fraud in the seller in order to maintain the action. In sales of horses without a warranty of soundness by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects (*LE BLANC, J.*).—*PARKINSON v. LEE* (1802), 2 East, 314; 102 E. R. 389.

*Annotations*:—*Mentd.* *Jones v. Bright* (1829), 5 Bing. 533; *Budd v. Fairmaner* (1831), 8 Bing. 48; *Barr v. Gibson* (1838), 1 Horn & H. 70; *Shepherd v. Pybus* (1842), 3 Man. & G. 868; *Sutton v. Temple* (1843), 12 M. & W. 52; *Morley v. Attenborough* (1848), 13 Jur. 282; *Wilde v. Gibson* (1848), 12 Jur. 527; *Gompertz v. Bartlett* (1853), 18 Jur. 266; *Emmerton v. Matthews* (1862), 7 H. & N. 586; *Jones v. Just* (1868), 9 B. & S. 141; *Mody v. Gregson* (1868), L. R. 4 Exch. 49, Ex. Ch.; *Randall v. Newson* (1877), 2 Q. B. D. 102, C. A.; *Smith v. Baker, Son & Death* (1878), 40 L. T. 261.

**420. Verbal representation.]**—In an action on the warranty of a horse, letters passing between pltf.

W. L. R. 1012; 10 W. W. R. 1056; 29 D. L. R. 374.—*CAN.*

**f. On sale of "goods" — Mercantile Law Amendment (Scotland) Act, 1856 (c. 60), s. 5.]**—*Held*: the term "goods" in the above sect. applied to animals, & the purchaser of a horse suing for repetition of the price on the ground of unsoundness must prove that an express warranty was given at the sale.—*YOUNG v. GIFFEN* (1858), 31 J. 60; 21 D. 87.—*SCOT.*

**g. Under Sale of Goods Act, C. O., 1898 (c. 39), s. 16 (1).]**—Pltf., an ordinary farmer, sold a horse to deft. It was not in the course of pltf.'s business to supply stallions :—*Held*: under the above sub-sect. there was no implied warranty of soundness in the sale of the horse.—*BASTEDO v. YOUNG* (1915), 33 W. L. R. 25.—*CAN.*

**h. Redhibitory action — What are latent defects—Bone disease.]**—*DODD v. SPITALERI* (1910), 27 S. C. 196; 20 C. T. R. 274.—*S. AF.*

**i. — — — Not "heaves."]**—*TE-TRAULT v. DUFFY* (1899), Q. R. 16 S. C. 89.—*CAN.*

**m. S. P. JOHNSON v. RANGER** (1914), Q. R. 45 S. C. 325.—*CAN.*

**n. — — — "Heaves" may be.]**—*BIHEAU v. LECLERC* (1914), Q. R. 47 S. C. 272.—*CAN.*

**o. — — — Intermittent lameness.]**—*Ex p. TREMBLAY* (1887), Q. R. 13 Q. B. 64.—*CAN.*

**p. S. P. BALZER v. PROVENCHER** (1903), Q. R. 24 S. C. 137.—*CAN.*

**q. S. P. JACOBS v. GENTLEMEN OF THE SEMINARY** (1908), 5 E. L. R. 567.—*CAN.*

**r. — — — Lameness.]**—*FITZPATRICK v. TREMBLAY* (1914), 21 R. L. N. S. 148.—*CAN.*

**s. — — — "Rot or tic."]**—*DROLET v. LAFERRIERE* (1879), 12 R. L. N. S. 359.—*CAN.*

**t. S. P. CHAUSSÉ v. MALLETT** (1893), Q. R. 3 S. C. 402.—*CAN.*

**w. S. P. DUCHARME v. CHAREST** (1902), Q. R. 23 S. C. 82.—*CAN.*

**x. — — — Rinderpest.]**—*PRINGLE v. ELLIS & SON* (1898), 12 E. D. C. 119.—*S. AF.*

**y. — — — "Heaving."]**—*CULLEN v. PICARD* (1912), 18 R. de J. 210.—*CAN.*

#### PART VI. SECT. 2, SUB-SECT. 2.

**a. Burden of proof — Evidence evenly balanced.]**—In an action for breach of warranty the only evidence was that of pltf. & deft., & was conflicting, & the trial judge asked the jury if deft. warranted the horse, after telling them that if they could not believe one of the parties more than the other, they must find for deft., the *onus* of proof being on pltf. The jury replied, "Evidence is evenly balanced." :—*Held*: deft. not liable.—*MCDONALD v. BARTER* (1911), 9 E. L. R. 316.—*CAN.*

**420 i. Verbal representation.]**—In an action on the warranty of horses, a conversation just before delivery between the parties, when pltf. said, "You say these horses are sound," etc., & deft. replied, "Yes, they are," coupled with a subsequent refusal of deft. to take back the horses "because they were as he warranted them," is sufficient evidence from which the jury may infer that a warranty was given at the time of the sale, no witness appearing to

**Sect. 2.—Warranty: Sub-sects. 2 & 3, A.]**

& deft., in which pltf. writes, "you will remember that you represented the horse to me as a five-year-old," etc., to which deft. answers, "The horse is as I represented it," are sufficient evidence from which the jury may infer that a warranty was given at the time of the sale; & it is not necessary to give other proof of what actually passed when the contract was made.—*SALMON v. WARD* (1825), 2 C. & P. 211.

**421. Receipt by illiterate seller.]**—Pltf.'s witnesses alleged that pltf. bargained to give his colt for deft.'s mare & £10, & that pltf.'s colt was not warranted. Deft.'s servant produced a receipt as follows, which he had drawn up when he paid the £10, some time after the bargain: "Received £10 for a colt warranted sound." This receipt was signed by pltf., an illiterate man:—*Held*: (1) the receipt was not conclusive; (2) it was properly left to the jury to find whether the warranty of the colt formed any part of the bargain, or was inserted in the receipt without authority, by an after-thought of deft.'s servant.—*FAIRMANER v. BUDD* (1831), 7 Bing. 574; 5 Moo. & P. 534; 9 L. J. O. S. C. P. 180; 131 E. R. 222.

**422. Parol evidence—Where written memorandum.]**—In an action for breach of warranty of a horse sold by deft. to pltf., it appeared that deft. gave a verbal warranty of the horse, which pltf. thereupon bought & paid for, & deft. then gave him the following memorandum: "Bought of [deft.] a horse for the sum of £7 2s. 6d." :—*Held*: parol evidence might, notwithstanding, be given of the warranty.—*ALLEN v. PINK* (1838), 4 M. & W. 140; 1 Horn & H. 207; 7 L. J. Ex. 206; 150 E. R. 1376.

*Annotation*:—*Distd.* *Brumby v. Johnston* (1862), 5 L. T. 715.

have been present at the sale.—*LIBBY v. NESBIT* (1841), 1 Kerr, 362.—*CAN.*

**422 i. Parol evidence—Where written memorandum.]**—Deft. sold to pltf. two horses & orally warranted them to be staunch & sound. They were subsequently delivered to pltf. together with a sale note, which contained no warranty:—*Held*: the sale note was in the nature of a mere invoice, & pltf. entitled to recover on the oral contract.—*FARAM v. KERR* (1877), 3 V. L. R. 146.—*AUS.*

**422 ii.** ———. ]—Applt. sold to resp. a horse, warranting him sound. After the completion of the bargain the following document was given by applt. to resp.: "Sold to K. one bay horse, branded . . . for the sum of £30 for which I have received payment":—*Held*: this became the contract, to the exclusion of the verbal agreement, & there was consequently no warranty.—*McDEVITT v. KATTENGALL* (1879), 5 V. L. R. 89.—*AUS.*

**422 iii.** ———. ]—Pltf., during negotiations for the sale of a horse, having asked for, & deft. having promised to give him, a warranty as to soundness, etc., deft., after the sale & delivery of the horse was complete, sent to pltf. a written warranty signed by himself. Deft. contended that evidence could not be received of any warranty or misrepresentation outside of the written warranty delivered:—*Held*: all the circumstances connected with the sale could be inquired into, & pltf. entitled to have his contract rescinded.—*HUPP v. McLAUGHLIN* (1894), 10 Man. L. R. 75.—*CAN.*

**b. Warranty on unstamped paper.]**—On the sale of a horse a receipt for the price was given on unstamped paper, containing a warranty of soundness. Some time afterwards a receipt was given on a stamp, but without the warranty:—*Held*: the former receipt might be given in evidence.—*HAMBLIN v. HARGRAVE*, 2 Leg. Rep. 195.—*IR.*

**c. Advertisement—Verbal repudiation at sale.]**—A statement in an advertisement of an auction sale stated that a pair of horses were "warranted sound." The conditions of sale announced by the auctioneer expressly stated that "no warranty would be given":—*Held*: no warranty.—*ALLAN v. BURLAND* (1885), 2 M. L. R. 1; 9 L. N. 25.—*CAN.*

**d. Catalogue—Verbal repudiation at sale.]**—A sale catalogue stated a bull was "a sure stock-getter," but at the commencement of the sale the auctioneer publicly announced that the seller warranted nothing:—*Held*: the purchaser must show the warranty, if any, contained in the catalogue was imported into the sale.—*CRAIG v. MILLER* (1872), 22 C. P. 348.—*CAN.*

**PART VI. SECT. 2, SUB-SECT. 3.—A.**

**428 i. "Sound"—Meaning of term—"Bent over" in knees.]**—Horses, of which one was "bent over" or "sprung" in the knees:—*Held*: sound.—*ALLAN v. RUSLAND* (1885), 2 M. L. R. 1; 9 L. N. 25.—*CAN.*

**428 ii.** ———. *Mange.* ]—*Mange* is a breach of warranty of soundness.—*SWILLING v. ARNOLD*, *SWILLING v. GLASS* (1905), 2 W. L. R. 48.—*CAN.*

**428 iii.** ———. *Running thrush.* ]—The disease called the running thrush, affecting the feet of a horse, constitutes unsoundness.—*JARDINE v. CAMPBELL* (1806), Jan. 15, M. "Sale" App. No. 6.—*SCOT.*

**428 iv.** *S. P. RALSTON v. ROBB* (1808), July 9, M. "Sale" App. No. 6.—*SCOT.*

**428 v.** ———. *Corns.* ]—Bad corns amount to such a degree of unsoundness in a horse as to entitle a purchaser, from whom the horse's condition was concealed, to reject it.—*HAMILTON v. HART* (1830), 8 S. 596.—*SCOT.*

**428 vi.** ———. *Latent chronic disease.* ]—A cow labouring under a latent

**423.** ———. ]—In an action to recover the balance of a sum due by deft. to pltf. for the purchase of five cows, it appeared that deft. had given pltf. the following memorandum: "I have bought of [pltf.] five cows for £42." Evidence was offered on the part of deft. of the cows having been purchased under a warranty, which had been broken, but this evidence was rejected by the trial judge:—*Held*: (1) the instrument was really meant to be the memorandum containing the terms of the bargain between the parties & the memorandum of the contract itself; (2) the evidence of warranty was rightly rejected.—*DUTTON v. COLE* (1844), 2 L. T. O. S. 332.

**424.** ———. ]—In an action upon a breach of warranty on the sale of a pony by deft. to pltf., the warranty as laid in the declaration was proved by verbal evidence, & pltf. afterwards put in evidence a document in the following form: "I have purchased of you a grey pony for £19 for which I have paid £1 deposit, & will pay the remainder on Friday next, the 15th instant":—*Held*: the document was only declaratory of a contract already completed, & the contract itself was verbal, & the warranty part of it, & the parol evidence of the warranty was properly received.—*DENDY v. DURLING* (1850), 16 L. T. O. S. 126.

**SUB-SECT. 3.—CONSTRUCTION OF TERMS OF WARRANTY.****A. In General.**

**425. Distinction between verbal & written warranty.]**—If the warranty is by parol, it may be construed with reference to all the surrounding circum-

stances. The chronic disease, from a variety of causes, became excited into acute inflammation, of which the animal died:—*Held*: under the implied warranty arising from a fair price, the cow was not sound.—*BROWN v. BORELAND* (1818), 10 D. 1460; 20 J. 537.—*SCOT.*

**428 vii.** ———. *Cold—Subsequent strangles.* ]—A horse was sold under a warranty of soundness:—*Held*: not unsound, though proved to have been at the time of the sale labouring under a cold, which afterwards became strangles, & of which the horse died twenty-two days subsequent to the day of sale.—*DYKES v. HILL* (1860), 22 D. 1523; 32 J. 682.—*SCOT.*

**428 viii.** ———. *bronchitis.* ]—A horse was sold with a warranty of soundness:—*Held*: a severe cold at the time of the sale, which developed in a few days into pleurisy, congestion of the lungs, & bronchitis, amounted to unsoundness, though the horse was ultimately cured after a good deal of expense & trouble.—*GARDINER v. McLEAVY* (1880), 7 R. 612; 17 Sc. L. R. 440.—*SCOT.*

**p. "Sound & without vice, fault or tricks."—Subsequent development of vice.]**—A horse was guaranteed by deft. sound & without vice, fault, or tricks. For a period of eight years before the sale the horse was without faults or tricks, but immediately afterwards, in the hands of pltf., it hauled & kicked when in harness, & was useless for the purpose for which it was purchased:—*Held*: deft. not liable.—*McGILL v. HARRIS* (1903), 36 N. S. R. 414.—*CAN.*

**q. "Free from vice & every blemish" & "thorough broke horse for either gig or saddle." ]**—A horse, warranted "free from vice & every blemish," & a "thorough broke horse for either gig or saddle," when on a journey in harness, plunged, ran off, & broke the gig:—*Held*: the warranty was not broken,



stances; if written, it must be construed by the terms of the instrument (ERLE, J.).—WESTON v. POTTER (1846), 8 L. T. O. S. 137.

**426. "Sound"—Ignorance of seller immaterial.]**—If a seller warrants a horse sound, he does it at his peril if the horse was not sound at the time of sale, whether he knew it or not.—ANON. (1773), Loft, 146; 98 E. R. 579.

**427. ——— Unsoundness a question for jury.]**—The soundness or unsoundness of a horse is a question peculiarly fit for the consideration of a jury, & the ct. will not set aside a verdict for a preponderance of contrary evidence.—LEWIS v. PEAKE (PEAT) (1816), 7 Taunt. 153; 2 Marsh. 431; 129 E. R. 61.

*Annotations:—*Dbtd. Penley v. Watts (1841), 7 M. & W. 601. *Expld.* Walker v. Hatton (1842), 10 M. & W. 249. *Dbtd.* Hammond v. Bussey (1887), 20 Q. B. D. 79, C. A.

**428. ——— Meaning of term.]**—The term "sound" in a warranty of a horse, or other animal, implies the absence of any disease or seeds of disease in the animal at the time, which actually diminishes or in its progress will diminish its natural usefulness in the work to which it would properly & ordinarily be applied.—KIDDELL v. BURNARD (1842), 9 M. & W. 668; Car. & M. 291; 11 L. J. Ex. 268; 6 Jur. 327; 152 E. R. 282.

**429. ——— Temporary injury.]**—A warranty that a horse is sound is not false, because the horse labours under a temporary injury from an accident.—GARMENT v. BARRS (1798), 2 Esp. 673.

*Annotation:—*N.F. Jones v. Cowley (1825), 4 B. & C. 445.

**430. ——— ———.]**—A temporary lameness, rendering a horse less fit for present service, is a breach of a warranty of soundness.—ELTON v. BROGDEN (1815), 4 Camp. 281.

**431. ——— "Roaring."]**—Roaring is not unsoundness in a horse, unless it is shown to proceed from some disease or organic defects.—BASSETT v. COLLINS (1810), 2 Camp. 523.

**432. ——— ———.]**—Roaring constitutes unsoundness in a horse. If a horse be affected by any malady which renders it less serviceable for a permanency it is an unsoundness; I do not go by the noise, but by the disorder (LORD ELLENBOROUGH C.J.).—ONSLOW v. FAMES (1817), 2 Stark. 81.

**433. ——— "Coughing."]**—A horse had a cough when it was sold, & pltf. was told of this. It was alleged that the horse had been hunted the day after the warranty. In an action for breach of warranty the jury found a verdict for deft.:—*Held*: there must be a new trial. *Semble*: if deft. alleged that the defect was only temporary, the *onus* was upon him to prove it.

as the accident was due to bad driving by pltf.—GEDDES v. PENNINGTON (1817), 6 Pat. 312.—SCOT.

**r. "Free of fault"—Crib-biting.]**—A horse being sold under a warrantee that he was free of fault, & being returned, on the same day, on account of crib-biting & wind-sucking:—*Held*: the seller must make repetition of the price.—DEUCHARS v. SHAW (1833), 11 S. 612.—SCOT.

**s. "Good working" horse.]**—MERCIER v. MORIN (1914), 20 R. de J. 549.—CAN.

**t. "Quiet in all harness & saddle & sound to best of my knowledge."]**—Horses were bought with a written warranty that they were "quiet in all harness & saddle, & sound to the best of my knowledge":—*Held*: the words "to the best of my knowledge" qualified the whole of the written warranty, & not only the warranty of soundness.—CAMPBELL v. HENDERSON (1886), 23 Sc. L. R. 712.—SCOT.

**u. "Undisturbed possession."]**—A guarantee by the vendor of a horse,

that the vendee shall have undisturbed possession of the thing bought, is a warranty of title, not of quality, & the *maxim caveat emptor* does not apply.—FITZGERALD v. LUCK (1839), 1 Legge, 118.—AUS.

**w. "Due to calve."]**—*Held*: the above words did not in themselves import a warranty that the cow was with calf.—WILSON v. SHAVER (1912), 27 O. L. R. 218; 4 O. W. N. 71; 8 D. L. R. 627.—CAN.

**x. Undertaking to exchange should buyer "fail to get good black male" from foxes sold.]**—Pltf. wrote to deft. agreeing to purchase a pair of black foxes "on the understanding agreed upon, i.e., should we fail to get a good black male from either pair mated . . . then you agree to exchange the male you are sending for a good silver black male next year." Mating was successfully accomplished so far as one pair was concerned, but the litter was destroyed by the mother. The other pair was not successfully mated, the female dying. Deft. contended that all he was undertaking by the contract was to guarantee

If the cough was of a permanent nature it was a breach of warranty. The knowledge of pltf. that it had a cough makes no difference, as he relied upon the warranty only & did not trust to his own knowledge. As to the hunting there was no evidence of mismanagement, & there is no proof that the cold was temporary (LORD ELLENBOROUGH, C.J.).—SHILLITOE v. CLARIDGE (1816), 2 Chit. 425.

**434. ——— ———.]**—A horse was warranted sound, but a few hours after the sale pltf. found it had a cough. He kept it a few days in a stable, but the horse became worse, & for some days it was very ill & unfit for work, suffering from what was called influenza or distemper, from which he ultimately recovered. Deft's. evidence was to the effect that the horse at the time of the sale suffered at most from a slight & common cold:—*Held*: (1) the question for the jury was whether the horse at the time of sale had upon it any disease calculated permanently to diminish its usefulness, or whether the disorder which it then had was a mere cold, which with ordinary care would soon have been cured so as to leave the horse no tendency to any subsequent incurrence of the disorder; (2) a slight disorder (e.g., a mere cold) on a horse at the time of a sale, not calculated permanently to diminish its usefulness, & from which it ultimately recovers, is not an unsoundness constituting a breach of the warranty.—BOLDEN v. BROGDEN (1838), 2 Mood. & R. 113.

*Annotations:—*N.F. Coates v. Stephens (1838), 2 Mood. & R. 157; Kiddell v. Burnard (1842), 9 M. & W. 668.

**435. ——— ———.]**—A cough at the time of the sale of a horse warranted sound is an unsoundness & breach of the warranty, though it be afterwards cured without any permanent injury to the horse.—COATES v. STEPHENS (1838), 2 Mood. & R. 157.

*Annotation:—*Folld. Kiddell v. Burnard (1842), 9 M. & W. 668.

**436. ——— Crib-biting.]**—Crib-biting is no such unsoundness in a horse to entitle a purchaser, who has bought under a general warranty, to maintain an action for the breach of it, upon this fault only.—BROENNENBURGH v. HAYCOCK (1817), Holt, N. P. 630.

**437. ——— ———.]**—Crib-biting, which has not yet produced disease, or alteration of structure, is not an unsoundness, but a vice, under a warranty that a horse is sound & free from vice.—SCHOLEFIELD v. ROBB (1839), 2 Mood. & R. 210.

**438. ——— Seeds of disease at date of sale.]**—Certain sheep, apparently healthy & sound in every respect, were sold, warranted sound. Two months

the quality of the foxes to be such that as the result of breeding in the manner indicated one good black male would be found amongst the progeny:—*Held*: the contract could not be construed as an undertaking on deft. part to insure the lives of the foxes.—BAIRD v. CLARK (1914), 7 O. W. N. 535; 19 D. L. R. 762.—CAN.

**y. Sale of foxes to be of certain parentage.]**—G. agreed to sell two black foxes "to be the offspring of certain foxes purchased by the vendor from Charles Dalton & W. R. Oulton in 1911":—*Held*: the two foxes to be sold must have both Dalton & Oulton parentage, & G. could not be compelled to deliver a pair bred from the Dalton strain only.—COFFIN v. GILLIES (1915), 7 O. W. N. 354; 51 S. C. R. 539; 24 D. L. R. 317.—CAN.

**z. Warranty "against all defects."]**—In an exchange of horses, warranty against all defects means warranty against all defects apparent or unapparent sickness of any kind, & everything which renders the animal useless.—FORTIER v. TANQUAY (1913), Q. R. 44 S. C. 440.—CAN.



**Sect. 2.—Warranty: Sub-sect. 3, A. & B.]**

afterwards a great number of them died. There was nothing to connect the disease of which they died with their previous condition, but it was, in the opinion of farmers & breeders, an hereditary disease called the goggles, & incapable of discovery until its fatal appearance:—*Held*: this disease was an unsoundness existing at the time of the sale, the jury being of opinion that it existed in the constitution of the sheep at that time.—*JOLIFF v. BENDELL* (1824), Ry. & M. 136.

**439. ——— “Nerved” horse.]**—A horse sold with a warranty of soundness had been “nerved,” i.e., a nerve leading from the foot up the leg had been severed. There was evidence by farriers that, although horses which had been so treated often went free from lameness & continued so for years, such a horse was, in their opinion, unsound & could not be trusted for very severe work, & that it was an organic defect:—*Held*: this was a breach of the warranty.

A horse in which there is an organic defect cannot be considered sound. Sound means perfect, & a horse deprived of a useful nerve is imperfect & has not that capacity of service which is stipulated for in a warranty (*BEST, C.J.*).—*BEST v. OSBORN* (1825), 2 C. & P. 74; Ry. & M. 290, N. P.

**440. ——— Splint—Subsequent lameness.]**—Deft. warranted sound wind & limb at the time of the bargain, & sold for £90, a racehorse which had broken down in training, & was affected with a splint. These circumstances, but for which the horse would have been worth £500, were disclosed to pltf.:—*Held*: (1) this warranty did not import that the horse was fit for the purposes of an ordinary horse; (2) defects apparent at the time of the warranty were not included in it. *Seem*: the warranty being restricted to the time of the bargain, pltf. could not sue in respect of the horse breaking down afterwards.—*MARGETSON v. WRIGHT* (1831), 7 Bing. 603; 5 Moo. & P. 606; 131 E. R. 233.

*Annotation*:—*Reid. Watson v. Denton* (1835), 7 C. & P. 85.

**441. ——— ———.]**—Deft. warranted a horse sound wind & limb at the time of the contract. The horse had at that time a splint on the off-foreleg which did not then inconvenience it, but, by reason of its subsequent growth & consequent pressure upon a sinew, it caused lameness in a few months. In an action for breach of the warranty the jury were directed to say whether or not the horse was unsound at the time of the contract, or, if unsound, whether that unsoundness arose from the splint in question. The jury said “that, although the horse exhibited no symptoms of lameness at the time when the contract was made, it had then upon it the seeds of unsoundness, arising from the splint”:—*Held*: pltf. was entitled to a verdict upon this finding.—*MARGETSON v. WRIGHT* (1832), 8 Bing. 454; 1 Moo. & S. 622; 1 L. J. C. P. 128; 131 E. R. 469.

**442. ——— ———.]**—Deft. sold to pltf. a horse, but before so doing pointed out to pltf. a splint it then had. Deft. afterwards gave a written warranty to pltf. that the horse was sound. It soon afterwards became lame from that splint:—*Held*: deft. was liable on the warranty.—*SMITH v. O'BRYAN (BRYANT)* (1864), 11 L. T. 346; 10 Jur. N. S. 1107; 13 W. R. 79.

**443. ——— Foreleg turned out.]**—Mere badness of shape, though rendering the horse incapable of work, is not unsoundness.

A horse, warranted sound, was so ill-formed from one of its forelegs being turned out, as to be incapable of work to any extent without cutting so as to produce lameness:—*Held*: the horse could not be considered unsound so long as it was uninjured, but when injury was produced by the badness of

its action, that injury constituted unsoundness.—*DICKINSON v. FOLLET* (1833), 1 Mood. & R. 299.

*Annotation*:—*Folld. Brown v. Elkington* (1841), 8 M. & W. 132.

**444. ——— Curby hocks.]**—Defective formation, or badness of shape, which has not produced lameness at the time of the sale of a horse, although it may render it more liable to become lame at some future time, e.g., “curby hocks,” is not a breach of a general warranty of unsoundness.—*BROWN v. ELKINGTON* (1841), 8 M. & W. 132; 10 L. J. Ex. 336; 151 E. R. 979.

*Annotation*:—*Folld. Bailey v. Forrest* (1845), 2 Car. & Kir. 131.

**445. ——— Thin soles.]**—A horse was sold with a warranty of soundness, but had at the time “thin soled” feet. Some time after the sale the horse fell lame:—*Held*: the mere fact that the horse was “thin soled” at the time of sale did not constitute unsoundness, & mere defective formation not producing lameness at that time was not a breach of the warranty.—*BAILEY v. FORREST* (1845), 2 Car. & Kir. 131.

**446. ——— Congenital defect of eye.]**—A warranty of soundness, on the sale of a horse, is broken by a malformation, existing from the birth of the horse, which, at the time of the sale, renders the horse less fit for reasonable use, e.g., an extraordinary convexity of the cornea of the eye, producing shortsightedness, in consequence of which the horse is liable to shy. Such defect in the eye is not so patent a defect that a purchaser with express warranty is bound to notice it.—*HOLLIDAY (HALLIDAY) v. MORGAN* (1858), 1 E. & E. 1; 28 L. J. Q. B. 9; 32 L. T. O. S. 73; 5 Jur. N. S. 69; 7 W. R. 7; 120 E. R. 808.

**447. ——— Spavin.]**—Bone spavin in the hock is unsoundness in a horse, & is a breach of a warranty of soundness, whether it produces lameness apparent at the time of the warranty or not, & though it may not produce lameness for years after.—*WATSON v. DENTON* (1835), 7 C. & P. 85.

**448. “Good drawer & would pull quietly in harness” —No evidence of pulling quietly.]**—Proof that a horse is a good drawer only will not satisfy a warranty that it is a good drawer & would pull quietly in harness.—*COLTHERD (COULTHERD) v. PUNCHEON* (1822), 2 Dow. & Ry. K. B. 10; 1 L. J. O. S. K. B. 2.

**449. “Quiet in harness.”]**—Although a person may disclaim against making a warranty of a horse, yet, if he give it a character for a particular quality, as by saying that it is quiet in harness, & do it in such manner as reasonably to make an impression in the mind of a buyer that it is generally quiet in harness, he will be bound by that representation, & if it is not true, an action will lie to recover back the price of the horse.—*HORT v. NEWRY (LORD)* (1823), 1 L. J. O. S. K. B. 237.

**B. Limitations of Warranty.**

**450. Horse warranted sound—No warranty of age.]**—If a horse sold at a public auction be warranted sound & six years old, & it be one of the conditions of sale that it shall be deemed sound unless returned in two days, this condition applies only to the warranty of soundness.

Where a horse sold with such a warranty was discovered to be twelve years old ten days after the sale & was then offered to the seller, who refused to take it:—*Held*: an action might be maintained by the buyer against the seller, & his right to recover was not affected by his having sold the horse after offering it to deft.—*BUCHANAN v. PARNSHAW* (1788), 2 Term Rep. 745; 100 E. R. 401.

*Annotations*:—*Distd. Best v. Osborn* (1825), 2 C. & P. 74. *Reid. Chapman v. Gwyther* (1866), 7 B. & S. 417.

**451. Horse sold by pedigree—No warranty of age.]**—If a man, not knowing the age of a horse, but having a written pedigree which he received with it, sell it as a horse of the age stated on the pedigree, at the same time stating he knows nothing of it but what he has learnt from the pedigree, he is not liable to an action, when it appears that the pedigree is false.—*DUNLOP v. WAUGH* (1792), Peake, 167.

**452. "Constantly driven in plough warranted"—Warranty of soundness only.]**—Pltf. brought an action to recover the price of a horse sold under the following warranty, viz., "a black gelding about five years old, has been constantly driven in the plough—warranted." It was proved the horse was sound, but there was no evidence that it had been constantly driven in the plough:—*Held*: the terms of the warranty applied only to the soundness of the horse, & not to the nature of its employment.—*RICHARDSON v. BROWN* (1823), 1 Bing. 344; 8 Moore, C. P. 338; 2 L. J. O. S. C. P. 7, 130 E. R. 138.

*Annotation*:—*Appld.* *Budd v. Fairmaner* (1831), 8 Bing. 48.

**453. "Quiet to ride & drive & warranted sound"—Warranty of soundness only.]**—A memorandum acknowledging the receipt of money "for a black horse, rising five years, quiet to ride & drive, & warranted sound up to this date, or subject to the examination of a veterinary surgeon":—*Held*: not a warranty that the horse was quiet to ride & drive.—*ANTHONY v. HALSTEAD* (1877), 37 L. T. 433.

**454. "Quiet in harness"—No warranty as to health.]**—Pltf. bought a horse at a horse repository, the horse being warranted in the sale catalogue as quiet in harness. Two days after the sale the horse was found to be suffering from influenza:—*Held*: there was no breach of warranty, as the warranty referred to the behaviour of the horse & not to its state of health.—*BUSH v. FREEMAN* (1887), 3 T. L. R. 449.

**455. "Clever hack & hunter"—No warranty of soundness.]**—A description, in auction sale particulars, of a horse as "a clever hack & hunter" does not amount to a warranty of soundness.—*CLEOBURY v. TATTERSALL* (undated), *Dixon's Law of the Farm* (6th ed.), 352.

**456. Time limited for duration—Condition limiting time for notice of unsoundness.]**—Pltf. bought a horse, warranted sound, by private contract, at a repository. At the time of sale there was a board fixed to the wall of the repository, having certain rules painted upon it, one of which was that a warranty of soundness, there given, should remain in force till noon on the day after the sale, when the sale should become complete, & the seller's responsibility terminate, unless a notice, & surgeon's certificate, of unsoundness, were given in the meantime. The rules were not particularly referred to at the time of the sale & warranty in question. The horse proved unsound, but no complaint was made till after noon on the following day. The unsoundness was of a nature likely not to be immediately discovered; some evidence was given to show that deft. knew of it, & the horse was shown at the sale in circumstances favourable for concealing it:—*Held*: (1) there was sufficient proof of pltf. having had notice of the rules at the time of the sale, to render them binding on him; (2) the rule in question was such as a seller might reasonably impose; (3) the facts did not show such fraud or artifice in him as would render the condition inoperative, & pltf.'s action failed.—*BYWATER v. RICHARDSON* (1834), 1 Ad. & El. 508; 3 Nev. & M. K. B. 748; 3 L. J. K. B. 164; 110 E. R. 1301.

*Annotations*:—*Consd.* *Humfrey v. Dale* (1857), 7 E. & B. 266. *Mentd.* *Gorton v. Macintosh* (1882), 31 W. R. 232.

**457. ———.]**—The declaration stated that, in consideration that pltf. would buy of deft. a mare at a certain price, deft. promised that she was sound, & averred as a breach that she was not sound. Deft. pleaded that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which were that "a warranty of soundness should remain in force until noon of the day after the sale, when it would be complete, & the responsibility of the seller terminate, unless in the meantime a notice & certificate of unsoundness were given"; that the sale took place subject to the rules, & that same were agreed to by the parties, & that such notice & certificate were not given within the time limited:—*Held*: the plea was good, & did not amount to the general issue.—*SMART v. HYDE* (1841), 8 M. & W. 723; 1 Dowl. N. S. 60; 10 L. J. Ex. 479; 151 E. R. 1231.

*Annotations*:—*Consd.* *M'Cance v. L. & N. W. Ry. Co.* (1861), 7 H. & N. 477. *Refd.* *Moore v. Harris* (1876), 1 App. Cas. 318, P. C. *Mentd.* *Sharland v. Lefschild* (1847), 4 C. B. 529; *Weedon v. Woodbridge* (1850), 13 Q. B. 470; *James v. Isaac* (1852), 20 L. T. O. S. 68; *Canham v. Barry* (1855), 3 C. L. R. 487.

**458. ——— "Warranted sound for one month"—Date of sale or delivery.]**—Action for damages for breach of warranty of soundness. Deft., when selling two horses to pltf. on June 5, signed the following document: "Bought of [deft.] a brown horse, six years old, warranted sound, for £180; also a bay horse five years old, for £90, warranted sound for one month." The horses were delivered on June 12, & pltf. sent deft. a cheque payable to order, with the following memorandum written on the back, intending it to be signed by deft.: "This cheque is received by me for a brown gelding, price £180, also a bay gelding, price £90, both of which animals I warrant sound & right for one month from the date of delivery." Deft. indorsed the cheque, but did not sign the memorandum. On July 8 pltf. found that the bay horse was unsound, & on July 9 he wrote to deft. informing him of this:—*Held*: (1) the words "warranted sound for one month" meant that complaint must be made of any unsoundness within one month from the date of sale, & as the complaint was not made in time, pltf. could not recover; (2) the memorandum on the cheque was no part of the contract.—*CHAPMAN v. GWYTHYR* (1866), L. R. 1 Q. B. 463; 7 B. & S. 417; 35 L. J. Q. B. 142; 14 L. T. 477; 30 J. P. 582; 12 Jur. N. S. 522; 14 W. R. 671.

*Annotations*:—*Refd.* *Moore v. Harris* (1876), 1 App. Cas. 318, P. C.; *Gorton v. Macintosh* (1882), 31 W. R. 232.

——— **Condition limiting time for return of animal.]**—*See* Nos. 481—484, *post*.

**459. Warranty relating to future—No action for deceit.]**—If I sell a horse to one & warrant it will carry him thirty leagues in a day, if the horse does not do it, I am not liable to an action of deceit, for one ought to warrant such a thing as exists at the time of the warranty, for one cannot warrant a thing which is to come (*CHOKE, J.*).—*ANON.* (1471), Y. B., 11 Edw. 4, fo. 6, pl. 10.

*Annotation*:—*Mentd.* *Burnby v. Bollett* (1847), 16 M. & W. 644.

**460. Sheep warranted sound for year.]**—In an action upon a warranty by a vendor that certain sheep were sound, & that they should be sound for the space of a year, it was moved that the action did not lie because the warranty was impossible to be performed by the party, as it was only the act of God to make them sound for a year:—*Held*: it was not impossible, any more than a warranty of a safe return of a ship, which was the usual course between merchants.—*KING v. BRAINE* (1596), Owen, 60; 74 E. R. 899.



## Sect. 2.—Warranty: Sub-sect. 4, A. B. &amp; C.]

## SUB-SECT. 4.—BREACH OF WARRANTY.

## A. Remedies in General.

**461. Assumpsit.]—Assumpsit** lies for breach of warranty of soundness.—*STUART v. WILKINS* (1778), 1 Doug. K. B. 18; 99 E. R. 15.

*Annotations:—Consd.* *Brown v. Crump* (1815), 1 Marsh. 567. *Mentd.* *Williamson v. Allison* (1802), 2 East, 446; *Edwards v. Bates* (1844), 3 L. T. O. S. 203.

**462. Exchange of animals for money consideration—Form of action.]—If money & a horse are given in exchange for another horse warranted sound, which was unsound at the time, an action for money had & received is not a proper action to try the warranty. Nor will trover lie for the horse given in exchange, because the property is altered.—*POWER v. WELLS* (1778), 2 Cowp. 818; 98 E. R. 1379.**

*Annotations:—Distd.* *Towers v. Barrett* (1786), 1 Term Rep. 133. *Appld.* *Weston v. Downes* (1778), 1 Doug. K. B. 23; *Payne v. Whale* (1806), 7 East, 274; *Street v. Blay* (1831), 2 B. & Ad. 456; *Dawson v. Collis* (1851), 10 C. B. 523. *Refd.* *Gompertz v. Denton* (1832), 1 Cr. & M. 207; *Edwards v. Bates* (1844), 7 Man. & G. 590.

**463. ———.]—A purchaser with a warranty, on a breach thereof, has no right, without the assent of the vendor, to return the article purchased, & to bring an action for the price; but his remedy is by an action for damages upon the warranty.**

Pltf. gave deft. a horse, worth £60, & £30 in money, for a horse of deft.'s, worth £90, warranted sound, & on deft.'s horse turning out to be unsound, sent it back to deft., demanding the return of his own horse & the £30, & on refusal arrested & held deft. to bail for the £90:—*Held*: deft. entitled to his costs for an arrest without reasonable or probable cause, under 43 Geo. 3, c. 46.—*GOMPERTZ v. DENTON* (1832), 1 Cr. & M. 207; 1 Dowl. 623; 3 Tyr. 232; 2 L. J. Ex. 82; 149 E. R. 376.

**464. Notice to seller of breach of warranty—Whether necessary.]—Where a horse has been sold warranted sound, which, it can be clearly proved, was unsound at the time of sale, the seller is liable to an action on the warranty, without either the horse being returned or notice given of the unsoundness.—*FIELDER v. STARKIN* (1788), 1 Hy. Bl. 17; 126 E. R. 11.**

*Annotations:—Apprvd. & Distd.* *Adam v. Richards* (1795), 2 Hy. Bl. 573. *Apprvd.* *Pateshall v. Tranter* (1835), 3 Ad. & El. 103. *Refd.* *Poulton v. Lattimore* (1829), 9 B. & C. :

**465. ———.]—Where an unsound horse is sold with a warranty of soundness, the purchaser may maintain an action on the warranty, although shortly after the sale he discovers the unsoundness, & without giving notice of that fact to the seller, keeps & uses the horse for nine months as his own, & during that time administers physic to it & uses other means to cure it.—*PATESHALL (PATTESHALL) v. TRANTER* (1835), 3 Ad. & El. 103; 4 Nev. & M. K. B. 649; 1 Har. & W. 178; 4 L. J. K. B. 162 111 E. R. 352.**

## PART VI. SECT. 2, SUB-SECT. 4.—A.

**466 i. Alternative remedies.]—Horses** were returned as unsound by pltf., pursuant to an alleged agreement, in the event of their turning out unsound, & were accepted & retained by deft.:—*Held*: pltf. entitled to succeed in an action for a return of the price paid for the horses, & need not sue for breach of the warranty.—*HOLT v. BROOKS* (1913), 24 W. L. R. 944; 11 D. L. R. 838.—CAN.

**467 i. ——— Rescission or damages.]—Deft. bought a mare which turned out to be unsound:—*Held*: (1) the buyer having acted promptly upon discovering the defect could reject the mare; (2) the seller not having received the**

mare back when she was offered to him, the buyer entitled to resell the mare, recovering as damages the difference between the price the mare was sold for by the seller & her real value, a reasonable sum for her keep, the buyer not having kept the animal longer than was necessary to effect a sale to the best advantage, & expenses.—*HOGG v. PARK* (1893), 3 Terr. L. R. 171.—CAN.

**a. Delay—Effect of.]—A. & B. exchanged horses, & B. gave A. a note for difference in the exchange. After two years, during which nothing appeared to be done by either party, B. was sued upon the note by A.:—*Held*: B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault &**

**466. Alternative remedies.]—If a person buys a horse which is warranted & it turns out to be unsound at the time, he may keep the horse & bring an action on the warranty, or he may return the horse & bring an action for the full money paid, but in the latter case the seller has a right to expect that the horse will be returned in the same state as when sold.—*CURTIS v. HANNAY* (1800), 3 Esp. 82.**

*Annotations:—Consd.* *Street v. Blay* (1831), 2 B. & Ad. 456. *Appld.* *Clare v. Maynard* (1837), 7 C. & P. 741. *Expld. & Distd.* *Head v. Tattersall* (1871), L. R. 7 Exch. 7. *Refd.* *Dawson v. Collis* (1851), 10 C. B. 523.

**467. Rescission or damages.]—In an action for breach of warranty on the sale of a pair of horses, which deft. had warranted were five years old, when in fact they were only four years old, & which were not returned by pltf. within a specified time:—*Held*: (1) if pltf. would rescind the contract entirely he must do it within a reasonable time; (2) as he had not done so, he could only recover damages; (3) the question was what was the difference of the value of horses of four or five years old.**

The difference in cases of this kind is this, where the pltf. is entitled to recover his whole money he must show that the contract is at an end, but if it continue open he can only recover damages, & then he must state the special contract & the breach of it (*BULLER, J.*).—*ANON.* (undated), cited in *TOWERS v. BARRETT* (1786), 1 Term Rep. 136; 99 E. R. 136.

**468. ——— Contract or tort.]—Upon the treaty for the sale of a mare, deft., being asked whether the mare was sound, replied that she was to the best of his knowledge. Upon being asked whether he would warrant her, deft. said "I never warrant; I would not even warrant myself." There was evidence that the mare was unsound & that deft. knew it. In an action of *assumpsit* upon breach of warranty the jury found a verdict for pltf. Deft. having moved for a new trial on the ground that the action should have been in tort, & not upon contract:—*Held*: although the action might have been in tort for the deceit, yet an action lay on the contract as deft. gave a qualified warranty that to the best of his knowledge the mare was sound.—*WOOD v. SMITH* (1829), 4 C. & P. 45; 5 Man. & Ry. K. B. 124; Mood. & M. 539; 8 L. J. O. S. K. B. 50.**

**469. Action against infant.]—Infancy is a good defence to an action on the warranty of a horse.—*HOWLETT v. HASWELL* (1814), 4 Camp. 118.**

**470. ———.]—The declaration alleged that pltf. having agreed to exchange mares with deft., deft., by falsely warranting his mare to be sound well knowing her to be unsound, falsely & fraudulently deceived pltf., & that deft.'s mare became of no use to pltf. Deft. pleaded that he was an infant:—*Held*: the plea was a good bar to the action.—*GREEN v. GREENBANK* (1816), 2 Marsh. 485.**

*Annotations:—Expld.* *Bartlett v. Wells* (1862), 1 B. & S. 836. *Refd.* *Stikeman v. Dawson* (1847), 1 De G. & Sm. 90.

blemish at the time of sale.—*HALL v. COLEMAN* (1834), 3 O. S. 39.—CAN.

**b. ———.]—On June 15 a mare was sold to a horse-dealer with a warrant of soundness. On June 18 & July 4 the purchaser intimated to the seller by letter that the mare was unsound, & called upon him to take her back, which he refused to do, denying the unsoundness. She was kept in the purchaser's stable for fifty-seven days, when there was intimated to the seller a petition to the sheriff for warrant of sale, under which she was sold:—*Held*: the purchaser's claim for repetition of the price was barred by his failure to place the animal in neutral custody, & his delay in having recourse to judicial proceedings.—*M'Bey v. GARDINER* (1858), 20 D. 1151; 30 J. 691. SCOT.**



**Mentd.** Lopes v. De Tastet (1820), 1 Brod. & Bing. 538; Marzette v. Williams (1830), 1 Br. Ad. 415; Godefroy v. Jay (1831), 7 Bing. 413; Alton v. Mid. Ry. Co. (1865), 19 C. B. N. S. 213.

See, further, INFANTS & CHILDREN.

**B. Defences available where Seller brings Action for Price.**

**471. Recovery of true value only.]—**Pltf. had sold to deft. a horse, warranted sound, for 12 guineas, of which deft. had paid three. In fact, the horse was not sound, & deft. refusing to pay any more, an action was brought for the value of the horse sold to recover the difference. It was proved that the horse, at the time of the sale to deft., was not worth more than £1 11s. 6d. & deft. afterwards sold it for £1 10s.:—**Held:** pltf. could only recover the value, & more having been paid to him by deft., pltf. was nonsuited.—**KING v. BOSTON** (1794), 7 East, 481, n.; 103 E. R. 186.

**Annotations:—****Refd.** Street v. Blay (1831), 2 B. & Ad. 456; Mondel v. Steel (1841), 1 Dowl. N. S. 1; Dawson v. Collis (1851), 10 C. B. 523; Davis v. Hedges (1871), L. R. 6 Q. B. 687; Bow, McLachlan v. Camosun, [1909] A. C. 597, P. C.

**472. Effect of purchaser keeping animal & diminishing its value.]—**To an action for the recovery of the price of a horse, it is no defence that the warranty was untrue, if deft. was, after the sale, apprised of the fault of the horse, & did not return him, but afterwards, by the application of medicines, or otherwise, lessened the value of the horse, from what it was at the time of the sale.—**CURTIS v. HANNAY** (1800), 3 Esp. 82.

**Annotations:—****Consd.** Street v. Blay (1831), 2 B. & Ad. 456. **Distd.** Head v. Tattersall (1871), L. R. 7 Exch. 7. **Refd.** Dawson v. Collis (1851), 10 C. B. 523. **Mentd.** Clare v. Maynard (1837), 7 C. & P. 741.

**473. Animals unsound on delivery—Defects apparent at time of sale.]—**Pltf., after telling deft. that one of two horses he was about to sell had a cold, agreed to deliver both at the end of a fortnight, sound & free from blemish. The horses were delivered, one with a cough & the other with a swelled leg, a fault that was also apparent at the time of the sale. In an action for the price, a verdict having been found for deft.:—**Held:** a new trial must be refused.—**LIDDARD v. KAIN (CAIN)** (1824), 2 Bing. 183; 9 Moore, C. P. 356; 3 L. J. O. S. C. P. 246; 130 E. R. 276.

**474. Reduction of damages.]—**A person who has purchased a horse warranted sound, sold it again & then repurchased it, cannot, by reason of the unsoundness of the animal, resist an action by the first vendor for the price, but he may give the breach of warranty in evidence in reduction of damages.—**STREET v. BLAY** (1831), 2 B. & Ad. 456; 109 E. R. 1212.

**Annotations:—****Consd.** Gompertz v. Denton (1832), 1 Cr. & M. 207; Allen v. Cameron (1833), 1 Cr. & M. 832; Chappel v. Hicks (1833), 4 Tyr. 43; Elliott v. Thomas (1838), 1 Horn & H. 38; Mondel v. Steel (1841), 8 M. & W. 858.

**PART VI. SECT. 2, SUB-SECT. 4.—B.**

**c. Bill of exchange given for price—Breach of warranty no defence.]—**In an action to recover the amount of a bill of exchange, drawn by deft. in favour of pltf., for the price of a horse, the warranty & unsoundness are no defence to the action.—**CRIPPS v. SMITH** (1841), 3 L. L. R. 277; Ir. Circ. Rep. 127.—**IR.**

**d. Promissory note given for price—Compensation paid under Animals Contagious Diseases Act, 1903.]—**Action on a promissory note given for the price of horses, which were unsound & had to be killed under the above Act after four months' user by deft., who received \$146 compensation under the above Act:—**Held:** deft.'s user of the horses must be set off against his expenses of

quarantine, disinfecting premises, etc., & pltf. entitled to the compensation.—**CONN v. ANNIS** (1906), 4 W. L. R. 332.—**CAN.**

**e. — Counterclaim for damages for breach of warranty.]—**Action on promissory note given for the price of a mare. There was no absolute sale of the mare enabling the buyer to sue for breach of warranty:—**Held:** the buyer could set up the breach of warranty by way of set-off or counterclaim.—**HOGG v. PARK** (1893), 3 Terr. L. R. 171.—**CAN.**

**f. —.]—**Judgment for pltf. on the note & for deft. on the counterclaim, the one judgment to be set off against the other.—**SWILLING v. ARNOLD**, **SWILLING v. GLASS** (1905), 2 W. L. R. 48.—**CAN.**

**Expld.** Dawson v. Collis (1850), 20 L. J. C. P. 116. **Consd.** Dawson v. Collis (1851), 10 C. B. 523; Woodgate v. Wetton (1854), 24 L. T. O. S. 158; Clarke v. Dickson (1858), 4 Jur. N. S. 832; Azémar v. Casella (1867), L. R. 2 C. P. 677, Ex. Ch.; Bright v. Rogers, [1917] 1 K. B. 917. **Refd.** Pateshall v. Tranter (1835), 3 Ad. & El. 103; Parson v. Sexton (1847), 4 C. B. 899; Murray v. Mann (1848), 2 Exch. 538; Syers v. Jonas (1848), 2 Exch. 111; Bannerman v. White (1861), 10 C. B. N. S. 844; Behn v. Burness (1862), 5 L. T. 670; Azémar v. Casella (1867), L. R. 2 C. P. 431; Kennedy v. Panama, New Zealand & Australian Royal Mail Co., Panama, New Zealand & Australian Royal Mail Co. v. Kennedy (1867), L. R. 2 Q. B. 586; Heilbutt v. Hickson (1872), L. R. 7 C. P. 438; Re Green & Balfour, Williamson (1890), 63 L. T. 97. **Mentd.** Sieveking v. Dutton (1846), 3 C. B. 331; Horsfall v. Thomas (1862), 1 H. & C. 90; Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394, C. A.

**C. Return of Animal by Purchaser.**

**475. Not permissible—Unless express stipulation—Or fraud.]—**A person who has purchased a horse warranted sound, sold it again & then repurchased it, cannot, on discovery that the horse was unsound when first sold, require the original vendor to take it back again, nor can he by reason of the unsoundness resist an action by such vendor for the price, but he may give the breach of warranty in evidence in reduction of damages. *Seemle:* the purchaser of a specific chattel under warranty, having once accepted it, can in no instance return the chattel or resist an action for the price on the ground of breach of warranty, unless in case of fraud or express agreement authorising the return, or unless the vendor has taken back the chattel. But where the contract is executory only when the chattel is received, the vendor may rescind the contract if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial or exercised the dominion of ownership over them.—**STREET v. BLAY** (1831), 2 B. & Ad. 456; 109 E. R. 1212.

**Annotations:—****Apld.** Gompertz v. Denton (1832), 2 Cr. & M. 207; Allen v. Cameron (1833), 1 Cr. & M. 832; Parson v. Sexton (1847), 4 C. B. 899; Dawson v. Collis (1851), 10 C. B. 523. **Consd.** Kennedy v. Panama, New Zealand & Australian Royal Mail Co., Panama, New Zealand & Australian Royal Mail Co. v. Kennedy (1864), 8 B. & S. 571. **Refd.** Chappel v. Hicks (1833), 4 Tyr. 43; Pateshall v. Tranter (1835), 3 Ad. & El. 103; Elliott v. Thomas (1838), 1 Horn & H. 38; Mondel v. Steel (1841), 8 M. & W. 858; Murray v. Mann (1848), 2 Exch. 538; Syers v. Jonas (1848), 2 Exch. 111; Woodgate v. Wetton (1854), 24 L. T. O. S. 158; Clarke v. Dickson (1858), 4 Jur. N. S. 832; Bannerman v. White (1861), 10 C. B. N. S. 844; Azémar v. Casella (1867), L. R. 2 C. P. 431; Heilbutt v. Hickson (1872), L. R. 7 C. P. 438. **Mentd.** Sieveking v. Dutton (1846), 3 C. B. 331; Behn v. Burness (1862), 5 L. T. 670; Horsfall v. Thomas (1862) 1 H. & C. 90; Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394, C. A.; Re Green & Balfour, Williamson (1890), 63 L. T.

**476. —.]—**Pltf. sold a horse for deft., & received the price. The purchaser afterwards rescinded the contract on the ground of fraud, & was repaid the purchase-money. In an action by pltf. for the keep of the horse:—**Held:** the mere breach of warranty did not entitle the

**g. — —.]—**Judgment for pltf. on the note, & damages for the same amount on the counterclaim, the one to be set off against the other.—**BURKE v. VEINOT** (1909), 7 E. L. R. 285.—**CAN.**

**h. Lien note given for price—Counterclaim for damages for breach of warranty.]—**Judgment for pltf. on the note for \$600, & for defts. on the counterclaim for \$550.—**GRIFFIN v. RULLER** (1906), 3 W. L. R. 374.—**CAN.**

**i. Mortgage given to secure price—Counterclaim for damages for breach of warranty.]—**Judgment for pltf. on the mtge. for principal, interest & costs, less the damages to deft. to be ascertained by reference.—**LOCKWOOD v. MCPHERSON** (1907), 6 W. L. R. 277.—**CAN.**

*C. & D.]*

purchaser to return the horse, unless that condition was annexed to the contract, or unless fraud had been practised upon him.—*MURRAY v. MANN* (1848), 2 Exch. 538; 17 L. J. Ex. 256; 12 Jur. 634; 154 E. R. 605.

*Annotations*:—*Apld.* *Stevens v. Legh* (1853), 2 C. L. R. 251. *Mentd.* *Brady v. Todd* (1861), 9 C. B. N. S. 592; *Holland v. Russell* (1861), 30 L. J. Q. B. 308; *Udell v. Atherton* (1861), 7 H. & N. 172.

**477. ——— Scottish law different.]**—In England, if a horse is sold with a warranty of soundness, & it turns out to be unsound, the purchaser cannot return the horse, unless there is a stipulation that, if the horse does not answer to the warranty, the purchaser shall be at liberty to return it. But in Scotland there would be an absolute right to return the horse upon the discovery of its unsoundness, without any specific stipulation to that effect (*LORD CHELMSFORD*).—*COUSTON, THOMSON & Co. v. CHAPMAN* (1872), L. R. 2 Sc. & Div. 250, H. L.

*Annotation*:—*Mentd.* *Grimoldby v. Wells* (1875), L. R. 10 C. P. 391.

**478. Offer to take back—Duty of buyer to return in reasonable time.]**—Though on the sale of a horse there is an express warranty by the seller that the horse is sound, free from vice, etc., yet, if it is accompanied with an undertaking on the part of the seller to take the horse again, & pay back the purchase-money, if on trial it shall be found to have any of the defects mentioned in the warranty, the buyer must return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. In such case the term "trial" means a reasonable trial.—*ADAM v. RICHARDS* (1795), 2 Hy. Bl. 573; 126 E. R. 710.

*Annotation*:—*Refd.* *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438.

**479. ——— Made after sale—Warranty not discharged.]**—After a warranty of a horse as sound the vendor in a subsequent conversation said that if the horse were unsound (which he denied), he would take it again & return the money:—*Held*: (1) no abandonment of the original contract, which still remained open; (2) though the horse were unsound the vendee must sue upon the warranty, & could not maintain *assumpsit* for money had & received to

recover back the price, after a tender of the horse.—*PAYNE v. WHALE* (1806), 7 East, 274; 3 Smith, K. B. 130; 103 E. R. 105.

*Annotations*:—*Apld.* *Street v. Blay* (1831), 4 B. & Ad. 456; *Dawson v. Collis* (1851), 10 C. B. 523.

**480. ——— Refusal by buyer to accept—Warranty not waived.]**—T., owner of a horse which had been sold by deft., a stable keeper, with a warranty of soundness, told pltf. he would take the horse back. Pltf. did not then know of the horse's defects & refused, saying he knew nothing of T., & had bought the horse of deft.:—*Held*: this was no rescission of the contract or waiver of the warranty.—*BEST v. OSBORN* (1825), 2 C. & P. 74, N. P.

**481. Condition for return within limited period—Whether sufficient notice of, to buyer.]**—Deft. sold a horse by auction at his repository, & it was warranted sound. One of the conditions of sale posted up in the sale room was that in case any unsoundness were discovered, the horse must be returned before the evening of the second day after the sale. At the time of sale deft. announced that the conditions of sale were as usual. The sale took place on Wednesday & pltf., who alleged that the horse was unsound, did not return it until Saturday. In an action on the warranty:—*Held*: (1) sufficient notice of the condition had been given; (2) as pltf. had not returned the horse within the two days, he must be nonsuited.—*MESNARD v. ALDRIDGE* (1801), 3 Esp. 271.

**482. ———.]**—The terms of a warranty were proved by witnesses, who also saw a notice board on deft.'s premises stating that horses warranted sound would not be taken in if not returned within six days:—*Held*: (1) the jury should consider whether this notice formed any part of the original contract; (2) if it did not, it would not avail deft.—*BEST v. OSBORN* (1825), 2 C. & P. 74, N. P.

**483. ——— Effect of accidental injury before return.]**—Pltf. on Monday, Mar. 13, 1871, bought a horse of deft. warranted to have been hunted with the Bicester hounds. By a condition of the contract he was to be at liberty to return the horse if it did not answer its description up to the Wednesday evening following the sale. Previous to removing it from deft.'s premises he was told by the groom, who had charge of it, but who was not in deft.'s employment, that it had not, nor had it in fact, been hunted with the Bicester hounds. Pltf. never-

**PART VI. SECT. 2, SUB-SECT. 4.—C.**

**477 i. Not permissible—Unless express stipulation—Scottish law different.]**—A horse warranted sound died of staggers within four weeks of sale. The purchaser did not give sufficient care & attention to the horse, & gave no notice to the vendor for a month:—*Held*: the purchaser could not return the horse.—*WILSON v. MARSHALL* (1812), Hume, 697.—*SCOT.*

**477 ii. ———.]**—A mare being sold, warranted quiet in harness, but proving liable to shy greatly at meeting stage-coaches:—*Held*: the purchaser entitled to return her, though completely cured in a short time after being returned, & not bound to break her in for the use for which she was warranted as fit at the time.—*BEGGIE v. ROBERTSON* (1838), 6 S. 1014.—*SCOT.*

**477 iii. ———.]**—A horse was alleged to have been sold with a warranty that it was quiet to ride & drive:—*Held*: assuming such a warranty to have been given, the buyer was not entitled to reject the horse as disconform to warranty, in respect that upon its first trial by the buyer, on a strange road & with a strange vehicle & driver, it had shown fright by rearing & stopping at the smoke & noise of a rail-

way train.—*WILSON v. TURNBULL & Co.* (1896), 23 R. 714; 33 Sc. L. R. 556.—*SCOT.*

**477 iv. ———.]**—A contractor purchased a horse, warranted "correct in wind & work." On being tried it was very unruly & plunged violently, & ran into a mill dam, where it was drowned:—*Held*: as the purchaser would have been entitled to reject the horse as disconform to warranty, & his inability to do so was due to the seller's breach of warranty, he was not liable for the price.—*KINNEAR v. BRODIE* (1901), 3 F. 540; 38 Sc. L. R. 336; 8 S. L. T. 475.—*SCOT.*

**477 v. ———.]**—A horse was sold under a warranty that it was a good worker & sound in wind. It was stipulated that its buyers should have a week's trial of the horse. They returned it within the week on the ground that it was unsound in limb:—*Held*: there was a completed contract of sale between the parties, & the buyers entitled to return the horse within the week if disconform to warranty, but not otherwise.—*CRANSTON v. MALLOW & LIEN*, [1912] S. C. 112; 49 Sc. L. R. 186; 2 S. L. T. 383.—*SCOT.*

**477 vi. ——— Delay.]**—A horse warranted "free from vice & trick

of any kind" was ridden by the purchaser from Edinburgh to Suffolk & back before any complaint was made, & after about a month the purchaser desired to return the horse as being vicious & unmanageable:—*Held*: he could not do so.—*SHERIFF v. MARSHALL* (1812), Hume, 697.—*SCOT.*

**477 vii. ———.]**—A delay of thirty-seven days in the return of a horse, on the ground of unsoundness:—*Held*: sufficient to deprive the purchaser of his claim for repetition of the price.—*BENNOCH v. M'KAIL* (1820), Jan. 27, F. C.—*SCOT.*

**viii.**

Where the purchaser of a horse kept it & worked it for about six weeks without objection:—*Held*: the seller was not bound to take back the horse.—*POLLOCK v. MACADAM* (1840), 2 D. 1026; 15 Fac. 1131.—*SCOT.*

**477 ix. ——— Sale of two horses—Single transaction.]**—Two hunters were sold for £205, being sold at a lower price than if they had been sold separately. One of the horses being unsound the buyer offered to keep the other at £90:—*Held*: the purchase was a single transaction, & the buyer entitled to return both.—*HAMILTON v. HART* (1830), 8 S. 596.—*SCOT.*



theless took the horse away. Whilst it was in his possession, though not through any neglect or default on his part, it met with an accident which depreciated its value. He returned it before the Wednesday evening & brought an action to recover the price he had paid for it:—*Held*: (1) pltf.'s conduct in removing the horse, after the information given him by the groom, did not deprive him of his right under the contract to return the horse; (2) his right to return it was unaffected by an accident having happened to it whilst it was in his possession, without neglect or default on his part.—*HEAD v. TATTERSALL* (1871), L. R. 7 Exch. 7: 41 L. J. Ex. 4; 25 L. T. 631; 20 W. R. 115.

*Annotation*:—*Consd. & Folld.* Elphick v. Barnes (1880), 5 C. P. D. 321.

**484.** —Pltf. bought a horse of deft., warranted quiet to ride. One of the conditions of the contract was to the effect that, if the buyer contended that the horse did not correspond with the warranty, it must be returned on the second day after the sale, & that the non-return within the time limited should be a bar to any claim on account of any breach of warranty. The horse was removed by pltf., & while being ridden, fell, & was so injured that it could not safely be returned on the second day after the sale, but pltf. gave notice to deft. on the day that the animal was not according to warranty, & was unfit to travel:—*Held*: in these circumstances the non-return of the horse within the period stipulated by the condition was no bar to an action for breach of the warranty.—*CHAPMAN v. WITHERS* (1888), 20 Q. B. D. 824; 57 L. J. Q. B. 457; 37 W. R. 29; 4 T. L. R. 465.

**485. Horse returned to seller—Subsequent rescission of contract by seller.**—In an action for breach of a warranty of a horse, pltf. failed to prove a warranty at the time of sale, but it appeared that he had returned the horse to deft., who stated that he would keep it without prejudice, but he afterwards used it & offered to sell it to a third person:—*Held*: by so doing he rescinded the original contract of sale, & the jury rightly found a verdict for pltf. for the sum paid for the horse.—*LONG v. PRESTON* (1828), 2 Moo. & P. 262; 7 L. J. O. S. C. P. 14.

**484 i. Condition for return within limited period—Death of horse before return.**—Deft. sold to pltf. a horse & warranted it sound. On the same occasion it was agreed between the parties that, if pltf. did not like the horse, he might return it at any time before the Tuesday following. The horse was unsound, & died in pltf.'s possession three weeks afterwards:—*Held*: the warranty & the agreement respecting the return of the horse were distinct contracts, & pltf. might recover on the warranty, although he had not returned the horse within the time limited by the agreement.—*MAGROVE v. LOY* (1839), 1 Craw. & D. 286.—*IR.*

**485 i. Horse returned to seller—Refusal of seller to receive.**—A horse was purchased, & after a month's trial returned to the vendor as unsound, in breach of a warranty, but was not received by him:—*Held*: not sufficient to rescind the contract.—*CRIPPS v. SMITH* (1841), 3 L. L. R. 277.—*IR.*

#### PART VI. SECT. 2, SUB-SECT. 4.—D.

**486 i. Damages recoverable.**—A horse was sold for breeding purposes & warranted to be an imported Clydesdale:—*Held*: on breach of warranty, the measure of damages was the difference in value between an imported horse & a Canadian-bred one.—*TAYLOR v. GARDINER* (1892), 8 Man. L. R. 310.—*CAN.*

**486 ii.** —A mare was warranted to be standard-bred, & the seller agreed to furnish her pedigree to the purchaser. In an action for breach of the warranty & breach of contract in not supplying the pedigree, the trial judge assessed at \$200 pltf.'s damages for breach of deft.'s promise to furnish a pedigree, whereby pltf. was unable to register the mare's colts in the registry for standard horses, & so lost profits:—*Held*: these damages were too remote, & pltf. entitled as damages only to the diminution in value of the mare herself by the failure to furnish the pedigree. *Semble*: if pltf. had, before buying, informed deft. he was buying the mare for the purpose of breeding registerable stock, the case might have been different.—*STEINACKER v. SQUIRE* (1913), 5 O. W. N. 566; 30 O. L. R. 149; 19 D. L. R. 434.—*CAN.*

**486 iii.** —]—Deft. sold to pltf. diseased bees, which had been warranted "clean & all right":—*Held*: the damages should not be limited to a return of the purchase money, the natural result of deft.'s act being to spread the disease among other colonies of bees.—*MCKAY v. DAVEY* (1913), 28 O. L. R. 322; 4 O. W. N. 903; 12 D. L. R. 458.—*CAN.*

**486 iv.** —]—In an agreement for the sale of a warranted horse:—*Held*: the purchaser entitled to damages equal to the amount paid where the horse had to be returned not being as warranted.—

#### D. Action for Damages.

**486. Damages recoverable.**—Upon breach of warranty of a horse, if the horse is returned, the measure of damages is the price paid for him. If the horse is not returned, the measure of damages is the difference between his real value & the price given.—*CASWELL v. COARE* (1809), 1 Taunt. 566; 127 E. R. 954.

**487. Costs & damages paid by buyer on resale.**—Pltf. bought a horse with warranty from deft. & resold it with warranty. On being sued thereon by his vendee he offered the defence of the action to deft., his vendor, who gave no directions as to the action, which pltf. lost:—*Held*: pltf. was entitled to recover the damages & costs which he had to pay in that action as part of the damage occasioned by deft.'s breach of warranty.—*LEWIS v. PEAKE* (PEAT) (1816), 7 Taunt. 153; 2 Marsh. 431; 129 E. R. 61.

*Annotations*:—*Expld.* Walker v. Hatton (1842), 10 M. & W. 249. *Refd.* Penley v. Watts (1841), 7 M. & W. 601. *Mentd.* Hammond v. Bussey (1887), 20 Q. B. D. 79, C. A.

**488. Liability improperly incurred.**—Pltf. purchased a horse of deft., with a warranty of soundness, & sold it with a like warranty to J. S., who some months afterwards returned the horse, finding it to have been unsound at the time of the sale. Pltf. declining to take it back, J. S. brought an action on the warranty. Pltf. gave deft. notice that the horse was returned to him as unsound & of action brought. Deft. disregarding this notice, pltf. defended the action brought against him by J. S., & failed. In an action against deft. on his warranty, the jury finding that pltf. might, by a reasonable examination of the horse, have discovered that it was unsound at the time he sold it to J. S.:—*Held*: pltf. not entitled to recover as special damage the costs incurred by him in the defence of the former action, such defence being in the circumstances rash & improvident.—*WRIGHTUP v. CHAMBERLAIN* (1839), 2 Arn. 28; 7 Scott, 598.

*Annotations*:—*Consd.* Mowbray v. Merryweather, [1895] 1 Q. B. 857. *Refd.* Penley v. Watts (1841), 7 M. & W. 601; Walker v. Hatton (1842), 10 M. & W. 249.

**489. Cost of keep—Failure of buyer to tender back animal.**—Upon breach of warranty of a horse, if the horse is not tendered to deft., pltf. can recover

*SHAW v. TORRANCE* (1914), 26 O. W. R. 189, 859; 6 O. W. N. 172, 403.—*CAN.*

**486 v.** —]—measure of damages on breach of a warranty, on a sale of a horse, is the difference between the value of the chattel with the warranty & its value without its warranty.—*LOUGHNAN v. McDONELL* (1903), 23 N. Z. L. R. 14.—*N.Z.*

**486 vi.** —*Stallion.*—Deft. sold pltf. a stallion, warranting it to be a good coverer & foal-getter. The stallion turned out worthless as a foal-getter, & the jury gave £150 damages. The ct., although considering the damages too high, refused a new trial.—*NATRASS v. NIGHTINGALE* (1857), 7 C. P. 266.—*CAN.*

**486 vii.** —]—Deft. bought a stallion warranted as a 60 per cent. foal-getter:—*Held*: deft. entitled to recover as damages for breach of such warranty \$12 for each foal short—\$12 being his charge for each service.—*BRAITHWAITE v. BAYHAM* (1912), 21 W. L. R. 839; 2 W. W. R. 778; 4 D. L. R. 498.—*CAN.*

**486 viii.** —]—The measure of damages in an action for breach of warranty of a stallion is the difference between the value of the horse as it actually was & the value it would have had if it had fulfilled the warranty, & the loss of service fees.—*MCPHAIL v. ABBOTT* (1916), 34 W. L. R. 134; 10 W. W. R. 347; 9 Sask. L. R. 130; 27 D. L. R. 71.—*CAN.*



*Sect. 2.—Warranty: Sub-sect. 4, D. E. & F.]*

no damages for the expense of its keep.—*CASWELL v. COARE* (1809), 1 Taunt. 566 ; 127 E. R. 954.

**490. — Until resale.]**—In *assumpsit* for breach of warranty of soundness of a horse, deft. having refused to take back the horse, pltf. is entitled to recover for the keep, for such time only as would be required to resell the horse to the best advantage.—*M'KENZIE v. HANCOCK* (1826), Ry. & M. 436.

**491. — —.]**—If the purchaser of a horse on warranty discovers it to be unsound, he should immediately tender it back to the seller, & if the seller refuse to take it, should sell it as soon as possible for the best price that can be procured. The seller is liable for its keep in the meanwhile for a reasonable length of time. What length of time is reasonable in any particular case is a question for a jury. In an action upon such warranty, if deft. wishes to reduce pltf.'s claim for keep on the ground that the time was unreasonable, he must make that point at the trial. If he then defends solely on the ground that there was no breach of warranty, & the jury give damages in respect both of the price & keep, he cannot move to reduce them because the judge did not leave it to the jury whether or not the horse was kept an unreasonable time.—*CHESTERMAN v. LAMB* (1834), 2 Ad. & El. 129 ; 4 Nev. & M. K. B. 195 ; 111 E. R. 50.

*Annotation:—Mentd.* *Moore v. Eddowes* (1835), 2 Ad. & El. 134, n.

**492. — —.]**—If a person has bought a horse with a warranty which has been broken, & he tenders the horse back to the seller, who refuses to receive it, the buyer is entitled to keep the horse for a reasonable time till he can fairly sell it & may recover against the seller for keeping the horse during that time.—*ELLIS v. CHINNOCK* (1835), 7 C. & P. 169.

**493. Loss of profits on resale.]**—In an action for breach of warranty of a horse sold as sound, the special damage alleged in the declaration was pltf.'s expense incurred by reason of the warranty, & his loss of gains & profits in reselling the horse. The only plea was a denial of the unsoundness. Pltf. had bought the horse of deft. for £100, & had been offered £140 for it ; but, the horse proving unsound, pltf. had been obliged to give up the bargain, & to sell it for £49 7s.—*Held* : pltf. entitled to recover the difference between the price at which he had sold & the actual value of the horse, if it had been sound at the time of such sale, & the price offered for the horse while in pltf.'s hands was a matter to be left to the jury as a measure of the value.—*COX v. WALKER* (1835), 6 Ad. & El. 523, n. ; 112 E. R. 200.

*Annotation:—Refd.* *Clare v. Maynard* (1837), 6 Ad. & El. 519.

**490 i. Cost of keep—Until resale.]**—A horse warranted fit for breeding purposes was found to be unfit.—*Held* : the purchaser was entitled to recover (1) the price paid for the horse, (2) costs of transport, (3) interest on the purchase money, & having offered to return the horse, (4) all expenses necessarily caused by the horse lying on his hands until it could be sold, limited to a reasonable time, the actual value of the horse being deducted.—*WOOD v. ANDERSON* (1914), 7 O. W. N. 731, 731 ; 33 O. L. R. 143 ; 21 D. L. R. 247.—*CAN.*

**496 i. Diseased cow—Infection of other cows.]**—A. sued B. by civil bill process, for having sold to pltf. a cow, warranted sound, but which was then unsound, by reason of an infectious disease. The civil bill then assigned as special damage that four other cows of pltf. became thereby infected by it, & died. B., having been decreed in this suit, appealed, & upon the hearing of the

appeal, relied upon a decree made against himself at a former sessions at the suit of A., immediately after the death of the particular cow, which was warranted sound, for the breach of the above warranty. By that decree, deft. had been ordered to pay £6, being the value of the deceased cow.—*Held* : inasmuch as both actions were framed in contract, & were for substantially the same cause of action, although the special damage complained of was not identical, pltf. was not entitled to recover in the present action. *Semble* : the result would have been the same had the second action been framed expressly in tort for the consequential damage.—*GARDINER v. MATHEWSON* (1853), 6 Ir. Jur. 147.—*IR.*

**m. Diseased sheep—Infection of plaintiff's land.]**—Ten ewes, apparently healthy & sound in every respect, were sold warranted sound. A few days after, the disease of scab developed.

**494. —.]**—The declaration on breach of warranty of a horse alleged by way of special damage that pltf. had resold the horse at an advanced price ; that the horse had been returned to him, & that he had lost all the profit which he would have derived from the resale.—*Held* : on this declaration pltf. could not recover the difference between the two prices, it not being averred that the increased value of the horse was owing to any outlay by him since it had been in his possession. *Qu.* : if it had been so averred & proved.—*CLARE v. MAYNARD* (1837), 6 Ad. & El. 519 ; 1 Nev. & P. K. B. 701 ; Will. Woll. & Dav. 274 ; 6 L. J. K. B. 138 ; 112 E. R. 198.

**495. Set off by seller for keep.]**—In an action of *assumpsit* for money had & received on the warranty of a horse, deft. pleaded (*inter alia*), as to part, a set-off for the keep. At the trial it appeared that the horse remained in deft.'s possession from Aug. in one year to Feb. in the next, pltf. refusing to take it, & deft. sought to deduct the value of its keep during that period from the amount claimed, but the trial judge told the jury that he had no right to keep the horse without the authority of pltf., & that he ought to have sold it, at all events, within a reasonable time, *c.g.*, ten days or a fortnight. A verdict having been given for pltf. for the full amount, the ct. declined to grant a rule for a new trial.—*HETHERINGTON v. WOODIN* (1845), 6 L. T. O. S. 119.

**496. Diseased cow—Infection of other cows.]**—Deft., a cattle dealer, sold a cow to pltf., warranting it to be free from infectious disease, whereas in fact at the time of the sale the cow had the foot & mouth disease. Pltf. placed it with other cows who caught the disease & died. In an action on the warranty containing a count for false representation, the jury found that deft. knew that pltf. was a farmer, & that in the ordinary course of his business he would put the cow with other cows ; but the count for false representation was abandoned.—*Held* : on the warranty pltf. was entitled to recover as damages the value of the cows infected as well as that of the cow which deft. had warranted.—*SMITH v. GREEN* (1875), 1 C. P. D. 92 ; 45 L. J. Q. B. 28 ; 33 L. T. 572 ; 40 J. P. 103 ; 24 W. R. 142.

*Annotations —Refd.* *Randall v. Newson* (1877), 2 Q. B. 1102, C. A. *Ward v. Hobbs* (1877), 3 Q. B. D. 150, C. A.

*See, also, Nos. 665—668, post.*

*E. Proof of Breach.*

**497. Positive proof required.]**—In an action on a warranty of a horse, pltf. must positively prove that the horse was unsound.—*EAVES v. DIXON* (1810), 2 Taunt. 343 ; 127 E. R. 1110.

**498. Kicking horse — Unskilful driving.]**—G. purchased from P., a horse-dealer, a horse war-

One of the sheep died, & pltf.'s lands were proclaimed from Feb. until June. Besides the loss of the sheep pltf. claimed damages by reason of his being unable to let his land owing to its being proclaimed by the local authority.—*Held* : damages should be awarded him on that head.—*STONEV v. FOLEY* (1897), 31 I. L. T. Jo. 165.—*IR.*

**PART VI. SECT. 2, SUB-SECT. 4.—E.**

**n. "Gray Percheron stallion" — Sale void on failure to provide pedigree papers.]**—K. sold a stallion to G., & 3 lien notes were given, each of which stated that it was "given for a gray Percheron stallion." One of the notes also contained a clause providing that it should be void, if K. failed to provide G. "with the necessary papers (pedigree) to get a pure-bred certificate" before the end of 1907.—*Held* : there was no evidence to justify a finding that there was a breach of warranty

ranted "a thorough broke horse for a gig," P. representing at the time that the horse had been sent to him to be sold by a gentleman from England. For about two months from the time of the purchase G. himself had no opportunity to drive the horse in a gig, but during that interval the horse was often driven in a gig by others, & performed well. Then G. himself on two occasions drove the horse in a gig, on both of which occasions the horse performed ill, kicking out behind & running forcibly to the side of the road, & overturning the gig in a ditch. P. refusing to take back the horse, G. brought an action for the price & damages. It appeared in evidence that P. had got the horse from A., who parted with it on account of its having on one occasion when driven in a gig without any apparent cause kicked out violently behind & broken the gig. It was proved, however, that the horse, while in the possession of A., of P., & of G. himself had been very often driven in a gig, & on those occasions found steady & safe. It was in evidence likewise that G. had lashed the horse & checked it at the same time, on the occasion when his gig was overturned. No other evidence was given as to G.'s experience or skill in driving:—*Held*: (1) the horse answered the warranty at the time when it was sold, & its bad demeanour in the hands of G. was owing to want of skill in G., & judgment should be given for P.; (2) if the horse answered the warranty at the time it was sold, the misrepresentation as to the place from which it came would not invalidate the sale, but it was a material circumstance with respect to the question of costs.—*GEDDES v. PENNINGTON* (1817), 5 Dow, 159; 3 E. R. 1287.

**499. Acts of vice subsequent to sale.]**—Pltf. bought a mare warranted quiet to ride & quiet in single & double harness & free from vice. In an action on the warranty pltf. produced evidence of acts of vice by kicking, which took place one month, six weeks, & five months respectively after the time of sale:—*Held*: (1) this was evidence on which the jury might not unreasonably find for pltf.; (2) delay in making a complaint might be some evidence of the unreasonableness of the complaint, but should not prevail against positive evidence that the horse did not answer the warranty.—*GILL v. LOMER & Co.* (1888), 5 T. L. R. 76, C. A.

**500. Restiveness due to defective harness.]**—In an action for breach of warranty that a horse was quiet, it appeared that the horse was tried in a cart at the time of sale & was then quiet, but that when it was tried by pltf. on the day after the sale it was very restive. Pltf. offered to send the horse back, but deft. refused to receive it. There was evidence for deft. that the horse had always been quiet, & he contended that if it was restive after the sale it was from bad usage. When pltf. tried the horse the collar was too small & a new one was obtained; & when the horse was ultimately resold there was an old wound on its neck such as would be made by a

collar:—*Held*: pltf. had not proved that the horse was not quiet.—*LONDON & PROVINCIAL LAUNDRY Co., LTD. v. BALLARD* (1888), 4 T. L. R. 233.

**501. Surprise—New trial.]**—In an action on a warranty of a horse, it is no ground for a new trial that deft. was taken by surprise by the proof of a particular kind of unsoundness, of which he had no previous notice.—*ATTERBURY v. FAIRMANNER* (1823), 8 Moore, C. P. 32; 1 L. J. O. S. C. P. 63.

**502. Variance of pleading & proof.]**—In an action of *assumpsit* upon the warranty of a horse, the consideration alleged was an agreement to buy the horse for £12, whereas the proof was of an agreement to buy two horses at a fixed price for both. There were two separate contracts for the particular horses; one was unsound, & was sold without a warranty, & the other separately, with a warranty. The ct. refused to grant a new trial.—*KITE v. LOWE* (1849), 14 L. T. O. S. 177.

#### F. Pleading.

**503. Claim—Variance between declaration & proof.]**—Where pltf. declared that in consideration of his re-delivery to deft. of an unsound horse, which he had before then sold to pltf., deft. promised to deliver to him another horse in lieu, etc., which should be worth £80 & be a young horse, & then alleged a breach in both those respects:—*Held*: sufficient, though the proof was not only of a promise that the second horse should be worth £80 (which it was not) & be a young horse, but also a warranty that it was sound & had never been in harness.—*MILES v. SHEWARD* (1806), 8 East, 7; 103 E. R. 246.

**504. ———.]**—Proof that deft. agreed to sell his horse warranted sound to pltf. for £31 10s. & at the same time agreed that, if pltf. would take the horse at that value, he, deft., would buy another horse of pltf.'s brother for £14 14s., & that the difference only should be paid to deft., will support a count charging only that in consideration that pltf. would buy of deft. a horse for £31 10s. deft. promised that it was sound, & that in fact pltf. bought the horse for that price, & paid to deft. the £31 10s.—*HANDS v. BURTON* (1808), 9 East, 349; 103 E. R. 696.

*Annotations*:—*Consd.* *Whitcher v. Hall* (1826), 5 B. & C. 269. *Folld.* *Saxty v. Wilkin* (1843), 11 M. & W. 622.

**505. ———.]**—Pltf. purchased a horse for £55, deft. warranting him sound, & agreeing to give £1 back if the horse did not bring pltf. £4 or £5. The averment in the declaration was that in consideration pltf. would buy of deft. a horse for a certain price, to wit, £55, deft. undertook the horse was sound:—*Held*: a variance.—*BLYTH (BLYTHE) v. Bampton* (1826), 3 Bing. 472; 11 Moore, C. P. 387; 4 L. J. O. S. C. P. 157; 130 E. R. 595.

**506. ———.]**—In *assumpsit* on warranty of a horse, the consideration stated for the warranty

that the stallion was pure-bred. — *foal when sold*:—*Held*: a breach of the *IMPERIAL BANK v. GEORGES, GEORGES v. KIDD* (1910), 14 W. L. R. 654.—CAN. 26 I. L. T. Jo. 697. —IR.

**o. Adverse claim — Recognition of, by seller.]**—Deft. sold to pltf. a mare, assumed to be in deft.'s possession. Deft. agreed with pltf. that a third party should hold the mare pending settlement of a dispute about the title, & upon inspecting adverse claimant's alleged title, authorised the custodian to give her up to claimant:—*Held*: sufficient evidence of breach of warranty of title.—*DICKIE v. DUNN* (1887), 1 Terr. L. R. 83.—CAN.

**p. "All right for harness"—Mare in foal.]**—A mare was sold with a warranty that she was "all right for harness," but she subsequently proved to have been in

#### PART VI. SECT. 2, SUB-SECT. 4.—F.

**503 i. Claim — Variance between declaration & proof.]**—In an action on a warranty for the sale of a mare, the warranty, as set forth in the declaration, stated that she was only five years old; the evidence proved that she was more than five but not six years old, or what is called five off:—*Held*: no variance.—*VERSCHOYLE v. ALLEN* (1829), 2 L. Rec. O. S. 487.—IR.

**503 ii. — Form of declaration.]**—A declaration stated that in consideration that pltf. at the request of deft. had then & there bought a horse of him, he

then & there promised that the horse was sound:—*Held*: good, for that the sale & warranty were contemporaneous, & the statement in the declaration was not an averment of a sale being had before the promise was made.—*SMYTH v. MORRISON* (1846), 10 I. L. R. 213.—IR.

**q. Defence — General issue.]**—In an action on a warranty, the plea of not guilty puts the warranty in issue.—*HONEYWELL v. DAVIS* (1845), 2 U. C. R. 63.—CAN.

**r. ———.]**—In an action on a warranty, to which deft. pleaded the general issue:—*Held*: evidence to show that the horse was sound at the time of the alleged warranty was admissible.—*HALE v. TOMPKINS* (1912), 11 E. L. R. 91; 6 D. L. R. 502.—CAN.



**Sect. 2.—Warranty: Sub-sect. 4, F. Sect. 3. Part VII. Sect. 1: Sub-sect. 1, A.]**

was that pltf. would purchase the horse for £63, but the consideration, as proved, was that pltf. would pay that sum, & if the horse was lucky, would give deft. £5 more, or the buying of another horse:—*Held*: no variance, the conditional promise omitted in the declaration being too vague to be legally enforced, & not amounting, in point of law, to a promise.—*GUTHING (GETHING) v. LYNN* (1831), 2 B. & Ad. 232; 9 L. J. O. S. K. B. 181; 109 E. R. 1130.

**507. ———.]**—The declaration alleged that in consideration that pltf. would buy of deft. a horse at & for a "certain price or sum, to wit, the sum of £56 10s.," deft. promised that the horse was sound. Breach, that it was unsound. Plea, *non assumpsit*, & a traverse of the unsoundness. At the trial, it was proved that pltf., a tailor, agreed to give deft. for the horse £55, & a new pair of breeches, value £1 16s. It was contended that the consideration for the warranty was not correctly stated:—*Held*: although it might have been more proper to have described the contract for so much money & a pair of breeches, yet there was no variance.—*SAXTY v. WILKIN* (1843), 11 M. & W. 622; 1 Dow. & L. 281; 12 L. J. Ex. 381; 7 Jur. 704; 152 E. R. 954.

**508. ———.]**—Pltf. by his particulars claimed "the sum of £50, being the price of & value given & paid to deft. for a certain chestnut gelding, the chestnut gelding not being sound & answering to the warranty of him given by deft. to pltf., but being lame & unsound, & deft. having refused to take back & receive the chestnut gelding when returned or tendered to him as unsound. The case proved at the trial was merely one of damages for the breach of warranty. Judgment was given for pltf. for £50, the price of the gelding:—*Held*: the judge ought to have nonsuited pltf.—*FIGG v. WILKINSON* (1853), 18 J. P. 73.

**509. ——— Proof of qualified warranty.]**—*MORRIS v. LITHGOE* (1805), 2 Smith, K. B. 394.

**510. ———.]**—A declaration in *assumpsit* stated that deft. warranted a horse to be sound, but the proof was that deft. warranted the horse to be sound everywhere except a kick on the leg:—*Held*: this was a qualified, & not a general warranty, & there was a variance between the warranty proved & that stated in the declaration.—

*JONES v. COWLEY* (1825), 4 B. & C. 445; 6 Dow. & Ry. K. B. 533; 3 L. J. O. S. K. B. 263; 107 E. R. 1126.

*Annotation*:—*N.F. Hemming v. Parry* (1834), 6 C. & P. 580.

**511. ——— Unnecessary averment of knowledge.]**—In an action for a breach of an express warranty that a horse was quiet, if the declaration allege that deft. well knew him to be unquiet, this is an unnecessary averment, & need not be proved.—*GRESHAM v. POSTAN* (1826), 2 C. & P. 540.

**512. ——— Consideration for warranty.]**—A declaration stated that in consideration that pltf., at the request of deft., had bought a horse of deft. at a certain price, deft. promised that the horse was free from vice, but that it was vicious:—*Held*: bad, for the executed consideration, though laid with a request, neither raised by implication of law the promise charged in the declaration, nor would support such promise, assuming it to be express.—*ROSCORLA v. THOMAS* (1842), 3 Q. B. 234; 2 Gal. & Dav. 508; 11 L. J. Q. B. 214; 6 Jur. 929; 114 E. R. 496.

*Annotations*:—*Distd.* *Tanner v. Moore* (1846), 9 Q. B. 1. *Refd.* *Kaye v. Dutton* (1844), 7 Man. & G. 807; *Earle v. Oliver* (1848), 2 Exch. 71; *Elderton v. Emmens* (1848), 6 C. B. 160; *Stindy v. Roberts* (1848), 2 Saund. & C. 212; *Atkinson v. Stephens* (1852), 7 Exch. 567; *Aris v. Orchard* (1860), 6 H. & N. 160. *Mentd.* *Kennedy v. Brown* (1863), 9 Jur. N. S. 119.

**513. ——— Particulars.]**—The ct. will not compel pltf. in an action for breach of warranty of a horse to give particulars of the unsoundness complained of.—*PYLIE (TYLEY) v. STEPHEN (STEVENS)* (1840), 6 M. & W. 813; 8 Dowl. 771; 9 L. J. Ex. 216; 4 Jur. 852; 151 E. R. 641.

**SECT. 3.—MISREPRESENTATION AND FRAUD.**

*See, generally, MISREPRESENTATION & FRAUD.*

**514. By servant—Liability of master.]**—If a servant sells a horse with deceit without his master's privity, action lies against the master (*ROLFE & MARTIN, J.J.*).—*SOUTHERNE v. HOWE* (1817), 2 Roll. Rep. 5; 81 E. R. 621.

*Annotations*:—*Mentd.* *Grylls v. Davies* (1831), 2 B. & Ad. 514; *Crawshay v. Thompson* (1842), 5 Scott, N. R. 562; *Burgess v. Burgess* (1853), 3 De G. M. & G. 896; *Hirst v. Denham* (1872), L. R. 14 Eq. 542.

*See, further, AGENCY, Vol. I., pp. 587-594; MASTER & SERVANT.*

**PART VI. SECT. 3.**

**a. What must be pleaded.]**—On motion to set aside paragraphs of a summons & plaint averring that deft. knowing that a horse was unsound, by then fraudulently "concealing from pltf. that the horse was unsound," & representing to him that it was sound, induced pltf., who was ignorant of such unsoundness, to buy the horse:—*Held*: the words "concealing from pltf. that the horse was unsound" should be struck out.—*TIMPSON v. DALTON* (1874), 3 I. L. T. 184.—IR.

**d. What must be proved.]**—Where pltf. alleges that deft., knowing the horse to be unsound, falsely & fraudulently represented the animal to be sound, & pltf. purchased the horse from deft. on the faith of the truth of such representations, it must be established beyond doubt that these facts were true to allow pltf. to recover.—*TEASEL v. PRYOR* (1868), 12 L. C. J. 108.—CAN.

**w. Effect of.]**—Pltf. at the sale of a mare at auction made certain untrue representations as to the mare's capacity for work, & instructed the auctioneer as soon as he got a bid of \$60 to knock her down quickly to the bidder.

His son bid against deft. until \$60 was reached. When deft. offered the mare to pltf. for the price he bid, pltf. said he did not want her. The mare was not worth \$60, & deft. had told pltf. before the sale what kind of a horse he wanted:—*Held*: pltf. was guilty of fraud which avoided the contract of sale.—*WRIGHT v. BENTLEY* (1913), 12 E. L. R. 270; 11 D. L. R. 515; 46 N. S. L. R. 534.—CAN.

**x. ——— Promissory notes given for price—Onus on indorsees to show they were holders in due course.]**—*WILLUGHBY v. CONOVER* (1907), 7 W. L. R. 87.—CAN.

**y. ——— Sale by notarial deed.]**—*GINGRAS v. JETTE* (1915), 21 R. L. N. S. 489.—CAN.

**z. ——— Measure of damages.]**—A race-horse was sold, with its engagements, with a representation that it was "untried." The purchaser, on discovering the representation to be false, did not disaffirm the contract, but, after some considerable time, sold the horse:—*Held*: pltf. entitled to recover the difference between the price & the value, & also the amount which he had to pay as forfeits, but not the cost of

keeping the horse, nor the extra cost of keep as a racehorse, as that had not been distinguished at the trial.—*JELLETT v. PHILLIPS* (1877), 3 V. L. R. 209.—AUS.

**a. Waiver—Giving note after delivery.]**—After the delivery of horses by pltf. to deft., the latter gave pltf. a note for the price. Deft. afterwards alleged that one of the horses, instead of being quiet & gentle, was vicious:—*Held*: if there had been any misrepresentation, deft. had waived it by signing the note.—*MCPHERSON v. FARIS* (1912), 21 W. L. R. 654; 2 W. W. R. 643; 5 D. L. R. 385.—CAN.

**b. Tampering to enhance value.]**—Pltf. bought a dog as having won prizes at dog shows. Pltf. alleged that the dog being naturally a prick-eared dog, & to that extent deficient in one of the main points of a prize collie, defenders varnished him up by fixing lozenges to the tips of his ears in order to give him the proper ear carriage & thereby enabled him to take the prizes which he did:—*Held*: pltf. had failed to establish not merely that there was a fraud, but that without fraud the hall mark would not have been obtained, & defenders not liable.—*GORDON v. WATSON & MONTGOMERY* (1899), 6 Sc. L. T. 274.—SCOT.



**515. Concealment of latent defects.]—**I may be possessed of a horse I know to have many faults, & I wish to get rid of it for whatever sum it will fetch. I desire my servant to dispose of it, & instead of giving a warranty of soundness, to sell it "with all faults." Having thus freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound. In a contract such as this there is no fraud, unless the seller by positive means renders it impossible for the purchaser to detect latent faults (LORD ELLENBOROUGH, C.J.).—*BAGLEHOLE v. WALTERS* (1811), 3 Camp. 154.

*Annotations:—*Apprvd. *Ward v. Hobbs* (1878), 4 App. Cas. 13, H. L. *Mentd. Pickering v. Dowson* (1813), 4 Taunt. 779; *Bywater v. Richardson* (1834), 1 Ad. & El. 508; *Ward v.*

*Hobbs* (1877), 3 Q. B. D. 150, C. A.; *Gorton v. Macintosh* (1882), 31 W. R. 232.

**516. As to age of horse—Effect of fraud.]—**In an action to recover the price of a horse sold with a warranty the purchaser contended that the sale was avoided by fraud, pltf. having at the time of sale represented that the horse was five years old & had often been used as a hunter, whereas the horse though more than four years old was not five:—*Held*: (1) if there was a fraudulent representation at the time of sale, it invalidated the contract, no matter whether it was a breach of warranty or not; (2) here there was no pretence for a charge of fraud.—*STEWART v. COESVELT* (1823), 1 C. & P. 23.

## Part VII.—Carriage of Animals.

### SECT. 1.—RIGHTS AND LIABILITIES OF OWNERS.

#### SUB-SECT. 1.—APART FROM RAILWAY AND CANAL TRAFFIC ACT, 1854 (C. 31).

##### A. Rights.

*See, generally, CARRIERS.*

**517. Injury during transit—Dog insufficiently secured—Defect visible.]—**Deft., a carrier, received a greyhound & gave a receipt for it. The dog was afterwards lost:—*Held*: deft. could not set up as a defence that the greyhound was not properly secured when delivered to him.—*STUART v. CRAWLEY* (1818), 2 Stark. 323.

*Annotations:—*Distd. *Richardson v. N. E. Ry. Co.* (1872), L. R. 7 C. P. 75. *Consd. Blower v. G. W. Ry. Co.* (1872), L. R. 7 C. P. 655. *Refd. Kendall v. L. & S. W. Ry. Co.* (1872), L. R. 7 Exch. 373.

**518. — Insufficient fastening—Evidence of negligence.]** A valuable greyhound was delivered by its owner to the servants of a railway co., who were not common carriers of dogs, to be carried, & the fare demanded was paid. At the time of delivery the greyhound had on a leather collar with a strap attached to it. In the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap & collar to an iron spout on the open platform on one of the co.'s stations, & while so fastened, it slipped its head from the collar & ran upon the line & was killed:—*Held*: (1) as defts. were not common carriers of dogs they stood in the position of ordinary bailees & were only liable in respect of some negligence established by evidence against them; (2) the fastening the greyhound by the means furnished by the owner himself, which at the

time appeared to be sufficient, was no evidence of negligence on the part of the co.—*RICHARDSON v. NORTH EASTERN RY. CO.* (1872), L. R. 7 C. P. 75; 20 W. R. 461; *sub nom. NORTH EASTERN RY. CO. v. RICHARDSON & SISSON*, 41 L. J. C. P. 60; 26 L. T. 131.

*Annotations:—*Refd. *Blower v. G. W. Ry. Co.* (1872), L. R. 7 C. P. 655; *Sutcliffe v. G. W. Ry. Co.*, [1910] 1 K. B. 478, C. A.

**519. Defective landing slip—Animal under owner's control.]—**The lessees of a ferry provided steamboats for the conveyance of passengers, goods, & cattle from A. to B., & also slips for landing & embarking which were (generally) sufficient for the purpose:—*Held*: they were liable for an injury sustained by the horse of a passenger, in consequence of the side-rail of the landing slip (of the dangerous state of which they had been forewarned) giving way, although the horse was at the time under the control & management of its owner.—*WILLOUGHBY v. HORRIDGE* (1852), 12 C. B. 742; 22 L. J. C. P. 90; 16 J. P. 761; 17 Jur. 323; 138 E. R. 1096; *sub nom. HORRIDGE v. WILLOUGHBY*, Saund. & M. 53; 20 L. T. O. S. 97.

**520. — Delay through snowstorm—Limits of duty of carrier.]—**A carrier of cattle is only bound to carry in a reasonable time in ordinary circumstances, & is not bound to use extraordinary efforts or incur extra expense in order to surmount obstructions caused by the act of God, *e.g.*, a fall of snow.

Pltf. despatched certain animals by goods train in charge of defts. The train was shunted to a siding, the engine being required to add power to a passenger train obstructed by a fall of snow. This continued for thirty hours, during which time the animals were deprived of food. In an action

#### PART VII. SECT. 1, SUB-SECT. 1.—A.

**c. General rule.]—**A railway co., carrying live animals, are not insurers thereof, & in absence of any evidence of negligence or proof of the cause of injury to the animals, will not be liable to damages for such injury. (MAY, C.J.).—*M'INDOE v. MIDLAND GREAT WESTERN RY. CO.* (1882), 16 I. L. T. 99.—IR.

**d. — Extent of duty to carry.]—**Common carriers of cattle by rail are bound to carry only when they can reasonably be expected to have waggons at the station from which the cattle are to be carried, & they are only bound to forward them with reasonable diligence (FITZGERALD, J.).—*M'NAMARA v. GREAT SOUTHERN & WESTERN RY. CO.* (1867), 1 I. L. T. Jo. 120.—IR.

**e. — — —.]—***Held*: an undertaker to have a car in readiness for the

shipment of horses imposed an obligation to take initiatory steps towards transportation, & resp. justified, on discovering the lack of efficient action, in treating that as a breach of contract sufficient to relieve him from the necessity of bringing the horses forward.—*MANCELL v. MICHIGAN CENTRAL RY.* (1914), 26 O. W. R. 427; 6 O. W. N. 451.—CAN.

**520 i. Injury during transit—Delay through fog & frost.]—**The contract of a carrier to carry cattle within a reasonable time does not extend so as to create responsibility for injuries caused by delay, where such delay has been unavoidably occasioned by fog & frost.—*GRANT v. LANCASHIRE & YORKSHIRE RY. CO.* (1882), 17 I. L. T. 36.—IR.

**f. Defective ferry.]—***Held*: a county council was liable for loss of cattle

sustained through an accident caused by the breaking of a defective link in an untested chain which formed part of the gear of a ferry under its control, it being its duty to have had a tested chain supplied.—*WHAKATANE COUNTY COUNCIL v. NEWSHAM*, 2 N. Z. L. R. 746.—N.Z.

**g. — Several loose oxen in one truck.]—**Where one of several head of cattle belonging to the same owner is injured through being trampled upon by the rest while being conveyed by rail, the ry. dept. is not liable for the loss, in the absence of proof that it was an improper mode of conveyance to place several oxen loose in one truck, or that the injury was otherwise facilitated through negligence on the part of the dept.—*TREGIDGA v. SIVEWRIGHT*, 14 S. C. 76; 7 C. T. R. 67.—S. AF.

*Rights and liabilities of owners: Sub-sect. 1,**A.*

against defts. the trial judge substantially left it to the jury whether in all the circumstances the detention of the animals was the result of the snow or was owing to the negligence of defts.' servants, & the jury found a verdict for defts.:—*Held*: the verdict was right.—*BRIDDON v. GREAT NORTHERN RY. Co.* (1858), 28 L. J. Ex. 51; 32 L. T. O. S. 94.

*Annotation*: *Consd.* *Hick v. Rodocanachi*, [1891] 2 Q. B. 626, C. A.

**521. — Mere accident—Not being risk of travel.]**—Railway cos. are responsible for the safe treatment of animals intrusted to them for carriage from the moment they receive the animals into their charge until the carriages that have conveyed those animals are unloaded.

Pltf. sent a mare to the railway station at H. to be conveyed to A. At the railway station the animal was put into a horse box & tied up. Some time afterwards a porter on looking in found that the animal had got her foot into the manger & slipped, causing strangling by the rope. No negligence on the part of the railway co. was proved other than might be due to the length of the halter used:—*Held*: (1) the co. were not responsible for accidents of a nature beyond the range of ordinary risks, but they were for anything resulting from the negligence of their servants; (2) pltf. was entitled to a verdict.—*MOFFAT v. GREAT WESTERN RY. Co.* (1867), 15 L. T. 630.

**522. — Inherent vice of animal—No negligence by carrier.]**—Pltf. delivered a bullock to defts. at D., to be carried to N. In the course of the journey the animal escaped from the truck in which it was placed & was killed. The escape of the bullock was wholly attributable to the efforts & exertions of the animal itself, & not to any negligence on the part of the co., & the truck was in every respect proper & reasonably sufficient for the conveyance of the cattle:—*Held*: upon these facts, the trial judge ought to have directed a verdict for defts., the co. (assuming them to be common carriers of cattle) not being responsible for the consequences of an inherent vice in the animal to be carried, which resulted in its destruction without any negligence on their part.—*BLOWER v. GREAT WESTERN RY. Co.* (1872), L. R. 7 C. P. 655; 41 L. J. C. P. 268; 26 L. T. 883; 36 J. P. 792; *sub nom.* *GREAT WESTERN RY. Co. v. BLOWER*.

*Annotations*:—*Refd.* *Kendall v. L. & S. W. Ry. Co.* (1872), L. R. 7 Exch. 373; *Nugent v. Smith* (1876), 1 C. P. D. 423, C. A.; *Greenfields, Cowie v. Stephens*, [1908] A. C. 431, H. L.

**523. — Vice inferred.]**—Pltf. delivered to defts. a horse to be carried by their railway. At the end of the journey the horse was found to be injured. No accident had happened to the train, &

**521 i. — Mere accident—Not being risk of travel.]**—A horse fastened in the usual way in a railway horse-box struggled through the feeding window (about 25 inches square) into the adjoining compartment & was thereby injured:—*Held*: the accident was not of a kind that the railway co. were bound to have foreseen & to have provided against, & they were not liable.—*RALESTON v. CALLEDONIAN RY. Co.* (1878), 5 R. 671; 15 Sc. L. R. 372.—*SCOT*.

**h. Failure to carry—Measure of damages.]**—Pltf. proposing to sell certain horses by auction at Dublin, on Apr. 26, agreed with defts., a railway co., that the horses should be carried by rail to Dublin on Apr. 24. Defts. failed to provide the necessary means of carriage for the horses on the 24th, whereupon pltf. took them by road to Dublin, having no other alternative if

he wished to sell them at the auction as contemplated. In consequence of the journey some of the horses were deteriorated in appearance, one of them was lamed, & those which were sold fetched lower prices than would otherwise have been realised. For some time previous the horses had been fed on soft food, & had they been in hard hunting condition they would not have been the worse for the journey:—*Held*: the injury to the horses was attributable to the default of defts., & damages awarded in consequence of the deterioration in the selling value of the horses were not too remote.—*WALLER v. MIDLAND GREAT WESTERN RY. Co.* (1878), 12 L. L. T. Jo. 145.—*IR*.

**1. Delay in carrying—Want of trucks.]**—In an action for damages for delay in carrying cattle from Dublin to Sheffield, it was proved that the cattle

defts. were guilty of no negligence. The cause of the injuries was unknown, except that from their nature they appeared to be caused by the horse getting down upon the floor of the horse-box. The horse was quiet, & accustomed to travel by rail. In an action to recover damages for these injuries:—*Held*: defts. were not liable, since it was to be inferred that the injuries resulted from the proper vice of the horse.—*KENDALL v. LONDON & SOUTH WESTERN RY. Co.* (1872), L. R. 7 Exch. 373; 41 L. J. Ex. 184; 26 L. T. 735; 20 W. R. 886.

*Annotation*:—*Refd.* *Nugent v. Smith* (1876), 1 C. P. D. 423, C. A.

**524. — Coupled with act of God.]**—A carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; & if he can show that either the act of nature or the defect of the thing itself, or both taken together, formed the sole direct & irresistible cause of the loss, he is discharged. In order to show that the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution in the circumstances could it have been prevented.

Def., a common carrier by sea from L. to A., received from pltf. a mare to be carried to A. for hire. In the course of the voyage the ship encountered rough weather, & the mare received such injuries that she died. The jury found that the injuries were caused partly by more than usually bad weather, & partly by the conduct of the mare herself by reason of fright & consequent struggling, without any negligence of deft.'s servants:—*Held*: deft. was not liable for the death of the mare.—*NUGENT v. SMITH* (1876), 1 C. P. D. 423; 45 L. J. Q. B. 697; 34 L. T. 827; 41 J. P. 4; 25 W. R. 117; 3 Asp. M. L. C. 198, C. A.

*Annotations*:—*Expld.* *Nichols v. Marsland* (1876), 2 Ex. D. 1, C. A. *Consd.* *Kopitoff v. Wilson* (1876), 1 Q. B. D. 377; *Watkins v. Cottell*, [1916] 1 K. B. 10. *Refd.* *Box v. Jubb* (1879), 48 L. J. Q. B. 417; *Lister v. L. & Y. Ry.* (1903), 72 L. J. K. B. 385; *The West Cock* (1911), 80 L. J. P. 97, C. A. *Mentd.* *Woodley v. Mitchell* (1883), 11 Q. B. D. 47, C. A.

**525. — Defective truck—Evidence of negligence.]**—Pltf. sent off some horses from W., a station on a co.'s line, in horse-boxes belonging to that co., in charge of a groom, who was to take them to F., a station on defts.' line. At G. was the junction with defts.' railway, where it was necessary to book again, & whence there were two routes to F., & the groom, on going to take tickets, was told that the train direct to F. did not go for some hours, but that by paying a little higher fare he could go on a train which was about to start immediately, & went round a longer way. He said he would go on at once, & he & the horses proceeded in the same trucks in which they had come from W. At F.

arrived before the steamer started, but as she was full they had to be kept till the next steamer, & they were further detained at Holyhead for want of trucks to send them on in:—*Held*: the jury were warranted in finding for pltf., as the delay was caused by the want of trucks, & not by any unavoidable impediment.—*DONOHUE v. LONDON & NORTH WESTERN RY. Co.* (1867), 1 L. L. T. Jo. 350.—*IR*.

**m. — Measure of damages—Loss of market.]**—Owing to an accident to a train, the cause of which could not be ascertained, a number of pigs arrived about five hours too late for a market to which they had been forwarded:—*Held*: the railway co. were not liable for damage incurred by loss of market.—*ANDERSON v. NORTH BRITISH RY. Co.* (1875), 2 R. 443; 12 Sc. L. R. 312.—*SCOT*.



two porters came to unload the trucks, & the groom told them of a danger of an accident, arising from a wide space between the flap & the body of the horse-box, & how at W. it had been stopped up for horses to be put in. They accordingly tried to stop it up with straw, while the groom kept the horses quiet inside. When done they said "all right," & he then led out a mare, her foal following. The latter put its foot through the opening & broke its leg:—*Held*: (1) the co. were bound to provide a truck reasonably fit for the conveyance of pltf.'s horses, & there was evidence that this was unfit; (2) defts. had adopted the truck from the other co. at G., & by sending it on to F. became liable for an accident caused by its defects; (3) defts. were bound to deliver safely at F., & the facts proved were evidence for the jury of negligence in defts.' servants in delivering, & not necessarily of any contributory negligence in pltf., arising from the groom's advice how to remedy the defect.—*COMBE v. LONDON & SOUTH WESTERN RY. CO.* (1874), 31 L. T. 613.

**526. — Failure by carrier to comply with statutory requirements—Act passed for different purpose.]**—Deft., a shipowner, undertook to carry pltf.'s sheep from a foreign port to England. On the voyage some of the sheep were washed overboard, by reason of deft.'s neglect to take a precaution enjoined by an Ord. in Council made under the authority of Contagious Diseases (Animals) Act, 1869 (c. 70), s. 75:—*Held*: the object of the above Act & the Ord. being to prevent the spread of contagious disease among animals, & not to protect them against perils of the sea, pltf.s. could not recover.—*GORRIS v. SCOTT* (1874), L. R. 9 Exch. 125; 43 L. J. Ex. 92; 30 L. T. 431; 22 W. R. 575; 2 Asp. M. L. C. 282.

*Annotations*:—*Reid*. *Ross v. Rugge-Price* (1876), 1 Ex. D. 269; *Groves v. Wimborne*, [1898] 2 Q. B. 402, C. A.

Importation of diseased animals, generally, see Part X., Sect. 2, Sub-sect. 3, *post*.

**527. — Horse-box in mineral train—Shunting of uncoupled trucks.]**—A horse had been put into a box next to mineral trucks not coupled, & the trucks were moved backwards & forwards, with the result that the horse was knocked about on the head. In an action for negligence in the conveyance of the horse:—*Held*: this was not a reasonable & proper mode of carrying the horse.—*PICKERING v. NORTH EASTERN RY. CO.* (1889), 4 T. L. R. 7, C. A.

*Annotation*:—*Mentd*. *Smith v. Mid. Ry. Co.* (1887), 57 L. T. 813.

**528. — Cattle injured—No affirmative evidence.]**—Eight cows having been safely loaded in a truck at D. for conveyance to B., on the arrival of the train at B. it was found that of these one had a leg broken, & that three others were injured about the hips & rump. The owner of the cows having brought an action for negligence against the railway co., & having proved the injuries & given his opinion that they were caused by undue shunting & jerking of the train:—*Held*: the *onus* of proof being on pltf. & no affirmative evidence having been given by him of negligence on the part of the railway co., defts. were entitled to judgment.—*SMITH v. MIDLAND RY. CO.* (1887), 57 L. T. 813; 52 J. P. 262; 4 T. L. R. 68.

*Annotation*:—*Distd*. *Ainsby v. G. N. Ry. Co.* (1891), 8 T. L. R. 148.

**529. Injury after transit but before delivery.]**—Pltf. delivered to defts. as common carriers some cattle to be carried by them to their London station. The cattle arrived on a Sunday morning between 11 & 12 o'clock, but owing to certain police regulations pltf. was unable to take them away before 12

o'clock at night. Meanwhile they were placed by defts.' servants, with the sanction & assistance of a man employed by pltf. to receive them, in pens at the station. Early on the Monday morning when pltf.'s servant went to take them away he found that two steers had been killed. He wished to take away the remaining cattle, but was refused permission unless he signed a receipt ticket for the whole number, which he declined to do. Later in the day pltf. came & removed them, but before he could reach the market for which they were intended, it was over, & he could not sell them until the Thursday following. In an action for the value of the two steers which were killed, & for the damage done to the remaining beasts by delay:—*Held* (*MARTIN, B., dis.*): defts.' liability as carriers had ceased when the alleged loss & damage occurred.—*SHEPHERD v. BRISTOL & EXETER RY. CO.* (1868), L. R. 3 Exch. 189; 37 L. J. Ex. 113; 18 L. T. 528; 16 W. R. 982.

### *B. Liabilities.*

*See, generally, CARRIERS.*

**530. Expenses reasonably—Incurred in disinfecting & cleaning trucks.]**—An Ord. in Council directed that every carriage, truck, etc., should be cleansed & disinfected by the owners in manner therein pointed out once in every twenty-four hours during the time when it was used for any animal. Defts. were authorised by their special Act to charge certain rates for the carriage of goods on their line, & also to "charge a reasonable sum for loading, covering & unloading of goods . . . & for delivery & collection & any other services incidental to the business or duty of a carrier . . . & for any other extraordinary services performed" by them. Pltf. sent cattle by defts.' line:—*Held*: defts. could not require pltf. to pay the cost properly incurred by them under the Ord. in cleansing the truck in which the cattle were sent, as the cleansing was not a service done for pltf. individually as distinguished from the rest of the public.—*COX v. GREAT EASTERN RY. CO.* (1869), L. R. 4 C. P. 181; 38 L. J. C. P. 151.

Disinfection relating to diseased animals, generally, see Part X., Sect. 2, Sub-sect. 2, *post*.

**531. — Through failure to take delivery promptly.]**—Deft. sent a horse by pltf.'s railway directed to himself at S. station. On the arrival of the horse at S. station at night there was no one to meet it, & pltf.s. having no accommodation at the station, sent the horse to a livery stable. Deft.'s servant soon after arrived & demanded the horse, & he was referred to the livery stable-keeper, who refused to deliver the horse except on payment of charges which were admitted to be reasonable. On the next day deft. came & demanded the horse, & the station-master offered to pay the charges & let deft. take away the horse, but deft. declined & went away without the horse, which remained at the livery stable. Pltf.s. afterwards offered to deliver the horse to deft. at S. without payment of any charges, but deft. refused to receive it unless delivered at his farm & with payment of a sum of money for his expenses & loss of time. Some time after, pltf.s. paid the livery stable-keeper his charges, & sent the horse to deft., who received it. In an action brought to recover the amount of the charges:—*Held*: pltf.s. acted reasonably in putting the horse in the livery stable, & deft., having refused to take the horse, was liable to pltf.s. for all the livery charges which they had paid.—*GREAT NORTHERN RY. CO. v. SWAFFIELD* (1874), L. R. 9 Exch. 132; 43 L. J. Ex. 80; 30 L. T. 562.

*Annotations*:—*Reid*. *Sims v. Mid. Ry. Co.*, [1913] 1 K. B. 103; *L. & N. W. Ry. Co. v. Duerden* (1915), 85 L. J. K. B. 176. *Mentd*. *Mitchell v. L. & Y. Ry. Co.* (1875), L. R. 10 Q. B. 256.



**Sect. 1.—Rights and liabilities of owners : Sub-sect. 2.]****SUB-SECT. 2.—UNDER RAILWAY AND CANAL TRAFFIC ACT, 1854 (c. 31).**

*See, generally, CARRIERS.*

**532. Declaration of value—Requisites of.]**—The declaration of value required by Railway & Canal Traffic Act, 1854 (c. 31), s. 7, must be such as to convey a distinct intimation to the railway co. that the sender intends to hold them responsible for a higher sum. *Semble*: the declaration of value need not be made at the moment of tendering the animal to be carried.

Where a servant of a railway co., having casually learned that a mare tendered for carriage was worth £135, refused to carry her unless insurance money was paid beyond the usual charge for carriage:—*Held*: the co. were responsible for such refusal.—**ROBINSON v. LONDON & SOUTH WESTERN RY. CO.** (1865), 19 C. B. N. S. 51; 6 New Rep. 119; 34 L. J. C. P. 234; 12 L. T. 347; 11 Jur. N. S. 390; 13 W. R. 660; 144 E. R. 704.

—**Necessity for.]**—*See* Nos. 533, 536, 541—543, 554, *post*.

**533. No declaration of value—Statutory limits of claim.]**—Pltf.'s ram, delivered to defts. to be carried upon their railway, was injured through the negligence of their servants. No written contract was entered into, nor any declaration of its value made on its delivery to defts. In an action to recover the value of the ram:—*Held*: although no written contract had been made, the liability of defts. was limited to the amount specified in Railway & Canal Traffic Act, 1854 (c. 31), s. 7 (second proviso).—**HILL v. LONDON & NORTH WESTERN RY. CO.** (1880), 42 L. T. 513.

**534. Injury before actual delivery to carrier—Before signing special contract—Statutory limits of claim.]**—A railway co. is entitled to the protection against responsibility for the carriage of animals given by Railway & Canal Traffic Act, 1854 (c. 31), s. 7 (second proviso), although no complete contract for carriage of the animal has been entered into, & no complete delivery of it has taken place; it is enough if the animal was in the course of being delivered to or received by the co.—**HODGMAN v. WEST MIDLAND RY. CO.** (1864), 5 B. & S. 173; 4 New Rep. 397; 33 L. J. Q. B. 233; 10 L. T. 609; 28 J. P. 693; 10 Jur. N. S. 673; 12 W. R. 1054; 122 E. R. 796; *affd.* (1865), 6 B. & S. 560, Ex. Ch.

*Annotations*:—**Consd.** *Gallin v. L. & N. W. Ry. Co.* (1875), L. R. 10 Q. B. 212; *Hill v. L. & N. W. Ry. Co.* (1880), 42

L. T. 513. **Reid.** *Bunch v. G. W. Ry. Co.* (1885) 2 T. L. R. 62.

**535. Carrier exempted from responsibility for injury "however caused."]**—Railway & Canal Traffic Act, 1854 (c. 31), s. 7, extends to cases where a special contract has been signed in conformity with the subsequent provisions in the Act.

Pltf. brought three horses to the cattle station of defts.' railway at L., to be forwarded by a cattle truck to Y. Defts.' servant provided a truck for the purpose, which to all external appearance, so far as the servant knew, was sufficient for the purpose. Pltf. signed a ticket, which contained the following memorandum: "This ticket is issued subject to the owners undertaking all risks of conveyance, loading & unloading whatsoever, as the co. will not be responsible for an injury or damage (howsoever caused) occurring to live stock of any description travelling upon the railway or in their vehicles." Twopence per mile was charged for horses laden at the cattle station. Horses so laden were forwarded in open trucks by a cattle or luggage train. At a passenger station horses were taken at the rate of fourpence a horse per mile. Horses laden at this station were forwarded in horse-boxes by the trains departing from the passenger station, usually passenger trains. The tickets issued by the co. for horses forwarded by the passenger trains were similar to that signed by pltf. The truck proved to be insufficient for the carriage of the horses, & a hole was made in it on the journey, by which the horses were injured:—*Held*: (1) the condition that the co. "would not be responsible for any injury or damage howsoever caused" was not just & reasonable, & was void; (2) it did not protect defts. from liability in respect of the defect in the truck.—**M'MANUS v. LANCAIRE & YORKSHIRE RY. CO.** (1859), 4 H. & N. 327; 28 L. J. Ex. 353; 33 L. T. O. S. 259; 24 J. P. 4; 5 Jur. N. S. 651; 7 W. R. 547; 157 E. R. 865, Ex. Ch.

*Annotations*:—**Apld.** *Beal v. South Devon Ry. Co.* (1860), 5 H. & N. 875; *Harrison v. L. B. & S. C. Ry. Co.* (1860), 2 B. & S. 122. **Consd. & Apld.** *Harrison v. L. B. & S. C. Ry. Co.* (1860), 2 B. & S. 152, Ex. Ch. **Apld.** *McCance v. L. & N. W. Ry. Co.* (1861), 7 H. & N. 477. **Consd.** *Peck v. North Staffordshire Ry. Co.* (1862-3), 10 H. L. Cas. 473, H. L. **Apld.** *Gregory v. West Mid. Ry. Co.* (1864), 2 H. & C. 944. **Consd.** *McCawley v. Furness Ry. Co.* (1872), L. R. 8 Q. B. 57; *Kendall v. L. & S. W. Ry. Co.* (1872), L. R. 7 Exch. 373. **Reid.** *North Staffordshire Ry. Co. v. Peck* (1860), E. B. & E. 986, Ex. Ch.; *Lewis v. G. W. Ry. Co.* (1860), 29 L. J. Ex. 425; *Hodgman v. West Mid. Ry. Co.* (1864), 5 B. & S. 173; *Rooth v. N. E. Ry. Co.* (1867), 15 L. T. 624; *Cohen v. G. E. Ry. Co.* (1876), 45 L. J. Q. B. 298, Ex. Ch.; *Harris v. G. W. Ry. Co.* (1876), 1 Q. B. D. 515.

**PART VII. SECT. 1, SUB-SECT. 2.**

**n. Carrier exempted from "all risk of loss" unless arising from "gross negligence or default" of company's servants.]**—*Held*: (1) a railway co. not liable to the owner of cattle forwarded by the line, for loss sustained from the cattle being crowded in a waggon of insufficient dimensions, as the owner had himself bespoken a waggon of those dimensions, had superintended the loading thereof, & had signed conditions of carriage, whereby he undertook "all risk of loss," etc., "in loading, unloading, conveyance or otherwise, except such as shall arise from the gross negligence or default of the railway co., or their servants," & these conditions were "just & reasonable," within Railway & Canal Traffic Act, 1854 (c. 31), s. 7; (2) in the ordinary case it would not be a just & reasonable condition that the co. should not be liable for the negligence of their officials.—**RAIN v. GLASGOW & SOUTH WESTERN RY. CO.** (1869), 7 M. 439.—**SCOT.**

**o. Carrier exempted from all liability for loss on specified route—Damage sustained on different route.]**—A railway co. agreed to charge only half rates for the return journey of stock not sold

at a show at A., on condition that the exhibitor consigned them "on the return journey by the same route as they were sent." An exhibitor signed a form supplied by the co. requesting them to carry back to M. three unsold cattle "by the same route as on the journey here" at their reduced rate, & in consideration thereof he undertook to relieve the co. of all liability for loss or damage unless caused by wilful misconduct on the part of their servants. The cattle on the outward journey had been consigned from M. to A. via K., no route being specified between K. & A. From K. there were two routes to A., with little difference as regarded distance & convenience. The co. had carried the cattle by the one route on the outward journey & were carrying them by the other on the return journey, when the truck containing the cattle caught fire, from the effects of which they died:—*Held*: (1) the stipulation for carriage back "by the same route as on the journey here" was not a condition of the contract which the co. could waive as having been made solely in its own interest; (2) the co. had broken the contract; (3) the breach did not put the co. outside Railway & Canal Traffic Act, 1854 (c. 31), s. 7,

which limited their liability.—**POLWARTH v. NORTH BRITISH RY. CO.**, [1908] S. C. 1275; 45 Sc. L. R. 102; 15 S. L. T. 461.—**SCOT.**

**p. Carrier exempted from liability caused by restiveness of animal carried.]**—The owner of a dog, carried by defts., authorised a porter to get a ticket for the dog, which ticket was handed to the owner, but not read or signed by him. One of the conditions of the ticket was that defts. should not be liable for damage occasioned by the restiveness of the animal carried. The dog was, with pltf.'s knowledge, tied to some luggage in the guard's van by a chain & collar furnished by the owner, but escaped in course of transit & was lost:—*Held*: (1) pltf. entered into a contract upon the terms & conditions of the ticket supplied by the porter; (2) the contract not being signed in accordance with Railway & Canal Traffic Act, 1854 (c. 31), s. 7, did not relieve defts. from liability for negligence, although just & reasonable, & pltf. not disentitled to recover by reason of his knowledge of the mode in which the dog was tied up.—**STRITCH v. NORTHERN COUNTIES RY. CO.** (1876), 10 I. L. T. 169.—**IR.**

**536. Carrier not exempted from liability for loss occasioned by wilful wrong—Contract severable.]—**

A passenger by railway from L. to W. took with him two horses & a retriever dog; the horses were put into a horse-box, & a servant of defts. proposed that the dog should be placed in the horse-box, to which pltf. assented. The dog was fastened in the horse-box by a strap attached to a leather collar round its neck, the collar & strap being furnished by pltf. Pltf.'s agent signed a ticket subject to the following conditions:—"The co. will not be liable in any case for loss or damage to any horse or other animal above the value of £40 or any dog above the value of £5, unless a declaration of its value, signed by the owner or his agent, at the time of booking same, has been given to them, & by such declaration the owner shall be bound, the co. not being in any event liable to any greater amount than the value so declared. The co. will in no case be liable for injury to any horse or other animal or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed £40 or any dog £5, the price of conveyance will, in addition to the regular fare, be after the rate of 2½ per cent., or 6d. in the pound, upon the declared value above £40 [or £5] whatever may be the amount of such value, & for whatever distance the horse or other animal is to be carried." Pltf. made no declaration of the value of the dog, & paid 3s. for the carriage of it. On the arrival of the train at W. a window in the horse-box was found open, through which the dog had escaped, & was lost:—*Held*: (1) the loss of the dog was occasioned by pure accident; (2) assuming Railway & Canal Traffic Act, 1854 (c. 31), s. 7, applied, the conditions on the ticket were just & reasonable within that sect. because the effect of the first condition was not to exempt defts. from liability for loss or injury occasioned by wilful wrong, & if it exempted them from responsibility for any negligence it was severable, & valid to exempt when there was no negligence, & it lay upon pltf. to show that the extra charge in the third condition was exorbitant or unfair, & the question whether it was so was for a jury & not for the ct.; (3) (ERLE, C.J. & KEATING, J.) the above sect. was confined to cases in which the loss or injury was occasioned by misconduct on the part of the co. & did not apply where it occurred through pure accident.—*HARRISON v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1862), 2 B. & S. 152; 31 L. J. Q. B. 113; 6 L. T. 466; 8 Jur. N. S. 740; 121 E. R. 1029, Ex. Ch.

*Annotations*:—*Distd.* Wilton v. Royal Atlantic Mail Steam Navigation Co. (1861), 8 Jur. N. S. 231. *Consd.* Peck v. North Staffordshire Ry. Co. (1862-3), 10 H. L. Cas. 473, H. L.; Stevens v. L. B. & S. C. Ry. Co. (1877), 42 J. P. 70. *Dbtd.* Ashendon v. L. B. & S. C. Ry. Co. (1880), 5 Ex. D. 190. The case of *Peck v. North Staffordshire Ry. Co.* is decisive against defts., & being a decision of the House of Lords we are absolutely bound by it; *Harrison v. L. B. & S. C. Ry. Co.* must, therefore, so far as it affects the question before us, be considered as virtually overruled (HAWKINS, J.); *Sutcliffe v. G. W. Ry. Co.*, [1910] 1 K. B. 478, C. A. It may be doubted whether since the decision in the H. L. in *Peck's Case* the judgment of the Exchequer Chamber in *Harrison v. L. B. & S. C. Ry.*, even on the point on which the ct. was nearly unanimous, namely, in holding the condition in that case reasonable, is to be relied on as an authority (VAUGHAN WILLIAMS, L.J.). *Refd.* Dickson v. G. N. Ry. Co. (1886), 18 Q. B. D. 176, C. A.; Williams v. Mid. Ry. Co. (1907), 98 L. T. 81, C. A. *Mentd.* Kendall v. L. & S. W. Ry. Co. (1872), L. R. 7 Exch. 373.

**537. Carrier exempted from liability for detention or delay or over-carriage "however caused."—**

A railway co. issued a consignment note for the carriage of cattle from O. to B., one of the conditions of which was, "the Co. are not to be amenable for any consequences arising from detention or delay in or in relation to the conveying or delivery of the animals however caused":—*Held*: this was an

unreasonable condition within Railway & Canal Traffic Act, 1854 (c. 31), s. 7 (first proviso). *Semble*: a condition that a railway co. shall not be amenable for any damage arising from over-carriage however caused is also unreasonable.—*ALLDAY v. GREAT WESTERN RY. CO.* (1864), 5 B. & S. 903; 5 New Rep. 9; 34 L. J. Q. B. 5; 11 L. T. 267; 29 J. P. 99; 11 Jur. N. S. 12; 13 W. R. 43; 122 E. R. 1066.

*Annotations*:—*Folld.* Kirby v. G. W. Ry. Co. (1868), 18 L. T. 658. *Distd.* Harris v. Mid. Ry. Co. (1876), 25 W. R. 63.

**538. — Contract not severable.]—**In an action by a cattle dealer against a railway co. for negligence in carrying animals whereby one was killed & the others were injured:—*Held*: (1) a set of conditions in a consignment note was unreasonable & void if any part of it was unreasonable; (2) a condition not to be liable for delay however caused was unreasonable. *Qu.*: whether the liability of a railway co. for live animals is the same as for inanimate objects.—*KIRBY v. GREAT WESTERN RY. CO.* (1868), 18 L. T. 658.

*Annotation*:—*Consd.* Foreman v. G. W. Ry. Co. (1878), 38 L. T. 851.

**539. Carrier exempted from liability for negligence & default of servants & defects in plant—Free pass.]—**A contract for the conveyance of cattle by a railway, signed by the party sending them, contained the two following conditions: (1) The owner undertakes all risks of loading, unloading, & carriage, whether arising from the negligence or default of the co., or their servants, or from defect or imperfection in the station, platform, or other place of loading or unloading, or of the carriage in which the cattle may be loaded or conveyed, or from any other cause whatsoever. (2) The co. will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with & to take care of them:—*Held*: the first of these conditions was unreasonable, & its unreasonable character was not removed by the fact that the co., under the second condition, granted, & the owner accepted, a free pass for a person who travelled with the cattle sent.—*ROOTH v. NORTH EASTERN RY. CO.* (1867), L. R. 2 Exch. 173; 36 L. J. Ex. 83; 15 L. T. 624; 15 W. R. 695.

*Annotations*:—*Expld.* G. W. Ry. Co. v. Glenister (1873), 22 W. R. 72. *Distd.* Harris v. Mid. Ry. Co. (1876), 25 W. R. 63. *Refd.* Western Electric Co. v. G. E. Ry. Co., [1914] 3 K. B. 554, C. A.; Buckton, Joshua v. L. & N. W. Ry. Co. (1917), 87 L. J. K. B. 234.

**540. Carrier to be "liable for negligence only"—In consideration of conveying at lower rate.]—**A special contract, by which a railway co. agreed to carry cattle at a lower rate on condition that they should be liable for negligence only:—*Held*: not unreasonable within Railway & Canal Traffic Act, 1854 (c. 31), s. 7.—*HARRIS v. MIDLAND RY. CO.* (1876), 25 W. R. 63.

*Annotation*:—*Folld.* Smith v. Mid. Ry. Co. (1887), 57 L. T. 813.

**541. Carrier exempted from liability "in any case" above declared value.]—**A condition that a railway co. will not be liable "in any case" for loss or damage to a horse or dog above certain specified values delivered to them for carriage, unless the value is declared, is not just & reasonable within Railway & Canal Traffic Act, 1854 (c. 31), s. 7, as it is in terms unconditional, & would, if valid, protect the co., even in case of the negligence or wilful misconduct of their servants.—*ASHENDON v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1880), 5 Ex. D. 190; 42 L. T. 586; 44 J. P. 203; 28 W. R. 511.

*Annotations*:—*Distd.* Dickson v. G. N. Ry. Co. (1886), 18 Q. B. D. 176, C. A. *Folld.* Shaw v. G. W. Ry. Co., [1894]



**Sect. 1.—Rights and liabilities of owners: Sub-sect. 2.**  
**Sect. 2.]**

1 Q. B. 373. **Consd.** *Marriott v. Yeoward*, [1909] 2 K. B. 987; *Sutcliffe v. G. W. Ry. Co.*, [1910] 1 K. B. 478, C. A.

**542.** —.]—A condition contained in a ticket signed by a person delivering a dog for carriage to a railway co. stated that the co. were not & would not be common carriers of dogs, nor would they receive dogs for conveyance, except on the terms that they should not be responsible for any amount of damages for the loss thereof, or for injury thereto beyond the sum of £2, unless a higher value was declared at the time of delivery to the co., & a percentage of 5 per cent. paid upon the excess of value beyond the £2 so declared:—**Held**: (1) although the railway co. were not bound to be common carriers of dogs, yet, being bound by Railway & Canal Traffic Act, 1854 (c. 31), to afford reasonable facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions; (2) the above condition was not just & reasonable within s. 7 of the above Act, & did not protect the railway co. from liability to an amount exceeding £2 in respect of damage done to the dog through the negligence of their servants.—**DICKSON v. GREAT NORTHERN RY. CO.** (1886), 18 Q. B. D. 176; 56 L. J. Q. B. 111; 55 L. T. 868; 51 J. P. 388; 35 W. R. 202; 3 T. L. R. 200, C. A.

**Annotations**:—**Expld.** *Winsford L. B. v. Cheshire Lines Committee* (1890), 24 Q. B. D. 456; *Glamorganshire County Council v. G. W. Ry. Co.* (1894), 8 Ry. & Can. Tr. Cas. 196; *Darlston L. B. v. L. & N. W. Ry. Co.*, [1894] 2 Q. B. 694, C. A.; *Williams v. Mid. Ry. Co.*, [1908] 1 K. B. 252, C. A. **Refd.** *Sutcliffe v. G. W. Ry. Co.*, [1910] 1 K. B. 478, C. A.

**543.** —.]—A contract, signed by a person delivering a dog for carriage to a railway co., stated that the co. would not be common carriers of dogs, nor would they receive dogs for carriage, except on the condition that they should not be responsible beyond the sum of £2, unless a higher value was declared at the time of delivery to the co. & a percentage of 1½ per cent. paid upon the excess of the value so declared:—**Held**: (1) the above-mentioned condition was just & reasonable within Railway & Canal Traffic Act, 1854 (c. 31), s. 7, & there having been no declaration of value, protected the railway co. from liability beyond the £2 in respect of the loss, through the negligence of their servants, of the dog delivered to them for carriage.—**WILLIAMS v. MIDLAND RY. CO.**, [1908] 1 K. B. 252; 77 L. J. K. B. 157; 98 L. T. 81; 24 T. L. R. 170; 52 Sol. Jo. 113; 13 Com. Cas. 119, C. A.

**544. Offer of fair alternative contract—Alternative rates at owner's risk or carrier's risk.]**—Cattle were carried by a railway co., under a special contract signed by the consignor, which stated that the co. had two rates for the conveyance of cattle, one the ordinary rate when they took the ordinary liability of the carrier, the other a reduced rate; that these cattle were to be carried at the reduced rate, the co. to be relieved from all liability in case of damage or delay,

except upon proof that such loss, detention or injury arose from wilful misconduct on the part of the co.'s servants. A notice was posted up in the co.'s office which stated that the co. had two rates, namely, the owner's risk rate upon the terms above given, & the co.'s risk rate, which was 10 per cent. above the owner's risk rate, at which the co. undertook the ordinary risk of carriers in respect of rail transit, limited for neat cattle to £15, for pigs & sheep to £2, but did "not admit liability for any animals dying of disease or arriving at destination in such condition as to be able to walk from the truck." The consignor had never seen any rate but the owner's risk rate. After two trials cattle had ceased to go at the higher rate. The higher rate was less than the maximum allowed by the co.'s Acts. No list of rates was exhibited. The cattle having been injured through the negligence (but not the wilful misconduct) of the co.'s servants:—**Held**: (1) the notice of the higher rate was not invalidated by the limitation as to value, nor by the fact that it did not mention the terms upon which cattle could be carried without limitation of value, as provided by Railway & Canal Traffic Act, 1854 (c. 31), s. 7; (2) the clause as to not admitting liability meant only that the liability must be established by proof, & so construed the condition was just & reasonable within the above sect.; (3) the consignor might have known, & must be taken to have known, the terms of the higher rate, & had the offer of a just & reasonable alternative; (4) the co. were protected by the special contract.—**GREAT WESTERN RY. CO. v. MCCARTHY** (1887), 12 App. Cas. 218; 56 L. J. P. C. 33; 56 L. T. 582; 51 J. P. 532; 35 W. R. 429; 3 T. L. R. 374, H. L.

**Annotations**:—**Consd.** *Duckham v. G. W. Ry. Co.* (1899), 80 L. T. 774. **Refd.** *Rickett Smith v. Mid. Ry. Co.*, *Derbyshire Silkstone Coal Co. v. Mid. Ry. Co.*, *Grassmoor Co. v. Mid. Ry. Co.*, [1896] 1 Q. B. 260, Ry. & Can. Com.; *Sutcliffe v. G. W. Ry. Co.*, [1910] 1 K. B. 478, C. A.

**545. Reasonableness of extra charge—Question for jury.]**—It is for a jury, not for the judge, to say whether the percentage charged on the extra value declared in respect of any animal is reasonable (**ERLE, C.J.**).—**HARRISON v. LONDON, BRIGHTON & SOUTH COAST RY. CO.** (1862), 2 B. & S. 152; 31 L. J. Q. B. 113; 6 L. T. 466; 8 Jur. N. S. 740; 121 E. R. 1029, Ex. Ch.

**Annotations**:—**Refd.** *Peck v. North Staffordshire Ry. Co.* (1863), 10 H. L. Cas. 473, H. L.; *Dickson v. G. N. Ry. Co.* (1886), 18 Q. B. D. 176, C. A.; *Williams v. Mid. Ry. Co.* (1907), 98 L. T. 81, C. A. **Mentd.** *Wilton v. Royal Atlantic Mail Steam Navigation Co.* (1861), 8 Jur. N. S. 231; *Kendall v. L. & S. W. Ry. Co.* (1872), L. R. 7 Exch. 373; *Stevens v. L. B. & S. C. Ry. Co.* (1877), 42 J. P. 70; *Ashendon v. L. B. & S. C. Ry. Co.* (1880), 5 Ex. D. 190; *Sutcliffe v. G. W. Ry. Co.*, [1910] 1 K. B. 478, C. A.

**SECT. 2.—UNDER SPECIAL CONTRACT.**

*See, generally, CARRIERS.*

**546. Consignee failing to take delivery promptly.]**—A horse was sent by a railway directed to the

**PART VII. SECT. 2.**

**g. Carrier exempted from all responsibility.]**—The railway comr., under 22 Vict. No. 19, has no power to make a bye-law relieving himself from all responsibility for care of horses carried by rail. — **BELL v. RAILWAY COMR.** (1861), 2 Legge, 1398.—**AUS.**

**r. Carrier exempted from all risks of conveyance.]**—Where live stock is delivered to a railway co. for carriage, the co. may protect itself from loss arising from its own negligence, & may provide in the contract of carriage that the owner shall take upon himself all risks of conveyance, Railway & Canal Traffic

Act, 1854 (c. 31), not applying to Newfoundland. — **GARLAND v. REID NEWFOUNDLAND CO.** (1906), 9 Nfld. L. R. 172.—**NFLD.**

**s. Carrier "in no case" to "be responsible."]**—Defts. received a horse for carriage under a contract providing:—"The co. shall in no case be responsible for each & any horse," etc.:—**Held**: the above words were sufficiently general to cover all cases of loss however caused, & the horse having been killed by negligence of defts.' servants, the owner could not recover more than \$100, though the value of the horse largely exceeded that amount.—

**ROBERTSON v. GRAND TRUNK RY. CO.** (1895), 24 S. C. R. 611.—**CAN.**

**t. Carrier "in no case" to "be responsible for delivery at any particular time"—Conditions in sailing bills—Whether part of contract.]**—The delivery or risk note of a railway co., whose station-masters were empowered to book cattle through from stations in Ireland to market towns in England, contained a notice that "the co. will in no case be responsible for any damage to live stock arising from overcrowding any waggon or for the delivery of cattle or live stock at any particular time or for any particular market":—**Held**:



owner at Eton. The sender signed a document in the following terms:—"W. paid for one horse 12s. 6d. Newbury to Windsor. Notice: The directors will not be answerable for damage to any horses conveyed by this railway." The horse arrived safe at the Windsor station, but the owner not appearing to claim it, it was forgotten & left tied up in a horse-box in an exposed situation for twenty-four hours, & was seriously injured by such neglect:—*Held*: the co. were not responsible for the injury done to the horse.—*WISE v. GREAT WESTERN RY. CO.* (1856), 1 H. & N. 63; 25 L. J. Ex. 258; 27 L. T. O. S. 110; 4 W. R. 551; 156 E. R. 1119.

*Annotations*:—*Apld.* *White v. G. W. Ry. Co.* (1857), 2 C. B. N. S. 7. *Refd.* *Peck v. North Staffordshire Ry. Co.* (1858), E. B. & E. 958; *M'Manus v. L. & Y. Ry. Co.* (1859), 4 H. & N. 327, Ex. Ch. *Mentd.* *Pardington v. South Wales Ry. Co.* (1856), 26 L. J. Ex. 105; *M'Manus v. L. & Y. Ry. Co.* (1858), 2 H. & N. 693; *Peck v. North Staffordshire Ry. Co.* (1863), 10 H. L. Cas. 473, H. L.

**547. Injury from defective truck.**—*M'MANUS v. LANCASHIRE & YORKSHIRE RY. CO.*, No. 535, *ante*.

**548. Loss through mere accident.**—*HARRISON v. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, No. 536, *ante*.

**549. Negligence—Contract not relieving carrier of liability for negligence.**—*Pltf.* desiring to send a cow from D. to S., took her to the station at D., belonging to G. N. Co., where he booked her for S. by defts.' ry. He signed a contract, in which it was agreed between him & G. N. Co. that they should not be responsible for any loss or injury to cattle in the delivering, if such damage should be occasioned by kicking, plunging, or restiveness. The cow was put into a truck belonging to defts. & on arriving at S. was brought into a siding by defts.' yard for the purpose of being unloaded. A porter in charge of the yard began to unfasten the truck. *Pltf.* thereupon warned him not to let the cow out, as she would run at him; nevertheless he did let her out, & she ran about the yard, & ultimately got on to the line & was killed. By an agreement between defts. & G. N. Co. it was provided that a complete & full system of interchange of traffic

in passengers, goods, parcels, etc., should be established from all parts of one co. & beyond its limits to all parts of the other co. & beyond its limits, with through tickets, through rates & invoices & interchange of stock at junctions, the stock of the two cos. being treated as one stock, & that the two cos. should aid & assist each other in every possible way, as if the whole concerns of both cos. were amalgamated. In an action brought against defts. for the loss of the cow:—*Held*: (1) the agreement, if it did not constitute a partnership between the two cos., showed that G. N. Co. became the agents of defts. to make the contract for the carriage of the cow; (2) the condition in the contract did not relieve defts. from liability for negligence on the part of their servants in delivering the cow; (3) the inference to be drawn from the facts was that there was negligence on the part of defts.' porter, & they were liable to *pltf.* for the loss of the cow.—*GILL v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1873), L. R. 8 Q. B. 186; 42 L. J. Q. B. 89; 28 L. T. 587; 37 J. P. 549; 21 W. R. 525.

*Annotation*:—*Fold.* *Foulkes v. Met. Dist. Ry. Co.* (1880), 5 C. P. D. 157, C. A.

**550. — Onus of proof.**—Where a railway co. entered into a special contract, by which they agreed to carry cattle at a lower rate on condition that they should be liable for negligence only:—*Held*: the condition took the co. out of the category of common carriers, & in an action against the co. for damage to the cattle during the journey, the *onus* of proving negligence was on *pltf.*—*HARRIS v. MIDLAND RY. CO.* (1876), 25 W. R. 63.

*Annotation*:—*Apprvd.* *Smith v. Mid. Ry. Co.* (1887), 57 L. T. 813.

**551. "Neglect or default"—Evidence of.**—*Pltf.*'s horse was carried by railway from Waterloo to Guildford under a contract, which relieved the railway co. from liability for loss or damage, "except upon proof that same was occasioned by neglect or default on the part of the co. or their servants." The horse was properly boxed at Waterloo, & upon arrival at Surbiton the train was

such stipulation did not qualify the implied contract to deliver within a reasonable time, but only prevented the question of reasonable time from being affected by the express wish of the consignor to have his cattle delivered at a particular time or for a particular market.

The sailing bills of a steam packet co., whose vessels formed a link in a through booking system, contained a condition as follows: "Cattle to be forwarded by this route are received subject to the express stipulation that, if it shall be found on the arrival of the cattle in Dublin that there is not room for the conveyance of the cattle by the next ordinary vessel of the London & North Western Ry. Co. proceeding to Holyhead, the co. shall not be bound to forward the cattle until the sailing of the ordinary vessel next following that of the vessel in which there shall not be room for the cattle." Part of a contract to carry cattle was in writing, viz., the above sailing bill, part by parol:—*Held*: it was a question for the jury whether upon the evidence the contract between the parties had been made subject to the above stipulation or not.—*MATTHEWS v. DUBLIN & DROGHEDA RY. CO.* (1865), 17 I. C. L. R. 87.—*IR.*

**W. Carrier exempted from liability for negligence & default of servants & for loss in loading—Free pass.**—A dealer in horses signed a shipping note which provided: (1) "The owner of animals undertakes all risks of loss, injury, damage, & other contingencies, in loading, etc.; (2) when free passes are given to persons in charge of animals, it is only on the express condition that

the railway co. are not responsible for any negligence, default, or misconduct of any kind, on the part of the co. or their servants, causing or tending to cause the death, injury, or detention of any person or persons travelling upon any such free passes—the person using any such pass takes all risks of every kind, no matter how caused."—*Held*: the co. could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants.—*GRAND TRUNK RY. CO. v. VOGEL* (1885), 11 S. C. R. 612.—*CAN.*

*See, however,* *GRAND TRUNK RY. v. McMILLAN*, 16 S. C. R. 543, & *R. v. GRENIER*, 30 S. C. R. 42.

**549 i. Negligence—Contract not relieving carrier of liability for negligence—Warranty of seaworthiness not excluded.**—A charterparty contained the usual exceptions of the act of God, the Queen's enemies, fire, etc., & also a clause "Cargo carried on deck, & live stock, whether on deck or below, to be at charterer's risk for all loss, including mortality":—*Held*: this clause would not cover the risk of loss or damage arising from the negligence or improper acts or omissions of the master & crew, & would not relieve the shipowner from his obligation to supply a ship that was seaworthy & fit for the cargo at the commencement of the voyage.—*FLEMMING v. RAMSAY* (1905), 25 N. Z. L. R. 596.—*N.Z.*

**550 i. — Onus of proof—No affirmative evidence.**—A cattle dealer hired a truck from a railway co. for the purpose of conveying some cattle, & having loaded the truck himself, delivered it

to the co., sending no one in charge. On the arrival of the truck it was found that some of the cattle were dead or seriously injured through overcrowding. By the contract of carriage the owner undertook all risk of loss, except such as should arise from the gross negligence or default of the co. or their servants:—*Held*: there was no evidence of negligence or fault on the part of the co. or their servants, & the overcrowding being due to the fault of the owner, the co. were not liable.—*GLASGOW & SOUTH WESTERN RY. CO. v. RAIN* (1869), 41 J. 237.—*SCOT.*

**x. Animals carried at "owner's risk."**—A railway co. will not be liable for damage done to cattle while carrying them, if the ticket given to the consignor contained a printed condition against their liability for damage to cattle *in transitu*, e.g., stipulated that the cattle were to be carried at "owner's risk" (DEASY, B.).—*BARRATT v. CORK & BRANDON RY. CO.* (1873), 7 L. L. T. 175.—*IR.*

**y. — Slaughter & sale of injured animal.**—Pursuer's cattle were carried by defenders at "owner's risk." One of the cattle was found to be injured & was slaughtered & the carcass sold by defenders to a local butcher. The injury was not proved to be due to the misconduct of defenders' servants:—*Held*: defenders not liable for the injury, but liable for selling the carcass.—*BENNETT & NICHOLSON v. CALEDONIAN RY. CO.*, [1916] 1 S. L. T. 326.—*SCOT.*

**z. Consignee's knowledge of conditions from course of business.**—*HOTTE v. GRAND TRUNK RY. CO. OF CANADA* (1912), 18 R. de J. 320.—*CAN.*

**Sect. 2. — Under special contract. Part VIII.**  
**Part IX. Sects. 1, 2, 3, 4, 5, 6, 7 & 8.]**

divided, & the front portion was shunted to allow a horse-box to be taken off. The horse-box containing pltf.'s horse was in the rear portion of the train. Before the front portion of the train was backed on to the rear portion the horse was heard groaning, & on the box being opened it was found lying on its back with its feet in the air, the ropes to the headstall being still secured & drawn tight. The horse was got out, when it was found to be injured in two or three places. There was no evidence of any improper slowing down or stopping of the train at Surbiton. The box was then converted into a loose box by taking out the partitions, which left exposed the hooks or hinges on which the partitions hung, & the horse was sent on by a later train to Guildford. There was no evidence that any of the injuries were occasioned between Surbiton & Guildford. In an action against the railway co. to recover damages for the injury to the horse:—*Held*: there was no evidence of any "neglect or default" on the part of the railway co., & pltf. was not entitled to recover.—*RUSSELL v. LONDON & SOUTH WESTERN RY. CO.* (1908), 24 T. L. R. 548, C. A.

*Annotation*:—*Appld.* United Machine Tool Co. v. G. W. Ry. Co. (1914), 30 T. L. R. 312.

**552. Injury through wrongful refusal to give delivery — Not "detention."**—Pltf. delivered cattle, carriage prepaid, to defts. for carriage on the terms of conditions whereby, in consideration of an alternative reduced rate, it was agreed that the co. were "not liable in respect of any loss or detention or injury to the animals, or any of them, in the receiving, forwarding, or delivery thereof, except from proof that such loss, detention, or injury, arose from the wilful misconduct of the co., or its servants." The cattle were carried, but, on application made for them by pltf., defts., in consequence of their clerk having negligently omitted to enter the cattle on the consignment note as "carriage paid," refused to deliver them, & alleged that the carriage was not paid. The cattle were kept exposed to the weather until the next day, when, the mistake having then been ascertained, they were delivered. They were injured by the exposure. In an action for damages by reason of wrongful detention & negligence:—*Held*: the withholding of the cattle, under a groundless claim to retain them, at the end of the transit was not "detention" within the conditions, & the co. were liable.—*GORDON v. GREAT WESTERN RY. CO.* (1881), 8 Q. B. D. 44; 51 L. J. Q. B. 58; 45 L. T. 509; 46 J. P. 294; 30 W. R. 230.

*Annotation*:—*Distd.* Spittle v. G. W. Ry. Co. (1886), 2 T. L. R. 618, C. A.

**553. Provision for supply of food & water—Exceptions in charterparty.**—A live-stock charter-

party provided that water for cattle & sheep was to be provided by the ship in accordance with the A. Govt. regulations, which required a daily supply of 11½ tons. Four bullocks died as a result of bad & insufficient water, & others were deteriorated in value. The exceptions in the charterparty exempted the owners from liability for damage from unseaworthiness, & from the master's negligence:—*Held*: the exceptions did not relieve the owners from liability to supply water according to the A. Govt. regulations, & they were liable for the damage to, & loss of, the cattle.—*VALLÉE v. BUCKNALL* (1900), 16 T. L. R. 362.

**554. Damages limited to declared value of animal injured.**—Pltf. delivered to defts., a railway co., some horses to be carried on their railway, & at their request signed a declaration that the value of the horses did not exceed £10 per horse, & that, in consideration of the rate charged for their conveyance, he thereby agreed that same were to be carried entirely at the owner's risk. In the course of the journey the horses were injured in consequence of the defective state of the truck in which they were carried. In an action against the railway co. they paid £25 into ct. The horses were in fact worth more than £10 each, & if taken at their real value, £40 was the measure of pltf.'s damage; if at £10 each, the £25 covered pltf.'s claim:—*Held*: (1) the declaration of the value of the horses was no part of the contract, but a statement which formed the basis of the intended contract, & by which it was to be regulated & governed; (2) it was not competent to pltf. to deny the truth of the statement & prove that the real value of the horses exceeded £10 each.—*MCCANCE v. LONDON & NORTH WESTERN RY. CO.* (1864), 3 H. & C. 343; 4 New Rep. 467; 34 L. J. Ex. 39; 11 L. T. 426; 29 J. P. 148; 10 Jur. N. S. 1058; 12 W. R. 1086; 159 E. R. 563, Ex. Ch.

*Annotation*:—*Mentd.* Lebeau v. General Steam Navigation Co. (1872), L. R. 8 C. P. 88.

**555. —**—A condition in a contract for the carriage of a pair of horses limited defts.' responsibility to £50 each horse, unless a higher value were entered & an additional percentage paid. One horse was fatally injured on the journey through the negligence of defts.' servants, & the consignee, who had agreed to buy the pair for £140, refused to accept the survivor, which was subsequently sold for pltf. Pltf. claimed £100 damages, including as special damages £2 15s. 4d. for carriage of the horses, & £15 11s. 6d. for additional expenses in the case of the survivor:—*Held*: all the damage arose from the mishap to one horse, & defts.' liability was limited to £50.—*BERRY v. SOUTH EASTERN & CHATHAM & DOVER RY. COS.' MANAGING COMMITTEE* (1901), 18 T. L. R. 159.

## Part VIII.—Wild Birds.

**556. Wild birds—Sale in close season—Imported birds.**—It is no defence to an information under Wild Birds Protection Act, 1876 (c. 29), for exposing wild birds for sale during the prohibited season, that such birds have been bought or received of or from a person residing out of the United Kingdom.—*WHITEHEAD v. SMITHERS*

(1877), 2 C. P. D. 553; 46 L. J. M. C. 234; 37 L. T. 378; 41 J. P. 808.

*Annotations*:—*N.F.* Guyer v. R. (1889), 23 Q. B. D. 100. *Refd.* Taylor v. Rogers (1881), 50 L. J. M. C. 132.

**557. —**—*Appld.*, a poulterer, was summoned, under Wild Birds Protection Act, 1880 (c. 35), s. 3, for having in his possession &

### PART VIII.

**556 i. Wild birds—Bye-law—V**  
 —A bye-law framed under Municipal

Clauses Act, s. 50 (27), for regulating public health & sanitation.—*FRENCH v. SAANICH CORPN.* (1911), 16 B. C. R. 106.—*CAN.* cannot be supported under other provisions of the same sect. dealing with

exposing for sale some wild birds on Mar. 18, 1881. He proved that he had bought them from S., a salesman in Leadenhall Market, who had bought & received them from a person residing out of the United Kingdom:—*Held*: applt. had not brought himself within the exemption clause in the above sect., which contemplated a direct purchase or a receipt from a person residing out of the United Kingdom.—*TAYLOR v. ROGERS* (1881), 50 L. J. M. C. 132; 45 L. T. 311; 46 J. P. 70.

*Annotation*:—*N.F. Guyer v. R.* (1889), 23 Q. B. D. 100.

**558. ——— Birds recently taken.]**—A wild bird is not of necessity not recently taken because it has been in the possession of a person for a period of three weeks.

The offence of exposing for sale, or having possession of, any wild bird recently taken is dependent upon Wild Birds Protection Act, 1880, s. 3, as amended by Wild Birds Protection Act, 1881 (c. 51), & it is incumbent upon the prosecution to show that the birds were wild birds & have been recently taken.—*GREEN v. CARSTANG* (1901), 85 L. T. 615; 66 J. P. 102; 20 Cox, C. C. 92.

*Annotation*:—*Distd. R. v. Hopkins, Ex p. Lovejoy* (1911), 104 L. T. 917.

**559. ——— Snaring in close time—Owner or occupier of land.]**—G. went on lands of a stranger without authority, & caught with nets sparrows, during the wild birds close time. He then sold them to a publican, who liberated the sparrows one by one, while R. & others shot at them for prizes in the publican's field:—*Held*: both G. & R. committed an offence against Wild Birds Protection Act, 1880 (c. 35), as they were not owners or occupiers of the land where the birds had originally been caught, nor were they authorised by the owners or occupiers of such land, & were not within the proviso in s. 3 of the Act. *Qu.*: whether they would not in the circumstances have committed the offence, even if they had been authorised by such owners or occupiers.—*R. v. GILHAM* (1884), 52 L. T. 326; 15 Cox, C. C. 719; *sub nom.* *WARR v. GILHAM*, 49 J. P. 357; 1 T. L. R. 90.

**560. ——— Special close time—No publication of order—Jurisdiction of justices.]**—When a Secretary of State, in pursuance of the powers vested in him by Wild Birds Protection Acts, 1880 to 1902 (c. 6), makes an order prohibiting in a certain county or any part thereof the killing or taking of certain wild birds during the period of the year to which the protection of wild birds under the Act of 1880 does not extend, proceedings for breach of the order may be instituted, & justices have jurisdic-

tion to entertain same, notwithstanding that no public notice of the order has been given by the county council of the county, as required by Wild Birds Protection Act, 1894 (c. 24), s. 4, & Wild Birds Protection Act, 1896 (c. 56), s. 2.—*DUNCAN v. KNILL* (1907), 96 L. T. 911; 71 J. P. 287; 5 L. G. R. 620; 21 Cox, C. C. 457.

**561. ——— Possession in close season—Birds recently taken.]**—*GREEN v. CARSTANG*, No. 558, *ante*.

**562. ——— ——— ———.]**—On the hearing of an information charging deft. with knowingly & wilfully having in his possession certain wild birds recently taken, contrary to Wild Birds Protection Act, 1880 (c. 35), s. 3, the evidence for the prosecution showed that on July 30, deft., a dealer in wild birds, had on his premises in seven cages seven young larks, that they were very wild, beating themselves against the bars of the cages, & that their feathers were of a light colour. The magistrate at the hearing, without calling on deft., dismissed the information on the ground that there was no evidence that the birds were "recently taken" within the above sect.:—*Held*: there was evidence that the birds were recently taken within the sect., & the magistrate was wrong in dismissing the information without calling on deft.—*HOLLIS v. YOUNG*, [1909] 1 K. B. 629; 78 L. J. K. B. 340; 98 L. T. 751; 72 J. P. 199; 24 T. L. R. 500; 21 Cox, C. C. 582.

**563. ——— ——— ———.]**—The question whether wild birds were recently taken within Wild Birds Protection Act, 1880, s. 3, is a question of fact for the magistrate.—*R. v. HOPKINS, Ex p. LOVEJOY* (1911), 104 L. T. 917; 75 J. P. 340; 22 Cox, C. C. 465.

**564. ——— ——— Birds lawfully taken elsewhere.]**—A Secretary of State made an order under Wild Birds Protection Act, 1880 (c. 35), s. 8, applicable to the county of London, extending the time during which the "killing or taking" of certain wild birds, including larks, was prohibited to the whole of the year:—*Held*: the words "killing & taking" in the above sect. included all the offences specified in s. 3 of the Act of 1880, & by virtue of the order it was made an offence for a person to have in his possession or control in the county of London at any time of the year live larks which had been recently taken, though they might have been taken in a place where it was lawful to take them.—*FLOWER v. WATTS*, [1910] 2 K. B. 327; 79 L. J. K. B. 751; 103 L. T. 39; 74 J. P. 302; 26 T. L. R. 495; 8 L. G. R. 809.

*Annotation*:—*Consd. R. v. Hopkins, Ex p. Lovejoy* (1911), 104 L. T. 917.

## Part IX.—Particular Kinds of Animals.

### SECT. 1.—BEARS.

*See* Nos. 241, 242, *ante*.

### SECT. 2.—BEES.

*See* Nos. 49, 50, 341, *ante*.

### SECT. 3.—BIRDS OTHER THAN GAME BIRDS.

*See* Nos. 22—24, 70; 591; 35, 36, 590; 37, 65—67, 118, 119, 654, 655; 48; 25, 86; 593; 9—12, 100, 117, 122, 222, 584, 656.

### SECT. 4.—BULLS.

*See* Nos. 137, 146, 246, 259, 260, 271, 277, 346, 580.

### SECT. 5.—CATS.

*See* Nos. 35, 36, 121, 125, 576, 650, 651.

### SECT. 6.—DEER.

*See* Nos. 38—44, 78, 90, 98, 99, 602, 648, 649.

### SECT. 7.—ELEPHANTS.

*See* No. 243, *ante*.

### SECT. 8.—FISH.

*See* Nos. 30—34, 57, 58, 72, 73, 83, *ante*.



*Part IX. Sects. 9, 10, 11 & 12. Part X. Sect. 1 : Sub-sect. 1.*

**SECT. 9.—GAME BIRDS.**

*See Nos. 51, 52, 75; 68, 69, 79; 59—62, 88; 45—47.*

**SECT. 10.—MONKEYS.**

*See Nos. 35, 36, 240, ante.*

**SECT. 11.—RABBITS AND HARES.**

*See Nos. 26—29, 76, 80—82, 95, 107, 108, 165, 325, 585—587; 74, 101, 102, 193.*

**. 12.—WILD ANIMALS GENERALLY.**

*See Nos. 6, 11, 17—21, 54—56, 238, 244, 573, 592.*

## Part X. Cruelty to and Killing, Maiming, and Wounding Animals.

**SECT. 1.—CRUELTY TO ANIMALS.**

**SUB-SECT. 1.—GUILTY KNOWLEDGE.**

**565. Horse suffering from wounds—Absence of colliery owner and manager.]—**In a colliery certain horses were worked while suffering from raw wounds. T. was an owner, & S. was the certificated manager, but neither was proved to be present or to have any notice or knowledge of the state of the horses:—*Held*: the justices were wrong in convicting S. of ill-treating the horses under Cruelty to Animals Act, 1849 (c. 92), s. 2, merely because he was certificated manager, some knowledge of the matter being an essential ingredient of that offence.—*SMALL v. WARR* (1882), 47 J. P. 20.

**566. Injured sheep sent to market—Carelessness.]—**Resp. conveyed nine sheep to a market, one of which broke its leg in getting out of the waggon. The sheep were then placed in a pen, in consequence of which the injured animal was trampled on by the others. Deft. having been charged under Cruelty to Animals Act, 1849:—*Held*: although resp. was guilty of carelessness in not having looked after the sheep, his conduct did not amount to the offence of torturing it.—*WESTBROOK v. FIELD* (1887), 51 J. P. 726; 3 T. L. R. 465.

**567. Cattle left in headropes—Neglect of master's orders by servant.]—**Applt., the receiver of large consignments of cattle, which he was supposed personally to receive & attend to, had not removed the headropes from the cattle (which arrived in port on Saturday) until the Monday following. The magistrate having convicted deft. of cruelty for not removing the head ropes, deft. appealed on the ground that there was no guilty knowledge & no intentional cruelty on his part, he having ordered his men to examine the cattle & attend to the headropes, which they had neglected to do:—*Held*: there being no evidence of a guilty knowledge on applt.'s part, or that he wilfully abstained from the knowledge of the alleged cruelty, the

conviction must be quashed.—*ELLIOTT v. OSBORN* (1891), 65 L. T. 378; 56 J. P. 38; 17 Cox, C. C. 346.

*Annotations*:—*Refd.* Thielbar v. Craigen (1905), 93 L. T. 600. *Mentd.* Green v. Cross (1910), 103 L. T. 279.

**568. Horse worked in unfit state—Veterinary surgeon giving wrong advice.]—**The owner of a horse, which was lame, consulted resp., a veterinary surgeon, as to whether the horse was in a fit condition to work. The surgeon advised that it was free from pain & quite fit for work. The owner worked the horse, which was very lame & in great pain. Resp. was summoned, under s. 2 of Cruelty to Animals Act, 1849, for cruelly ill-treating the horse by causing it to be worked while in an unfit state. The magistrate found that resp. knew, when he advised the working of the horse, that to work it in its then state would be an act of cruelty, but he dismissed the information, on the ground that resp.'s advice was only the remote cause of the cruelty in some degree & not the proximate cause in any degree, & not the cause of the cruelty within the Act, & also that resp. was not charged with knowingly counselling an act of cruelty to be caused, the offence shown by the facts. On a case stated:—*Held*: the magistrate should have convicted, as by Summary Jurisdiction Act, 1848 (c. 43), s. 5, a person who counselled the commission of an offence punishable summarily might be proceeded against as a principal.

There are very special findings in this case, which affords no ground for supposing that a veterinary surgeon, who gives a wrong opinion & commits an error of judgment, is liable to be convicted of cruelty, if from following his opinion cruelty results (*CHANNELL, J.*).—*BENFORD (BENFIELD) v. SIMS (SIMMS)*, [1898] 2 Q. B. 641; 67 L. J. Q. B. 655; 78 L. T. 718; 47 W. R. 46; 14 T. L. R. 424; 42 Sol. Jo. 556; 19 Cox, C. C. 141.

*Annotations*:—*Consd.* Callow v. Tillstone (1900), 83 L. T. 411; Du Cros v. Lambourne, [1907] 1 K. B. 40.

**569. — In charge of servant.]—**Applt., who was convicted of causing two horses to be worked

**PART X. SECT. 1, SUB-SECT. 1.**

**a. Animals left without food.]—***Held*: a contravention of Cruelty to Animals (Scotland) Act, 1850, (c. 92), s. 1, by a butcher leaving four oxen at the slaughter-house unsupplied with food for seventy-seven hours was relevantly charged in a complaint which did not set forth that the cruelty or ill-treatment libelled was committed with the personal knowledge of the accused.—*WILSON v. JOHNSTONE* (1874), 3 Couper, 8; 1 R. 16; 11 Sc. L. R. 548.—*SCOT.*

**568 i. Horse worked in unfit state.]—**Applt. was convicted under Police Offences Act, 1908 s. 7 (1) (a), of cruelly ill-treating a horse by permitting it to be driven whilst in a weak condition. The magistrate did not find that applt. actually knew that the horse was being driven, but that he should have known it, & should have given instructions for the horse not to be used:—*Held*: to justify a conviction under the above sect. there must be proof of guilty knowledge on the part of the accused. *Seemle*: actual know-

ledge is not necessary, if it is proved that the accused has wilfully abstained from acquiring knowledge on the subject.—*McFARLANE v. ROBSON* (1916), 35 N. Z. L. R. 216.—*N.Z.*

**569 i. — In charge of servant.]—**An innkeeper's servant drove a pair of horses from Alloa to Stirling in a waggonette, which held nineteen people & then made four & a half double journeys between Stirling & Bridge of Allan, where games were being held. One of the horses then showed signs of

in an unfit state on a certain day, carried on business in London, & the two horses in question were under the charge of L. at a farm at C., where applt. resided. He was practically always away & did not see the horses above once a fortnight, they being under the entire management of L. There was some evidence that applt. knew that the horses had been out of condition at some time, but no evidence was given as to the date when that was, or how long it was before the alleged improper working. There was no evidence that applt. had interfered with L., had given any order for the horses to be worked, or knew of their condition on the day of the alleged offence:—*Held*: there was a failure on the part of the prosecution to give any evidence of guilty knowledge with regard to the offence in question, & the conviction must be quashed.—*GREENWOOD v. BACKHOUSE* (1902), 86 L. T. 566; 66 J. P. 519; 20 Cox, C. C. 196.

**570. — Onus of proof.**—Resp. was the owner of several horses, & he used them for the purposes of his business. These horses were left in charge of a servant, who was entirely responsible for them. The servant bought a horse for resp. When the purchase had been made resp. saw the animal, & remarked that it was in poor condition. The servant, however, stated that it was a good horse & good worker, & resp. left it to him. About six weeks after the horse had been purchased whilst the servant was driving it, it fell & was found to be suffering from mange & to be otherwise in a bad condition. The servant was summoned for cruelty to the animal & was convicted. Resp. was afterwards summoned, as the owner of the horse, for permitting it to be cruelly ill-treated by being worked whilst in an unfit condition. The justices, however, were of opinion that the *onus* of proving want of exercise of reasonable care & supervision was on the prosecution, & that there was no evidence of such want of reasonable care & supervision before them. They therefore dismissed the summons:—*Held* (1) the justices were wrong in law in so deciding; (2) there was a *prima facie* case established against resp., which he ought to be called upon to answer, & the case must be remitted to the justices.—*WHITING v. IVENS* (1915), 84 L. J. K. B. 1878; 113 L. T. 869; 79 J. P. 457; 31 T. L. R. 492; 25 Cox, C. C. 128; 13 L. G. R. 965.

**571. Attempt to kill dog—Intention immaterial.**—Resp. beat a dog, which was chained to a kennel, with a large piece of wood. He then struck the dog several times with a handbill used for chopping wood, & when it ran into the kennel he prodded it

many times with a spade; the beating, etc., lasted for half an hour during which time the dog suffered great pain. Ultimately resp. obtained a gun & shot the dog. Upon the hearing of an information for cruelly beating & ill-treating the dog under Cruelty to Animals Act, 1849 (c. 92), resp. alleged that the dog was in the habit of barking & running at children & that he had committed the acts complained of in trying to destroy it. The justices dismissed the information on the ground that the resp. had no intention to commit cruelty because he was trying to destroy the animal:—*Held*: the justices were wrong & should have convicted resp., as the only question for them was whether there was cruelty in fact & resp.'s intention was immaterial.—*DUNCAN v. POPE* (1899), 80 L. T. 120; 63 J. P. 217; 15 T. L. R. 195; 19 Cox, C. C. 241.

**572. Gamekeeper shooting dog—Intention to frighten.**—A keeper seeing a dog come into a field, over which his master had the shooting rights, & frightening the pheasants, shot at it, not with the intention of killing it but intending to injure it, if necessary, for the purpose of frightening it away:—*Held*: this did not necessarily amount to cruelly ill-treating the dog, each case being a question of degree, & one of fact for the justices, who could lawfully dismiss the summons, although they found that deft. intended to injure the dog, if necessary for the purpose of frightening it.—*ARMSTRONG v. MITCHELL* (1903), 88 L. T. 870; 67 J. P. 329; 19 T. L. R. 525; 20 Cox, C. C. 497.

*Annotation*:—*Distd. Green v. Cross* (1910), 103 L. T. 279.

**573. Pony exposed to performing lions.**—Applt., a lion-tamer, conducted performances in a cage with lions, & part of the performance consisted of a roundabout of six boats, in each of which was seated a lion, the roundabout being drawn by a pony. At one of these performances, after applt. had introduced the pony into the cage & attached it to the roundabout, one of the lions jumped out of its boat & raised itself on to the hindquarters of the pony & sniffed at it. Applt. drove the lion back to its boat, but immediately applt.'s attention was diverted from the lion it attacked the pony, causing injuries from which the pony died two days afterwards. A considerable number of performances with the same pony had taken place for several years & nothing of the kind had happened. Formerly, during the performance three or four men with iron bars kept watch on the stage, & recently a man with a firehose kept watch. Applt. having been convicted under Cruelty to Animals Act, 1849, s. 2, of having unlawfully & cruelly caused the pony to be ill-treated:—*Held*: there

distress, & the innkeeper ordered it to be changed to another waggonette holding twenty-four people, & which was drawn by three horses. It made three single journeys in this carriage, when it fell dead in the street:—*Held*: the innkeeper was rightly convicted of cruelty by overdriving.—*CARMICHAEL v. WELSH* (1887), 1 White, 333; 24 Sc. L. R. 348.—*SCOT*.

**569 ii.** — — —.]—M. had used a horse belonging to D., his master, to draw a cart of stones when the horse was suffering from a bleeding wound under the fore part of the saddle:—*Held*: knowledge of the horse's condition not being proved against D., the conviction of D. must be quashed.—*DOWNIE v. FRASER* (1893), 1 Adam, 80; 30 Sc. L. R. 897; 1 S. L. T. 177.—*SCOT*.

**569 iii.** — — —.]—Where a horse unfit for use is unlawfully driven within Metropolitan Traffic Regulations, s. 6 (22), by a servant, the owner is liable to conviction without proof of guilty knowledge on his part.—*TRENCHARD v. RYAN* (1910), 10 S. R. N. S. W. 618.—*AUS*.

**569 iv.** — — —.]—*Liability of company secretary.*—The secretary of a limited liability co., who has nothing whatever to do with the state of the co.'s horses, cannot be convicted of an offence under Cruelty to Animals Act, 1849 (c. 92), s. 2, for "causing or procuring" a horse "to be cruelly ill-treated."—*HUGHES v. MOONEY* (1909), 43 I. L. T. 127.—*IR*.

**572 i. Coachman shooting trespassing dog.**—A dog trespassing on a field in pursuit of rabbits was deliberately shot at from a distance of five yards by a coachman in the employment of the owner & occupier of the field, & was wounded in the thigh:—*Held*: this was not cruelty within Cruelty to Animals (Scotland) Act, 1850 (c. 92), & conviction quashed.—*JACK v. CAMPBELL* (1880), 8 R. 1; 18 Sc. L. R. 16.—*SCOT*.

**b. Wounding dog with knife—To separate dogs fighting.**—A. was walking along the street when a large dog attacked two small dogs which accompanied him. For a considerable time A. endeavoured in vain to separate the dogs, & finally struck the large dog

twice with a knife, thereby inflicting two wounds, of which the dog subsequently died:—*Held*: A. was not guilty of "wanton cruelty" within Cruelty to Animals (Scotland) Act, 1850, s. 1.—*CORNELIUS v. GRANT* (1880), 7 R. 13; 17 Sc. L. R. 633.—*SCOT*.

**c. Permitting sale alive of animal delivered to knacker.**—A knacker's assistant, while in charge of a cart belonging to the knacker, at a distance from the knackery & without the knowledge of his master, bought a horse for £1 & sold it alive for £1 10s. to another person, who exported it to Antwerp. The assistant was charged with selling the horse alive, & the knacker with permitting him so to do, in contravention of Protection of Animals (Scotland) Act, 1912 (c. 14), Sched. 1 (9):—*Held*: (1) the knacker, not having been proved to have had any knowledge of the transaction, had not "permitted" the sale; (2) the assistant had been rightly convicted.—*DUNDAS v. PHYN*, [1914] S. C. (J.) 114; 51 Sc. L. R. 427; 1 S. L. T. 311.—*SCOT*.



**Sect. 1.—Cruelty to animals: Sub-sects. 1 & 2.]**

was sufficient evidence of *mens rea* on the part of applt. to justify the conviction, & the conviction was right.—**THIELBAR v. CRAIGEN** (1905), 93 L. T. 600; 69 J. P. 421; 21 T. L. R. 745; 21 Cox, C. C. 44.

**574. Omission to alleviate suffering—Dog mortally wounded—Refusal to kill.]—**Applt., convicted under Cruelty to Animals Act, 1849 (c. 92), s. 2, of ill-treating & torturing & causing to be cruelly ill-treated & tortured a dog, had shot with a bullet from a pistol through the eye a neighbour's dog, which was trespassing in his garden, & it was assumed for the purposes of the case that the shooting the dog was lawful. Applt. immediately gave notice of what he had done to the owner of the dog & to a policeman, & dragged the dog into the road. When in the road he found for the first time that the dog was not dead, but was in pain; he however left it in the road, & although desired so to do by the policeman, refused to cause it to be killed. It died some hours afterwards in great pain, & deft. knew when he left it that it could not survive its wound, & that death only could put an end to its pain:—*Held*: applt. had not been guilty of any offence within the Act, & the conviction was wrong.—**POWELL v. KNIGHT** (1878), 38 L. T. 607; 42 J. P. 597; 26 W. R. 721.

*Annotations*:—**Appld.** Hooker v. Gray (1907), 96 L. T. 706. **Expld.** Green v. Cross (1910), 103 L. T. 279.

**575. Horse incurably diseased—Failure to slaughter.]—**The owner of a horse who, knowing it to be incurably diseased & in pain, merely omits to have it slaughtered, commits no offence within Cruelty to Animals Act, 1849 (c. 92), s. 2, & cannot be convicted of "cruelly ill-treating, abusing, or torturing," such animal by reason of such omission only. But if he keeps the animal in such manner as that it is inevitably put to intense pain in moving about a field, in its efforts to graze in order to support its life, he thereby commits an act of cruelty & an offence under the Act, & is guilty of "torturing or causing the animal to be tortured," as much as if he had actively tortured it with his own hand.—**EVERITT v. DAVIES** (1878), 38 L. T. 360; 42 J. P. 248; 26 W. R. 332.

*Annotation*:—**Consd.** Green v. Cross (1910), 103 L. T. 279.

**576. — Cat severely injured—Failure to kill immediately.]—**Resp. shot a cat in his garden with a saloon rifle with intent to kill it. The bullet struck it, wounding it severely, but not killing it. He saw the cat was not dead, & it crawled away out of resp.'s view to its owner's premises next door. About thirty minutes later, on the owner of the cat pointing out to resp. that it was still alive & suffering great pain, resp. destroyed it. Resp. did not call the owner's attention to the injured state of the cat, although he knew to whom it belonged, & although he knew that the animal was severely injured, he took no steps to have it attended to or its suffering alleviated:—*Held*: resp. was not guilty of an offence under Cruelty to Animals Act, 1849 (c. 92), s. 2.—**HOOKE v. GRAY** (1907), 96 L. T. 706; 71 J. P. 337; 23 T. L. R. 472; 21 Cox, C. C. 437.

*Annotation*:—**Consd.** Green v. Cross (1910), 103 L. T. 279.

**577. — Diseased sheep—Neglect to dress maggot wounds—Onus of proof.]—**On the hearing of an information against resp. for cruelty to a sheep, evidence was given that the sheep died in a field belonging to resp. a quarter of a mile from his house, death being due to exhaustion owing to the

sheep being eaten by maggots, & that it must have suffered great pain. Evidence was also given that resp. stated that he knew some of his sheep were affected with fly, & that four days previous to the death of the sheep he sent a man down to dress the wounds. The justices dismissed the information on the ground that there was no sufficient evidence that resp. unlawfully & cruelly caused the sheep to be ill-treated:—*Held*: as it was for the prosecution to prove the offence, it could not be said that the justices were wrong.—**POTTER v. CHALLANS** (1910), 102 L. T. 325; 74 J. P. 114; 22 Cox, C. C. 302.

**578. — Dog caught in trap—Failure to release.]—**Resp., a farmer & the owner & occupier of certain land on which was a rabbit warren, was in the habit of setting spring traps near the warren to catch vermin, & on a certain morning he found a dog caught by the foot in a trap with sharp teeth so set by him. The foot was severely injured, & the dog was suffering great pain, which was obvious to resp., who went at once to a neighbour to find out if the dog was his, & finding that it was not, returned to his farm & attended to his horses & then went to the police. He would have run some risk of being bitten if he had attempted to release the dog with his hands. The dog was released from the trap by two police officers about two hours after resp. had observed it. Upon an information against resp. for cruelly ill-treating the dog, the justices were of opinion that the dog had been cruelly ill-treated by resp., but that, as there was a mere omission to release the dog, they felt compelled, in view of certain authorities, to dismiss the complaint:—*Held* (**CHANNELL, J. diss.**): the magistrates were not bound by the authorities to dismiss the information, but had jurisdiction to convict resp. if they should think fit so to do, & the case should be remitted to them for further consideration.—**GREEN v. CROSS** (1910), 103 L. T. 279; 74 J. P. 357; 26 T. L. R. 507.

**579. — Cow overstocked—Failure to milk.]—**Resp. was summoned under Protection of Animals Act, 1911 (c. 27), s. 1, for causing a cow to be cruelly ill-treated by allowing her to be overstocked with milk. Resp., a farmer & the owner of the cow, caused the cow & her calf, which was muzzled, to be walked to the market, a distance of more than five miles, for the purpose of selling her. The cow, which had calved only twelve days before, was a heavy milker & was in full milk, but had not been milked for some nineteen hours, though it was usual for cows to be milked every twelve hours. She appeared to be in pain, & when walking along her legs rubbed against her distended udder, which caused her great pain & suffering. The suffering was unnecessary so far as any benefit of improvement to the cow was concerned. The justices found that the udder of the cow was overstocked with milk & that the cow suffered pain in consequence, but they dismissed the summons on the ground that it was an old-established custom in the district to expose cows for sale in this condition:—*Held*: resp. was guilty of the offence of cruelty within the above sect., by unreasonably doing or omitting to do an act which caused to the animal suffering unnecessary in the interests or for the benefit of the animal, & the fact that there was a custom to expose cows for sale in such a state was no defence to the charge of cruelty.—**WATERS v. BRAITHWAITE** (1913), 110 L. T. 266; 78 J. P. 124; 30 T. L. R. 107; 24 Cox, C. C. 34.

**574 i. Omission to alleviate suffering—** which has been wounded & is in great pain, & incurable, is not an offence within 9 Nfld. L. R. 71.—**NFLD.**  
**Animal severely injured—Refusal to kill.]—**The omission to kill an animal, Cruelty to Animals Act (Consolidated Statutes, c. 69).—**COX v. DUNPHY** (1905),



SUB-SECT. 2.—SPECIFIC OFFENCES.

**580. Bull-baiting.]—Held:** bull-baiting was not punishable under 3 Geo. 4, c. 71, for preventing cruelty to cattle, as bulls were not included in that Act.—*Ex p. HILL* (1827), 3 C. & P. 225; 1 Man. & Ry. M. C. 105.

**581. Cock fighting—Keeping place as cockpit.]—**A publican & another fought two cocks in the bowling alley of the public-house:—*Held:* Cruelty to Animals Act, 1849 (c. 92), did not apply, there being no proof that the place was a place kept or used for the fighting of cocks, & the parties were not liable to any penalties.—*CLARK (CLARKE) v. HAGUE* (1859), 2 E. & E. 281; 29 L. J. M. C. 105; 2 L. T. 85; 24 J. P. 517; 6 Jur. N. S. 273; 8 W. R. 363; 8 Cox, C. C. 324; 121 E. R. 106.

*Annotations:*—*Folld. Morley v. Greenhalgh* (1863), 1 New Rep. 268. *Distd. Eastwood v. Millar* (1874), 43 L. J. M. C. 139; *Hawke v. Dunn*, [1897] 1 Q. B. 579. *Refd. Budge v. Parsons* (1863), 27 J. P. 231; *R. v. Preedy* (1888), 17 Cox, C. C. 433.

**582. ———.]—**It is not an offence under Cruelty to Animals Act, 1849, s. 3, to assist at the fighting of cocks unless in a place specially kept or used for that purpose.—*MORLEY v. GREENHALGH* (1863), 3 B. & S. 374; 1 New Rep. 268; 32 L. J. M. C. 93; 7 L. T. 624; 27 J. P. 197; 9 Jur. N. S. 745; 11 W. R. 263; 122 E. R. 142.

*Annotations:*—*Folld. Budge v. Parsons* (1863), 3 B. & S. 379. *Distd. Eastwood v. Miller* (1874), L. R. 9 Q. B. 440. *Expld. Pitts v. Millar* (1874), 38 J. P. 615. *Distd. Hawke v. Dunn*, [1897] 1 Q. B. 579; *M'Inaney v. Hildreth*, [1897] 1 Q. B. 600. *Refd. R. v. Preedy* (1888), 17 Cox, C. C. 433.

**583. ——— Domestic animal.]—**Applt., who had been convicted under Cruelty to Animals Act, 1849, s. 2, of causing a cock to be cruelly ill-treated & abused & tortured, had taken part in a cock-fight, the cocks having steel spurs. Although one of them had its thigh broken, applt. induced it to continue to fight:—*Held:* (1) a cock was a domestic animal within the above sect.; (2) applt. had been rightly convicted of ill-treating & abusing it.—*BUDGE v. PARSONS* (1863), 3 B. & S. 382; 1 New Rep. 436; 7 L. T. 784; 27 J. P. 231; 11 W. R. 424; 122 E. R. 145; *sub nom. BRIDGE v. PARSONS*, 32 L. J. M. C. 95; 9 Jur. N. S. 796.

*Annotations:*—*Refd. Murphy v. Manning* (1877), 2 Ex. D. 307; *Swan v. Saunders* (1881), 29 W. R. 538; *Ford v. Wiley* (1889), 23 Q. B. D. 203; *Harper v. Marks* (1894), 42 W. R. 605.

**584. Cutting combs.]—**Upon an information against resps. under Cruelty to Animals Act, 1849, s. 2, for cutting the combs of cocks, evidence

was given that the operation caused very great pain, & was inflicted in order to fit the birds for one or other of two purposes, cock-fighting or winning prizes at exhibitions:—*Held:* (1) (*KELLY, C.B.*) resps. did, as a matter of fact, "cruelly ill-treat, abuse, or torture the birds," & as a matter of law, the act could not be justified by the purpose of cock-fighting; (2) (*CLEASBY, B.*) neither the purpose of cock-fighting nor that of winning prizes at exhibitions would prevent the case from being within the Act.—*MURPHY v. MANNING* (1877), 2 Ex. D. 307; 46 L. J. M. C. 211; 36 L. T. 592; 41 J. P. 104; 25 W. R. 540.

*Annotations:*—*Expld. Colam v. Paget* (1883), 48 J. P. 263. *Consd. Ford v. Wiley* (1889), 23 Q. B. D. 203. *Refd. Swan v. Saunders* (1881), 29 W. R. 538; *Lewis v. Fermor* (1887), 18 Q. B. D. 532; *R. v. Cable*, [1906] 1 K. B. 719.

**585. Rabbit coursing—"Baiting" animals.]—**A match took place between the owners of two dogs as to which could kill the greatest number of rabbits by running after them. The match took place in a field containing an area of three acres, walled in so that the rabbits could not escape:—*Held:* this was not "baiting" animals within Cruelty to Animals Act, 1849, s. 3.—*PITTS v. MILLAR* (1874), L. R. 9 Q. B. 380; 43 L. J. M. C. 96; 30 L. T. 328; 38 J. P. 615.

**586. ——— Domestic animal.]—**Resps. coursed with dogs in an enclosed field wild rabbits, which had been caught in nets five or six days previously & since kept in confinement & fed. On an information for cruelly torturing the rabbits:—*Held:* the rabbits were not "domestic animals" within Cruelty to Animals Acts, 1849 & 1854 (c. 60), & resps. could not be convicted.—*APLIN v. PORRITT*, [1893] 2 Q. B. 57; 62 L. J. M. C. 144; 69 L. T. 433; 57 J. P. 456; 42 W. R. 95; 9 T. L. R. 482; 17 Cox, C. C. 662; 5 R. 467.

**587. ——— Test of "coursing."]**—A rabbit-coursing meeting was held in a field of between 2½ & 3 acres in extent; the field was closely fenced all round with boards & wire netting. The rabbits were brought in crates & were in turn taken out & dropped upon the grass, when the dogs whose turn it was to course were slipped at a point about sixty or seventy yards distant. The rabbits, which, owing to the fence, were unable to escape, were all of them killed. On a prosecution of an official of the meeting under s. 1 (1) of Protection of Animals Act, 1911 (c. 27):—*Held:* (1) notwithstanding there was no chance of escape, there was evidence on which the magistrate could find that the chasing of the rabbits in the above circumstances was

PART X. SECT. 1, SUB-SECT. 2.

d. "Illegally using."—To support a conviction for illegally using an animal under 17 Vict. No. 3, s. 6, it must appear that the animal was used for the profit, convenience, or pleasure of the party using it.—*Re HAUGHTON* (1877), Q. L. R. (Beor.) Pt. II., 53.—AUS.

**581 i. Cock fighting.]—**C. was committed at petty sessions on the charge of having been unlawfully engaged in cock-fighting on the lands of G. & K., contrary to Cruelty to Animals Act, 1849 (c. 92). It was proved that C. was present at a cock-fight, but no evidence was given to show that the place had been previously used for that purpose:—*Held:* the conviction was bad.—*COYNE v. BRADY* (1863), 12 L. C. L. R. 577; 7 Ir. Jur. N. S. 105.—IR.

**583 i. ——— Animal.]—**To cause one cock to fight another is an offence punishable under Cruelty to Animals Act, 1849, s. 2, a cock being an "animal" within that sect.—*BATES v. M'CORMICK* (1863), 9 L. T. 175.—IR.

**583 ii. S. P. ALLEN v. SMALL**, [1904] 2 L. R. 705; 38 L. L. T. 253.—IR.

e. Pigeon shooting.]—A person may legally pursue the sport of shooting at tame pigeons liberated from a trap, even if the sport incidentally inflicts suffering upon the animals shot at, & the infliction of such pain must not be regarded as contemplated cruelty. The object of the sport in thus killing tame pigeons is an adequate & reasonable object.—*TUCKER v. HAZELHURST* (1906), 26 N. Z. L. R. 263.—N.Z.

**588 i. Neglect to supply food—Seller or buyer liable.]—**A calf was sent by steamer to deft., & was landed on a wharf, where it remained seventeen days without food, & died of starvation. Deft. had, immediately after its being landed, sold the calf to a butcher:—*Held:* (1) as the property in the calf had passed from deft., he was not bound to feed it, & was not liable under Cruelty to Animals Act, 14 Vict. No. 40; (2) even if the property had not passed by the sale, deft. would not be liable under the Act, if he really believed that the property had passed, & thought that the calf was on the wharf at the purchaser's risk.—*Ex p. FOLEY* (1875), 14 N. S. W. S. C. R. 162.—AUS.

f. Horses—Cruelty to.]—*Held:* a complaint against a cab driver for a contravention of Cruelty to Animals (Scotland) Act, 1850 (c. 92), was relevantly laid, which charged against the accused that he did, at a time & place libelled, "cruelly ill-treat or cause to be ill-treated a horse under his charge," by causing or allowing such horse to remain yoked to a cab during the night libelled on, "such horse suffering severely from hunger, cold & exposure, in consequence of which the horse suffered great & unnecessary pain, & whereby the horse was thus ill-treated, abused or tortured."—*ANDERSON v. WOOD* (1881), 9 R. 6; 19 Sc. L. R. 142.—SCOT.

**591 i. Domestic animal—Crabs.]—**Crabs are "animals" within Act. XI. of 1890, s. 2, & if a person exposes them for sale at a public place with their legs broken & with their shells crushed in so as necessarily to cause them pain, he incurs the penalty prescribed by s. 3 of the Act.—*TULSI BEWAH v. SWEENEY* (1897), I. L. R. 24 Calc. 881; 1 C. W. N. 642.—IND.

1.—*Cruelty to animals: Sub-sect. 2.]*

“coursing” within the sect.; (2) the word “liberated” in s. 1 (3) (b) meant “set free from the receptacle in which the animal has been confined,” & the mere fact that the rabbits had no chance of escape did not prevent their being liberated; (3) no offence against the sect. had been committed, although unnecessary suffering had been caused to the rabbits.

The mere fact that the chasing of the animals takes place in an inclosure from which there is no possibility of escape does not prevent it amounting to coursing, unless the space is so small as to render it impossible to test the relative coursing abilities of the competing dogs, & thereby to defeat the object of the coursing (BRAY, J.).—WATERS v. MEAKIN, [1916] 2 K. B. 111; 85 L. J. K. B. 1378; 115 L. T. 110; 80 J. P. 276; 32 T. L. R. 480; 25 Cox, C. C. 432; 14 L. G. R. 699.

**588. Neglect to supply water—Cattle on railway journey.]**—Applt. was the consignor of cattle from K. to C., to be carried over a railway upon a journey which lasted more than thirty hours. He did not make any request that the cattle should be supplied with water. The justices of C. issued a summons against applt., then being in W., & on his appearing on the summons, convicted him of an offence against Contagious Diseases (Animals) Act, 1869 (c. 70), s. 64:—*Held*: (1) the offence was within the summary jurisdiction of the justices; (2) the conviction could not be sustained, for the offence was completed before the cattle reached C., the thirty hours having then expired; & applt., by appearing before the justices in obedience to their summons, did not “happen to be” at C. & within their jurisdiction.—JOHNSON v. COLAM (1875), L. R. 10 Q. B. 544; 44 L. J. M. C. 185; 32 L. T. 725; 40 J. P. 135; 23 W. R. 697.

*Annotation*:—*Consd.* Swan v. Saunders (1881), 44 L. T. 421.

**589. Impounded animal.]**—Where the keeper of a common pound had neglected to provide food & water for sheep placed in the pound by another person:—*Held*: (1) the keeper of a common pound was not, as such, within Cruelty to Animals Act, 1849 (c. 92), s. 5, “a person who impounds or confines, or causes to be impounded or confined” animals brought to his pound, & he was under no obligation to provide such animals with food & water, nor subject to the penalty for neglecting so to do; (2) that obligation was imposed on the person bringing the animal to the pound.—DARGAN v. DAVIES (1877), 2 Q. B. D. 118; 46 L. J. M. C. 122; 35 L. T. 810; 41 J. P. 468; 25 W. R. 230.

*See, now*, Protection of Animals Act, 1911 (c. 27), s. 7.

**590. — Domestic animal—Parrots.]**—Applt., foreman to a dealer in foreign birds, sent some parrots from L. to D. by rail in a box without water. They were found at H., a station on the route, after ten hours’ travelling, suffering from want of water, which they drank eagerly when offered to them. The magistrate having convicted applt. under Cruelty to Animals Act, 1849, s. 2, of torturing or causing to be tortured “domestic animals”:—*Held*: the conviction was bad, on the ground that there was no evidence of cruelty or that the parrots in question were “domestic animals” within the Acts relating to cruelty to

animals. *Qu.*: whether if an offence had been committed, such offence would have been a continuing one.

Cruelty to animals to be within this stat. must cause substantial & unnecessary suffering, & without evidence of such suffering to keep parrots for a few hours without water is not an act of cruelty upon which a conviction can rightly follow (*per* CUR.).—SWAN v. SANDERS (SAUNDERS) (1881), 50 L. J. M. C. 67; 44 L. T. 424; 45 J. P. 522; 29 W. R. 538; 14 Cox, C. C. 566.

*Annotation*:—*Reid*. Ford v. Wiley (1889), 23 Q. B. D. 203.

**Horses—Cruelty to.]**—*See* Nos. 565, 568—570, 573, 575, *ante*.

**591. Domestic animal—Linnets used as decoys.]**—Resp. caught linnets, kept them in cages for a year & used them as decoy birds. On a charge of cruelly ill-treating the birds, it appeared that resp. tied a string round the breast under the wing, by pulling which the birds were jerked into the air, & made to struggle & twitter, & so attract wild birds. The justices found that resp. cruelly ill-treated the birds, but dismissed the information, being doubtful as to whether the birds were domestic animals:—*Held*: the linnets were domestic animals within Cruelty to Animals Acts, 1849 & 1854 (c. 60), & the case must be remitted.—COLAM v. PAGETT (1883), 12 Q. B. D. 66; 53 L. J. M. C. 64; 48 J. P. 263; 32 W. R. 289.

*Annotations*:—*Consd.* Harper v. Marcks, [1894] 2 Q. B. 319. *Distd.* Yates v. Higgins (1896), 65 L. J. M. C. 31.

**592. — Caged lions.]**—Resp. kept full-grown lions in a cage & gave for profit a public performance, in which he entered the cage with a lady dancer, who danced, whilst he being armed with a whip & a strong pole kept the lions in subjection. Afterwards one of them was made to jump over a board. Except in these respects the lions did not differ in any way from wild animals kept in confinement:—*Held*: the lions were not “domestic animals” within Cruelty to Animals Act, 1849, ss. 2, 29, & Cruelty to Animals Act, 1854, s. 3, & resp. could not be convicted on an information charging him with cruelly treating them.—HARPER v. MARCKS, [1894] 2 Q. B. 319; 63 L. J. M. C. 167; 70 L. T. 804; 58 J. P. 527; 42 W. R. 605; 10 T. L. R. 488; 38 Sol. Jo. 619; 17 Cox, C. C. 758; 10 R. 335.

*Annotation*:—*Consd.* Yates v. Higgins, [1896] 1 Q. B. 166.

**593. — Tame seagull.]**—Resps. were charged, under Cruelty to Animals Act, 1849 (c. 92), s. 2, with cruelly ill-treating a tame seagull. The bird had been the property of its owner for three years, & was used by her in her business as a photographer. It was tame, & was kept in a field. One wing having been pinioned, it could not fly, but could get out of the field by going down a river. It would go to its owner when called, & feed from the hand:—*Held*: the seagull was not a “domestic animal” within Cruelty to Animals Acts, 1849, s. 29, & 1854 (c. 60), s. 3, & resps. could not be convicted.—YATES v. HIGGINS, [1896] 1 Q. B. 166; 65 L. J. M. C. 31; 60 J. P. 88; 44 W. R. 335; 12 T. L. R. 163.

*See, now*, Protection of Animals Act, 1911 (c. 27), ss. 1, 15.

**594. Dishorning cattle.]**—At the hearing of an information under Cruelty to Animals Act, 1849, s. 2, against resp., a farmer in Norfolk, for

**594 i. Dishorning cattle.]**—M., being the owner of cattle, caused their horns to be cut off close to the skull. Upon the hearing of a summons against M. for having ill-treated & caused & procured the cattle to be cruelly ill-treated, tortured & abused contrary to Cruelty to Animals Act, 1849, s. 2, evidence was given that the operation of dishorning caused very great pain & suffering, & that the reasons for cutting off the horns were (1) greater convenience in feeding cattle in yards, & (2) that cattle without horns brought in some places £2 a head more than those with horns. The magistrate having refused to convict:—*Held*: the above sect. & ought to have been convicted.—BRADY v. MCARDLE (1884), 14 L. R. N. 174; 15 Cox, C. C. 516.—*IR.*

**594 ii. —.]**—It is not an offence punishable under Cruelty to Animals Act, 1849, s. 2, to dishorn cattle, provided the operation be skilfully &



ill-treating, abusing, & torturing a number of oxen, it appeared that he had caused their horns to be sawn off, & evidence was given by scientific witnesses that this operation caused extreme & prolonged pain, & was cruel, & absolutely unnecessary; that dishorning was not practised in other counties of England, & had been long discontinued in Norfolk, & only revived within four years in one part of that county, & that goring was prevented by "tipping" the horns, or by removing the core before the animal was six months old, which caused only trifling pain. For the defence, evidence was given by farmers that dishorning changed the character of the animals, rendered them quiet, prevented them from goring & ill-treating others, made them graze better & fatten more quickly, enabled a greater number of them to be stowed in a yard or railway truck, & slightly increased the value of each animal, & that "tipping" the horns was of no benefit. The justices were of opinion that the dishorning had caused considerable pain & suffering to the animals, that resp. had exercised ordinary care in the operation, that the practice had been carried on in a part of the county of Norfolk to a considerable extent during the past three or four years, that the results attained by dishorning would not be attained by merely tipping the horns, that resp. had not any cruel intentions, but acted under the honest belief that the operation was for the benefit of the animals themselves, & as well for the benefit of himself as a grazier, & that the object he had in view could not be attained by any known method; & they accordingly dismissed the information:—*Held*: (1) the operation of dishorning caused extreme pain without adequate & reasonable object, & was unnecessary abuse of the animal & unjustifiable; (2) resp. ought to have been convicted.—*FORD v. WILEY* (1889), 23 Q. B. D. 203; 58 L. J. M. C. 145; 61 L. T. 74; 53 J. P. 485; 37 W. R. 709; 5 T. L. R. 483; 16 Cox, C. C. 683.

*Annotations*:—*Distd.* Bowyer v. Morgan (1906), 70 J. P. 253. *Consd.* R. v. Cable, [1906] 1 K. B. 719. *Refd.* Waters v. Braithwaite (1913), 110 L. T. 266.

**595. Spaying Sows — Operation to improve value.**—A person who, with reasonable care & skill, performs on an animal a painful operation, which is customary, & is performed *bond fide* for the purpose of benefiting the owner by increasing the value of the animal, is not guilty of the offence of cruelly ill-treating, abusing, or torturing the animal within Cruelty to Animals Act, 1849 (c. 92), s. 2, even though the operation is in fact unnecessary & useless.

Resp., a veterinary surgeon, performed the operation of spaying five sows, which operation consisted in cutting out & removing the uterus & ovaries. It caused severe pain to the sows, but it was admitted that the operation was performed in a skilful & careful manner. There was evidence for the prosecution that the operation did not improve the flesh of the sow except at the periods of heat, but that it was a customary operation in many parts of the country & was supposed (though it was alleged erroneously) to increase the weight & development of the animals. The justices having dismissed an information against resp. for

cruelly ill-treating & abusing the sows:—*Held*: the justices were right.—*LEWIS v. FERMOR* (1887), 18 Q. B. D. 532; 56 L. J. M. C. 45; 56 L. T. 236; 51 J. P. 371; 35 W. R. 378; 3 T. L. R. 449; 16 Cox, C. C. 176.

*Annotations*:—*Distd.* Ford v. Wiley (1889), 23 Q. B. D. 203. *Consd.* Waters v. Braithwaite (1913), 110 L. T. 266. *Refd.* Re Foveaux, Cross v. London Anti-Vivisection Soc., [1895] 2 Ch. 501; R. v. Cable, [1906] 1 K. B. 719.

**596. Attempting to kill—Pig.**—A. was convicted of cruelly ill-treating a pig. He tried on Saturday to catch one of his pigs, & chased it round a stable, hacking at it with a carpenter's axe, & inflicted four wounds on its head & nose. He sent for a butcher, but was unable to find one till Monday, the pig meanwhile lying half dead & bleeding:—*Held*: there was sufficient evidence to support the conviction.—*ADCOCK v. MURRELL* (1890), 54 J. P. 776.

**597. — Dog.**—*DUNCAN v. POPE*, No. 571, *ante*.

**598. Cattle left in headropes.**—*ELLIOTT v. OSBORN*, No. 567, *ante*.

**599. Pony exposed to performing lions.**—*THIELBAR v. CRAIGEN*, No. 573, *ante*.

**600. Lambs—Branding with hot iron.**—Upon an information under Cruelty to Animals Act, 1849, s. 2, for cruelly ill-treating lambs by branding them on the nose with a hot iron, it was proved that the branding was done by the accused by drawing the hot branding iron across the nostrils of the lamb three or four times, thereby burning through the skin & leaving a permanent scar on the nose. The justices found that the branding of the sheep with a hot iron in the manner described caused substantial pain & suffering, that there had been no unnecessary abuse of the animals, that the practice of branding sheep on the unclosed mountain lands of certain Welsh counties had existed for a great number of years, & that the practice was reasonably necessary for the purpose of identifying sheep grazing in large numbers on unclosed mountain lands, & could not be effectually attained by ear-marking & pitch-marking; & they dismissed the information:—*Held*: as the justices had not applied any wrong principle of law, & had come to the conclusion that the practice of branding, on the nose was reasonably necessary for purposes of identification, the ct. could not say that there was no evidence to support their finding, & could not interfere with their decision.—*BOWYER v. MORGAN* (1906), 95 L. T. 27; 70 J. P. 253; 22 T. L. R. 426; 50 Sol. Jo. 377; 21 Cox, C. C. 203.

**601. Sheep—Neglect to dress maggot wounds.**—*POTTER v. CHALLANS*, No. 577, *ante*.

**602. Stag hunting—Captive hind—Whether hunt ended.**—Resp. was master of certain drag hounds, & in connection with the drag hounds a number of hinds were kept & hunted with the hounds. A hind which was not in a mutilated or injured state was released & hunted, & three times it took refuge in a yard from which it was dislodged by being prodded & beaten. On two occasions it charged against barbed wire, trying to break through. Two men were seen to get hold of the neck of the hind, which had turned & was fighting with its forelegs, & put a whip thong round it &

properly performed for the purpose of rendering them more profitable to farmers in the course of their trade.—*CALLAGHAN v. SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS* (1885), 16 L. R. Ir. 325; 16 Cox, C. C. 101.—*IR.*

**594 iii. — Cruelty to Animals (Scotland) Act, 1850 (c. 92), s. 1.**—Upon a complaint against a cattle dealer for a contravention of Cruelty to Animals (Scotland) Act, 1850 (c. 92), by sawing off the horns of oxen close to the

skull, it was proved that the operation caused great pain but that it was in common use throughout the counties of Fife, Forfar & Kincardine as a means of preventing the cattle doing each other harm by goring one another or in railway trucks, & that in other districts operations securing the same result, but painless, were made use of:—*Held*: the accused were rightly acquitted.—*RENTON v. WILSON* (1888), 15 R. 84; 2 White, 43; 25 Sc. L. R. 501.—*SCOT.*

**594 iv. S. P. TODRICK v. WILSON** (1891), 18 R. 41.—*SCOT.*

**594 v. —**—Dishorning cattle, if the operation be performed with due care & skill, for the purpose of rendering beasts more profitable to farmers & exporters in the course of their trade, is not cruelty to the animals within Cruelty to Animals Act, 1849, s. 2.—*R. v. McDONAGH* (1891), 28 I. L. R. 204.—*IR.*



**Sect. 1.—Cruelty to animals : Sub-sects. 2 & 3.]**

pull it along by the neck, & another man pulled its tail, endeavouring to get it out of the yard. They dragged it a short distance, when it fell down in the yard exhausted. It was lifted up & dragged in the same manner through the gateway on to the road, where it again fell down exhausted. It lay there for a short time, when it was again lifted up & dragged along the road in the same way as before for about 15 or 16 yards, when it fell down again & died. The hind had a wound in its chest, which was bleeding, caused by the barbed wire, against which it had charged, as mentioned above, it was bleeding at the hocks and it was exhausted. One witness deposed that resp. was present the whole of the time, & subsequently when seen by a witness said that he was present all the time & was responsible for all that took place, that there was no cruelty so far as he could see, & that he gave orders for the hind to be got out of the yard with a view to hunting it again, because it was not blown, but was only sulking, as it had done before. At the close of the evidence for the prosecution it was submitted that there was no case to answer, as all the acts deposed to took place while the hind was being hunted, & by Wild Animals in Captivity Act, 1900 (c. 33), the Act did not apply to anything done in the hunting of an animal:—*Held*: there was a case which required an answer—namely, as to whether the hunt was or was not at an end when the acts proved took place, & the case must be remitted.—*RODGERS v. PICKERSGILL* (1910), 103 L. T. 33; 74 J. P. 324; 26 T. L. R. 493; 54 Sol. Jo. 564.

*Annotation*:—*Consd.* *Waters v. Meakin*, [1916] 2 K. B. 111.

**603. Whale—Wild animal unable to escape.]—**A whale temporarily stranded without the agency of man & surrounded by people “is not in captivity or close confinement” within Wild Animals in Captivity Protection Act, 1900, s. 2.—*STEELE v. ROGERS* (1912), 106 L. T. 79; 76 J. P. 150; 28 T. L. R. 198; 22 Cox, C. C. 656.

**604. Cow overstocked.]—***WATERS v. BRAITHWAITE*, No. 579, *ante*.

**SUB-SECT. 3.—PENALTIES AND PROCEDURE.**

**605. Variance between declaration & proof—Cured by verdict.]—**Declaration for striking pltf.'s cow divers blows, whereof the animal died. Proof, that deft. had beaten the cow unmercifully, & that pltf., to shorten the animal's miseries, put it to death:—*Held*: after verdict, no variance.—*HANCOCK v. SOUTHALL* (1824), 4 Dow. & Ry. K. B. 202.

**606. Arrest—Liability in trespass—Cruelty to Animals Act, 1835 (c. 59), s. 9.]—**A person who is not the owner of an animal cannot under the above sect. direct a police-officer to take into custody a person who has ill-treated it, unless such person saw the ill-treatment inflicted. In such a case the *bona fides* of the intention of the person giving the charge affords him no protection under the stat. in an action of trespass.—*HOPKINS v. CROWE* (1836), 4 Ad. & El. 774; 2 Har. & W. 21; 5 L. J. K. B. 147; 111 E. R. 974.

*Annotations*:—*Distd.* *Hudson v. Howard* (1837), 1 Jur. 658; *Jones v. Gooday* (1842), 9 M. & W. 736. *Consd.* *Hughes*

*v. Buckland* (1846), 3 Dow. & L. 702. *Expld.* *Smith v. Hopper* (1847), 16 L. J. Q. B. 93; *Kine v. Evershed* (1847), 10 Q. B. 143. *Consd.* *Booth v. Clive* (1851), 10 C. B. 827. *Expld.* *Read v. Coker* (1853), 13 C. B. 850; *Derecourt v. Corbishley* (1855), 1 Jur. N. S. 870.

**607.** .]—Pltf. sued defts. for damages for false imprisonment, he having been given into custody by M., an inspector of defts., for alleged cruelty to a horse. The charge had been dismissed. At the trial M. did not appear, & the only defence raised by defts. was that M., in giving pltf. into custody, was not acting within scope of his authority. As evidence that M. was so acting, a code of suggestions issued by defts. to its inspectors was put in, one of which suggestions stated that Cruelty to Animals Act, 1849 (c. 92), enabled the offender to be given into the custody of a policeman & that in flagrant cases this was the best course to adopt:—*Held*: (1) although an inspector of defts. would not, without special instructions, be acting within scope of his authority in giving a person into custody, nevertheless the code of suggestions pointed out to the inspectors that they might, & in some cases ought to, do so; (2) defts. were liable in damages for their inspector's action.—*LINE v. ROYAL SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS* (1902), 18 T. L. R. 634.

**608. Appeal—Fine exceeding £2.]—***Held*: the right of appeal given by Cruelty to Animals Act, 1849, s. 25, existed only where the sum which the party was adjudged to pay, by way of penalty, exclusive of costs, exceeded £2, or where imprisonment was awarded as a punishment for the offence.—*R. v. WARWICKSHIRE JJ.* (1856), 6 E. & B. 837; 25 L. J. M. C. 119; 27 L. T. O. S. 235; 20 J. P. 693; 2 Jur. N. S. 930; 4 W. R. 650; 119 E. R. 1075.

*Annotation*:—*Consd.* *Ex p. Novis*, [1905] 2 K. B. 456.

*See, now*, Protection of Animals Act, 1911 (c. 27), s. 14; Criminal Justice Administration Act, 1914 (c. 58), s. 57.

**609. Quashing conviction—Point of form—Cruelty to Animals Act, 1849 (c. 92), s. 26.]—**An order of quarter sessions recited that on appeal from a certain conviction, after reading the conviction, & hearing the allegations of counsel on both sides, & upon due proof & consideration of the premises, the ct. did order that the conviction be quashed:—*Held*: this order was good on the face of it, for it was often sufficient to hear the allegations of counsel without requiring facts to be proved. *Semble*: the Ct. of Queen's Bench will not review an order of quarter sessions, if valid on the face of it, merely in order to criticise the reason of the judgment.—*R. v. COLAM* (1872), 36 J. P. 660; 20 W. R. 331.

**610. — Certiorari.]—**The provisions of Cruelty to Animals Act, 1849, s. 26, preclude the issuing of a *certiorari* for the purpose of bringing up a case stated by justices in quarter sessions for the opinion of the ct.—*R. v. CHANTRELL* (1875), L. R. 10 Q. B. 587; 44 L. J. M. C. 94; 33 L. T. 305; 39 J. P. 472; 23 W. R. 707.

*Annotations*:—*Consd.* *R. v. Walsall Overseers* (1878), 3 Q. B. D. 457, C. A.; *Kydd v. Liverpool Watch Committee*, [1907] 2 K. B. 591, C. A. *Mentd.* *Re Carpenter & Bristol Corpn.* (1907), 5 L. G. R. 977, C. A.

**Appeal—Non-appearance of prosecutor.]—**B. was convicted of cruelly ill-treating a

**PART X. SECT. 1, SUB-SECT. 3.**

**h. Police entering land—Trespass—Cruelty to Animals (Scotland) Act, 1850 (c. 92), s. 6.]—**A farmer presented a note of suspension & interdict against the chairman, directors, & secretary of the Scottish Society for the Prevention of Cruelty to Animals, & against one of

their inspectors, to have resps. & others acting on their instructions interdicted from trespassing on his farms. The reason of the raising of the action was that the Society's inspector had gone to the farm accompanied by a police constable, & they had examined the horses used on the farm in consequence of information received of an alleged

offence under the above Act, with the result that one of the complainer's ploughmen was tried for cruelty to animals & convicted:—*Held*: the visit was authorised, & interdict refused.—*SHEPHERD v. MENZIES* (1900), 2 F. 443; 37 Sc. L. R. 335; 7 S. L. T. 330. —*SCOT.*

horse & sentenced to fourteen days' imprisonment. He gave notice of appeal to quarter sessions, the only ground alleged being that the sentence was excessive. Prosecutor did not appear on the appeal, & the ct. quashed the conviction:—*Held*: this order was right, for as there was no evidence as to what should be the right punishment, & a conviction without a sentence would be bad, the proper course was to quash the conviction.—*R. v. SURREY JJ.*, [1892] 2 Q. B. 719; 61 L. J. M. C. 200; 67 L. T. 266; 56 J. P. 742; 41 W. R. 79; 17 Cox, C. C. 547.

**612. Joinder—Separate offences—Mandamus.]—**An information was laid against a person for that he "ill-treated, overdrove, tortured & abused" two heifers. On the hearing of the information he objected that the information alleged four separate offences. The justices allowed the objection, but they were willing to grant new process, but the time had expired for laying a new information. The ct. granted a rule *nisi* for a mandamus to the justices to hear & determine the case on its merits.—*R. v. TOTNES JJ.* (1879), *Times*, May 9.

*Annotations:—***Consd.** *R. v. Cable* (1906), 1 K. B. 719. **Distd.** *Johnson v. Needham*, [1909] 1 K. B. 626.

**613. Defect in substance.]—**On the hearing of a charge before a magistrate it was objected that the information disclosed two offences, contrary to Summary Jurisdiction Act, 1848 (c. 43), s. 10. The magistrate allowed the objection, & dismissed the summons, but stated a case for the opinion of the ct.:—*Held*: although the prosecutor might have been required to elect on which charge he would proceed, the inclusion of two offences in one information was a "defect in substance" within s. 1 of the Act, & no objection to the information could be allowed in respect of it.—*RODGERS (ROGERS) v. RICHARDS*, [1892] 1 Q. B. 555; 66 L. T. 261; 56 J. P. 281; 40 W. R. 331; 36 Sol. Jo. 274; 17 Cox, C. C. 474.

*Annotation:—***Mentd.** *R. v. Rawson*, [1909] 2 K. B. 748.

**614. Refusal to issue summons—Res judicata.]—**Justices heard a summons for ill-treating a horse on June 26, the alleged cruelty then being working the horse while suffering from a swollen & stiff fetlock & a sore on the shoulder. The justices after a view dismissed the summons. On the following Aug. 7 another summons was applied for in respect of cruelty to the same horse, the alleged cruelty then being the same stiff joint, & an open wound on the shoulder. The justices, considering the circumstances to be the same as before, refused to issue a summons:—*Held*: the justices were wrong, inasmuch as the sores seemed to be not identical in circumstances with the former adjudication.—*R. v. PELL* (1885), 49 J. P. Jo. 148.

**615. — Arrest of offender.]—**An inspector of the Society for the Prevention of Cruelty to Animals, having found a horse driven in an unfit state, reported to his society, & a fortnight later, applied for a summons, but the magistrate refused to grant it on the ground that the driver ought to have been arrested & charged at the time, & the horse brought before the magistrate:—*Held*: the magistrate was wrong, & a rule made absolute, commanding him to issue the summons.—*R. v. PAGET* (1889), 53 J. P. 469.

**616. Prosecution—Right of informer to conduct proceedings.]—**An inspector of the Society for the Prevention of Cruelty to Animals, who has preferred an information & complaint before a ct. of summary jurisdiction against a person for cruelty to animals, has a right to appear on behalf of such society.—*DUNCAN v. TOMS* (1887), 56 L. J. M. C. 81; 56 L. T. 719; 51 J. P. 631; 35 W. R. 667; 16 Cox, C. C. 267.

**617. Summons against two persons for one offence—Power to convict both offenders.]—**W., the servant of C., & C. were both summoned for ill-treating & causing to be ill-treated a horse. Defts. objected that these were two separate offences, & the justices required prosecutor to elect which he would proceed with, & because he declined to elect, dismissed the summons:—*Held*: the justices were wrong, & they ought to have convicted each of the offence which he had committed.—*BARTHOLOMEW v. WISEMAN* (1891), 56 J. P. 455; 8 T. L. R. 147.

*Annotation:—***Appld.** *Rogers v. Richards* (1892), 66 L. T. 261.

**618. Time for making complaint—Computation—"Calendar month."]**—On June 30 an information was laid against applt. in respect of an act of cruelty alleged to have been committed by him on May 30. An objection to the jurisdiction of the justices having been taken, on the ground that the complaint had not been made within one calendar month after the cause of complaint had arisen within Cruelty to Animals Act, 1849 (c. 92), s. 14:—*Held*: the day on which the alleged offence was committed was to be excluded from the computation of the calendar month within which the complaint was to be made, & the complaint was made in time, & the justices had jurisdiction to hear the case.—*RADCLIFFE (RADCLYFFE, RATCLIFFE) v. BARTHOLOMEW*, [1892] 1 Q. B. 161; 61 L. J. M. C. 63; 65 L. T. 677; 56 J. P. 262; 40 W. R. 63; 8 T. L. R. 43; 36 Sol. Jo. 43.

**619. — Date of offence.]—**Where an animal was shot & continued to suffer pain, it was contended that the act of shooting was a continuing offence, & that time under Cruelty to Animals Act, 1849, s. 14, might run from a time subsequent to the act of shooting when the animal was suffering pain:—*Held*: the cause of complaint arose on the shooting, & time ran under the sect. from the minute when the animal was shot.—*PENGELLY v. TERRELL* (1903), 67 J. P. Jo. 616.

**620. Aiding & abetting—Conviction as principal.]—***BENFORD v. SIMS*, No. 568, *ante*.

**621. Several animals—One offence.]—**A conviction for an offence under Cruelty to Animals Act, 1849 (c. 92), s. 2, stated that deft. was convicted for that he did cruelly ill-treat, abuse & torture five cows by causing them to be overstocked with milk. On an objection being taken that the conviction was bad on its face, in that it was a conviction for five separate & distinct offences:—*Held*: an act or omission affecting several animals might constitute one offence under s. 2, & the conviction was not bad on its face.—*R. v. CABLE, Ex p. O'SHEA*, [1906] 1 K. B. 719; 75 L. J. K. B. 381; 94 L. T. 772; 70 J. P. 246; 54 W. R. 625; 22 T. L. R. 438; 50 Sol. Jo. 391; 21 Cox, C. C. 186.

**622. —.]—**An information under Cruelty to Animals Act, 1849, s. 2, charged deft. for that he did cruelly ill-treat four ponies between certain dates by neglecting to supply them with nourishing food. Deft. was convicted by a ct. of summary jurisdiction & fined £5 in respect of each pony. Four convictions were drawn up, each of which stated that deft. had been convicted of ill-treating "a pony" in the manner alleged in the information. Deft. had no notice before conviction that he was being charged with a separate offence in respect of each pony:—*Held*: the information alleged only one offence, & deft. could not, without previous notice, be convicted on the information of four offences, & three of the convictions were bad & must be quashed.—*R. v. RAWSON (TRAFFORD-RAWSON)*, [1909] 2 K. B. 748; 78 L. J. K. B. 1156;



*Sect. 1.—Cruelty to animals: Sub-sects. 3, 4 & 5. Sect. 2.]*

101 L. T. 463; 73 J. P. 483; 25 T. L. R. 785; 22 Cox, C. C. 173.

**623. Several offences—One conviction.]—Held:** the words "ill-treat," "abuse" & "torture," in Cruelty to Animals Act, 1849 (c. 92), s. 2, created three separate offences, & a conviction for "ill-treating, abusing, & torturing" would be bad.—*JOHNSON v. NEEDHAM*, [1909] 1 K. B. 626; 78 L. J. K. B. 412; 100 L. T. 493; 73 J. P. 117; 25 T. L. R. 245.

#### SUB-SECT. 4.—DESTRUCTION OF INJURED ANIMALS.

**624. Horses paralysed by illness—Power to slaughter—Injured Animals Act, 1894 (c. 22).]**—A constable saw one of pltf.'s omnibus horses fall, & it appeared to be in great pain & unable to rise. He summoned a veterinary surgeon, who certified it was suffering from azoturia (paralysis), & that he considered it to be cruel to keep it alive. The constable thereupon caused it to be slaughtered by defts. In an action to recover damages for its slaughter:—*Held:* the certificate did not protect defts. from liability, as it did not state that the horse was "injured," & the above Act did not apply to animals suffering from disease, but related solely to injury from some external cause, & a horse which fell down from disease was not injured within the above Act.—*LONDON ROAD CAR CO. v. HARRISON* (1900), 44 Sol. Jo. 424.

#### SUB-SECT. 5.—VIVISECTION.

**625. Ass paralysed by drug—Unnecessary suffering—Question of fact.]—Resp.,** the director of certain research laboratories, held a licence to perform experiments on living animals & administered to an ass a drug which would bring on general paralysis without pain. By his instructions the animal was kept in a field. The weather was dry & very hot, & after some days the animal lay on the ground & was unable to rise, being very weak & not able to protect itself against the attacks of the flies. The animal was painlessly destroyed as soon as the experiment was completed. On a summons against resp. under Protection of Animals Act, 1911 (c. 27), for causing unnecessary suffering to the animal by omitting to give it proper care & attention while it was in a suffering state, the justices found that it did not suffer unnecessary

**628.1. Several offences—One conviction.]**—A conviction under Cruelty to Animals Act, 1849 (c. 92), s. 2, that deft. did cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure such to be done to a horse his property, is bad as being uncertain & charging offences in the alternative. The defect is one of substance & not of form only, & is not validated by s. 26.—*R. (VAUGHY) v. MEATH (CO.) JUSTICES* (1903), 38 L. L. T. 12.—*IR.*

**1. Costs.]**—It is competent to award expenses against a prosecutor bringing a complaint under Summary Jurisdiction Acts for a penalty incurred by

contravention of Cruelty to Animals (Scotland) Act, 1850 (c. 92).—*TODRICK v. WILSON* (1891), 18 R. 41; 28 Sc. L. R. 724.—*SCOT.*

#### PART X. SECT. 2.

**630 i. Horse—"Maiming"—Castrating stallion.]**—Castration of a stallion at large contrary to Entire Animals Ordinance is a "maiming" of the stallion within Criminal Code, s. 510 (B.) (b), & the fact that the owner of the stallion had expressed an intention to castrate it is no justification of the unauthorised act of deft.—*R. v. KROESING* (1909), 2 Alta. L. R. 275; 10 W. L. R. 649.—*CAN.*

pain while lying in the field, & they dismissed the summons:—*Held:* the question was one of fact for the justices.—*DEE v. YORKE* (1914), 78 J. P. 359; 30 T. L. R. 552; 12 L. G. R. 1314.

#### SECT. 2.—KILLING, MAIMING, AND WOUNDING ANIMALS.

*See, now, Larceny Act, 1861 (c. 96), s. 12; Malicious Damage Act, 1861 (c. 97), s. 40.*

**626. Horse—Included as cattle—9 Geo. 1, c. 22.]**—*Held:* the provisions of the above Act were designed to extend & not to abridge the offences described in 22 & 23 Car. 2, c. 7, & horses, mares & colts were included in the word cattle.—*R. v. PATY* (1770), 2 Wm. Bl. 721; 2 East, P. C. 1074; 1 Leach, 72; 96 E. R. 423.

**627. ———.]—M.** was convicted for wounding a gelding. It was objected in arrest of judgment that the gelding was not averred in the indictment to be cattle within the above Act, & that the word cattle did not necessarily include horses, mares & colts:—*Held:* the objection must be overruled.—*R. v. MOTT* (1783), 2 East, P. C. 1075.

**628. ——— Permanent injury not essential—9 Geo. 1, c. 22.]**—Prisoner was indicted under the above Act for maliciously wounding a gelding. Prisoner had driven a nail into the frog of the horse's foot rendering it useless for a time, but likely to be sound in a short time:—*Held:* prisoner was rightly convicted, as the word "wounding" did not import a permanent injury.—*R. v. HAYWOOD* (1801), Russ. & Ry. 16; 2 East, P. C. 1076, C. C. R.

**629. ——— Indictment — Evidence.]**—Prisoner was indicted under 9 Geo. 1, c. 22, for killing & for wounding certain cattle, to wit, one mare. The evidence showed that the animal was a colt, but no evidence was given as to its sex:—*Held:* the evidence did not support the indictment, for (1) though "cattle" only were mentioned in the Act, it was necessary to specify the species in an indictment; (2) there being no evidence of the sex of the colt, the allegation that it was a mare was not supported.—*R. v. CHALKLEY* (1813), Russ. & Ry. 258, C. C. R.

**630. ——— "Maiming"—Blinding horse—7 & 8 Geo. 4, c. 50, s. 16.]**—Where it was proved that prisoner poured a quantity of nitrous acid into the left ear of a mare, & that he had either also poured some of it into the left eye or, what was more probable, that some of the acid which he had poured into the ear had run into the eye:—*Held:* the injury done to the eye of the mare in this manner & thereby blinding her was a maiming within 7 & 8 Geo. 4, c. 30, s. 16.—*R. v. OWENS* (1828), 1 Mood. C. C. 205

*Annotation:—Reid. R. v. Bullock* (1868), 16 W. R. 405, C. C. R.

**m. ——— Maliciously damaging.]**—Deft. was convicted of having, in a secret & clandestine manner, cut off the hair from the manes & tails of two horses, the property of B.:—*Held:* (1) the offence did not come within R. S., 3rd series (c. 169), ss. 12 & 13, but was covered by s. 22; (2) the offence having been committed wrongfully & intentionally, without just cause or excuse, & with full knowledge as to the ownership of the property, malice might be fairly inferred.—*R. v. SMITH*, 7 N. S. L. R. 29.—*CAN.*

**n. ——— Poisoning.]**—In considering the question of compensation where a



**631. Permanent injury essential—7 & 8 Geo. 4, c. 30, s. 16.]**—Where prisoner laid hold of the tongue of a horse, a part of which was left in his hand, & it was proved that the wound had healed & that the horse was able to work as well as before, the only injury resulting from the loss of the point of its tongue being that it could not eat its food quite as fast as before:—*Held*: there was no such permanent injury as would support a count for maiming under the above sect.—*R. v. JEANS* (1844), 1 Car. & Kir. 539.

*Annotation*:—*Refd.* *R. v. Bullock* (1868), 16 W. R. 405, C. C. R.

**632. — “ Wounding ”—Instrument unnecessary—Malicious Damage Act, 1861 (c. 97), s. 40.]**—Upon an indictment for wounding a gelding, contrary to the above sect., prisoner was convicted upon evidence which showed that the gelding had suffered a laceration of the roots of the tongue, which protruded, & a tearing of the mouth, which injuries might have been caused by a pull of the tongue by the hand; but there was no evidence to show that any other instrument than the hand had been used:—*Held*: (1) it was not necessary the wounding should be done by an instrument; (2) there was sufficient evidence of a wounding, & the conviction must be affirmed.—*R. v. BULLOCK* (1868), L. R. 1 C. C. R. 115; 37 L. J. M. C. 47; 17 L. T. 5. 32 J. P. 102; 16 W. R. 405; 11 Cox, C. C. 125, C. C. R.

**633. — Malice—Evidence—Malicious Damage Act, 1861, s. 40.]**—On an indictment under the above sect. for unlawfully & maliciously killing, maiming, & wounding a mare, it was proved that prisoner caused the death of the mare through injuries inflicted by his inserting the handle of a fork into her vagina, & pushing it into her body. There was no evidence that prisoner was actuated by ill-will towards the owner of the mare, or spite towards the mare, or by any motive except the gratification of his own depraved taste. The jury found that prisoner did not, in fact, intend to kill, maim, or wound the mare, & nevertheless did what he did recklessly & did not care whether the mare was injured or not. The jury convicted the prisoner:—*Held*: there was sufficient malice, & the conviction was right.—*R. v. WELCH* (1875), 1 Q. B. D. 23; 45 L. J. M. C. 17; 33 L. T. 753; 40 J. P. 183; 24 W. R. 280; 13 Cox, C. C. 121, C. C. R.

*Annotation*:—*Consd.* *R. v. Faulkner* (1877), 13 Cox, C. C. 550.

**634. — Property of accused—Malicious Damage Act, 1861, s. 40.]**—Prisoner was indicted under the above sect. for feloniously & maliciously wounding a mare which was prisoner's property. For the defence it was contended that the stat. aimed only at injury to the property of a person other than accused:—*Held*: the prisoner could be convicted upon this indictment, although the mare was his own property.—*R. v. PARRY* (1900), 35 L. Jo. 456.

**635. Pigs—Included as cattle—9 Geo. 1, c. 22.]**—Pigs:—*Held*: cattle within the above Act.—*R. v. CHAPPLE* (1804), Russ. & Ry. 77.

number of horses died from poison, the question to be considered is whether the poisoning was accidental or maliciously done—malice not being understood in the ordinary sense of ill-will. The sole question is that of intention.—*STEED'S PRESENTMENT* (1888), 22 L. L. T. Jo. 247.—IR.

**632 l. — Wounding—Difference in civil & criminal proceedings.]**—A mare apparently sound & well in the morning was soon afterward caught by defenders, the first of whom had been seen that morning with a hayfork in his hands.

One of defenders rode her to a village & left her there, & soon afterwards two recently inflicted wounds were seen in her side, having the appearance as if inflicted by a hayfork:—*Held*: sufficient, in a civil action of reparation, to establish that defenders, although previously acquitted by a jury when tried criminally, had caused the mare's death.—*WILSON v. M'KNIGHT* (1830), 8 S. 398.—SCOT.

**o. Snake—Not included—29 Vict. No. 5, s. 43.]**—A snake is not an animal “ordinarily kept in a state of

**636. Sheep—Killing with intent to steal—Indictment—Evidence.]—Held**: cutting off & carrying away part of a sheep whilst it was alive, with intent to steal it, would support an indictment for killing with intent to steal, although the sheep was not completely killed at the time of the larceny, if the cutting off must have occasioned the sheep's death.—*R. v. CLAY* (1819), Russ. & Ry. 387, C. C. R.

**637. — — — — —.]**—On an indictment under 14 Geo. 2, c. 6, for killing sheep, with intent to steal the whole carcase:—*Held*: proof of killing with intent to steal part was sufficient to support the charge. *Semble*: merely removing a live sheep, for the purpose of killing it with intent to steal part of the carcase, was an asportation under the Act of the live sheep, as removal whilst alive was essential to constitute larceny.—*R. v. WILLIAMS* (1825), 1 Mood. C. C. 107.

*See, now, Larceny Act, 1916 (c. 50), s. 4.*

**638. — — — — —.]—Held**: inflicting a mortal wound on a sheep, of which it afterwards died, would support an indictment for killing with intent to steal the carcase, though the sheep did not die till two days afterwards.—*R. v. SUTTON* (1838), 8 C. & P. 291; 2 Mood. C. C. 29, C. C. R.

**639. — — — — — Receiving.]**—An indictment charged in the first count that A. & B. killed a sheep, with intent to steal one of its hind legs, & in the second count that C. received 9 lbs. weight of mutton “so stolen as aforesaid,” & in the third count that C. received the mutton “of a certain evil-disposed person,” *scilicet*, etc.:—*Held*: on this form of indictment, all the three prisoners might be properly convicted.—*R. v. WHEELER & COWLEY* (1835), 7 C. & P. 170.

*Annotation*:—*Distd.* *R. v. Caspar* (1839), 9 C. & P. 289.

**640. — Setting dog at sheep—4 Geo. 4, c. 54, s. 2.]**—Prisoner, indicted under 4 Geo. 4, c. 54, s. 2, for feloniously wounding a sheep, had set a dog at the sheep, & the dog bit the sheep, inflicting several severe wounds:—*Held*: this was neither an offence at common law, nor a maiming & wounding within the above Act.—*R. v. HUGHES* (1826), 2 C. & P. 420.

*Annotation*:—*Refd.* *R. v. Bullock* (1868), 16 W. R. 405, C. C. R.

**641. — Maliciously killing—Malicious Injuries to Property Act, 1827 (c. 30), s. 16.]**—Prisoner, indicted under the above sect. for unlawfully & maliciously killing a sheep, had killed the sheep with intent to steal it:—*Held*: prisoner might be convicted, for maliciously meant *malo animo*, i.e., with any improper motive or bad intention.—*R. v. FORDHAM* (1839), 4 J. P. 397.

*See, now, Malicious Damage Act, 1861 (c. 97), ss. 40, 58, 60.*

**642. — Killing & stealing in different counties—Venue.]**—Where a man killed a sheep in county A. & carried the carcase into county B.:—*Held*: (1) he might be convicted upon an indictment for stealing, taking, & driving away the sheep in county B.; (2) he could not be convicted of killing the sheep with intent to steal the carcase in county B.—*R. v.*

confinement,” & does not come within the above sect.—*DOWLING v. FRITZ* (1882), 1 Q. L. J. 82.—AUS.

**p. Dog—Injuring—Police Offences Act, 1890 (No. 1126), s. 18 (7).]**—The above sub-sect., which deals with “injury to private property,” is not limited to inanimate property, & injury or damage to a dog comes within that sub-sect., the words “injury or damage” including total destruction, such as the killing of an animal.—*MCDONALD v. CARTER* (1905), V. L. R. 181.—AUS.

**Sect. 2.—Killing, maiming, and wounding animals.**  
**Part IX. Sect. 1.]**

NEWLAND (1847), 9 L. T. O. S. 395 ; 2 Cox, C. C. 283.

*See, now, Larceny Act, 1916 (c. 50), s. 39.*

**643. Ass—Included as cattle—9 Geo. 1, c. 22—4 Geo. 4, c. 54, s. 2.]—Asses:—Held:** “cattle” within the above Acts.—*R. v. WHITNEY* (1824), 1 Mood. C. C. 3.

*See, now, Malicious Damage Act, 1861 (c. 97), s. 40.*

**644. Cow—Maliciously killing—Setting fire to cow-house—Malicious Injuries to Property Act, 1827 (c. 30), s. 16.]—Where A. set fire to a cow-house, & burnt to death a cow which was in it:—Held:** A. was indictable under the above sect. for killing the cow.—*R. v. HAUGHTON* (1833), 5 C. & P. 559 ; 1 Nev. & M. M. C. 376.

*Annotation:—Distd. R. v. Pembleton* (1874), 38 J. P. 454, C. C. R.

*See, now, Malicious Damage Act, 1861 (c. 97), s. 40.*

**645. Cattle—Maliciously maiming—Evidence of malice.]—On an indictment against a man for maliciously maiming cattle:—Held:** not necessary to prove express malice either against the animal or against the owner ; it was sufficient if the offence appeared to have been committed wilfully & wantonly, & the law would then infer malice from the act itself.—*R. v. WEARE* (1840), 4 J. P. 508.

**646. ———— Malicious Injuries to Property Act, 1827 (c. 30), s. 16.]—On an indictment under the above sect. & 1 Vict. c. 90, s. 2, for maliciously wounding cattle:—Held:** not necessary to prove that the prisoner was actuated by malice against any one.—*R. v. TIVEY* (1844), 1 Car. & Kir. 704 ; 1 Den. 63 ; 2 Cox, C. C. 99, C. C. R.

*See, now, Malicious Damage Act, 1861 (c. 97), ss. 40, 58, 60.*

**647. ————.]—Qu:** whether in an indictment for maliciously wounding cattle under the above sect. it was necessary after 1 Vict. c. 90, s. 2, to prove malice against the owner.—*R. v. MUMFORD* (1845), 4 L. T. O. S. 475 ; 1 Cox, C. C. 149.

**648. Deer—Enclosed part of forest.]—A commitment, under 7 & 8 Geo. 4, c. 29, s. 26, reciting a conviction that deft. “did unlawfully kill & carry away one fallow deer, the proper of Her Majesty Queen Victoria, against the form of the statute”:—Held:** bad, for omitting to state that the deer was in the uninclosed part of some forest, chace, or purlicu.—*R. v. KING* (1843), 13 L. J. M. C. 43.

*Annotation:—Consd. Threlkeld v. Smith*, [1901] 2 K. B. 531.

**649. ————.]—An inclosure by ditch & bank in a forest, sufficient to prevent cattle getting in, but over which the deer could pass freely:—Held:** an inclosed part of the forest within 7 & 8 Geo. 4, c. 29, s. 26.—*R. v. MONEY* (1847), 2 Russ. Cr., 7th ed., p. 1328.

**650. Cat—Setting trap for—Malicious Damage Act, 1861 (c. 97), s. 41.]—A closet of resp.’s adjoined the boundary wall between his premises & applt.’s garden. Applt. set a trap in his garden, where resp.’s cat was in the habit of jumping over from the wall & the cat was caught in the trap & injured:—Held:** there was nothing unlawful or contrary to the above sect. in setting a trap in a garden to catch cats trespassing there.—*BRYAN v. EATON* (1875), 40 J. P. 213.

**651. ——— Domestic animal—Evidence—Malicious Damage Act, 1861 (c. 97), s. 41.]—Three boys found a couple of cats in the neighbourhood of a farm & chased them into a barn, where they killed the cats with a hurdle rail. No evidence was**

called on behalf of the prosecution to prove the ownership of the cats or to show that they were kept for domestic purposes:—*Held:* (1) it was not necessary for the prosecution to prove that the particular animal killed was in fact kept for a domestic purpose, if it belonged to a class of animals which were ordinarily so kept ; (2) it was not necessary to prove the ownership of the animal.—*NYE v. NIBLETT*, [1918] 1 K. B. 23 ; 87 L. J. K. B. 590 ; 82 J. P. 57 ; 16 L. G. R. 57.

**652. Dog—Setting poison after notice—Malicious Damage Act, 1861, s. 41.]—Resp.’s dog was wont to stray into applt.’s garden, which was fenced with a quickset hedge, in which were holes sufficiently large for the dog to get through. Applt. gave resp. notice to keep his dog out of the garden, & that he should place poisoned flesh there which would kill the dog. He did place poisoned flesh there, & the dog ate it & so was killed:—Held:** applt. was not guilty of unlawfully & maliciously killing the dog within the above sect. *Seemle:* he was liable to be convicted summarily under Poisoned Flesh Prohibition Act 1864 (c. 115), s. 2.—*DANIEL v. JANES* (1877), 2 C. P. D. 351 ; 41 J. P. 712.

*Annotations:—Folld. Smith v. Williams* (1892), 9 T. L. R. 9 ; *Miles v. Hutchings*, [1903] 2 K. B. 714. *Reid. Armstrong v. Mitchell* (1903), 88 L. T. 870 ; *Nye v. Niblett* (1917) 87 L. J. K. B. 590.

**653. ——— Shooting in defence of game—Malicious Damage Act, 1861, s. 41.]—An information under the above sect. was laid against applt., a gamekeeper, for unlawfully & maliciously killing a dog ; the dog was at the time near an aviary in which pheasants, the property of applt.’s master, were confined for breeding purposes:—Held:** the test of applt.’s liability under the sect. was whether he acted under the *bona fide* belief that what he was doing was necessary for the protection of his master’s property, & that it was the only way in which the property could be protected.—*MILES v. HUTCHINGS*, [1903] 2 K. B. 714 ; 72 L. J. K. B. 775 ; 89 L. T. 420 ; 52 W. R. 284 ; 20 Cox, C. C.

**654. Birds—Pigeons—Trespassing after notice—Larceny Act, 1861 (c. 96), s. 23.]—House pigeons kept by A. were in the habit in the daytime of flying over & upon & feeding upon the land of B. He served notice on A., requesting that he would immediately cause them to be destroyed, or prevent them from doing further injury to applt.’s crops ; if not, he would be compelled in self-defence to shoot or otherwise destroy them, besides claiming damages for the injury he sustained from their feeding on his land. After this B. found them feeding on his land, & fired at them & thereby caused them to rise ; he then fired at them a second time, & killed one, which he left on the ground:—Held:** he had not unlawfully killed it within the above sect.—*TAYLOR v. NEWMAN* (1863), 4 B. & S. 89 ; 2 New Rep. 275 ; 32 L. J. M. C. 186 ; 8 L. T. 424 ; 27 J. P. 502 ; 11 W. R. 752 ; 9 Cox, C. C. 314 ; 122 E. R. 393.

*Annotations:—Apprvd. Hudson v. MacRae* (1863), 4 B. & S. 585. *Mentd. R. v. Prince* (1875), L. R. 2 C. C. R. 154 ; *R. v. Tolson* (1889), 23 Q. B. D. 168, C. C. R.

**655. ——— Right of third party to prosecute—Larceny Act, 1861 (c. 96), s. 23.]—The right to prosecute under the above sect. for unlawfully & wilfully killing a pigeon, in such circumstances as do not amount to larceny at common law, is not limited to the owner of the bird or the person aggrieved, & this is so notwithstanding the fact that the owner of the bird has been fully compensated & in no way countenances the prosecution.—*SMITH v. DEAR* (1903), 88 L. T. 664 ; 67 J. P. 244 ; 20 Cox, C. C. 458.**

**656. ——— Fowls—Trespassing after notice—Malicious Damage Act, 1861 (c. 97), s. 41.]—Fowls**



## PART XI—DISEASED ANIMALS.

shot by applt., a farmer, were at the time on land in his occupation, which was sown with seed. Resp. & her husband had been previously warned by applt. not to allow their fowls to trespass on the land. It was contended for applt. that having warned persons keeping fowls in that neighbourhood against allowing them to trespass on his land, he was entitled to kill the fowls of such persons at

the time they were damaging his crops, & that there was no malice on his part & he merely protected his crops:—*Held*: applt. was wrongly convicted under the above sect.—*SMITH v. WILLIAMS* (1892), 56 J. P. 840; 9 T. L. R. 9; 37 Sol. Jo. 11.

*Annotations*:—*Consd.* Nye v. Niblett (1917), 82 J. P. 57. *Refd.* Armstrong v. Mitchell (1903), 88 L. T. 870.

## Part XI.—Diseased Animals.

### SECT. 1.—IN GENERAL.

**657. Failure to prevent trespass of diseased animal—Knowledge of disease.**—Trespass *quare clausum fregit et cum averiis* did beat & trample & that the cattle having infectious diseases did infect the cattle of pltf., so that several died. Pltf. had a verdict & 20s. damages. On a motion to allow pltf. full costs, these were granted, the consequential damage being matter of aggravation.—*ANDERSON v. BUCKTON* (1719), 1 Stra. 192; 11 Mod. Rep. 303; 93 E. R. 467.

*Annotations*:—*Dctd.* Daubney v. Cooper (1830), 10 B. & C. 830. *Consd.* Theyer v. Purnell, [1918] 2 K. B. 333. *Refd.* Woodward v. Walton (1807), 2 Bos. & P. N. R. 476; Wright v. Helton Downs Co-op. Soc. (1883), Cab. & El. 200.

**658.** ———.]—Sheep of deft. having a contagious disease were found in pltf.'s field with his sheep, & the disease was communicated to them. Deft. occupied land near pltf.'s, but there was no evidence as to how deft.'s sheep got into pltf.'s field. Four days afterwards, deft., on being told that his sheep were diseased, said, "I could not help it; I had the sheep at tack at P.'s; they caught it from B.'s sheep":—*Held*: these facts did not show any right of action, for there was no evidence of any knowledge by deft., at the time the disease was communicated, that his sheep were diseased.—*COOKE v. WARING* (1863), 2 H. & C. 332; 32 L. J. Ex. 262; 9 L. T. 257; 159 E. R. 138.

*Annotations*:—*Consd.* Bodger v. Nicholls (1873), 28 L. T. 441. *Dctd.* Ward v. Hobbs (1877), 47 L. J. Q. B. 90. C. A. *Expld.* Theyer v. Purnell, [1918] 2 K. B. 333. *Mentd.* Read v. Edwards (1864), 34 L. J. C. P. 31; Fletcher v. Rylands & Horrocks (1865), 3 H. & C. 774.

**659.** ———.]—Deft.'s sheep trespassed on pltf.'s land, where, in the course of a few days, they developed scab, in consequence of which they were interned in a circumscribed area on pltf.'s land, under a notice of detention given under Sheep-scab Ord., 1905, made in pursuance of Diseases of Animals Act, 1894 (c. 57), the notice extending also to sheep belonging to pltf., which had been in contact with the trespassing sheep. In an action by pltf. to recover damages for the trespass, the ct. judge nonsuited pltf., on the ground that

there was no allegation or proof that deft. was aware of the condition of his sheep at the date of the trespass:—*Held*: the doctrine of *scienter* had no application to an action founded on trespass, & pltf. was entitled to recover all such damages as were the natural consequence of the presence of deft.'s sheep on his land, as well after as before the date of the notice of detention.—*THEYER v. PURNELL* (PARNELL), [1918] 2 K. B. 333; 119 L. T. 285; 16 L. G. R. 840, D. C.

**Knowledge of servant — Defective fencing.**—An action will lie to recover damages sustained by the negligence of servants having the care of cattle, which they knew to be suffering from an infectious disease, in allowing such cattle to intermingle with other cattle.

Upon the trial of such an action it was proved that the condition of the cattle was known to defts.' servants at the time the cattle came into contact with those of pltf., & that shortly before defts. had been convicted at the petty sessions for allowing their cattle infected with the foot-&-mouth disease to be at large in a field insufficiently fenced. The certificate of such conviction was tendered & received in evidence, & the jury found in favour of pltf.:—*Held*: (1) the knowledge of their servants was sufficient to make defts. responsible, & there was evidence of negligence to support the findings of the jury; (2) the certificate was improperly received in evidence, but this was cured by Jud. Act, 1875 (c. 77), Ord. 39, r. 3, as no substantial miscarriage of justice had been thereby caused.—*EXEP v. FAULKNER* (1875), 34 L. T. 284; *affd.* 24 W. R. 774, C. A.

**661. Bailment of diseased animal—Bailee's animals infected.**—The declaration alleged that deft. had a horse & well knowing it to be glandered, & to be in an infectious state, delivered the horse to pltf. to be kept by pltf. for deft. in a stable of pltf. with another horse of pltf. & without informing pltf. that the horse was glandered, by means of which pltf., not knowing that the horse was glandered, was induced by deft. to, & did, place the horse in a stable of pltf. with pltf.'s horse, & the disease was then communicated by deft.'s horse to pltf.'s horse, so that it had to be killed. After verdict for pltf.:—*Held*: the declaration

### PART XI. SECT. 1.

**657 i. Failure to prevent trespass of diseased animal—Knowledge of disease.**—Where sheep of deft., a runholder, which were to deft.'s knowledge infected with scab, strayed upon the adjoining run of pltf., & infected his sheep:—*Held*: such straying afforded a presumption of negligence on the part of deft.—*HOWELL v. RAYMOND*, Mac. 525.—N.Z.

**g. Diseased animal put in another's stable—Knowledge of servant.**—A servant was instructed by his master to take a horse to a fair fifty miles off for sale. On his way to the place of sale, the servant put the horse in the pursuer's stable for a night's lodging. The horse was ill of glanders, & communi-

cated the disease to the pursuer's horses in the same stable, by which again it was communicated to other cattle, in consequence of which both horses & cattle were destroyed. In an action against the master, to make good the damage thus occasioned:—*Held*: sufficient to aver & prove that the servant knew that the horse under his charge was affected with the disease, & it was not necessary to prove knowledge against the master.—*BAIRD v. GRAHAM* (1852), 24 Sc. Jur. 313; 14 D. 615; 1 Stuart, 578.—SCOT.

**r. Agisted animal infected by diseased animal—Liability of agister.**—A. averred that he placed a chestnut horse in a grazing park belonging to B., to be grazed at a certain stipulated rate; that B. thereafter put into the park a grey pony,

knowing the pony to be diseased with glanders; that the pony communicated the disease to A.'s chestnut gelding; that A., seeing that his gelding was ill, but not knowing what was the disease, nor how the animal had caught it, took it home to his own stable; that it infected two other horses in the stable; & that these three horses died of the disease. In an action upon these averments, at A.'s instance against B., to recover the value of the three horses:—*Held*: the averments were relevant to infer liability not only for the chestnut gelding which had caught the disease in the park, but also for the other two horses which had caught it in the stable.—*ROBERTSON v. CONNOLLM* (1851), 23 J. 348; 14 D. 315; 1 Stuart, 104; 23 Sc. Jur. 348.—SCOT.



**Sect. 1.—In general. Sect. 2: Sub-sect. 1.]**

disclosed a good cause of action.—**PENTON v. MURDUCK** (1870), 22 L. T. 371; 18 W. R. 382.

**662. Sale of diseased animal.—When action for deceit will lie.]**—If I sell sheep to be killed & they are diseased, then if I have warranted them, an action of deceit does not lie on the warranty; but it is otherwise where there has been no warranty given & my good faith has been relied upon, there an action of deceit lies (**BRIAN, J.**).—**ANON.** (1471), Y. B., 11 Edw. 4, fo. 6, pl. 10.

**Annotation:—Refd.** Roswel v. Vaughan (1607), Cro. Jac. 196.

**663. — Sale at public market.]**—Where the owner of an animal takes it to a public market for sale, this furnishes evidence of a representation on his part that the animal is not, so far as he knows, suffering from any infectious disease (**BLACKBURN, J.**).—**BODGER v. NICHOLLS** (1873), 28 L. T. 441; 37 J. P. 597.

**Annotation:—Consd.** Ward v. Hobbs (1878), 4 App. Cas. 13, H. L.

**664. — — —.]**—The mere fact of exposing for sale in a market animals which were to the knowledge of the seller suffering from a contagious or infectious disease does not, in the absence of an express warranty & of any fraud or concealment on the part of the seller, create an implied warranty under Contagious Diseases (Animals) Act, 1869 (c. 70), s. 57, which will make him liable to the purchaser for damages sustained by him in consequence of the condition of the animals.—**WARD v. HOBBS** (1878), 4 App. Cas. 13; 48 L. J. Q. B. 281; 40 L. T. 73; 43 J. P. 252; 27 W. R. 114, H. L.

**Annotations:—Consd.** Peters v. Planner (1895), 11 T. L. R. 169. **Refd.** Sarson v. Roberts (1895), 43 W. R. 690; Clarke v. Army & Navy Co-op. Soc., [1903] 1 K. B. 155, C. A. **Mentd.** Dunn v. Currie (1902), 71 L. J. K. B. 963, C. A.

**665. — Purchaser's animals infected.]**—A declaration alleged that deft. was possessed of a horse, & knowing it to be afflicted with the glanders, caused it to be sold by auction at a horse repository, & pltf. believing it to be in a healthy state, became the purchaser, & paid a large sum for it, & by reason of its diseased state the horse was utterly worthless to pltf., & he paid a veterinary surgeon for examining it, & in consequence

**662 i. Sale of diseased animal.]**—Pltf. not knowing a cow was affected with tuberculosis sold it to deft., half cash & half on time.—**Held:** the sale was illegal under Animals Contagious Diseases Act (Dom.), s. 2, & pltf. could not recover balance of purchase money.—**NORTH v. MARTIN** (1909), 7 E. L. R. 439.—**CAN.**

**662 ii. —.]**—**Held:** Animals Contagious Diseases Act, 1903, was *intra vires* of the Dominion Parliament.—**BROOKS v. MOORE** (1907), 13 B. C. R. 91.—**CAN.**

**662 iii. —.]**—Deft. sold to pltf. a horse suffering from glanders, but he had no cause for suspicion that the animal was infected. There was no warranty:—**Held:** deft. not liable, even if there was a breach of Diseases of Animals Act, R. S. M. (c. 5), s. 25.—**ROTHWELL v. MILNER** (1892), 8 Man. L. R. 472.—**CAN.**

**662 iv. —.]**—Lien notes were given by deft. for the purchase price of two horses, which were infected with glanders & were killed by the govt. veterinary surgeon. Deft. failed to prove a warranty:—**Held:** the contract of sale was illegal, although there was no evidence that pltf. knew of the disease, & the lien notes were void, but pltf. might recover the sum of \$200 received by deft. for compensation money from the govt., as money had & received by deft. for pltf.'s use, deft. being entitled

to the costs of the action, to be set off *pro tanto* against the \$200.—**NICKLE v. HARRIS** (1910), 14 W. L. R. 515; 3 S. L. R. 200.—**CAN.**  
(*Cf. p. 269, ante.*)

**662 v. — Scienter.]**—Knowledge on the part of deft. that the animal sold was diseased is not necessary to make him liable to conviction under Animals Contagious Diseases Act, 1903, s. 7.—**R. v. PERRAS** (1904), 6 Terr. L. R. 58.—**CAN.**

**666 i. — Purchaser's animals infected.—Measure of damages.]**—Defts. agreed to buy certain horses, provided they were as good as those defts. had inspected. In an action by pltf., defts. contended (*inter alia*) that pltf. knowingly allowed diseased animals to mix with the rest of the horses:—**Held:** (1) the failure of defts. in making an examination could not be considered contributory negligence; (2) pltf. did not knowingly spread the infection by allowing diseased animals with others not affected; (3) pltf. were negligent in not giving a warning; (4) defts. entitled only to fix damages caused by quarantine, etc.—**URCH v. STRATHCONA HORSE REPOSITORY** (1909), 10 W. L. R. 475.—**CAN.**

**666 ii. — — —.]**—Pltf. sold an infected cow, which to their knowledge was to be placed with other cows of

of the horse being put into pltf.'s stables, wherein another horse of his was, the last-mentioned horse became infected & died of the disease, & pltf. was obliged to pay a large sum in endeavouring to cure it:—**Held:** the declaration disclosed no cause of action.—**HILL v. BALLS** (1857), 2 H. & N. 299; 27 L. J. Ex. 45; 3 Jur. N. S. 592; 5 W. R. 740; 157 E. R. 124.

**Annotations:—Distd.** Mullett v. Mason (1866), L. R. 1 C. P. 559; **Penton v. Murdock** (1870), 18 W. R. 382. **Consd.** Bodger v. Nicholls (1873), 28 L. T. 441; **Smith v. Green** (1875), 1 C. P. D. 92.

**666. Measure of damages.]**—Upon a sale of two oxen pltf. told deft. that if there was the least fear of disease, he would not have them, as he wanted to put them with his other stock, whereupon deft. replied that they were quite sound & free from disease. Pltf. thereupon purchased them, & placed them with his cattle; in a few days the two oxen died of the rinderpest, which they had upon them at the time of sale, & which disease they communicated to the other cattle of pltf., nine of which died therefrom. Upon an action upon the warranty:—**Held:** pltf. entitled to recover for the loss not only of the two oxen purchased, but for that of the nine other beasts.—**KNOWLES v. NUNNS** (1866), 14 L. T. 592.

**667. — — —.]**—Deft. sold a cow to pltf., a farmer, with a warranty that she was free from foot-&-mouth disease. Pltf. placed the cow (which had the disease) with other cows, & some of these became infected with the disease, & died, as also did the cow in question:—**Held:** deft. was liable in damages for the entire loss, if when he sold the cow he knew that pltf. was a farmer, & that he would or probably might place the infected cow with others.—**SMITH v. GREEN** (1875), 1 C. P. D. 92; 45 L. J. Q. B. 28; 33 L. T. 572; 40 J. P. 103; 24 W. R. 142.

**Annotations:—Expld.** Ward v. Hobbs (1877), 3 Q. B. D. 150, C. A. **Refd.** Randall v. Newson (1877), 2 Q. B. D. 102, C. A.

**668. — — — Fraudulent misrepresentation.]**—Where a cattle dealer sold to pltf. a cow, & fraudulently represented that it was free from infectious disease, when he knew that it was not, & pltf. having placed the cow with five others, they caught the disease & died:—**Held:** pltf. entitled to recover as damages the value of all the cows.—

**Held:** pltf. liable for damages due to the consequent infection of such other animals, viz., the price of the cow destroyed, loss of milk from that & other cows which had become affected through being inoculated by deft. to prevent the spread of the disease amongst her herd, & the cost of inoculation, such inoculation being a reasonable precaution in the circumstances, in order to minimise the damage & prevent further infection.—**DEMPSTER & WALSH v. SIMPSON** (1904), 7 W. A. L. R. 103.—**AUS.**

**s. Animal shown at exhibition.—Owner's animals infected.]**—Pltf. exhibited dogs at a show held by defts., & within a short time after the dogs were brought back to pltf.'s kennels, they & other dogs belonging to pltf. became ill with a violent form of distemper, in consequence of which many died & some were permanently injured. Pltf. alleged negligence, in consequence of which the dogs contracted the disease by infection from other dogs at the show:—**Held:** there was no proof that distemper germs, from which pltf.'s dogs could have contracted disease, were present at defts.' dog show at which pltf.'s dogs were exhibited, & pltf. had failed to establish negligence on the part of defts.—**COLTART v. WINNIPEG INDUSTRIAL EXHIBITION ASSOCN.** (1911), 17 W. L. R. 372; *affd.* 21 W. L. R. 471; 4 D. L. R. 108.—**CAN.**

**MULLETT v. MASON** (1866), L. R. 1 C. P. 559; Har. & Ruth. 779; 35 L. J. C. P. 299; 14 L. T. 558; 12 Jur. N. S. 547; 14 W. R. 898.

*Annotations*:—**Folld.** *Smith v. Green* (1875), 1 C. P. D. 92. **Distd.** *Wright v. Hetton Downs Co-op. Soc.* (1883), Cab. & El. 200.

**669. Return of animal for breach of warranty—Infected while in possession of purchaser.**—A purchaser of a horse sent it back to the seller on the ground of non-compliance with a warranty. The horse complied with the warranty, & whilst in the purchaser's stables, contracted a contagious disease. Of this the purchaser was unaware, when he sent back the horse. On arriving back at the seller's stables, other horses of the seller's contracted the disease from it & died:—*Held*: the seller could not recover damages from the purchaser for the loss of those other horses.—**WRIGHT v. HETTON DOWNS CO-OPERATIVE SOCIETY** (1883), 1 Cab. & El. 200.

**670. Impounding mangy cattle — Custom of forest.**—In an action of trespass for seizing & impounding pltf.'s mare, which was grazing in Waltham Forest, defts. pleaded a custom of the forest for seizing & impounding mangy cattle being thereon, & alleged that pltf.'s mare was mangy when she was put into the forest, & justified the impounding her under the custom. Pltf. replied that the mare was sound & well, & not labouring under any catching or infectious distemper whatsoever, & traversed without this, that the mare at the time when, etc., was sick & ill of, & labouring under, a catching & infectious distemper called mange, as defts. had alleged in their plea; & thereupon issue was joined & tried, when a verdict was found for pltf. & he had judgment for his damages, & all his costs.—**PALMER v. STONE** (1759), 2 Wils. K. B. 96; 95 E. R. 705.

*Annotation*:—**Distd.** *Brine v. G. W. Ry. Co.* (1862), 2 B. & S. 402.

**671. Throwing entrails of diseased animals on neighbour's land—Neighbour's animals thereby infected.**—In an action upon the case for killing of cattle infected with murrain & throwing their entrails into pltf.'s field, whereby pltf. suffered loss, after verdict for pltf., upon not guilty pleaded, it was moved to be too uncertain because it did not appear what, nor how many, beasts perished:—*Held*: judgment should be given for pltf., because no such certainty was necessary in an action upon the case, which was not brought for the beasts themselves, or the value of them, but for damages sustained by their death through deft.'s means.—**LODG (LODGE) v. WEEDEN** (1647), Sty. 50; Aleyn, 22; 82 E. R. 522.

*Annotations*:—**Refd.** *Jeveson v. Moor* (1699), 12 Mod. Rep. 262; *Iveson v. Moor* (1699), 1 Com. 58.

**672. Employment of person to cut up diseased carcase—No notice to person employed—Infection of employee.**—The first count of a declaration alleged that deft. E. was a contractor for the supply of beef to the Royal Navy, & supplied beasts to be slaughtered at one of the dockyards, at which deft. C. was the superintendent of E.'s business, & that it was deft.'s duty to take care that healthy

& sound beasts were supplied & slaughtered; yet defts. supplied & slaughtered certain diseased cattle, whereby pltf., who had been employed to cut up the carcasses of the cattle, was infected by the disease & suffered therefrom. The second count alleged that defts., by representing certain carcasses of beasts to be sound & healthy, procured pltf. to cut them up, & the carcasses being diseased, pltf. contracted the disease & was permanently injured. The third count alleged that defts., well knowing that certain carcasses were diseased & infectious, employed pltf., who was ignorant of their being diseased, to cut them up, whereby pltf. became infected & was injured:—*Held*: the first & second counts did not disclose a cause of action, but the third did.—**DAVIES v. ENGLAND & CURTIS** (1864), 33 L. J. Q. B. 321; 10 Jur. N. S. 1235.

**673. Exposure of diseased animal—In public place—Nuisance.**—An indictment charged deft. with bringing a mare into a public place where divers liege subjects then were, well knowing it to be inflicted with a contagious, infectious, & dangerous disease called the glanders, to the great danger of infecting with the disease the liege subjects to the common nuisance, etc.:—*Held*: the indictment was good, after verdict, without an allegation that deft. knew the glanders to be a disease which was communicable to the human race by infection.—**R. v. HENSON** (1852), Dears. C. C. 24; 20 L. T. O. S. 63; 16 J. P. 711.

*Annotations*:—**Consd.** *Hill v. Balls* (1857), 2 H. & N. 299. **Refd.** *Ward v. Hobbs* (1877), 2 Q. B. D. 331.

## SECT. 2.—UNDER STATUTE.

### SUB-SECT. 1.—ISOLATION.

**§ 674. Removal of animals.**—An Ord. in Council prohibited cattle being brought or sent without licence from any place out of district C. into any place within such district, provided that it should not be unlawful to send or carry such animal by railway through such jurisdiction. A. drove cattle without licence from a place out of C. into a railway station within C., thence to be conveyed by railway:—*Held*: he was rightly convicted, for he was not within the exception contained in the proviso.—**CHAPMAN v. CHAMBERS** (1866), 30 J. P. 583.

**675. — Different part of farm.**—An order of justices, made with reference to the cattle plague, prohibited the removal of certain animals specified from any one farm or place in the same county to any other farm or place therein, except that by licence of justices the owner might remove them from premises in his own occupation to other premises also in his own occupation:—*Held*: the above order did not prohibit the owner from removing without licence cattle from a field on one side of a highway to a field on the other side of such highway, both fields being part of the same farm, but it might be otherwise if they belonged to different farms, though in the same occupation.

## PART XI. SECT. 2, SUB-SECT. 1.

**t. Removal of animals — Order for fine or imprisonment—Jurisdiction of justices.**—M. was prosecuted upon two summonses, by the guardians of the B. Union, for moving into a district under their control certain cattle from a district declared to be infected, without having obtained a licence for such removal. After the evidence had concluded, the chairman announced that the magistrates were of opinion that the charge was proved, & that a fine of £50 altogether would be imposed,

£25, with £1 costs, in each case, & in default of payment within fourteen days, imprisonment for one month for each offence. The minute in the Ord. Book, in column 7, headed "Particulars of Ord. or Dismissal" was, in each case: "Fined £25, & costs £1, one-third to the guardians, or, in default, one month's imprisonment. Warrant to issue"; but columns 9, 10, 12, 13 & 14 were not filled up. The orders were not made up as convictions, & no warrant had been issued, in consequence of an intimation by M. that he intended to apply for a *certiorari*. A conditional

order for a *certiorari* having been obtained, on the grounds, amongst others, that the orders were *ex facie* bad, uncertain, & alternative, & that they left to M. the option of electing between fine & imprisonment, & that the magistrates failed to exercise the discretion as to which punishment should be inflicted under Contagious Diseases (Animals) Act, 1878, s. 61:—*Held*: such objections to the orders were not tenable, & the conditional order for a *certiorari* should be discharged.—**R. v. DUBLIN COUNTY JUSTICES** (1885), 18 I. L. R. 106.—IR.



## ANIMALS.

*Sect. 2.—Under statute: Sub-sects. 1 & 2.]*

—**EUSTACE v. SARGEANT** (1866), 14 L. T. 552; 30 J. P. 584.

**676. — Completion of offence—Jurisdiction of justices.]**—The removal of an infected animal from the county of S. to that of M. does not give the justices of the latter county jurisdiction to deal with the case. The offence is complete as soon as the animal has been removed from its place of location, & therefore, the justices of the former county alone have power to hear the cause or to punish the offender.—**R. v. WILLIAMS** (1866), 15 L. T. 290; 30 J. P. 823.

**677. — Licence—Power of justices to inquire into.]**—On the hearing of an information under Contagious Diseases (Animals) Act, 1848 (c. 107), s. 4, for removing cattle without a licence, the magistrates, on the production of a licence, have no jurisdiction to inquire into the sufficiency of the evidence upon which it was granted.—**STANHOPE v. THORSBY** (1866), L. R. 1 C. P. 423; Har. & Ruth. 459; 35 L. J. M. C. 182; 14 L. T. 332; 30 J. P. 342; 12 Jur. N. S. 374.

*Annotation:—Mentd. R. v. Kettle, Ex p. Ellis, [1905] 1 K. B. 212.*

**678. — Implied repeal of Order.]**—An Ord. in Council of Nov. 23 prohibited all cattle (including sheep) from being brought into the jurisdiction from places without. Another Ord. in Council of Dec. 16 prohibited cattle (other than sheep) being removed from places within to other places within the jurisdiction. B., after the Ord. of Dec. 16 had been applied to his county, imported sheep from a place without the jurisdiction:—*Held*: he was properly convicted, for the Ord. of Dec. did not impliedly repeal the Ord. of Nov., the one Ord. being directed against importation of sheep, & the other being directed against removal of cattle other than sheep within the same jurisdiction.—**BOLTON v. HODGKINSON** (1866), 31 J. P. 132.

**679. — —.]**—The justices of the petty sessional division of S., on Dec. 12, 1865, made an order prohibiting sheep, etc., being brought from any place without their jurisdiction to any place within. B. was a parish without, & W. a parish within, their jurisdiction, but both were within the same county. On Jan. 18 P. brought sheep without licence from B. to W., but the justices of the quarter sessions of the county had, on Jan. 4, made a new order under an Ord. in Council which substituted the justices of the county instead of the justices of petty sessions for the local authority. There was no express repeal of the petty sessional order by the quarter sessions' order:—*Held*: the latter order impliedly repealed the former order, & P. had committed no offence, inasmuch as he had not brought sheep from without the county to a place within it.—**PEARCE v. O'BRIEN** (1867), 31 J. P. 133.

**680. — Mistake in licence—Jurisdiction of justices.]**—W. bought cattle at A. in Norfolk & directed them to be sent to B. in Yorkshire. By mistake the licences & invoices necessary were filled up, showing the destination of the cattle to be D. in Durham county, & were sent there. W. at once ordered them, while still at the railway station at D., to be sent on from D. to B., & was afterwards convicted by the justices of Yorkshire for sending the cattle without licence from D. to B.:—*Held*: the offence, if any, was committed at D., & as the justices of Yorkshire had no jurisdiction in D., the conviction was defective on the face of it.—**R. v. WORDSWORTH** (1867), 31 J. P. 727.

**681. — Metropolis.]**—The prohibition to remove cattle within the metropolis without a

licence from the comrs. of the police under orders of Mar. 24, 1866:—*Held*: to apply to cattle removed from a place without to places within the metropolis, though the owner had duly obtained a licence signed by a justice of the place from which the cattle were about to be removed.—**MACKAY v. MARCHANT** (1867), 31 J. P. 710.

**682. — Liability of railway company—Jurisdiction of justices.]**—An Ord. in Council made under Contagious Diseases (Animals) Act, 1878 (c. 74), provided that if an animal was moved in contravention of the regulations of any local authority, the person "causing, directing, or permitting" the movement should be deemed guilty of an offence against the Act. The local authority of the county of Dorset having by regulations prohibited the movement of animals into their district except under specified conditions, animals were consigned to a place within the district, with through bills from Cork *via* Bristol & a specified route. Applts. were no parties to the contract with the consignor, but in furtherance of the scheme of carriage carried the animals on their railway over a portion of the route outside the county of Dorset, whence they were subsequently carried into that county by another co.:—*Held*: applts. were liable to be convicted of an offence against the Act as persons "causing, directing, or permitting" the movement of the animals within the Ord. in Council, & the justices of the county of Dorset had jurisdiction to convict.—**MIDLAND RY. CO. v. FREEMAN** (1884), 12 Q. B. D. 629; 53 L. J. M. C. 79; 48 J. P. 660; 32 W. R. 830.

*Annotation:—Appld. Williams v. G. W. Ry. Co. (1885), 52 L. T. 250.*

**683. — —. For refusal to carry.]**—By an Ord. in Council made in exercise of the powers given under Contagious Diseases (Animals) Act, 1878 (c. 74), it was ordered that any local authority in England or Wales might, with the view of preventing the introduction of foot-&-mouth disease into their district, make regulations for prohibiting or regulating the movement by land or water of animals into their district from the district of any other local authority, provided that any regulation made by a local authority under the Ord. should not restrict movement of animals by railway through the district of that local authority; & that if an animal was moved in contravention of the Ord., or of a regulation of a local authority thereunder, the owner of the animal, & the person for the time being in charge of the animal, & the person causing, directing, or permitting the movement, & the person or co. moving or conveying the animal, should be deemed guilty of an offence against the above Act. The local authority of G. county made a regulation that no animal might be moved into the district of the local authority, except that fat animals for immediate slaughter might be moved in from districts free from disease, subject to the following regulation: "Before any movement into the county district, or removal from the railway truck in the county district, takes place, the owner, consignee, or person in charge shall deliver to the inspector of the local authority a declaration under the Act." W. tendered fat animals to defts. in a district free from disease for carriage into G. district, but defts. refused to carry the cattle unless furnished by W. with a "declaration under the Act." In an action by W. against defts. to recover damages & expenses incurred by him through breach of duty on the part of defts.:—*Held*: notwithstanding the words of the regulation "or before removal from the railway truck in the

**683 i. — Liability of railway company—Failure to procure licence or forward declaration.]**—Action against a railway co. by a consignor of cattle to March & Lynn, claiming damages for delay in delivery. Defts. pleaded that by an Ord. in Council under Contagious Diseases (Animals) Act, 1878 (c. 74), the county of Norfolk, in which Lynn was



county district takes place," defts. were entitled to refuse to carry the cattle without a declaration, & committed no breach of duty in refusing so to do.—*WILLIAMS v. GREAT WESTERN RY. Co.* (1885), 52 L. T. 250; 49 J. P. 439.

**684. Removal of dung—Risk of infection—Evidence.]**—An order of quarter sessions ordered that no persons should bring or send hides, skins, or any dung whatsoever, or any litter likely to propagate infection from any place, etc., to any place, etc. Y., who had stables in London, sent without licence a cartload of his stable litter into another jurisdiction, & the justices convicted him under the above order, though there was no evidence of the likelihood of such dung to propagate infection:—*Held*: the conviction was wrong, & the justices could only convict where it was proved the dung was likely to propagate infection.—*YOUNGMAN v. MORRIS* (1866), 15 L. T. 276; 31 J. P. 6.

**685. Removal of grass—Prohibition of removal of hay.]**—An Ord. in Council prohibited the removal without a licence of hay, straw, litter, or other articles forming the food of animals, or used for or about animals. W., a farmer, bought at an auction some growing grass within an infected district, & after cutting it, removed it for the purpose of being stacked near his homestead, which was not in such district:—*Held*: this was hay within the Ord., & he was properly convicted for not obtaining a licence.—*WATSON v. COATES* (1867), 31 J. P. 150.

**686. Holding sale—Hawking pigs.]**—Markets & Fairs (Swine Fever) Ord., 1896, made in pursuance of Diseases of Animals Act, 1894 (c. 57), s. 22 (xix.), provided that no market, fair, sale, or exhibition of swine should be held in a district to which the Ord. applied except as expressly authorised by the Ord., & that a sale of swine (not being in a swine fever infected area) might be held with the licence of a local authority. M. was in charge of a horse & float passing along a highway containing pigs, two of which had been previously ordered, & whilst so travelling, asked other people if they

wanted to buy pigs, & subsequently sold them all to various people. This was not a swine fever infected area, & there had been no licence obtained from the local authority. The magistrates held that there had been no contravention of the above Ord., & dismissed the information:—*Held*: the magistrates were right, for, although there was a selling, there was no holding a sale.—*MCLEAN v. MONK* (1898), 77 L. T. 663; 62 J. P. 180; 42 Sol. Jo. 199; 18 Cox, C. C. 686.

#### SUB-SECT. 2.—DISINFECTION.

**687. Inspector's order to foreman—Liability of master for foreman's disobedience.]**—By an Ord. in Council, issued under Contagious Diseases (Animals) Act, 1848 (c. 107), every inspector had power to cause to be cleansed & disinfected within his district any premises in which animals labouring under the cattle plague had been, & every owner or occupier of such premises was to obey any order given by such inspector for that purpose, subject to a penalty of £20 for disobedience. An inspector gave an order to the foreman of applt. (who was not present, & resided at a distance) to disinfect the premises, which order was not obeyed:—*Semble*: applt. was not liable for the disobedience of the order by his foreman.—*SEARLE v. REYNOLDS* (1866), 7 B. & S. 704; 14 L. T. 518; 31 J. P. 4.

**688. Cleansing cattle trucks—Charges by railway company.]**—An Ord. in Council under Contagious Diseases (Animals) Act, 1848, directed that every carriage, truck, etc., should be cleansed & disinfected by the owners in manner therein pointed out once in every twenty-four hours during the time when it was used for any animal. Defts. were authorised by stat. to charge certain rates for the carriage of goods on their line, & also to "charge a reasonable sum for loading, covering, & unloading of goods . . . & for delivery & collection & any other services incidental to the business or duty of

situate, was declared to be an area infected with foot & mouth disease, & it became unsafe to move the cattle except by a licence of the local authority, & they averred that no such licence was forthcoming when cattle arrived at Lynn, & the local authority prevented the cattle from being moved until such licence was obtained & produced to their proper officer, & defts. averred that such licence was afterwards obtained & produced to the officer, whereupon the local authority permitted the cattle to be removed, & defts. thereupon forthwith removed same & delivered them to pltf. They further pleaded that it was unlawful to move or carry the cattle from Peterborough to March without a licence of the local authority of the county of Norfolk, & that previous to the arrival of the cattle at Peterborough pltf. had not obtained such licence, nor was any such licence given, & the cattle were prevented from being carried for a time. Pltf. replied that as owner of the cattle he made & signed the required declarations, but defts. negligently made default in forwarding same & producing same to the local authority:—*Held*: defts. were under no obligation to procure the licences, nor was any duty imposed on them to forward the declaration, & they would not be responsible in the circumstances for delay in carriage within such reasonable time, occasioned by the regulations of the Act & Ord. in Council.—*LYNCH v. MIDLAND RY. Co.* (1882), 16 I. L. T. 115.—IR.

**w. — Permitting.]**—A cattle dealer was convicted of an offence within Contagious Diseases (Animals) Act, 1878, on the ground that he had permitted the removal of certain cattle from his

farm into Lanarkshire unaccompanied by a declaration under the regulations of the local authority of Lanarkshire. In a case on appeal obtained by him it was stated that applt. sold the cattle at his farm in Ayrshire, where they were delivered to the purchaser; that the person who drove them into Lanarkshire had not a declaration properly filled up under the regulations of the local authority of that county; that the justices were "of opinion that applt. was the only person who could have made the declaration, & in permitting the removal of the cattle without such declaration, in the knowledge that they were to be removed into the county of Lanarkshire, was guilty of the offence charged":—*Held*: the grounds stated were not sufficient to justify the conviction, which must be set aside.—*DUNLOP v. WEIR* (1888), 16 R. 14; 26 Sc. L. R. 93.—SCOT.

**x. Lawful excuse.]** A person accused of an offence against a regulation of a local authority, forbidding cattle to be moved into its district without the person so moving them having made a certain declaration, or obtained a certain licence, admitted that he had moved a cow into the district without making a declaration or obtaining a licence, but proved that the inspector of the local authority, acting in official capacity, had informed him, shortly before the occasion charged, that a declaration or licence would not be necessary:—*Held*: he had established a lawful excuse, & not liable to be convicted.—*ROBERTS v. INVERNESS LOCAL AUTHORITY* (1889), 17 R. 19; 27 Sc. L. R. 198.—SCOT.

**y. — — —.]**—A local authority issued a regulation prohibiting the land-

ing in their district of certain animals, including horses, without a declaration by the owner & a veterinary certificate to a certain effect. The captain of a ship landed certain ponies on the faith of a statement by the agent for the owners that a certificate & declaration had been sent to him. The certificate & declaration, when produced, did not satisfy the requirements of the regulation:—*Held*: the captain was bound to see that the requirements of the regulation were satisfied, & he had not, in the circumstances, "lawful authority or excuse" for failing to comply with it.—*HOWMAN v.* (1897), 2 Adm 369; 25 R. 8; 1 F. 55; 35 Sc. L. R. 29; 5 S. L. T. 151.—SCOT.

#### PART XI. SECT. 2, SUB-SECT. 2.

**a. Disinfecting cattle trucks—Injury to animals therefrom.]**—Action for the loss of pigs which had been penned by defts. in a pen at the station negligently covered with lime-wash, by reason of which the pigs were injured. Defts. pleaded that an Ord. in Council had been made requiring loading pens to be disinfected with lime-wash, & that it was necessary for defts. to pen all pigs; that the disinfecting with lime-wash was pursuant to the Ord., & that it was the lime-wash that injured the pigs:—*Held*: the defence afforded no *prima facie* answer to the charge of negligence alleged, & it was consistent with the defence that the pigs might have been placed in a pen while still wet from the application of the lime or chloride of lime wash, or that there were some means whereby defts. could have prevented the injury caused by the lime.—*SHAW v. GREAT S. & W. RY. Co.* (1881) 8 L. R. Ir. 10; 15 I. L. T. Jo. 115.—IR.

**Sect. 2.—Under statute: Sub-sects. 2, 3, 4**

a carrier . . . & for any other extraordinary services performed" by defts. Pltf. sent cattle by defts.' line:—*Held*: defts. could not require pltf. to pay the cost properly incurred by defts. under the Ord. in Council in cleansing the truck in which the cattle were sent, as the cleansing was not a service done for pltf. individually as distinguished from the rest of the public.—*COX v. GREAT EASTERN Ry. Co.* (1869), L. R. 4 C. P. 181; 38 L. J. C. P. 151.

**689. Ship—Disinfection of part insufficient.]—***Held*: in cattle-carrying vessels the Ords. in Council under Contagious Diseases (Animals) Act, 1878 (c. 74), required the whole vessel to be disinfected, & not merely those parts with which cattle were in contact while carried.—*ISMAY, IMRIE & Co. v. BLAKE* (1892), 66 L. T. 530; 56 J. P. 486; 8 T. L. R. 277; 7 Asp. M. L. C. 189.

**690. Sheep dipping—Approved dip—Date of dipping.]—**Under Sheep Dipping (North of England) Ord. of 1906, it became the duty of deft. to dip certain sheep in an approved sheep dip between Sept. 15 & Sept. 30, 1906. Deft. in fact dipped the sheep, but not in a dip approved by the Board of Agriculture, on Sept. 26. He was thereupon convicted before justices under the Ord. for not dipping the sheep on Sept. 26 in an approved sheep dip:—*Held*: inasmuch as deft. was under no duty to dip the sheep on Sept. 26, the particular day stated, but had until Sept. 30 to dip them in an approved dip, the conviction disclosed no offence known to the law & was bad.—*BINGLEY v. QUEST* (1907), 97 L. T. 394; 71 J. P. 443; 21 Cox, C. C. 505; 5 L. G. R. 938.

**SUB-SECT. 3.—IMPORTATION OF DISEASED ANIMALS.**

**691. Provision of proper pens—Jurisdiction of justices at port of arrival.]—**Sheep were carried upon the deck of a vessel from Ireland to Wales without being divided into pens as required by an Ord. in Council:—*Held*: although Contagious Diseases (Animals) Act, 1869 (c. 70), did not extend to Ireland, this was a continuing offence, punishable in Wales, & Welsh justices had jurisdiction to entertain proceedings for a penalty under the above Act & against the master of the vessel.—*MUIR v. HORE* (1877), 47 L. J. M. C. 17; 37 L. T. 315; 41 J. P. 471.

**692. — Liability of shipowner for lack of instructions to master.]—**Resps. were summoned

**690 i. Sheep dipping—Who may prosecute.]—**A county council may prosecute, under Sheep Dipping (Ireland) Ord., 1907, for offences against Diseases of Animals Acts, 1894 to 1903.—*CORK C. v. HARTE* (1907), 41 I. L. T. 206.—*IR.*

**PART XI. SECT. 2, SUB-SECT. 3.**

**691 i. Provision of proper pens.]—**The owners of a steamship were charged with a contravention of Diseases of Animals Act, 1894 (c. 57), & an Ord. of the Board of Agriculture issued thereunder. It was proved that the mate of the steamship had placed certain sheep in a hold of the ship where there were no battens, because, in his opinion, it was for the advantage of the sheep, in the circumstances, that they should be so placed:—*Held*: the accused had failed to establish a lawful excuse within the above Act.—*HOWMAN v. ORKNEY STEAM NAVIGATION CO., LTD.* (1899), 1 F. 55; 36 Sc. L. R. 325.—*SCOT.*

**691 ii. — Right to recover damages for loss.]—**A s.s. co. contracted to carry

a number of sheep under conditions excluding liability for any act, neglect, or mistake in judgment of themselves or their servants. On the voyage the sheep were seriously overcrowded in breach of Board of Trade regulations, & several were killed:—*Held*: the owners could not recover for the loss because (a) even if wilful misconduct did not fall within the condition, no such misconduct had been proved, & (b) the Board of Trade regulations were directed only to preventing the spread of disease, or perhaps to preventing cruelty to the sheep, & neither they nor Diseases of Animals Act, 1894 (c. 57), upon which they were founded, could be construed as giving the owner any right to recover damages for his loss, as that was no part of their policy.—*M'ALLISTER v. AYR STEAM SHIPPING CO., LTD.* (1910), 41 I. L. T. 106.—*IR.*

**PART XI. SECT. 2, SUB-SECT. 4.**

**b. Power of local authority to withhold compensation—Contagious Diseases (Animals) Act, 1878 (c. 74), s. 30 (7).]**—To justify a local authority in with-

holding compensation for an animal slaughtered it is necessary that they should ascertain & determine that the offence has been committed, & that such determination should be recorded in the minutes, & it is not necessary that the outbreak of disease should be traceable to the offence.

for carrying cattle from Buenos Ayres to Birkenhead in their vessel, which was not fitted with pens which conformed to the requirements of Foreign Animals Ord., 1895. Resps., who knew that the vessel was not so fitted, instructed the master to ship cattle if an opportunity arose, but they gave him no instructions to have pens properly fitted. Resps. were convicted, but upon appeal to quarter sessions the conviction was reversed:—*Held*: (1) the absence of instructions from resps. to the master to have the pens properly fitted might or might not make the resps. liable, according to surrounding circumstances; (2) this was a question of fact, & there was no appeal from the recorder's decision upon it.—*HINDUSTAN S.S. Co. v. BIRKENHEAD JJ. & POCKOCK* (1897), 61 J. P. Jo. 708.

**693. Animal "brought from a port"—Slaughtered on board ship.]—**Foreign Animals Ord., 1910, art. 2, made under Diseases of Animals Act, 1894 (c. 57), s. 30 (1), provided that it was unlawful, without a licence from the Board of Agriculture & Fisheries, "to bring into a port in Great Britain any cattle, sheep, goats or swine brought from a port in a scheduled country." The schedule provided that France should be a country to which the Ord. should apply. Resp., the master of a steamer, on a voyage homeward from the East, put into the port of Marseilles in France with a live sheep on board, but the sheep was not landed at Marseilles. The steamer subsequently arrived in the port of London with the live sheep still on board. The sheep was not landed in London, but was slaughtered on board for food. No licence had been given by the Board of Agriculture & Fisheries in respect of the sheep:—*Held*: resp. had not committed an offence against the above art., as the sheep was not brought from the port of Marseilles within the above art.—*GLOVER v. ROBERTSON* (1912), 106 L. T. 118; 76 J. P. 135; 22 Cox, C. C. 692; 10 L. G. R. 230.

**SUB-SECT. 4.—SLAUGHTER OF DISEASED ANIMALS AND COMPENSATION.**

**694. Foreign animals—Not slaughtered in pursuance of statutory provisions.]—**Under Contagious Diseases (Animals) Act, 1869 (c. 70), no compensation is payable by local authorities in respect of foreign animals slaughtered after their arrival, but before being landed at a British port; for compensation is only payable where animals have been slaughtered in pursuance of the Act, &

In an action against a local authority, by the owner of cattle slaughtered by their order, for compensation, the local authority founded on a minute of meeting after the date of the action, in which they stated their opinion "that the pursuer had not adducted any reason to induce the authority to pay compensation for these animals in regard to which it is alleged that an offence had been committed," & resolved to withhold compensation, & pleaded that the jurisdiction of the Ct. was excluded. The Ct., in respect that the minute did not state that defenders had ascertained & determined that the offences had been committed, adjourned the case to allow them to supply this defect in their determination, & on a subsequent minute of meeting being produced, setting forth a finding by them



the Act does not authorise local authorities to order such animals to be slaughtered.—*NISSLER v. HULL CORPN.* (1880), 5 Q. B. D. 325; 49 L. J. Q. B. 501; 42 L. T. 894; 44 J. P. 664; 28 W. R. 700.

*Annotation* :—*Reid*. The Suez, [1908] P. 292.

#### SUB-SECT. 5.—LOCAL AUTHORITIES.

**695. Expenses—Cattle plague rate—Borough included in county rate—Validity.**—On an appeal against an assessment to a cattle plague rate purporting to be in the nature of, & levied in all respects in the same manner as, a county rate, & as provided by Cattle Diseases Prevention Acts of 1866 (cc. 2, 4, 15, 110), it was proved that the rate was levied upon a township situate within & forming part of the borough of S., a borough within Municipal Corpn. Act, 1835 (c. 76), but assessed to & paying its proportion of the county rate, & that no steps had been taken to annex the borough to the local authority of the county for the purposes of the Ord. in Council of Mar. 24, 1866, but that on the contrary the corpn. of the borough had, in pursuance of such Ord., formed themselves into a separate local authority & appointed an inspector, whose fees had from time to time been paid out of the borough fund :—*Held* : the rate was good & valid, notwithstanding that the result of the rate was that the borough of S. was rated twice over, the question whether the rate was excessive or not being a question for the quarter sessions, & not one which rendered the rate altogether bad.—*BRIGHTSIDE BIERLOW OVERSEERS v. WEST RIDING JJ.* (1867), 31 J. P. Jo. 388.

**696. ——— Recovery of.]**—An action was brought in a ct. in which “M., the inspector appointed by the local authority for the county of H., under Contagious Diseases (Animals) Act, 1869 (c. 70),” was pltf., & S. deft.; in the particulars the local authority claimed £4 10s. for the hire of a meadow for twenty-six days, & the keep & other expenses of certain animals seized under the above Act. Deft. had been summoned before justices for exposing the animals which were affected with a contagious disease, but the information was dismissed, on the ground that deft. had not knowledge of it :—*Held* : (1) the local authority, though not a corpn., could sue for the expenses in their own name; (2) the expenses were recoverable independently of whether the owner was convicted or not.—*MILLS v. SCOTT* (1873), L. R. 8 Q. B. 406; 42 L. J. Q. B. 234; 29 L. T. 96; 37 J. P. 807; 21 W. R. 915.

**697. ——— From county council—Limitation of time for suing.]**—The justices of a county, as the local authority for the county, neglected between the years 1869 & 1878 to recoup to pltf., as the local authority for a borough within the county, the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county in carrying out Contagious Diseases (Animals) Act, 1869 (c. 70), which they were bound to repay under s. 97 of that Act. After the passing of Local Government Act, 1888 (c. 41), pltf. sued defts., as successors of the local authority for the county, to recover the sums

which should have been recouped :—*Held* : the only remedy against the justices would have been by *mandamus* to them to pay the amounts claimed out of moneys in their hands, or to levy a rate for the purpose, & as Local Government Act, 1888, vested in the county council the property of the justices for the county subject to the same conditions & restrictions as if the Act had not been passed, defts. were not liable in the action; (2) if any action would lie, it would be an action on the case, & not an action for debt on a stat., & Stat. Limitations was a bar to the claim.—*SALFORD CORPN. v. LANCASHIRE COUNTY COUNCIL* (1890), 25 Q. B. D. 384; 59 L. J. Q. B. 576; 63 L. T. 409; 55 J. P. 85; 38 W. R. 661; 6 T. L. R. 362, C. A.

*Annotation* :—*Consd.* Bootle-cum-Linacre Corpn. v. Lancashire County Council (1890), 60 L. J. Q. B. 323, C. A.

**698. Of burial of frozen carcasses washed ashore—Diseases of Animals Act, 1894 (c. 57), s. 46.]**—A vessel carrying a cargo of frozen meat ran ashore, & some of the carcasses were washed ashore & by direction of the Board of Trade were buried by the Receiver of Wrecks. The Receiver of Wrecks demanded from & was paid by the county council the expenses he had incurred, & the county council then demanded them from the owners of the vessel. In an action to recover the amount of the expenses against the owners of the vessel :—*Held* : the expenses were recoverable from the owners of the vessel, as the above sect. did not refer only to diseased carcasses or to carcasses of animals shipped alive.—*THE SUEVIC*, [1908] P. 292; 77 L. J. P. 152; 99 L. T. 474; 72 J. P. 407; 24 T. L. R. 699; 11 Asp. M. L. C. 149; 6 L. G. R. 946.

*Annotation* :—*Mentd.* The Olympic, [1913] P. 92, C. A.

**699. Delegation of powers—By executive committee to local sub-committee—Validity of order.]**—The duly appointed executive committee of a county council (which, by virtue of Local Government Act, 1888 (c. 41), was the local authority for the purpose of Contagious Diseases (Animals) Acts) made an order delegating to local sub-committees its powers under those Acts & Rabies Ord., 1887. Subsequent to such delegation the executive committee, without expressly revoking the delegation, issued certain regulations under Rabies Ord., 1887, as to the muzzling of dogs & keeping them under control; no regulations under Rabies Ord., 1887, had been issued by the local sub-committee :—*Held* : (1) the delegation was not equivalent to a resignation by the executive committee of its own powers, & the delegated authority was subject to resumption at any time; (2) the regulations were valid.—*HUTH v. CLARKE* (1890), 25 Q. B. D. 391; 59 L. J. Q. B. 559; 63 L. T. 348; 55 J. P. 86; 38 W. R. 655; 6 T. L. R. 373.

**700. Negligence of inspector—Liability of local authority.]**—Local authorities :—*Held* : not liable, for the negligence of an inspector appointed by them under Diseases of Animals Act, 1894 (c. 57), where the alleged negligence was in respect of his having, whilst acting under Sheep-Scab Ord., 1898, seized & detained in a market sheep suspected of sheep-scab.—*STANBURY v. EXETER CORPN.*, [1905] 2 K. B. 838; 75 L. J. K. B. 28; 93 L. T. 795; 70 J. P. 11; 54 W. R. 247; 22 T. L. R. 3; 4 L. G. R. 57.

that the offences had been committed & their resolution to withhold compensation, the ct. sustained the plea of no jurisdiction.—*CALDER v. LINLITHGOW LOCAL AUTHORITY* (1890), 18 R. 48; 28 Sc. L. R. 65.—*SCOT*.

**c. “Cattle Cattle Slaughtering Diseases of Animals & Meat Act (No. 36 of 1902), s. 15.]**—The word “cattle” in the above sect. does not include sheep

& pigs.—*MACKAY v. DAVIES* (1904), 1 C. L. R. 483.—*AUS*.

#### PART XI. SECT. 2, SUB-SECT. 5.

**d. Failure to appoint inspectors.]**—A local authority failed to appoint an inspector as required by Contagious Diseases (Animals) Act, 1878 (c. 74), & disease having broken out amongst pltf.’s cattle, some of them died. The

local authority did not slaughter any of pltf.’s cattle, nor did they pay him any compensation. In an action for damages for failure to carry out the provisions of the above Act, so that the animals died :—*Held* : pltf. could not maintain the action, nor an action for a peremptory *mandamus*.—*MULCAHY v. KILMACTHOMAS UNION GUARDIANS* (1886), 18 L. R. Ir. 200.—*IR*.



*Sect. 2.—Under statute: Sub-sect. 6.]*

## SUB-SECT. 6.—POLICE POWERS AND PENALTIES.

**701. Exposure in public place—Glandered horse—Danger to human life—Form of indictment.]—**R. v. HENSON, No. 673, *ante*.

**702.— Summary jurisdiction.]—**Under Contagious Diseases (Animals) Act, 1869 (c. 70), ss. 57, 103:—*Held*: jurisdiction was impliedly given to justices summarily to convict in a penalty a person guilty of an offence under s. 57.—CULLEN v. TRIMBLE (1872), L. R. 7 Q. B. 416; 41 L. J. M. C. 132; 26 L. T. 691; *sub nom.* R. v. LANCASHIRE JJ., CULLEN v. TRIMBLE (1872), 20 W. R. 701.

*Annotation*:—*Reid*. Johnson v. Colam (1875), L. R. 10 Q. B. 544.

**703. Removal of herd of cattle—Single offence.]—**An Ord. in Council said it should not be lawful to bring or send any animal from one place to another after a certain date, & every person offending, for every such offence, should forfeit a sum not exceeding £20. R. drove nine cows in one herd within a prohibited place:—*Held*: R. had only committed one offence with respect to the whole nine cattle, & did not incur a separate penalty for each cow.—RAYNOR v. HORNE (1866), 30 J. P. 501.

**704. Failure to notify police—Publication of Order in Council.]—**On an information against applt., alleging that he had five sheep affected with a contagious disease & did not give notice to a constable, as required by an Ord. in Council, it was proved that applt. had five sheep so affected:—*Held*: (1) there was *prima facie* evidence on which applt. might be convicted of the offence charged, & it lay on him to show if he could that he had given notice to a police constable; (2) whether publication of the Ord. in Council was necessary to its validity or not, the production of a copy purporting to be printed by the Govt. printers

was *prima facie* evidence of the Ord. under Documentary Evidence Act, 1868 (c. 37), s. 2; (3) no penalty being imposed by the Ord. & the offence being with respect to more than four animals, the justices had power, under s. 103, to inflict a penalty of £20 or £5 for each animal. *Semble*: publication was not necessary to the validity of the Ord.—HUGGINS v. WARD (1873), L. R. 8 Q. B. 521; 29 L. T. 33; 37 J. P. 405; 21 W. R. 914.

**705. — Proof of scienter.]—**An Ord. in Council made under the authority of Contagious Diseases (Animals) Act, 1869, provided that any person in charge or possession of a diseased animal should give notice to a police constable of the fact of the animal being so affected:—*Held*: before a person could be convicted before a magistrate for a breach of the above enactment, it was necessary to prove that the accused was aware that the animal was suffering from a contagious disorder.—NICHOLS (NICHOLIS) v. HALL (1873), L. R. 8 C. P. 322; 42 L. J. M. C. 105; 28 L. T. 473; 37 J. P. 424; 21 W. R. 579.

*Annotations*:—*Consd.* Dickenson v. Fletcher (1873), L. R. 9 C. P. 1. *Reid*. Sherras v. De Rutzen, [1895] 1 Q. B. 918.

**706. — Conviction for driving diseased animals—Res judicata—Burden of proof.]—**C. was convicted by county justices of driving diseased animals contrary to an Ord. in Council. A further charge was preferred against him before the borough justices of failing to give notice to the borough police in respect of the same animals under the sect.:—*Held*: (1) the first conviction was no bar to the proceedings on the second charge, the offences being different; (2) the burden of proof of guilty knowledge lay upon the prosecution & had not been discharged, & the charge was properly dismissed on that ground.—R. v. COULMAN (1883), 48 J. P. 8.

## PART XI. SECT. 2, SUB-SECT. 6.

**e. Exposure for sale of diseased animal.]—**The word "animal" in Cattle Slaughtering & Diseased Animals & Meat Act, 1902 (No. 36), s. 47, by which it is an offence to sell, or consign, or expose for sale any diseased animal, means a living & not a dead animal. Costs were allowed against a public officer, where it appeared that, at the time the proceedings were instituted, the complainant had no reasonable ground for believing that an offence had been committed.—*Ex p.* LOMAX (1906), 6 S. R. N. S. W. 705.—AUS.

**f. Failure to notify police—Sheep "suspected of" scabs.]—**Sheep-scab Ord. of 1905 of the Board of Agriculture & Fisheries, art. 1 (1), enacts that "Every person having or having had in his possession or under his charge a sheep affected with, or suspected of, sheep-scab shall with all practicable speed give notice of the fact of the sheep being so affected or suspected to a constable of the police force for the police area wherein the sheep so affected or suspected is or was":—*Held*: (1) in a prosecution for contravention of the above art., if it were proved that it was within the knowledge of the accused that a reasonable suspicion of sheep-scab existed, it was not necessary, in order to convict, to prove that the accused himself shared that suspicion; (2) whether there was or was not a reasonable suspicion was a question of fact in each case, & would depend on the knowledge of the person suspecting the existence of scab, & the comparative knowledge of the owner or custodian to whom the suspicion was communicated.—MACLEAN v. LAIDLAW, [1909] S. C. 68; 4 Sc. L. R. 877; 2 S. L. T. 140.—SCOT.

**g. — Form of complaint.]—***Held*: in a complaint for contravention of Diseases of Animals Act, 1874 (c. 97), s. 4. (1) (b), as extended by Anthrax Ord., 1829, s. 16, it was sufficient to specify the sect. of the Act constituting the offence & the Ord. extending the Act, without libelling the particular sect. of the Act authorising the Ord., whereby the Act was extended.—CLARKE v. WOOD (1900), 37 Sc. L. R. 929; 8 S. L. T. 118.—SCOT.

**h. Driving sheep without permit—Scabby sheep.]—**A servant, who drives a flock of sheep for his employer, is liable to the penalties imposed by Sheep Act, 1878, s. 45, unless he has a permit from the inspector, if even one of the sheep is infected with scab, & this although he holds a clean certificate for the flock, is unaware of the existence of the disease, & is driving through a clean district.—RICHARDSON v. KENDERBY (1882), 1 N. Z. L. R. 231.—N.Z.

**i. Failure to clean—Scabby sheep.]—**When, under Sheep Act, 1878, deft. is ordered to clean a flock of sheep, & nine months afterwards he is convicted under s. 23 for having failed to clean the flock, he may be fined for the number of sheep composing the flock when the information on the latter charge was laid, & not when the original order was made.

An information, under s. 23, that the deft., having been served with an order to clean his flock, failed to do so within six months, " & has further failed to clean the sheep within a further period of three months next following such period of six months," when sworn by the sheep inspector himself, imports that in the opinion of the inspector the sheep are infected at the time of the

laying of the information.—MACKAY v. DRUMMOND (1886), 4 N. Z. L. R. 239.—N.Z.

**m. Conviction for keeping scabby sheep—Liability of purchaser to be further convicted—Res judicata.]—**Where sheep are bought from an owner, who has been convicted of being the owner of infected sheep under Sheep Act, 1878, s. 23, the purchaser cannot be convicted under the same sect. of having the same sheep still infected six months after the former conviction.—INGLIS v. R. (1885), 4 N. Z. L. R. 61.—N.Z.

**n. Seizure & sale on non-payment of penalties—Scabby sheep.]—**Where a conviction has been recorded against "the owner" of a scabby flock of sheep, the sheep can be seized & sold on non-payment of the penalties under Sheep Act, 1878, s. 64, as against a mtgee. not in possession, & although the warrant of distress is not issued for more than ten days after the conviction. *Qu.*: whether such a seizure would be good as against a *bona fide* purchaser or incumbrancer for value after the expiration of ten days from the conviction.—LEVIN v. SMART (1884), 2 N. Z. L. R. 290.—N.Z.

**o. Evidence—Opinion of sheep inspector—Scabby sheep.]—**To support a conviction under Sheep Act, 1878, s. 23, it is necessary to prove that some sheep are actually infected. The mere non-existence of a clean certificate is not sufficient. *Semble*: where it is proved the sheep are infected, the opinion of the sheep inspector is final on the question whether reasonable efforts have been made to clean the sheep.—COOKE v. WACHSMANN (1888), 6 N. Z. L. R. 399.—N.Z.

**707. Evidence—Certificate of veterinary inspector.]—**H. was summoned for exposing in a public market pigs suffering from typhoid fever. A certificate of the veterinary inspector under Contagious Diseases (Animals) Act, 1878 (c. 74), s. 51, that the pigs were so suffering was put in by the prosecution. H. tendered evidence to prove that he did not know, & had no means of knowing, that the pigs were suffering from fever. The justices refused to receive such rebutting evidence & convicted H.:—*Held*: the justices were wrong in rejecting the evidence, though what effect it might

have was a matter for the justices to consider.—*HARRIS v. SMITH* (1879), 44 J. P. 361.

**708. Penalties—Who may recover.]—**A private person may prefer informations under Diseases of Animals Act, 1894 (c. 57), & the Ords. made under that Act, for the right to enforce such Act & Ords. is not confined to the local authority.—*R. v. STEWART, Ex p. BURNHAM*, [1896] 1 Q. B. 300; 65 L. J. M. C. 83; 74 L. T. 54; 60 J. P. 356; 44 W. R. 368; 40 Sol. Jo. 259; 18 Cox, C. C. 232.

**707 i. — Certificate of veterinary inspector.]—**Where a person is charged before the magistrates under Contagious Diseases (Animals) Act, 1878 (c. 74), evidence is not admissible for the purpose of contradicting the fact certified, viz., that the animal was diseased, but is admissible for the purpose of showing that the person charged had no knowledge of the existence of the disease, & could not with reasonable

diligence have obtained that knowledge. Such absence of knowledge is a good defence.—*LEONARD v. RICHARDS* (1891), 25 L. L. T. 58.—*IR.*

**707 ii. — —.]—**In pursuance of an Ord. of the Board of Agriculture the inspector of a local authority, by notice in writing, required the owner of certain sheep, certified by the inspector to be affected with scab, to treat them with dipping or other remedy. In a prosecution

against the owner for failure to comply, the justices admitted evidence to prove that the sheep were not affected with scab, & in respect thereof held resp. had lawful excuse, & found the charge not proven:—*Held*: the inspector's certificate being conclusive, evidence to contradict it was incompetent, & resp. ought to have been convicted.—*JAMESON v. DOW* (1898), 2 F. 24; 37 Sc. L. R. 213; 7 S. L. T. 281.—*SCOT.*

## ANNUITIES.

See RENTCHARGES AND ANNUITIES.

## ANTICIPATION.

Restraint on.—See HUSBAND AND WIFE: PERPETUITIES; PERSONAL PROPERTY  
REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.

## APOLOGY.

See LIBEL AND SLANDER.

## APOTHECARIES.

See MEDICINE AND PHARMACY

## APPEAL.

See CONSTITUTIONAL LAW; COUNTY COURTS; COURTS; CRIMINAL LAW AND  
PROCEDURE; MAGISTRATES; PRACTICE AND PROCEDURE.

As to Licensing.—See INTOXICATING LIQUORS.

As to Rates and Rating.—See RATES AND RATING.

## APPEARANCE.

*See* PRACTICE AND PROCEDURE.

## APPOINTMENT.

Powers of.—*See* CHARITIES ; PERPETUITIES ; POWERS.

Trustees, of.—*See* TRUSTS AND TRUSTEES.

## APPORTIONMENT.

*See* EQUITY : LANDLORD AND TENANT ; REAL PROPERTY AND CHATTELS REAL ;  
RENTCHARGES AND ANNUITIES ; TRUSTS AND TRUSTEES.

## APPRAISERS.

*See* VALUERS AND APPRAISERS.

## APPRENTICES.

*See* INFANTS AND CHILDREN ; MASTER AND SERVANT ; POOR LAW.

## APPROPRIATION.

Of Goods.—*See* BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE  
INSTRUMENTS ; SALE OF GOODS.

Of Payment.—*See* CONTRACT ; MONEY AND MONEY-LENDING.

Of Trust Funds.—*See* TRUSTS AND TRUSTEES.



# ARBITRATION.

	PAGE
PART I. THE SUBMISSION . . . . .	312
SECT. 1. IN GENERAL . . . . .	312
SECT. 2. REQUISITES OF VALID SUBMISSION . . . . .	313
SECT. 3. WHAT CONSTITUTES A SUBMISSION TO ARBITRATION . . . . .	316
SUB-SECT. 1. IN GENERAL . . . . .	316
SUB-SECT. 2. REFERENCE TO JUDGE . . . . .	317
SUB-SECT. 3. REFERENCE TO COUNSEL . . . . .	318
SUB-SECT. 4. REFERENCE TO RACING STEWARDS . . . . .	318
SUB-SECT. 5. REFERENCE TO FOREIGN TRIBUNAL . . . . .	318
SUB-SECT. 6. DISTINCTION BETWEEN ARBITRATION AND VALUATION . . . . .	319
SECT. 4. WHAT MAY BE SUBJECT-MATTER OF A SUBMISSION . . . . .	322
SECT. 5. PARTIES TO A REFERENCE . . . . .	325
SECT. 6. CONSTRUCTION OF SUBMISSION . . . . .	330
SUB-SECT. 1. IN GENERAL . . . . .	330
SUB-SECT. 2. WHETHER ARBITRATION CLAUSE IS INCORPORATED . . . . .	331
SUB-SECT. 3. WHETHER ARBITRATION CLAUSE IS IN FORCE AND APPLICABLE . . . . .	332
SUB-SECT. 4. WHAT LAW GOVERNS CONSTRUCTION OF ARBITRATION CLAUSE . . . . .	335
SUB-SECT. 5. WHETHER ARBITRATION IS CONDITION PRECEDENT . . . . .	336
A. To Right to sue . . . . .	336
B. To other Remedies . . . . .	336
SUB-SECT. 6. WHETHER THERE IS CONDITION PRECEDENT TO ARBITRATION . . . . .	336
SUB-SECT. 7. WHAT IS REFERRED . . . . .	337
A. Who decides. . . . .	337
B. To what Date Claims are to be assessed . . . . .	338
C. Disputes between what Parties and in what Capacity . . . . .	341
D. Meaning and Effect of various Expressions . . . . .	342
E. Other Cases . . . . .	347
SECT. 7. EFFECT OF SUBMISSION ON RIGHTS OF PARTIES . . . . .	347
SECT. 8. EFFECT OF AGREEMENT TO REFER ON JURISDICTION OF THE COURT—OUSTER OF JURISDICTION . . . . .	350
SECT. 9. WHETHER SUBMISSION IS CONDITION PRECEDENT TO RIGHT TO SUE . . . . .	355
SUB-SECT. 1. VALIDITY . . . . .	355
SUB-SECT. 2. CONSTRUCTION AND EFFECT . . . . .	356
SUB-SECT. 3. EFFECT OF REPUDIATION . . . . .	361

	PAGE
SECT. 10. STAY OF PROCEEDINGS . . . . .	361
SUB-SECT. 1. TO WHAT COURT APPLICATION MAY BE MADE . . . . .	361
SUB-SECT. 2. IN REGARD TO WHAT PROCEEDINGS . . . . .	361
SUB-SECT. 3. IN REGARD TO WHAT SUBMISSIONS . . . . .	362
A. Under Common Law Procedure Act, 1854, s. 11 . . . . .	362
B. Under Arbitration Act, 1889, s. 4 . . . . .	363
C. Under Colonial Statutes . . . . .	364
SUB-SECT. 4. PARTIES AT WHOSE INSTANCE AND AGAINST WHOM STAY WILL BE GRANTED . . . . .	364
SUB-SECT. 5. POWERS OF THE COURT . . . . .	365
SUB-SECT. 6. GROUNDS FOR REFUSING OR GRANTING STAY . . . . .	368
A. No Defence to Action . . . . .	368
B. Allegations of Fraud . . . . .	368
C. Arbitrator disqualified . . . . .	369
D. Question of Law submitted . . . . .	371
E. Subject-matter of Dispute . . . . .	371
F. When Arbitration Clause only applies to Part of Dispute . . . . .	374
G. When Relief asked outside Arbitrator's Powers . . . . .	374
SUB-SECT. 7. AT WHAT STAGE APPLICATION MAY BE MADE—"STEP IN PROCEEDINGS" . . . . .	375
SUB-SECT. 8. APPLICANT MUST BE READY AND WILLING TO REFER . . . . .	377
SECT. 11. RESTRAINT OF ARBITRATION BY INJUNCTION . . . . .	377
SECT. 12. ENFORCEMENT OF A SUBMISSION OR AGREEMENT TO SUBMIT . . . . .	381
SUB-SECT. 1. IN GENERAL . . . . .	381
SUB-SECT. 2. ABORTIVE REFERENCES . . . . .	382
SECT. 13. REVOCATION OF AN AGREEMENT TO SUBMIT . . . . .	386
SUB-SECT. 1. IN WHAT CASES PARTY MAY REVOKE AGREEMENT TO SUBMIT . . . . .	386
A. At Common Law and in Cases not within Statutory Restrictions . . . . .	386
B. Where Statutory Restrictions apply—By Leave of the Court . . . . .	389
SUB-SECT. 2. BY OPERATION OF LAW . . . . .	393
A. By Death . . . . .	393
(a) Where no Proviso for Event of Death . . . . .	393
(b) Where Proviso for Event of Death . . . . .	395
B. By Marriage . . . . .	396
C. By Bankruptcy . . . . .	397
D. By Lunacy . . . . .	397
SUB-SECT. 3. EFFECT OF REVOCATION . . . . .	397
SUB-SECT. 4. REMEDIES AGAINST PARTY REVOKING . . . . .	398
SECT. 14. MAKING A SUBMISSION A RULE OF COURT—CASES ON THIS SUBJECT HAVE BEEN OMITTED AS OBSOLETE . . . . .	398
PART II. THE ARBITRATORS AND UMPIRE . . . . .	399
SECT. 1. APPOINTMENT OF ARBITRATORS AND UMPIRE . . . . .	399
SUB-SECT. 1. WHO MAY BE APPOINTED ARBITRATORS . . . . .	399
SUB-SECT. 2. HOW ARBITRATORS MAY BE APPOINTED . . . . .	401
A. Generally . . . . .	401
B. When one Party makes Default . . . . .	402
SUB-SECT. 3. HOW UMPIRE MAY BE APPOINTED . . . . .	403
A. Generally . . . . .	403
B. Appointment by Lot . . . . .	404
SUB-SECT. 4. APPOINTMENT OF THIRD ARBITRATOR . . . . .	406

**ARBITRATION.****307**

	<b>PAGE</b>
SUB-SECT. 5. APPOINTMENT OF ARBITRATOR IN SUCCESSION TO ORIGINAL NOMINEE .	<b>406</b>
SUB-SECT. 6. APPOINTMENT OF ARBITRATORS OR UMPIRE BY THE COURT . . .	<b>406</b>
A. Under Common Law Procedure Act, 1854, s. 12 . . . . .	<b>406</b>
B. Under Arbitration Act, 1889, s. 5 . . . . .	<b>407</b>
C. Under Colonial Statutes . . . . .	<b>408</b>
SECT. 2. COMMENCEMENT, DURATION, AND TERMINATION OF ARBITRATORS' AUTHORITY.	
TIME FOR MAKING AWARD . . . . .	<b>409</b>
SUB-SECT. 1. WHEN IT BEGINS . . . . .	<b>409</b>
SUB-SECT. 2. HOW TIME IS CALCULATED . . . . .	<b>410</b>
SUB-SECT. 3. WHEN AND HOW TERMINATED . . . . .	<b>411</b>
SECT. 3. TIME FOR APPOINTMENT AND COMMENCEMENT OF UMPIRE'S AUTHORITY. . .	<b>413</b>
SECT. 4. ENLARGEMENT OF TIME . . . . .	<b>415</b>
SUB-SECT. 1. BY THE PARTIES . . . . .	<b>415</b>
SUB-SECT. 2. BY THE ARBITRATORS OR UMPIRE . . . . .	<b>417</b>
SUB-SECT. 3. BY THE COURT . . . . .	<b>419</b>
SUB-SECT. 4. EFFECT OF ENLARGEMENT . . . . .	<b>422</b>
SECT. 5. REMUNERATION OF ARBITRATORS AND UMPIRE . . . . .	<b>423</b>
SUB-SECT. 1. HOW FIXED . . . . .	<b>423</b>
SUB-SECT. 2. TAXATION OF ARBITRATORS' AND UMPIRE'S FEES . . . . .	<b>425</b>
SUB-SECT. 3. REMEDY TO RECOVER FEES . . . . .	<b>426</b>
SUB-SECT. 4. REMEDY OF PERSON PAYING EXCESSIVE FEES . . . . .	<b>427</b>
SECT. 6. LIABILITIES AND DUTIES OF ARBITRATORS AND UMPIRE . . . . .	<b>428</b>
SECT. 7. INTERFERENCE BY THE COURT . . . . .	<b>430</b>
PART III. THE HEARING . . . . .	<b>431</b>
SECT. 1. DISCOVERY AND MEANS OF PROCURING EVIDENCE . . . . .	<b>431</b>
SECT. 2. CONDUCT OF THE HEARING . . . . .	<b>433</b>
SUB-SECT. 1. ARBITRATORS MUST ACT JUDICIALLY . . . . .	<b>433</b>
SUB-SECT. 2. ARBITRATORS MUST ACT TOGETHER . . . . .	<b>434</b>
SUB-SECT. 3. ARBITRATORS MAY NOT DELEGATE . . . . .	<b>436</b>
SUB-SECT. 4. APPOINTMENT OF MEETINGS AND NOTICE THEREOF . . . . .	<b>438</b>
SUB-SECT. 5. PROCEEDING EX PARTE ON NON-ATTENDANCE OF PARTIES . . . . .	<b>439</b>
SUB-SECT. 6. HEARING THE PARTIES AND THEIR CONTENTIONS . . . . .	<b>440</b>
SUB-SECT. 7. HEARING COUNSEL . . . . .	<b>441</b>
SUB-SECT. 8. HEARING EVIDENCE . . . . .	<b>441</b>
A. Duty to hear Witnesses . . . . .	<b>441</b>
B. Absence of One of the Parties or Both Parties . . . . .	<b>445</b>
C. Duty to examine on Oath . . . . .	<b>449</b>
D. Effect of Misreception and Misrejection of Evidence . . . . .	<b>450</b>
SUB-SECT. 9. POWERS OF AMENDMENT . . . . .	<b>452</b>
SUB-SECT. 10. EXCLUSION OF PARTIES AND STRANGERS . . . . .	<b>452</b>
SUB-SECT. 11. PROCEEDINGS BEFORE THE UMPIRE . . . . .	<b>453</b>
SUB-SECT. 12. EFFECT OF ACCEPTING HOSPITALITY . . . . .	<b>456</b>
SUB-SECT. 13. WAIVER OF OBJECTIONS TO CONDUCT OF THE HEARING . . . . .	<b>456</b>
SECT. 3. SPECIAL CASE . . . . .	<b>456</b>
SUB-SECT. 1. STATEMENT OF SPECIAL CASE DURING REFERENCE . . . . .	<b>456</b>



	PAGE
SUB-SECT. 2. STATEMENT OF AWARD IN FORM OF SPECIAL CASE . . . . .	459
A. Power to state Award in Form of Special Case . . . . .	459
B. Effect of Refusal to state Award in Form of Special Case . . . . .	460
C. Form of Award . . . . .	460
D. Hearing of Special Case . . . . .	461
E. Costs . . . . .	461
F. Appeal . . . . .	461
PART IV. THE AWARD . . . . .	462
SECT. 1. IN GENERAL . . . . .	462
SECT. 2. BY WHOM IT MUST BE MADE . . . . .	462
SECT. 3. WHEN TO BE MADE . . . . .	466
SECT. 4. HOW IT MUST BE MADE . . . . .	466
SECT. 5. PUBLICATION AND DELIVERY OF AWARD . . . . .	467
SECT. 6. FORM AND CONTENTS . . . . .	469
SUB-SECT. 1. GENERALLY . . . . .	469
SUB-SECT. 2. RECITALS . . . . .	469
SECT. 7. PRESUMPTION IN FAVOUR OF VALIDITY . . . . .	470
SECT. 8. REQUISITES OF VALID AWARD . . . . .	471
SUB-SECT. 1. MUST FOLLOW SUBMISSION . . . . .	471
SUB-SECT. 2. MUST BE WITHIN SUBMISSION . . . . .	471
A. In General . . . . .	471
B. Awards allowing Interest . . . . .	472
C. Arbitrations under Arbitration Clauses in Mercantile Contracts . . . . .	473
D. Awards for Payment to Strangers or affecting their Rights and Interests . . . . .	475
E. Awards directing entry of, or setting aside, Verdict. . . . .	477
F. Where Verdict taken subject to References . . . . .	478
G. Other Cases . . . . .	478
SUB-SECT. 3. MUST BE FINAL, CERTAIN AND CONSISTENT . . . . .	485
A. In General . . . . .	485
B. As to the Party who is to perform . . . . .	485
C. As to the Payee . . . . .	486
D. As to Time and Mode of Performance . . . . .	486
E. As to the Amount payable or Subject-matter . . . . .	487
F. Awards subject to the Opinion of a Stranger . . . . .	491
G. Awards involving Acquiescence of, or Action by Strangers, or affecting their Rights and Interests . . . . .	492
H. Awards subject to Discretion reserved to Arbitrator . . . . .	492
K. Awards subject to Will of Parties . . . . .	493
L. Alternative Awards . . . . .	493
M. Inconsistent Awards . . . . .	494
N. Where Verdict taken subject to Reference . . . . .	495
O. Other Cases . . . . .	495
SUB-SECT. 4. MUST BE REASONABLE . . . . .	498
SUB-SECT. 5. MUST BE LEGAL. . . . .	498
SUB-SECT. 6. MUST BE POSSIBLE . . . . .	498
SUB-SECT. 7. MUST BE MUTUAL . . . . .	499
SUB-SECT. 8. MUST DISPOSE OF ALL MATTERS . . . . .	499
A. Necessity for disposing of all Matters . . . . .	499
B. What must be disposed of . . . . .	501
C. Whether all Matters have been disposed of . . . . .	502
(a) In General . . . . .	502
(b) Awards "of and concerning" . . . . .	502
(c) Where Verdict taken subject to Reference . . . . .	504
(d) Other Cases . . . . .	504

	PAGE
SUB-SECT. 9. WHETHER NECESSARY TO FIND ON EACH CLAIM SPECIFICALLY . . .	507
A. Where an Action only is referred and Costs are to abide Event. . . . .	507
B. Where an Action and other Matters are referred and Costs of Action are to abide Event . . . . .	509
C. Where an Action or an Action and other Matters are referred and no Provision that Costs of Action are to abide Event . . . . .	511
D. Where no Action is referred . . . . .	512
E. Where Verdict taken subject to Reference . . . . .	513
SECT. 9. AWARD IN FORM OF SPECIAL CASE . . . . .	513
SECT. 10. AWARD BAD IN PART . . . . .	513
SECT. 11. WHERE VERDICT TAKEN SUBJECT TO REFERENCE . . . . .	515
SUB-SECT. 1. POWERS OF ARBITRATOR . . . . .	515
SUB-SECT. 2. SUFFICIENCY OF AWARD . . . . .	516
SUB-SECT. 3. EFFECT OF AWARD . . . . .	519
SUB-SECT. 4. OTHER CASES . . . . .	520
SECT. 12. DIRECTIONS BY THE ARBITRATOR . . . . .	521
SUB-SECT. 1. POWER TO GIVE DIRECTIONS . . . . .	521
SUB-SECT. 2. SUFFICIENCY OF DIRECTIONS . . . . .	521
SUB-SECT. 3. EFFECT OF DIRECTIONS . . . . .	521
SECT. 13. MISTAKES IN AND AMENDMENT OF AWARD . . . . .	521
SUB-SECT. 1. MISTAKES APPARENT ON FACE OF AWARD . . . . .	521
SUB-SECT. 2. MISTAKES NOT APPARENT ON FACE OF AWARD . . . . .	523
A. Admitted Mistakes . . . . .	523
B. Mistakes not admitted . . . . .	526
(a) Of Law . . . . .	526
(b) Of Fact . . . . .	528
SUB-SECT. 3. ALTERATION AND AMENDMENT OF AWARD . . . . .	530
SECT. 14. STAMP ON AWARD . . . . .	531
SECT. 15. CONSTRUCTION AND EFFECT OF AWARD . . . . .	532
SUB-SECT. 1. CONSTRUCTION OF AWARD . . . . .	532
SUB-SECT. 2. EFFECT OF AWARD . . . . .	534
A. Final and binding . . . . .	534
(a) In General . . . . .	534
(b) As to what Matters . . . . .	536
(c) As to what Parties . . . . .	539
B. Particular Awards . . . . .	539
(a) Award of General Releases . . . . .	539
(b) Other Cases . . . . .	540
C. As a Defence . . . . .	540
D. As Estoppel . . . . .	543
E. As Evidence . . . . .	543
F. As to transferring Property . . . . .	545
G. Where Award bad in Part . . . . .	545
H. Where Verdict taken subject to Reference . . . . .	545
SECT. 16. SETTING ASIDE AWARD . . . . .	545
SUB-SECT. 1. JURISDICTION TO SET ASIDE . . . . .	545
SUB-SECT. 2. GROUNDS FOR SETTING ASIDE . . . . .	547
A. Generally . . . . .	547
B. Misconduct. . . . .	548
C. Improperly procuring Award. . . . .	551
D. Other Cases . . . . .	552

	PAGE
SUB-SECT. 3. GROUNDS FOR REFUSING TO SET ASIDE . . . . .	552
SUB-SECT. 4. THE APPLICATION TO SET ASIDE . . . . .	554
A. Who may apply, and how Application made . . . . .	554
B. Notice of Motion . . . . .	554
C. Time for Application . . . . .	556
D. Evidence . . . . .	559
E. Costs . . . . .	561
F. Appeal . . . . .	561
SECT. 17. REMITTING AWARD . . . . .	561
SUB-SECT. 1. JURISDICTION . . . . .	561
SUB-SECT. 2. GROUNDS FOR REMITTING AWARD. . . . .	562
SUB-SECT. 3. GROUNDS FOR REFUSING TO REMIT AWARD . . . . .	564
SUB-SECT. 4. THE APPLICATION TO REMIT AWARD . . . . .	565
SUB-SECT. 5. PROCEEDINGS WHEN AWARD REMITTED . . . . .	566
SECT. 18. PERFORMANCE OF AWARD . . . . .	567
SECT. 19. ENFORCEMENT OF AWARD . . . . .	567
SUB-SECT. 1. IN GENERAL . . . . .	567
SUB-SECT. 2. BY ORDER OF THE COURT . . . . .	567
A. Under Arbitration Act, 1889, s. 12. . . . .	567
B. Under Judgments Act, 1838, s. 18. . . . .	568
(a) In what Cases available. . . . .	568
(b) Grounds for granting or refusing Order . . . . .	568
(c) Procedure . . . . .	570
SUB-SECT. 3. BY JUDGMENT AND EXECUTION PURSUANT TO ORDER OF REFERENCE OR WHEN VERDICT ENTERED SUBJECT TO AWARD . . . . .	571
SUB-SECT. 4. BY ACTION ON AWARD . . . . .	572
A. In General . . . . .	572
B. What Plaintiff must show . . . . .	572
C. Defences available . . . . .	573
SUB-SECT. 5. BY ACTION ON BOND. . . . .	575
SUB-SECT. 6. BY ATTACHMENT. . . . .	576
A. At whose Instance . . . . .	576
B. Against whom . . . . .	576
C. In what Cases . . . . .	576
D. Effect of contemporaneous Proceedings . . . . .	577
E. Grounds of Objection to Application . . . . .	578
F. Proceedings. . . . .	579
(a) Service of Award . . . . .	579
(b) Demand of Performance . . . . .	579
(c) Notice of Motion . . . . .	580
(d) Affidavits in support . . . . .	581
G. Costs . . . . .	583
H. Effect of Attachment . . . . .	583
SUB-SECT. 7. SPECIFIC PERFORMANCE . . . . .	583
SUB-SECT. 8. UNDER COLONIAL STATUTES AND RULES . . . . .	584
SECT. 20. COSTS . . . . .	585
SUB-SECT. 1. POWERS OF ARBITRATORS AND UMPIRE AS TO COSTS . . . . .	585
A. Under Arbitration Act, 1889, Sched. I. (i). . . . .	585
B. Before Arbitration Act, 1889. . . . .	586
C. Power to award Solicitor and Client Costs . . . . .	589
D. Effect of Statutory Provisions as to Costs . . . . .	590
(a) County Court Acts . . . . .	590
(b) Other Statutory Provisions . . . . .	592
(c) Certificates for Costs . . . . .	593



	PAGE
SUB-SECT. 2. POWER OF COURT AS TO COSTS . . . . .	595
SUB-SECT. 3. CONSTRUCTION OF PARTICULAR PROVISIONS IN SUBMISSIONS, ORDERS AND AWARDS . . . . .	596
SUB-SECT. 4. "COSTS TO ABIDE EVENT" . . . . .	599
SUB-SECT. 5. THE AWARD AS TO COSTS . . . . .	603
SUB-SECT. 6. WHAT COSTS ALLOWED—TAXATION . . . . .	605
SUB-SECT. 7. RECOVERY OF COSTS . . . . .	610
SUB-SECT. 8. SET-OFF OF COSTS . . . . .	612
PART V. REFERENCES BY ORDER OF COURT. . . . .	613
SECT. 1. REFERENCES FOR INQUIRY AND REPORT . . . . .	613
SUB-SECT. 1. IN GENERAL . . . . .	613
SUB-SECT. 2. FORM OF ORDER . . . . .	614
SUB-SECT. 3. PROCEEDINGS BEFORE REFEREE . . . . .	614
SUB-SECT. 4. THE REPORT AND PROCEEDINGS THEREON . . . . .	615
SUB-SECT. 5. POWER TO ADOPT OR VARY OR REMIT OR SET ASIDE REPORT . . . . .	616
SUB-SECT. 6. COSTS . . . . .	619
SECT. 2. REFERENCES FOR TRIAL . . . . .	619
SUB-SECT. 1. POWER TO REFER . . . . .	619
A. In General . . . . .	619
B. Prolonged Examination of Documents or Scientific Inquiry . . . . .	620
C. Matters of Account . . . . .	621
(a) Under Common Law Procedure Act, 1854, s. 3. . . . .	621
(b) Under Judicature Act, 1873, s. 57 . . . . .	622
(c) Under Arbitration Act, 1889, s. 14 . . . . .	623
D. Under Colonial Statutes and Rules . . . . .	623
E. Appeals from Order referring . . . . .	624
F. Amendment of Order referring . . . . .	625
G. Effect of Order referring . . . . .	626
SUB-SECT. 2. POWER OF COURT OVER REFEREE AND PROCEEDINGS BEFORE HIM . . . . .	628
SUB-SECT. 3. PROCEEDINGS BEFORE REFEREE . . . . .	629
SUB-SECT. 4. REFEREE'S FINDING AND ITS EFFECT . . . . .	630
SUB-SECT. 5. COSTS . . . . .	631
SUB-SECT. 6. POWERS OF COURT OVER FINDINGS AND JUDGMENT . . . . .	631
SUB-SECT. 7. REFERENCES TO MASTER UNDER R. S. C., ORD. 14, R. 7 . . . . .	633
SECT. 3. REFERENCES TO MASTER TO ASSESS DAMAGES . . . . .	633
PART VI. APPLICATION OF ARBITRATION ACT, 1889, TO REFERENCES UNDER STATUTE . . . . .	

For Arbitration in relation to :—

*Acquisition of Land  
for Allotments* . See SMALL HOLDINGS &  
SMALL DWELLINGS.

*Agricultural Holdings* ., AGRICULTURE.

*Building Societies* ., BUILDING SOCIETIES.

*Companies* ., COMPANIES.

*Compulsory Purchase  
of Land* .

. See COMPULSORY PURCHASE  
OF LAND & COMPEN-  
SATION.

*Electric Lighting, etc.* ., ELECTRIC LIGHTING &  
POWER.

*Factories and Work-  
shops* ., FACTORIES & SHOPS.

<i>Friendly Societies</i>	. See FRIENDLY SOCIETIES.	<i>Public Health</i>	. See PUBLIC HEALTH & LOCAL ADMINISTRATION.
<i>Gasworks</i>	. . . „ GAS.	<i>Railways</i>	. . . „ CARRIERS; RAILWAYS & CANALS.
<i>Housing of Working Classes</i>	. . . „ COMPULSORY PURCHASE OF LAND & COMPENSATION; PUBLIC HEALTH & LOCAL ADMINISTRATION.	<i>Savings Banks</i>	. . . „ BANKERS & BANKING.
<i>Industrial and Provident Societies</i>	. INDUSTRIAL, PROVIDENT & SIMILAR SOCIETIES.	<i>Telegraphs and Telephones</i>	. . . „ TELEGRAPHS & TELEPHONES.
<i>Local Government</i>	. „ LOCAL GOVERNMENT.	<i>Trade Disputes</i>	. „ TRADE & TRADE UNIONS.
<i>Lunatic Asylums</i>	. LUNATICS & PERSONS OF UNSOUND MIND; PUBLIC HEALTH & LOCAL ADMINISTRATION.	<i>Tramways</i>	. . . „ TRAMWAYS & LIGHT RAILWAYS.
		<i>Waterworks</i>	. . . „ COMPULSORY PURCHASE OF LAND & COMPENSATION; WATER SUPPLY.
		<i>Workmen's Compensation</i>	. . . „ MASTER & SERVANT.

NOTE.—The Act now in force in England is Arbitration Act, 1889 (c. 49), herein referred to as Act of 1889. The Act repealed (*inter alia*) Arbitration Act, 1698 (c. 15). Civil Procedure Act, 1833 (c. 42), & Common Law Procedure Act, 1854 (c. 125), herein referred to as Act of 1698, C. P. Act, 1833, & C. L. P. Act, 1854, respectively. In considering the cases set out in this title regard must be had to their date, the Act under which they were decided, & the effect of the subsequent Acts.

## Part I.—The Submission.

### SECT. 1.—IN GENERAL.

1. **Definition of arbitration.]**—An arbn. is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties.—*COLLINS v. COLLINS* (1858), 26 Beav. 306; 28 L. J. Ch. 184; 32 L. T. O. S. 233; 5 Jur. N. S. 30; 7 W. R. 115; 53 E. R. 916.

**Annotations:—***Folld. Bos v. Helsham* (1866), L. R. 2 Exch. 72. *Consd. Re Hopper* (1867), 8 B. & S. 100; *Vickers v. Vickers* (1867), L. R. 4 Eq. 529. *Distd. Thomson v. Anderson* (1870), L. R. 9 Eq. 523. *Apld. Re Evans, Davies & Caddick* (1870), 22 L. T. 507; *Re Dawdy* (1885), 15 Q. B. D. 426, C. A. *Reid. Turner v. Goulden* (1873), L. R. 9 C. P. 57. *Mentd. De Rosaz v. Anglo-Italian Bank* (1869), 10 B. & S. 354; *Re Carus-Wilson & Greene* (1886), 56 L. J. Q. B. 530, C. A.

2. — **Distinguished from proceedings in court.]**—An arbn.-room is anything but a forum of confession; & the whole difference between that & a ct. of justice is, that it is a tribunal chosen by the parties themselves; but still, a matter comes as adversely before an arbitrator as before any other tribunal (*VAUGHAN, B.*).—*DOE d. LLOYD v. EVANS* (1827), 3 C. & P. 219.

3. — **In nature of judicial inquiry.]**—Arbn. is a method of settling a dispute which has arisen between the parties. If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, & hear the respective

cases of the parties, & decide upon evidence laid before him, then the case is one of an arbn.—*Re CARUS-WILSON & GREENE* (1886), 18 Q. B. D. 7; 56 L. J. Q. B. 530; *sub nom. Re WILSON & GREENE, Re CASTERTON ESTATES*, 55 L. T. 864; 35 W. R. 43; 3 T. L. R. 22, C. A.

**Annotations:—***Apld. Re Hammond & Waterton* (1890), 62 L. T. 808; *Re Carpenter & Bristol Corpn.* (1907), 71 J. P. Jo. 340. *Consd. Kennedy v. Barrow-in-Furness Corpn.* (1909), Hudson, Bldg. Contracts, 4th ed., Vol. II., p. 411.

4. — **Method of determining but not of qualifying rights of parties.]**—The marginal note, "Any dispute on this contract to be settled by arbn. here in the usual way," is the fundamental submission to arbn. in this matter, & I interpret it thus: it in no way qualifies the rights of the parties under the contract, but is directed solely to the way in which those rights are to be determined. I treat this as a preliminary point, but the litigation has, I think, arisen from a misconstruction of this submission by the arbitrators, who have taken it as qualifying the rights of the parties under the contract, & not as relating solely to the mode of determination of those rights (*FLETCHER MOULTON, L.J.*).—*Re NORTH WESTERN RUBBER Co., LTD., & HÜTTENBACH & Co.*, [1908] 2 K. B. 907; 78 L. J. K. B. 51; 99 L. T. 680, C. A.

**Annotations:—***Mentd. Produce Brokers Co. v. Olympia Oil & Cake Co.* (1915), 21 Com. Cas. 320, H. L.; *Olympia Oil & Cake Co. v. Produce Brokers Co.* (1916), 86 L. J. K. B. 421, C. A.

## SECT. 2.—REQUISITES OF VALID SUBMISSION.

*Arbitration Act, 1889, s. 27. "Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.*

**5. At common law — Consideration for agreement.]**—In *assumpsit* pltf. declared whereas *lis et controversia* had been moved between pltf., lord of the manor, & deft., claiming to hold certain lands, parcel of the manor by copy, & both parties submitted themselves to the arbitrament of G., the parties reciprocally promising each other that they would abide by the award, & G. awarded the copy to be utterly insufficient, yet deft. continued the possession:—*Held*: a good & sufficient consideration, because it was to avoid controversies & suits.—*COOK & SONGATE'S CASE* (1588), 4 Leon. 31; 74 E. R. 708.

**6. ——— Signature of all other parties.]**—Where, in an action by the assignees of a bkpt., petitioning creditor's debt was to be proved by a deed of reference between himself, bkpt. & others their partners, of all accounts between them or any two of them, & by an award (*inter alia*) of a separate debt of above £100, due from bkpt. to petitioning creditor, who was also the assignee:—*Held*: it was not sufficient to prove the execution of the deed by petitioning creditor & bkpt., without proving also the execution by the other partners (by whom it appeared on the face of it to have been also executed), for the consideration to each to execute his own submission was the submission of all the others, & without proof of that the arbitrators had no authority to make their award between any of the parties.—*ANTRAM v. CHACE* (1812), 15 East, 209; 104 E. R. 823.

**7. ——— Submission by bond — Evidence of execution.]**—In an action upon an award, where the declaration averred a mutual submission of several persons by bond:—*Held*: (1) it was necessary that the execution by all should be proved, though the action was against one only; (2) it would be otherwise if the action were upon the bond, & the bond were joint & several, for then, though the submission might be joint, pltf. might declare upon the several bond, & the declaration would then be satisfied by proof of the execution by deft. alone.—*FERRER & ROLLASON v. OVEN* (1827), 7 B. & C. 427; 1 Man. & Ry. K. B. 222; 6 L. J. O. S. K. B. 28; 108 E. R. 783.

*Annotation*:—*Distd.* *Adams v. Bankart* (1835), 1 Gale, 48.

**8. ——— One party bound by deed — Other by simple contract.]**—It is no objection to a submission to arbn., that one of the parties is bound by deed & the other by simple contract only.—*TOMLIN*

*v. FORDWICH CORPN.* (1836), 2 Har. & W. 172; 6 Nev. & M. K. B. 594.

*Annotation*:—*Mentd.* *Selby v. Whitbread*, [1917] 1 K. B. 736.

**9. — Indorsements on counsels' briefs.]**—On showing cause against a rule it was agreed by indorsements on counsels' briefs that the matters should be referred to a barrister, who should be at liberty to certify what rule, if any, should be drawn up. The only written memorandum of the agreement of reference was the indorsements on counsels' briefs. The arbitrator certified that a rule should be drawn up in certain terms. The ct. thereupon permitted a rule of reference to be drawn up in the terms of the indorsements, & then a second rule pursuant to the certificate of the barrister.—*BRANDON v. SMITH* (1853), Bail Ct. Cas. 181; 22 L. J. Q. B. 321; 1 W. R. 130.

*See, also*, No. 25, *post*.

**10. ——— How proved.]**—A submission to arbn. by agreement written & attested is not sufficiently proved by evidence of a rule making such agreement a rule of ct. under the Act of 1698, s. 1.—*BERNEY (BERNIE) v. READ* (1845), 1 New Pract. Cas. 251; 7 Q. B. 79; 14 L. J. Q. B. 247; 5 L. T. O. S. 194; 9 Jur. 620; 115 E. R. 417.

**11. ———.]**—Pursuant to directions contained in an award, defts. signed an undertaking not to pirate pltf.'s inventions:—*Held*: this was a sufficient recognition of the authority of the arbitrators, & supplied the place of a formal submission.—*STUART v. NICHOLSON* (1836), 3 Bing. N. C. 113; 2 Hodg. 191; 3 Scott, 536; 6 L. J. C. P. 66; 132 E. R. 352.

**12. ———.]**—An application was made *ex p.* to make an agreement to refer to arbn. a rule of ct. The signatures of some of the parties to the agreement were not proved by the attesting witness, but an affidavit was made by the solr. to the other parties that he had called on the attesting witness at the address indicated in the attestation, & that he had refused to prove the execution. The agreement itself provided that either of the persons parties to it might apply *ex p.* to have it made a rule of ct.:—*Held*: in the circumstances, strict proof of the execution might be dispensed with.—*Re DIERDEN'S ARBITRATION* (1864), 4 New Rep. 394; 10 L. T. 690; 10 Jur. N. S. 673; 12 W. R. 978.

**Reference by order — Order is evidence of consent to abide by award.]**—To an action of *assumpsit* for goods sold, etc., deft. pleaded that pltf. had entered a plaint in a county ct. for the same cause of action, & that pltf. & deft. mutually referred the action in the county ct. & all matters in difference to arbn., & that the umpire afterwards

## PART I. SECT. 2.

**a. At common law — "Award" not necessary.]**—Not using the word "award" in an agreement for submission to arbn. does not alter the legal effect of the agreement or the submission.—*AINSWORTH v. CUSACK* (1858), 4 Nfld. L. R. 234.—*NFLD.*

**b. — Only signed by one party.]**—When an agreement to refer is signed by one party only:—*Qu.*: whether it is bad for lack of mutuality.—*THERIAU v. THERIAU* (1858), 4 All. 48.—*CAN.*

**c. — Oral submission.]**—A submission of private arbn. may be valid though not put in writing.—*BAHAL SINGH v. SHIBO RAM SINGH* (1864), W. R. 76.—*IND.*

*oral submission is valid.*—*ERBACH v. BENDER* (1910), 14 W. L. R. 720.—*CAN.*

**10 i. — How proved.]**—A witness to a deed of submission to arbn. refused to

verify the deed by affidavit; in the circumstances the deed of submission was made an order of ct. without such affidavit.—*SHORTALL v. MORAN* (1840), 2 I. L. R. 97.—*IR.*

**10 ii. ———.]**—In order to sustain a parol submission, there must be clear evidence that all the parties to it understood & intended it to operate as a reference.—*DELAPE v. FOSTER* (1854), James, 335.—*CAN.*

**10 iii. ———.]**—A declaration set out a submission, but contained no averment that defts., a corpn., had contracted under their common seal to perform the award:—*Held*: it was not necessary specially to aver that the submission was by deed.—*M'CLINTOCK v. LONDONDERRY & COLERAINE RY. CO.* (1854), 3 I. C. L. R. 609; 6 Ir. Jur. 229.—*IR.*

**10 iv. ———.]**—Pltf. had performed services for a mining co. when

a resolution was passed, whereby he was requested to accompany H. to England & assist in negotiating the sale of the mines, for which he was to be paid for his expenses & such further sum as H. should consider right. H. declined to allow pltf. anything, & defts. refused to pay him anything:—*Held*: the acceptance of the resolution constituted an agreement by pltf. to abide by the decision of H. to the exclusion of any right of action upon a *quantum meruit*, & a verdict for pltf. for a certain amount should be set aside.—*CROASDALE v. HALL* (1895), 3 B. C. R. 384.—*CAN.*

**e. — Arbitrator must be named.]**—By the law of Scotland an agreement to refer future disputes was not binding unless the arbitrator was selected by the agreement. For this purpose the appointment of the person filling a particular office for the time being was not a sufficient selection.—*TANCRED, ARROL & CO. v. STEEL CO. OF SCOTLAND, LTD.* (1890), 15 App. Cas. 125.—*SCOT.*



*Sect. 2.—Requisites of valid submission.]*

made his award of & concerning the matters in difference, etc., & that deft. had been always ready & willing, etc., to perform his part of the award, etc. Replication, that the umpire did not make his award of & concerning the matters in difference:—*Held*: the allegation that pltf. & deft. mutually referred the action in the county ct. & all matters in difference was supported by proof of an order of reference made by the judge of the county ct., under the powers given him by County Cts. Act, 1846 (c. 95), s. 77, by consent of pltf. & deft.—*ROPER v. LEVY (LEVI) (1851)*, 7 Exch. 55; 2 L. M. & P. 621; 21 L. J. Ex. 28; 18 L. T. O. S. 109; 155 E. R. 853.

—.]—An action having been commenced by pltf. against deft., by a judge's order made by the consent of the parties all matters in dispute were referred to arbn., & it was ordered by the like consent that the parties should fulfil & perform the award of the arbitrator, & an indorsement was made on the order under the hands of pltf. & deft. that the arbitrator should have power to order what the parties should do to prevent a repetition of the injuries complained of. The arbitrator ordered deft. to do certain things, & he having neglected to do them, pltf. brought an action for non-performance of the award:—*Held*: the action would lie, as the order by consent was evidence of an agreement between the parties to perform the award.—*LIEVESLEY v. GILMORE (1866)*, L. R. 1 C. P. 570; Har. & Ruth. 849; 35 L. J. C. P. 351; 15 L. T. 386; 12 Jur. N. S. 874.

*Annotation*:—*Refd.* Conolan v. Leyland (1884), 27 Ch. D. 632.

**15. Under Statute of Frauds—Writing necessary.]**—In the course of an arbn., the parties agreed

**15 i. Under Statute of Frauds—Writing necessary.]**—Deft. assigned lands to pltf. & covenanted to put him in possession on a specified date. The covenant having been broken, pltf. & deft., by parol, referred their differences respecting same to an arbitrator, who, by parol, awarded that pltf. should reconvey the land to deft., & that deft. should pay £100 to pltf. Pltf. tendered a reconveyance of the land to deft., which he refused to accept, & pltf. brought an action on the award for £100:—*Held*: the action was not maintainable, the contract between the parties being for an interest in land, which had not been reduced into writing, as required by Stat. Frauds.—*JOHNSTON v. M'ALLISTER (1835)*, 1 Jo. Ex. Ir. 499.

**15 ii. —.]**—The damage sustained by pltf. in an action of debt on an award, in consequence of a road having been made through his land, is not such an interest in land, within Stat. Frauds, as to require that a submission to arbn., to ascertain how much deft. should pay therefor, should be in writing signed by deft.—*GILLANDERS v. ROSSMORE (LORD) (1835)*, 1 Jo. Ex. Ir. 504.—IR.

**1. Under Arbitration (Scotland) Act—Arbitrators not named.]**—A lease of minerals stipulated that the tenants might give up the lease, on it being ascertained by arbiters that the minerals had become exhausted or workable only at an evident loss:—*Held*: although the arbiters were not named, a valid obligation was constituted to refer to arbn. the question whether the minerals were workable only at an evident loss.—*MERRY & CUNINGHAME v. BROWN (1863)*, 35 Sc. Jur. 417.—SCOT.

**g. —.]**—A policy provided that, where the co. did not claim to avoid its liability on the ground of fraud or non-fulfilment of the conditions in the policy, a difference arising between the co. & the insured as to the

amount payable should be referred to the arbn. of persons to be chosen by the parties:—*Held*: reference to unnamed arbiters was valid.—*CALEDONIAN INSURANCE CO. v. GILMOUR (1892)*, 20 R. (Ct. of Sess.) 13.—SCOT.

**h. Under Civil Procedure Code (Act XIV. of 1882), s. 523—General requisites.]**—The agreement to refer must name the arbitrator or arbitrators, & an agreement which provides for the future appointment or election of arbitrators does not fall within the above sect.—*FAZULBOY MEHRALI CHINYOY v. BOMBAY & PERSIA STEAM NAVIGATION CO. (1895)*, I. L. R. 20 Bom. 232.—IND.

**k. Under Indian Arbitration Act, s. 4—Contract Act (IX. of 1872), s. 28.]**—An arbn. clause in a contract amounts to a "submission" within Indian Arbn. Act, s. 4, & is valid, being covered by exception (1) to s. 28 of Contract Act.—*GANGES MANUFACTURING CO. v. INDRA CHAND (1906)*, I. L. R. 33 Calc. 1169.—IND.

**l. —.]**—A clause providing for the reference of any dispute to arbn., contained in a contract effected by means of bought & sold notes, identical in their terms & signed by the respective parties or their agents, constitutes a "submission" within Arbn. Act, s. 4.—*RAM NARAIN GUNGA BISSEN v. LILAHUR LOWJEE (1906)*, I. L. R. 33 Calc. 1237; 10 C. W. N. 814.—IND.

**m. Under C. P. C., Arts. 1341, 1344—General requisites.]**—An agreement that disputes which might arise between the parties to a contract shall be referred to arbitrators constitutes a simple promise to arbitrate & is not an arbn. itself. In order to be valid, this promise must, as the arbn. itself, point out the names & capacities of the parties & the arbitrators, the object in litigation, & the time within which the award shall be given.—*MCKAY v. MACKEDIE (1897)*, Q. R. 11 S. C. 513.—CAN.

by parol that the arbitrator should determine as to a lease to be granted:—*Held*: such an agreement was within the above stat., & the award, having directed a lease to be made, could not be enforced.—*WALTERS v. MORGAN (1792)*, 2 Cox, Eq. Cas. 369; 30 E. R. 169, L. C.

—.]—Disputes arose between landlord & tenant as to the validity of a notice to quit, & if the notice was good, as to compensation to be paid to the tenant R. for away-going crops & otherwise under the lease. The disputes were referred to arbn. by parol submission. The lease was granted by a trustee, S., & confirmed by H. & his wife, & the notice was signed only by H. & his wife. An award was made that there was due to R. from H. & his wife & S., some or one of them, £471 8s. 4d., & that sum was ordered to be paid by some or one of them on demand:—*Held*: the submission related to an interest in land, & required to be in writing under the above stat.—*RAINFORTH v. HAMER (1855)*, 25 L. T. O. S. 247; 3 C. L. R. 298.

**17. Under Act of 1698—Writing necessary.]**—The ct. has no authority by the above Act to make a parol submission to an award a rule of ct., the Act requiring that where the parties agree that their submission to the award should be made a rule of ct., their agreement should be inserted in their submission or the condition of the bond or promise, etc.—*ANSELL v. EVANS (1796)*, 7 Term Rep. 1; 101 E. R. 823.

*Annotations*:—*Apld.* Nusservanjee Pestanjee v. Meer Mynodeen Khan Wullud Meer Sudroodeen Khan Bahadur (1855), 6 Moo. Ind. App. 134, P. C. *Mentd.* R. v. Hardey (1850), 14 Q. B. 529.

**18. —.]**—A parol submission to arbn. is not within the above Act.—*v. MILLS (1811)*, 17 Ves. 419; 34 E. R. 162.

*Annotations*:—*Mentd.* Dawson v. Sadler (1823), 1 Sim & St.

**n. Under Arbitration Ordinance, s. 5—Parties must be ad idem.]**—An application, under the above sect., to stay proceedings in an action on the ground that there was an agreement to submit the matters in dispute to arbn. was refused, since the parties were not *ad idem* as to the terms of the agreement.—*KERR v. BROWN (1905)*, 1 W. L. R. 379.—CAN.

**o. —.] Writing necessary.]**—A submission, not being in writing:—*Held*: not governed by the above Ordinance.—*KIRBACH v. BENDER (1910)*, 14 W. L. R. 720.—CAN.

**p. Under Arbitration Act, s. 27—Proviso in agreement.]**—In an agreement for carrying on a joint business, a board of management was provided, with a proviso that, in case the board should not be able to agree, the matter in dispute was to be referred to the arbn. of S., whose decision was to be final:—*Held*: this clause contained a submission to arbn. within the word "submission" as defined in the above sect.—*Re FENWICK & PORT JACKSON CO-OPERATIVE SS. CO. (1897)*, 18 N. S. W. L. R. 405.—AUS.

**q. Under Arbitration Act, 1908—Clause in lease.]**—A lease contained provisions for the ground-rent to be fixed at the commencement of each period of ten years by the award of two arbitrators to be chosen, one by the landlords, & the other by the tenant, or of an umpire to be chosen & appointed by them in writing before they entered upon the arbn., & that the above Act should apply to the arbn. so far as the same was applicable:—*Held*: by virtue of the wide definition of "submission" in Arbn. Act Amendment Act, 1906, which definition was incorporated in Arbn. Act, 1908, the reference to arbn. in the lease was a submission within the Act of 1908.—*BRYANT v. THOMSON (1914)*, 33 N. Z. L. R. 983.—N.Z.

537; *Nichols v. Roe* (1834), 3 My. & K. 431; *Re Story, James & Robinson* (1837), 7 Ad. & El. 602.

**19. Cause depending at time of submission.]**—Where there was a cause depending at the time of the submission:—*Held*: the case was not within the above Act.

The Act is only declaratory of what the law was before, in cases where there was a cause depending in the ct. (LORD MANSFIELD).—*LUCAS v. MARKHAM v. WILSON* (1758), 2 Burr. 701; 97 E. R. 522.

*Annotation*:—*Consd. Lonsdale v. Littledale* (1794), 2 Ves. 451.

**20. Under Common Law Procedure Act, 1854 — Writing necessary.]**—Where parties to a deed covenant to refer disputes which may arise to arbitrators to be chosen by them, & on disputes arising appoint arbitrators, the submission is by parol, & therefore, cannot be made a rule of ct. under s. 17 of the above Act.—*Ex p. GLAYSHER* (1864), 3 H. & C. 442; 34 L. J. Ex. 41; 159 E. R. 603; *sub nom. Re MAITLAND & GLAISHER, Ex p. GLAISHER*, 11 L. T. 638.

*Annotations*:—*Distd. Re Newton & Hetherington* (1865), 19 C. B. N. S. 342; *Re Willcox & Storkey* (1866), L. R. 1 C. P. 671.

**21.** —.]—A lease contained a proviso that, in case any disputes & differences should arise between the parties, they should be referred to two arbitrators, one to be chosen by each party, & that, if either of them should neglect to name an arbitrator on his part within seven days after notice of the appointment of an arbitrator by the other, the arbitrator so appointed should act for both; & it was further agreed that the submission of the parties to the award of the arbitrators or arbitrator might at the instance of either party be made a rule of ct. Disputes having arisen, the lessor appointed an arbitrator in writing, & gave notice in writing to the lessee that he had done so: the latter did not appoint an arbitrator on his part; whereupon, after due notice, the arbitrator appointed by the lessor proceeded *ex p.* & made an award:—*Held*: there was a submission in writing which could be made a rule of ct. under the Act of 1698, & C. L. P. Act, 1854, s. 17.—*Re NEWTON & HETHERINGTON* (1865), 19 C. B. N. S. 342; 6 New Rep. 235; 12 L. T. 633; 13 W. R. 863; 144 E. R. 819.

*Annotation*:—*Consd. & Folld. Re Willcox & Storkey* (1866), L. R. 1 C. P. 671.

**22. Reference to nominee of firm.]**—By an agreement under seal for the transfer of a business, it was stipulated that "in case any dispute should arise between the parties thereto concerning any matter relating to the business, or those presents or the construction thereof, such disputes should be referred to such member of the firm of B. & Co., as should be appointed by that firm to undertake the reference, in accordance with & subject to the provisions of" the above Act. Disputes having arisen, B. & Co. appointed T., a member of their firm, to be an arbitrator, & he duly made his award:—*Held*: there was a sufficient submission in writing to be made a rule of ct. under s. 17 of the above Act.—*Re WILLCOX & STORKEY* (1866), L. R. 1 C. P. 671.

**23. Under Act of 1889 — Bought & sold notes — Arbitration clause in bought note only.]**—In an action for the price of goods sold, the bought note signed by defts. contained a provision for arbn. in case of dispute, whilst in the sold note signed by pltf. this provision was absent:—*Held*: there

was no submission within the above Act, for an agreement to submit to arbn. must be in writing & signed by both parties as their agreement.—*CAERLEON TINPLATE CO. v. HUGHES* (1891), 60 L. J. Q. B. 640; 65 L. T. 118; 7 T. L. R. 619.

*Annotations*:—*Distd. Baker v. Yorkshire Fire & Life Assce.*, [1892] 1 Q. B. 144. *Consd. Hickman v. Kent or Romney Marsh Sheep-Breeders' Asscn.*, [1915] 1 Ch. 881. *Mentd. Morgan v. Harrison (William)* (1907), 76 L. J. Ch. 548, C. A.

**24. Insurance policy — Not signed by assured.]**—An action on a fire insurance policy having been stayed, on the ground that the policy contained a clause that any differences arising under it should be referred to arbn.:—*Held*: the policy, although not signed by pltf., amounted to a submission to arbn. within ss. 4 & 27 of the above Act, & the action was rightly stayed.—*BAKER v. YORKSHIRE FIRE & LIFE ASSURANCE CO.*, [1892] 1 Q. B. 144; 61 L. J. Q. B. 838; 66 L. T. 161.

*Annotations*:—*Apld. Aitken v. Batchelor* (1893), 68 L. T. 530. *Consd. Hickman v. Kent or Romney Marsh Sheep Breeders' Asscn.*, [1915] 1 Ch. 881. *Mentd. Morgan v. Harrison (William)*, [1907] 2 Ch. 137, C. A.

**25. Indorsements on counsels' briefs.]** At the trial of an action terms were agreed upon by both sides (*inter alia*) that the counterclaim be referred to arbn. Counsel on either side indorsed & signed their briefs to that effect:—*Held*: these indorsements constituted a submission to arbn. within s. 27 of the above Act.—*AITKEN v. BACHELOR (BATCHELOR)* (1893), 62 L. J. Q. B. 193; 68 L. T. 530; 9 T. L. R. 221; 37 Sol. Jo. 252; 5 R. 218.

**26. — Company's articles of association.]**—An article providing for the reference of disputes to arbn. is a sufficient submission in writing within ss. 4, 27 of the above Act. — *HICKMAN v. KENT OR ROMNEY MARSH SHEEP-BREEDERS' ASSCN.*, [1915] 1 Ch. 881; 84 L. J. Ch. 688; 113 L. T. 159; 59 Sol. Jo. 478.

**27. Under Stamp Acts — Value not certain over £20.]**—An agreement of reference of all matters in difference in a cause does not require a stamp, when it does not appear for certain that the matter of the agreement is of the value of £20.—*LLOYD v. MANSELL* (1850), 1 L. M. & P. 130; 19 L. J. Q. B. 192.

*Annotation*:—*Mentd. Brunsdon v. Allard* (1859), 28 L. J. Q. B. 306.

**28. — Several parties on one side — One stamp only.]**—Where several underwriters on a policy enter into an agreement to refer the cause to arbn., that agreement & the award require each but one stamp, there being a community of interest between the parties in the subject-matter, & they are consequently receivable in evidence.—*GOODSON v. FORBES, GOODSON v. —* (1815), 1 Marsh. 525; 6 Taunt. 171; 128 E. R. 999.

*Annotation*:—*Mentd. Ramsbottom v. Davies* (1839), 7 Dowl. 173.

**29. — Memorandum amounting to new submission.]**—On the fly-leaf of an arbn. bond was an indorsement, bearing date after the time limited by the bond for making the award, & stating that the parties within named had met that day by consent, on the award:—*Held*: this memorandum, being evidence of a new agreement to refer, was not admissible in evidence without a stamp.—*STEPHENS v. LOWE, STEPHENS v. STRICK* (1832), 9 Bing. 32; 2 Moo. & S. 44; 1 L. J. C. P. 150; 131 E. R. 526.

**27 i. Under Stamp Acts—5 & 6 Will. 4, c. 64.]**—*Held*: 5 & 6 Will. 4, c. 64, s. 1, exempting submissions to arbn. from stamp duty, applied as well to submissions entered into previous

to the passing of the Act as to those entered into subsequently.—*HOOD v. HOOD* (1840), 1 Craw. & D. 413.—*IR.*

27 ii.

13

14 *Vict. c. 97.*—An

instrument of submission to arbn., since the above Act, not under seal, requires only a 2s. 6d. stamp.—*MAHON v. DAVIS* (1852), 5 Ir. Jur. 107.—*IR.*



### SECT. 3.—WHAT CONSTITUTES A SUBMISSION TO ARBITRATION.

#### SUB-SECT. 1.—IN GENERAL.

**30. Sale of land—Reference by order of court.]—**Having preferred a petition to the Lords Comrs. for the custody of the Great Seal, showing (*inter alia*) that he had been reported the best purchaser of a lot, in the particular mentioned to contain 106 acres, at the price of £4,700, but that such lot did contain no more than 84 acres, & praying a proportionable allowance out of his purchase money, the petition, on coming on to be heard, was ordered to stand over, & it was ordered that defts.' solr. should, according to his undertaking in ct., show to B., at such times as he should appoint, the land, according to the particular under which petitioner purchased, & B. was to certify his opinion. Afterwards, defts. preferred their petition to the Lord Chancellor setting forth (*inter alia*) that defts.' solr. had shown the land to B., & that he was ready to make his report concerning same, & prayed that C.'s petition might be set down to be heard upon B.'s report, & that same might be dismissed & defts. paid their costs. Both petitions having come on, & B. attended in his place at the bar & delivered in ct. a report in writing, which was offered to be read, but objected to:—*Held*: this report should be filed as an award, B. being an arbitrator.—*VERNON v. WELLS* (1771), Dick. 452; 21 E. R. 345.

**31. Reference by order of inferior court—Act of 1698.]—**An order of reference of a borough ct. of record expressed to be made by consent of the attorneys of the parties, & containing a consent for making the order a rule of one of the Superior Cts. at Westminster, may be made a rule of that superior ct. under the above Act, as an agreement of reference between the parties.—*HARLOW v. WINSTANLEY* (1850), 1 L. M. & P. 425; 19 L. J. Q. B. 430; 15 Jur. 426.

**32. Reference under 15 & 16 Vict. c. 86, s. 42, to surveyor for inquiry & report.]—**An application was made to the ct. in a suit by mtgees. of a life estate, & the ct. made a reference under the above sect. to a surveyor for inquiry & report as to what trees might prudently be cut. Upon the surveyor's report coming in, the ct. made an order directing timber to be cut as recommended by the report. On a motion by remaindermen to discharge or vary the order:—*Held*: (1) reports of that nature, although entitled to great weight, as affording independent testimony, could not be considered as awards or in any other light than as furnishing materials for the information & guidance of the ct.; (2) the remaindermen were not bound by the report.—*FORD v. TYNTE* (1864), 2 De G. J. & Sm. 127; 3 New Rep. 676; 10 L. T. 209; 10 Jur. N. S. 429; 12 W. R. 613; 46 E. R. 323, L.JJ.

*Annotations*:—*Re*ld. *Adamson v. Gill* (1868), 17 L. T. 464; *Baker v. Sebright* (1879), 13 Ch. D. 179.

**33. Reference under Lands Clauses Consolidation Act, 1845 (c. 18)—Common Law Procedure Act,**

**1854.]—**A reference to arbn. under the above Act of 1845 is "a submission to arbn. by consent" within s. 17 of the above Act of 1854.—*Ex p. HARPER* (1874), L. R. 18 Eq. 539; 22 W. R. 942.

*Annotations*:—*Ex*pld. *Re Harper & G. E. Ry. Co.* (1875), L. R. 20 Eq. 39. *Ment*d. *Rhodes v. Alredale Drainage Comrs.* (1876), 1 C. P. D. 402, C. A.

**34. ———.]—***Semble*: a submission to arbn. under the above Act of 1845 is not "a submission to arbn. by consent" within s. 17 of the above Act of 1854.—*Re HARPER & G. E. Ry. Co.* (1875), L. R. 20 Eq. 39; 44 L. J. Ch. 507; 32 L. T. 214; 23 W. R. 371.

*Annotations*:—*Re*ld. *Rhodes v. Alredale Drainage Comrs.* (1876), 1 C. P. D. 402, C. A.; *Re Stoker & Morpeth Corpn.* (1914), 84 L. J. K. B. 1169.

*See, further*, COMPULSORY PURCHASE OF LAND & COMPENSATION.

**35. Reference under Public Health Act, 1875 (c. 55)—Common Law Procedure Act, 1854.]—**The reference to arbn. of a question of disputed compensation, pursuant to s. 180 of the above Act of 1875, is "a submission to arbn. by consent" within the above Act of 1854.—*WARBURTON v. HASLINGDEN LOCAL BOARD* (1879), 48 L. J. Q. B. 451, D. C.

*Annotations*:—*A*pld. *Knowles v. Bolton Corpn.*, [1900] 2 Q. B. 253, C. A. *Ment*d. *Re Gifford & Bury Town Council* (1888), 58 L. T. 522, D. C.; *Re Yeadon L. B. & Yeadon Waterworks Co.* (1889), 41 Ch. D. 52, C. A.

*See, further*, PUBLIC HEALTH AND LOCAL ADMINISTRATION.

**36. Reference under local Act of Parliament—Act of 1889.]—**By Bristol Corpn. Act, 1904, s. 53 (12), it was provided that "any dispute or difference arising between the corpn. & any person or persons, who are or may be interested in the provisions of this sect. as to the proper construction of such provisions, or as to the carrying out of the matters dealt with in this sect., or in anywise in connection therewith, shall be referred to the decision of a second person, or such other fit person as shall be mutually agreed upon, whose decision shall be final":—*Held*: the sect. constituted a reference to arbn., & the arbitrator had power, under ss. 7 (b) & 24 of the above Act of 1889, to state a special case for the opinion of the High Ct., the words "whose decision shall be final" not depriving the arbitrator of that power.—*Re CARPENTER & BRISTOL CORPN.*, [1907] 2 K. B. 617; 76 L. J. K. B. 1145; 97 L. T. 461; 71 J. P. 417; 23 T. L. R. 654; 51 Sol. Jo. 589; 5 L. G. R. 977, C. A.

*See, further*, LOCAL GOVERNMENT.

*See, generally*, cross-references on p. 355, *post*.

**37. Question of costs—Reference to prothonotary.]—**Pltf. having succeeded in setting aside a nonsuit, deft. gave a cognovit for ls. damages & such costs as the prothonotary should think fit. The prothonotary having refused to allow pltf. the costs of the trial, the ct. declined interfering.—*ELVIN v. DRUMMOND* (1827), 4 Bing. 415; 1 Moo. & P. 88; 6 L. J. O. S. C. P. 31; 130 E. R. 827.

to arbn.—*RITCHIE v. SNOWBALL* (1887), 26 N. B. R. 258.—CAN.

#### PART I. SECT. 3, SUB-SECT. 1.

**s. Whether submission or not—Question of fact.]—**S. & P. were engaged in business together, & a dispute having arisen as to the state of accounts between them, a third person was chosen to enable them to effect a settlement. S. claimed the person so chosen was only to go over the accounts & make a statement, while P. contended that the whole matter was left to him as an arbitrator:—*Held*: whether or not there was a submission to arbn. was a question of fact, as to which the Supreme Ct. of Canada would not, on appeal, interfere with the finding of the trial judge that all matters were submitted, affirmed as it was by a

Divisional Ct. & the Ct. of Appeal.—*SNETSINGER v. PETERSON* (1894), 1 Cout. Dig. 146.—CAN.

**t. Reference of boundary dispute.]—**Pltf. having replevied lumber cut by deft. on land claimed by pltf. as being within the bounds of a licence granted to him by the Govt., they agreed to settle the suit, & that the lines of the licence should be surveyed & established by two named surveyors, & if they did not agree, they were to call in a third surveyor, the decision of any two of them to be final:—*Held*: the bounds of pltf.'s licence being a matter in dispute, the agreement that the surveyors should determine it was a submission

u. ———.]—The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, naming a person to fix the true division line the ground, & agreeing to abide by his decision:—*Held*: the agreement was a contract binding upon the parties to be executed between them according to the terms therein expressed, & was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbn.—*McGOEY v. LEAMY* (1897), 27 S. C. R. 545.—CAN.



## SUB-SECT. 2.—REFERENCE TO JUDGE.

**38. Judge's order—Not award.]**—In trover by pltfs., as churchwardens, to recover possession of a book belonging to the parish, a verdict was taken for pltfs., subject to a special case. Upon the argument of the special case, the ct. directed a nonsuit. The case was afterwards turned into a special verdict, & upon the argument, it was agreed "that the judgment of the ct. below should stand, & the select vestry be at an end, the costs of both sides to be paid out of the parish funds." This agreement was embodied in a judge's order, which was afterwards made a rule of ct. Difficulties arising in carrying out this order, the ct. of error awarded a *venire de novo*; & upon the cause again coming on for trial, an order of *Nisi Prius* was drawn up, by consent, referring it to Williams, J. to determine the cause & all matters relating to it, with power to direct in what manner the former order (& rule thereon) was to be carried into effect. Williams, J. made an order directing defts. to pay to pltfs. a certain sum (the amount at which pltfs.' costs had been taxed), "unless in the meantime the sum be paid to pltfs. out of the funds of the parish." This last mentioned order having been made a rule of ct., & the money not having been paid, pltfs. issued an execution thereon under Judgments Act, 1838 (c. 110), s. 18:—*Held*: the order of Williams, J. was not an award, but a judge's order, & made with competent authority, but, being conditional, it was not one upon which an execution could at once issue, in pursuance of the above Act.—*GIBBS v. FLIGHT* (1853), 13 C. B. 803; 22 L. J. C. P. 256; 17 Jur. 1034; 138 E. R. 1417.

**39. — Valid award.]**—Certain goods having been seized by the sheriff under an execution against S., a third party claimed to be entitled to them, whereupon the sheriff obtained a rule under Interpleader Act, 1831 (c. 58), & brought pltf. & claimant before a judge at chambers, who decided that the goods belonged to claimant, & ordered the sheriff to deliver up possession of them to him, & that pltf. should pay the costs of claimant & the sheriff. The order was not stated on the face of it to have been made by consent, but was in fact so made. Pltf. accordingly paid the costs, pursuant to the order, & the sheriff gave up possession of the goods; but pltf., having discovered that there was other property in debtor's possession which did not belong to claimant, ruled the sheriff to return the writ, & on his returning *nulla bona*, brought an action against him for a false return:—*Held*: although the order was bad as an order under the above Act, still it was binding & final between the parties as an award between them, the parties having, by their conduct, agreed to submit the matter to the decision of the judge.—*HARRISON v. WRIGHT* (1845), 13 M. & W. 816; 2 Dow. & L. 695; 14 L. J. Ex. 196; 153 E. R. 342, Ex. Ch.

*Annotations*:—*Reid. Howard v. Gossett, Gossett v. Howard* (1847), 6 State Tr. N. S. 319; *Dale's Case, Enraght's Case* (1881), 6 Q. B. D. 376, C. A.

**40. Special case—Raising questions of fact — No appeal from decision.]**—Where a special case is calculated & intended to raise for decision questions of fact only, the proceedings are *extra cursum curiæ*, the judgment of the ct. is in the nature of an arbitrator's award, & an appeal cannot be entertained if its competency is objected to by

the party holding the judgment. If in these circumstances the Ct. of Appeal reverses the judgment below, the House of Lords has no jurisdiction except to reverse as incompetent the judgment of the Ct. of Appeal.—*BURGESS v. MORTON*, [1896] A. C. 136; 65 L. J. Q. B. 321; 73 L. T. 713; 12 T. L. R. 104, H. L.

*Annotation*:—*Distd. Druce v. Young*, [1899] P. 84.

**41. Documents submitted by consent of both parties—No appeal from decision.]**—Where, on a summons for the production of documents under Jud. Act, 1875 (c. 77), Ord. 31, r. 11, by the consent of both parties, the documents in question were submitted to the judge:—*Held*: his decision could not be questioned in the Ct. of Appeal.—*BUSTROS v. WHITE* (1876), 1 Q. B. D. 423; 45 L. J. Q. B. 642; 34 L. T. 835; 24 W. R. 721; 3 Char. Pr. Cas. 229.

**42. Reference to court — Extra cursum curiæ—No appeal.]**—Where in the exercise of its proper jurisdiction the ct. has only one course of proceeding preparatory to its decision, *e.g.*, the reference of an issue of fact to a jury, & the parties agree to a deviation, the decision of the issue by the ct., thus giving to the ct. a power which otherwise it would not possess, the ct. is thereby placed in the position of arbitrator, & no appeal will lie.—*DUDGEON v. THOMSON* (1854), 1 Macq. 714; 24 L. T. O. S. 39, H. L.

*Annotations*:—*Consd. & Follid. Renfrew v. Hoby* (1856), 4 W. R. 632, H. L.; *Robin v. Hoby* (1856), 2 Jur. N. S. 647, H. L. *Consd. Burgess v. Morton*, [1896] A. C. 136, H. L.

**43. —.]**—Where the ct. below has acted as arbitrator, there is no appeal.

In an action of *declarator* an issue was submitted to a jury whether a corpn. had, under its charter, levied certain dues. After some witnesses were examined, & had proved payments of dues, it was agreed to withdraw the case from the jury & submit it to the Ct. of Session, each party being entitled to raise any question of law which the notes & record suggested. The ct. decided that the levy of dues was not in virtue of the charter. From this judgment pursuers appealed:—*Held*: there was an incompetency of appeal.—*RENFREW (PROVOST) v. HOBY* (1856), 4 W. R. 632; *sub nom. ROBIN v. HOBY*, 2 Macq. 478; 2 Jur. N. S. 647, H. L.

*Annotation*:—*Consd. Burgess v. Morton*, [1896] A. C. 136, H. L.

**44. — — —.]**—Where proceedings are taken out of the ordinary *cursus curiæ* with the assent of the parties, all subsequent interlocutors in the course adopted, though pronounced adversely, are in the nature of awards, & not subject to appeal.

Where in an action of *declarator* of right of way defender had consented to judgment against him upon issues describing the footpath claimed as leading "by or near" a red line on a plan in process, & the ct. had subsequently directed an engineer to lay off the footpath so consented to "in such a manner & such a line as to make the footpath least burdensome to defender":—*Held*: (1) the ct., by so doing, had departed from the *cursus curiæ*; (2) all the interlocutors following on that departure were extra-judicial & not appealable.—*WHITE v. BUCCLEUCH (DUKE)* (1866), L. R. 1 Sc. & Div. 70, H. L.

*Annotation*:—*Consd. Pisani v. A.-G. for Gibraltar* (1874), L. R. 5 P. C. 516, P. C.

## PART I. SECT. 3, SUB-SECT. 2.

**42 i. Reference to court—Extra cursum curiæ.]**—The advice given to the Govt. by the Ct. of Appeal on a question submitted by virtue of 61 Vict. c. 11, is only an opinion which has not the force of a matter *res judicata* & is not a compromise nor an arbn., as the matter is

not referred by consent of parties, but solely on the initiative of the Govt.—*PEDRO DE GALINDEZ v. SA MAJESTÉ LE ROI* (1904), Q. R. 26 S. C. 171.—*CAN.*

**42 ii. — — —.]**—In the course of a suit for recovery of possession of some land, the parties agreed that they should

ask the Ct. to decide the question of title on the basis of the *thakbust* map only. The ct. decided accordingly:—*Held*: in so deciding the ct. acted as arbitrator, & no appeal lay from that decision.—*SARADINDU ROY v. BHAGABATI DEBYA CHOWDHURANI* (1906), 10 C. W. N. 835.—*IND.*

**Sect. 3.—What constitutes a submission to arbitration: Sub-sects. 2, 3, 4, 5 & 6.]**

**45. Reference to judge personally — No appeal from decision.]**—Questions having arisen between the official liquidator of a co. & a mtgee., with whom the trustees had deposited deeds belonging to the co., with respect to the validity of the security, the parties signed an agreement that their rights should be determined in a summary way by the judge acting in the matter of the winding-up:—*Held*: this was a submission to the judge personally, & no appeal could be brought to the Ct. of Appeal in Ch.—*Re DURHAM COUNTY PERMANENT BENEFIT BUILDING SOCIETY, Ex p. WILSON* (1871), 7 Ch. App. 45; 41 L. J. Ch. 164.

*Annotation*:—*Reid. Law v. Garrett* (1878), 8 Ch. D. 26, C. A.

#### SUB-SECT 3.—REFERENCE TO COUNSEL.

**46. Counsel — Agreement to be bound by opinion — Whether liable for stamp.]**—A. & B. having a dispute as to the liability of B. to pay money to A., agreed to submit a case to a barrister, & to be bound by his opinion. In an action to enforce such payment:—*Semle*: the opinion was admissible in evidence without an award stamp.

There is no *animus arbitrandi* (DENMAN, C.J.).

We have all of us given opinions by which, we were told, the parties intended to abide. I never had any opinion of mine, given under such circumstances, stamped. It certainly is not the practice (TAUNTON, J.).—*BOYD v. EMMERSON* (1834), 2 Ad. & El. 184; 4 Nev. & M. K. B. 99; 4 L. J. K. B. 43; 111 E. R. 71.

*Annotations*:—*Distd. Carr v. Smith* (1843), 5 Q. B. 128. *Mentd. Chambers v. Miller* (1862), 13 C. B. N. S. 125.

**47. — — — — —.]**—If two persons agree to refer a case to counsel, & to be bound by his opinion, if the opinion does not contain the evidence of the agreement, it is not liable to an award stamp.—*SYBRAY v. WHITE* (1836), 1 M. & W. 435; 2 Gale, 68; Tyr. & Gr. 746; 5 L. J. Ex. 173; 150 E. R. 504.

*Annotations*:—*Distd. Carr v. Smith* (1843), 5 Q. B. 128. *Mentd. Barnes v. Ward* (1850), 9 C. B. 392; *Re Williams v. Groucott* (1863), 4 B. & S. 149.

#### SUB-SECT. 4.—REFERENCE TO RACING STEWARDS.

**48. Racing stewards — Disputes arising out of sporting events.]**—It would be very strange to say that it is to be held that all the proceedings before

**45 i. Reference to judge personally—Effect of appeal.]**—Where, with the acquiescence of both parties, a judge ordinary deviates from the *cursus curiæ*, he thenceforth ceases to act judicially & becomes an arbitrator, subject to no appeal. But if the party against whom the judge ordinary, *qua* arbitrator, decides, reclaims to the Inner House, & there obtains a reversal, he is personally precluded from afterwards objecting to an appeal by his opponent to the House of Lords.—*BICKERT v. MORRIS* (1866), L. R. 1 Sc. & Div. 47.—SCOT.

**a. Reference to county court judge.]**—Where the interested parties agree that a county judge may decide the matter in a summary way, he is in effect an arbitrator, & no appeal lies from his decision.—*HARRIS v. HARRIS* (1901), 8 B. C. R. 307.—CAN.

**b. Reference to assistant-barrister.]**—In cases where the assistant-barrister is entitled to the assistance of a jury, he

may, with the consent of the parties, swear in a lesser number of jurors than twelve, & such consent shall not take away the right of appeal; but if the parties agree in referring the matters in dispute to any number of persons whose decision is to be in the nature of an award, then the right of appeal is taken away.—*M'GHILL v. STEWART* (1839), 1 Craw. & D. 261.—IR.

#### PART I. SECT. 3, SUB-SECT. 3.

**46 i. Counsel—Agreement to be bound by opinion—No appeal.]**—In a suit pltf. & defts. applied that a pleader might be appointed to ascertain who held the land on either side of the *khal* in dispute, & agreed that, if pltf. were found in possession of such land, they should get a decree, while if first deft. was found in possession the suit should be dismissed. Pltf.'s suit was decreed in accordance with the comr.'s report. From this decision defts. appealed to the subordinate judge, who remanded the case to the first ct.:—*Held*: the

the steward of races are to be according to the strict rules of law, that there is to be a point regularly raised before him, & parties heard upon it—I suppose by counsel—& a formal decision after the hearing. It would next be said that the evidence must be given upon oath. The truth is, the parties mean that the matter shall be to the decision of the steward, & that, if he in fact, that shall be final (ALDERSON, B.).—*BOW v. JONES* (1845), 14 M. & W. 193; 14 L. 257; 5 L. T. O. S. 201; 153 E. R. 445.

*Annotations*:—*Distd. Carr v. Martinson* (1859), 1 E. & E. 456; *Sadler v. Smith* (1869), L. R. 4 Q. B. 214. *Reid. Dines v. Wolfe* (1869), L. R. 2 P. C. 280, P. C.

**49. — — — — —.]**—One of the conditions of a race was that "all disputes should be settled by the stewards, whose decision should be final." There were four stewards, & a dispute having arisen as to whether pltf.'s horse or deft.'s mare was the winner, three of the stewards voted in favour of pltf.'s horse. One of the three had betted against deft.'s mare:—*Held*: (1) the steward was not disqualified from acting by reason of his pecuniary interest in the event of the race; (2) even assuming that he was, that did not annul the decision of the other stewards.

This is not like the case of a judge or an arbitrator: it is a reference according to certain fixed rules, one of which was that the stewards should decide all disputes, the object being to prevent the necessity of resorting to litigation or arbn. (POLLOCK, C.B.).—*ELLIS v. HOPPER* (1858), 3 H. & N. 766; 28 L. J. Ex. 1; 32 L. T. O. S. 77; 22 J. P. 724; 4 Jur. N. S. 1025; 7 W. R. 15; 157 E. R. 677.

*Annotations*:—*Consd. Parr v. Winteringham* (1859), 1 E. & E. 394. *Reid. Dines v. Wolfe* (1869), 5 Moo. P. C. C. N. S. 382, P. C. *Mentd. Carr v. Martinson* (1859), 1 E. & E. 456.

**50. — — — — —.]**—Stewards of horse races are not in the strict legal position of judges or arbitrators; & where there are more than one, it is not necessary, to make their decision valid, that it should have been arrived at jointly. It need only be fair & final.—*PARR v. WINTERINGHAM (WITHERINGTON)* (1859), 1 E. & E. 394; 28 L. J. Q. B. 123; 32 L. T. O. S. 253; 5 Jur. N. S. 787; 7 W. R. 288; 120 E. R. 957.

*Annotations*:—*Reid. Dines v. Wolfe* (1869), L. R. 2 P. C. 280, P. C. *Mentd. Carr v. Martinson* (1859), 28 L. J. Q. B. 126.

*See, further, GAMING & WAGERING.*

#### SUB-SECT. 5.—REFERENCE TO FOREIGN TRIBUNAL.

*See Nos. 324, 329—331, post.*

agreement was valid, & the order of remand passed by the subordinate judge was bad in law.—*BAHIR DAS CHAKRAVARTI v. NOBIN CHUNDER PAL* (1901), 1 L. R. 29 Calc. 306.—IND.

#### PART I. SECT. 3, SUB-SECT. 6.

**c. Proceedings not changed by introduction of third valuer or umpire.]**—A proceeding which opens as a valuation is not converted into an arbn. by the introduction or action of a third valuer or even an umpire.—*CAMPBELL v. IRWIN* (1913), 25 O. W. R. 853; 5 O. W. N. 957.—CAN.

**d. Valuation indicated by use of "valuers."]**—It is indicative that valuation & not arbn. was intended by the written submission to three persons that they are therein termed "valuers," & that the submitting parties offered no evidence. *Re LAIDLAW & CAMPBELL-FORD, LAKE ONTARIO & WESTERN RY. Co.* (1914), 25 O. W. R. 431; 5 O. W. N. 534; 31 O. L. R. 209; 19 D. L. R. 481; 6 O. W. N. 196.—CAN.



## SUB-SECT. 6.—DISTINCTION BETWEEN ARBITRATION AND VALUATION.

**51. Fixing price of real estate—On sale.]—**The distinction between an arbn. & a valuation is that an arbn. is a reference of some matter or matters in difference between the parties; but an appraisal or valuation prevents differences & does not settle any which have arisen.

Parties entered into a contract to purchase a brewery & plant at a price to be fixed by arbitrators, who were to choose an umpire before entering upon the valuation. The arbitrators could not agree on an umpire:—*Held*: the ct. had no authority, under C. L. P. Act, 1854, ss. 1, 2, to appoint an umpire for such a purpose.

Undoubtedly, as a general rule, the seller wants to get the highest price for his property & the purchaser wishes to give the lowest, & in that sense it may be said that an expected difference between the parties is to be implied in every case, but unless a difference has actually arisen it does not appear to me to be an "arbn." Undoubtedly, if two persons enter into an arrangement for the sale of any particular property, & try to settle the terms, but cannot agree, & after dispute & discussion respecting the price, they say, "We will refer this question of price to A. B., he shall settle it," & thereupon they agree that the matter shall be referred to his arbn., that would appear to be "arbn.," in the proper sense of the term, & within the Act; but if they agree to a price to be fixed by another, that does not appear to me to be an arbn. (ROMILLY, M.R.).—*COLLINS v. COLLINS* (1858), 26 Beav. 306; 28 L. J. Ch. 184; 32 L. T. O. S. 233; 5 Jur. N. S. 30; 7 W. R. 115; 53 E. R. 916.

*Annotations*:—*Apld.* *Bos v. Helsham* (1866), L. R. 2 Exch. 72. *Consd.* *Re Hopper, Barningham & Wrightson* (1867), L. R. 2 Q. B. 367; *Vickers v. Vickers* (1867), L. R. 4 Eq. 529. *Expld.* *De Rosaz v. Anglo-Italian Bank* (1869), 10 B. & S. 354. *Apld.* *Re Evans, Davies & Caddick* (1870), 22 L. T. 507. *Distd.* *Thomson v. Anderson* (1870), L. R. 9 Eq. 523. *Consd.* *Turner v. Goulden* (1873), L. R. 9 C. P. 57; *Re Dawdy* (1885), 15 Q. B. D. 426, C. A.; *Re Carus-Wilson & Greene* (1886), 56 L. J. Q. B. 530, C. A.

**52.** —.]—Where, in articles of agreement for the sale of land by A. to B., it is stipulated that the price shall be fixed by an arbitrator, & the agreement be made a rule of ct., the award being published & the agreement made a rule of ct., A. cannot have an attachment against B. for non-

**51 i. Fixing price of real estate—On resumption by Crown.]—**By deed of grant, certain lands were vested by the Crown in trustees. The deed provided that the Crown might resume any part of the land for any public purpose, & that, on resumption, the value of the land so required should be paid by the Govt. to the party entitled thereto at a valuation fixed by arbitrators. The Crown gave notice of intention to resume a portion of the land. An arbitrator was appointed by the trustees & one was appointed by the Crown. These arbitrators appointed an umpire. After hearing evidence the arbitrators were unable to agree & the umpire, by a document, which he called an award, awarded £3,835 as the valuation of the land:—*Held*: the proceedings were proceedings to determine a valuation, & not an arbn.—*Re R. & ACCLIMATISATION SOCIETY OF QUEENSLAND* (1912), S. R. Q. 10.—AUS.

**1. Fixing value of buildings at expiry of building lease.]—**A building lease contained a covenant that at the expiration of the lease the buildings on the premises should be valued by disinterested persons:—*Held*: the valuation provided for was not an arbn., but a mere appraisal.—*GILBERT v. SMITH* (1878), 2 P. & B. 211.—CAN.

**g. Assessment of sums due under building contract.]—**Pltf. entered into a contract with a society to erect a building within a specified time, for a certain sum, & the society, if dissatisfied with the progress of the work, was authorised to complete the building, & charge the expense to pltf. The society took possession, & proceeded with the unfinished work. It was agreed that the unfinished work should be estimated by two mechanics, & that from the sum determined by them as necessary for that purpose the society should deduct a certain sum, & charge the balance to pltf.:—*Held*: the estimate of the unfinished work was not an award in the legal sense of the word, but a mere valuation or appraisal.—*HODGE v. REID* (1871), N. B. Dig. 308.—CAN.

**h. —.]—**By an agreement between L. & a building committee L. was to forego all right to compensation except under the agreement. E. was to inspect & value the work done, & if not according to plans L. was to rectify same. E. was to value the building in its then condition, & his award was to be final; he was also to value material on the ground, which was to be paid for at original cost:—*Held*: the agreement was that a price to be fixed by E. was to be paid for L.'s work, & E. was not

payment of the price awarded, such agreement not being within the Act of 1698., & A.'s only remedy is by action on the articles.—*Re LEE & HEMINGWAY* (1834), 15 Q. B. 306, n.; 3 Nev. & M. K. B. 860; 117 E. R. 474; *sub nom.* *LEE v. HEMINGWAY*, 3 L. J. K. B. 124.

*Annotations*:—*Distd.* *Parkes v. Smith* (1850), 15 Q. B. 297. *Consd. & Apld.* *Collins v. Collins* (1858), 26 Beav. 306.

**53.** —.]—A contract for the sale of an estate provided that the timber should be taken at a valuation, each party to appoint his own valuer, & that the parties should, in case of difference, appoint an umpire:—*Held*: the umpire was merely a valuer substituted for other valuers, & not an arbitrator.

If a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any dispute, this is not an arbn. (*per CUR.*).—*Re CARUS-WILSON & GREENE* (1886), 18 Q. B. D. 7; 56 L. J. Q. B. 530; *sub nom.* *Re WILSON & GREENE, Re CASTERTON ESTATES*, 55 L. T. 864; 35 W. R. 43; 3 T. L. R. 22, C. A.

*Annotations*:—*Consd. & Apld.* *Re Hammond & Waterton* (1890), 62 L. T. 808, D. C. *Apld.* *Re Carpenter & Bristol Corpn.* (1907), 71 J. P. 417, C. A. *Reid.* *Kennedy v. Barrow-in-Furness Corpn.* (1909), Hudson, Bldg. Contracts, 4th ed., Vol. II., p. 411.

**54. Fixing value of shares — In absence of agreement.]—**By an agreement relating to shares in a co. it was provided that the value of the shares should, in the absence of agreement, be determined by two valuers, one to be appointed by each party, & in case they differed by an umpire, to be appointed by the valuers, in pursuance of & in accordance with the Act of 1889:—*Held*: (1) a valuer was not made an arbitrator by calling him so, or *vice versa*; (2) the procedure intended was an arbn.—*TAYLOR v. YIELDING* (1912), 56 Sol. Jo. 253.

**55. Fixing price of business assets.]—**A. & B., being in partnership as distillers, agreed that B. should buy out A., but if, during A.'s life, B. should be desirous of retiring, A. was to have an option of repurchase, & the business assets were to be valued "in the usual way" by two valuers, one to be named by A., & the other by B., or by the umpire of the two valuers. B. gave notice of his intention to retire, whereupon A. gave notice of his intention to repurchase. Two valuers were appointed, but B. then refused to allow his valuer

an arbitrator.—*Re LANGMAN & MARTIN* (1882), 46 U. C. R. 569.—CAN.

**k. Assessing fire loss.]—**By a policy a co. reserved the power of having the loss submitted to arbitrators:—*Held*: the arbn. intended by the condition was not merely a valuation.—*MCINNES v. WESTERN INSURANCE CO.* (1870), 5 P. R. 242; 30 U. C. R. 580.—CAN.

**l. —.]—**Proceedings under R. S. O., 1887, c. 167, s. 114 (16), for the ascertainment of the amount of a fire loss, are in the nature of an arbn. & not of a valuation.—*VINEBERG v. GUARDIAN FIRE & LIFE ASSURANCE* (1891), 19 A. R.

**m. —.]—**A policy provided that differences as to the amount of any loss should be referred to the arbn. of some indifferent person to be agreed upon by both parties, or, failing such agreement, of two such persons, one to be chosen by the party claiming, & the other by the co. In case of disagreement between the arbitrators the difference was to be decided by an umpire to be chosen by the arbitrators before entering on the reference. The clause provided that the award should be conclusive of the amount of the loss:—*Held*: the office of the persons to be appointed was not that of valuers, but that of arbitrators.—*Re COLEMAN & ROYAL INSURANCE CO.* (1905), 24 N. Z. L. R. 817.—N.Z.



**Sect. 3.—What constitutes a submission to arbitration: Sub-sect. 6**

to proceed:—*Held*: (1) this was a case of valuation & not arbn.; (2) there was no contract between the parties which the ct. could specifically enforce until the valuation had taken place; (3) where valuers have to adjudicate upon a point of law, or a point of right between the parties, arising out of the facts, then it ceases to be a simple valuation, & becomes an arbn.—*VICKERS v. VICKERS* (1867), L. R. 4 Eq. 529; 36 L. J. Ch. 946.

*Annotations*:—*Apld.* *Smith v. Peters* (1875), L. R. 20 Eq. 511. *Consd.* *Loftus v. Roberts* (1902), 18 T. L. R. 532, C. A. *Refd.* *Richardson v. Smith* (1870), 5 Ch. App. 649, n.

**56. Offer & counter-offer.]**—A. & B., having dissolved partnership, signed an agreement by which, after stating that B. had offered A. £18,000 for the purchase of his interest in the partnership business & assets, & that A. had declined the offer but was willing to accept £20,000, they agreed to leave it to a referee to say what sum should be paid by B. to A.:—*Held*: one party having named the price he was willing to give & the other party having named the price he was willing to receive, there was in the strict & proper sense of the term an arbn.—*THOMSON v. ANDERSON* (1870), L. R. 9 Eq. 523; 39 L. J. Ch. 468; 22 L. T. 570; 34 J. P. 500; 18 W. R. 445.

*Annotations*:—*Consd.* *Fraser v. Ehrensperger* (1883), 12 Q. B. D. 310, C. A. *Mentd.* *Re Mitchell & Izard & Ceylon (Governor)* (1888), 21 Q. B. D. 408, C. A.

**57. — Whether appointee liable for negligence.]**—Pltf. purchased the goodwill, stock, & effects of a business at a valuation, the amount of which was to be fixed by valuers, one to be appointed on each side for that purpose, & in case of difference by an umpire to be chosen by the valuers. Pltf. employed deft. as his valuer, & deft. & the valuer appointed by the vendor fixed between them the amount of valuation. In an action for negligence in making such valuation, by which the valuation of the goodwill was fixed too high:—*Held*: (1) deft. had not acted in the matter as an arbitrator, but as a valuer only; (2) he was liable to his employer for negligence.—*TURNER v. GOULDEN* (1873), L. R. 9 C. P. 57; 43 L. J. C. P. 60.

*Annotation*:—*Refd.* *Re Hammond & Waterton* (1890), 62 L. T. 808.

Liability for negligence, *see* Nos. 791—796, *post*.

**58. — Share of outgoing partner & validity of notice of dissolution.]**—The validity of a notice to dissolve a partnership was disputed, & it was agreed that that question, as well as the price to be paid by the continuing partners for the share of the outgoing partner, should be settled by two valuers named in the agreement or their umpire. One of the valuers died before the valuation was made, & the new valuer (appointed under protest) neglected to join with the other valuer in appointing an umpire. In these circumstances, & by virtue of C. L. P. Act, 1854, s. 12, the ct. appointed an umpire to act in the matter, in case his services should be required.—*Re EVANS, DAVIES & CAD-DICK* (1870), 22 L. T. 507; 18 W. R. 723.

**59. Fixing price of goods — Valuation—Effect of death of one party.]**—Specific performance refused under a contract for sale at a price, to be fixed by arbitrators within a certain time, or if they should not agree to make their award within the time, by an umpire, also within a limited time, the construction of the contract, requiring the delivery of the award in writing to each party, being that, though the consequential acts, executing the conveyances, etc., might be done by representatives, it was with reference to the terms, to be fixed by the award, personal to the parties, one of whom

died before it. Objection to an award, to be ready to be delivered in writing, to the parties by a certain day, as not having a deed-stamp, overruled.—*BLUNDELL v. BRETTARGH* (1810), 17 Ves. 232; 34 E. R. 90.

*Annotations*:—*Distd.* *Pritchard v. Ovey* (1820), 1 Jac. & W. 396. *Consd.* *McDougall v. Robertson* (1827), 4 Bing. 435. *Distd.* *Brooke v. Mitchell* (1840), 8 Dowl. 392. *Apld.* *Morgan v. Milman* (1853), 3 De G. M. & G. 24.

**60. Fixing compensation payable to outgoing tenant.]**—Where an agreement between an outgoing & an incoming tenant was that the latter should buy the hay, etc., of the former upon the farm, & that the former should allow to the latter the expense of repairing the gates & fences of the farm, & that the value of the hay, etc., & of the repairs should be settled by third parties:—*Held*: nothing being referred to the appraisers except the mere value of the goods & of the repairs, an appraisal stamp upon the written valuation was sufficient under 46 Geo. 3, c. 43, & an award stamp was not necessary.—*LEEDS v. BURROWS* (1810), 12 East, 1; 104 E. R. 1.

*Annotations*:—*Consd.* *Collins v. Collins* (1858), 26 Beav. 306. *Refd.* *Boss v. Helsham* (1866), 15 L. T. 481.

**61. — Judicial inquiry intended.]**—Where it is intended that, in ascertaining the value of the property or the amount of compensation to be paid, the matter shall assume the character of a judicial inquiry, to be conducted upon the ordinary principles upon which judicial inquiries are conducted, by hearing the parties & the evidence of their witnesses, this is an arbn. & not a mere valuation.

By a clause in a farming lease, the tenant was to quit on the expiration of six months' notice from the lessor, at any time during the term, if the premises or any part should be sold, each party to appoint a valuer, such valuers to estimate the compensation to be given to the tenant for delivering up possession:—*Held*: the decision of the valuers was in the nature of an award on an arbn. & not a mere valuation.—*Re HOPPER* (1867), L. R. 2 Q. B. 367; 8 B. & S. 100; 36 L. J. Q. B. 97; 15 W. R. 443; *sub nom.* *WRIGHTSON v. HOPPER*, 15 L. T. 566; 31 J. P. 182.

*Annotations*:—*Apld.* *Turner v. Goulden* (1873), L. R. 9 C. P. 57. *Distd.* *Re Dawdy* (1885), 15 Q. B. D. 426, C. A. *Consd.* *Re Hammond & Waterton* (1890), 62 L. T. 808, D. C. *Mentd.* *Moseley v. Simpson* (1873), L. R. 16 Eq. 226.

**62. —.]**—An agreement between landlord & tenant for the letting of a farm provided that the tenant should be paid at the expiration of the tenancy the usual & customary valuation, as between outgoing & incoming tenant, in the same manner as he paid on entering the premises; & it was thereby mutually agreed by & between the parties thereto that, when any valuation of the covenants should be made between the tenant & the landlord, or his incoming tenant, the persons making such valuation should take into consideration the state, condition, & usage of the farm, & if not left in a proper & creditable state, should determine what sum of money should be paid to the landlord as compensation therefor, & should deduct such sum from the amount of the valuation. On the expiration of the tenancy, there being no incoming tenant, the landlord & tenant respectively appointed a valuer. The valuers could not agree upon the amount of the valuation, & they appointed an umpire, who held a sitting & heard witnesses, & then made & published an award in writing. The tenant, with the view of obtaining an order remitting the matters in dispute to the umpire for reconsideration, applied for an order to make the submission to arbn. contained in the agreement, together with the appointment of arbitrators & umpire, a rule of ct. under C. L. P.

Act, 1854, s. 17 :—*Held* : the agreement did not contain any submission to arbn., but it provided only for the appointment of valuers, & it could not be made a rule of ct.—*Re DAWDY* (1885), 15 Q. B. D. 426, C. A.

*Annotations* :—*Apld.* *Kennedy v. Barrow-in-Furness Corpn.* (1909), *Hudson, Bldg. Contracts*, 4th ed., Vol. II., p. 411. *Mentd.* *Re Hammond & Waterton* (1890), 6 T. L. R. 302, D. C.

**63. — Umpire to be appointed.]**—The mere fact that an umpire is to be appointed in case the arbitrators are unable to agree does not constitute the proceedings an arbn.

An agreement made between the purchaser of a close of land & the tenant, who was a nurseryman & market gardener, provided that the tenant should give up possession before the expiration of his lease, & that the amount of compensation to be paid to him (a) in respect of such giving up possession, (b) in respect of various plants & shrubs taken by the purchaser, should be determined by two named arbitrators, one of whom was a seedsman & the other a market gardener, & in case of dispute by an umpire to be appointed by the arbitrators. The arbitrators differed, & the amount of compensation was assessed by an umpire appointed by them :—*Held* : this was a valuation, & not an award, & the tenant was not entitled to issue execution under s. 12 of the Act of 1889.—*Re HAMMOND & WATERTON* (1890), 62 L. T. 808 ; 6 T. L. R. 302, D. C.

*Annotation* :—*Apld.* *Kennedy v. Barrow-in-Furness Corpn.* (1909), *Hudson, Bldg. Contracts*, 4th ed., Vol. II., p. 411.

**64. Assessing damages for misstatement in particulars of sale—“Existing or future difference.”]**—At a sale by auction of premises belonging to defts., stated in the particulars of sale as being then let at a rental of £30 per annum, one of the conditions was that, if any mistake was made in the description of any of the properties offered for sale, or if any error whatever appeared in the particulars of sale, such mistake or error should not annul the sale, but a compensation in such case should be given, to be settled by two referees, one to be appointed by either party to the sale, or an umpire. Pltfs. purchased of defts. the premises subject to this condition. After the conveyance had been executed an error in the rental stated in the particulars was discovered :—*Held* : the reference indicated in the condition being one of the *quantum* of compensation only, was not a reference to arbn. of an existing or future difference within C. L. P. Act, 1854, s. 11, & pltfs. had no power under s. 13 of that Act to appoint their referee as sole arbitrator.—*BOS v. HELSHAM* (1866), L. R. 2 Exch. 72 ; 4 H. & C. 642 ; 36 L. J. Ex. 20 ; 15 L. T. 481 ; 15 W. R. 259.

*Annotations* :—*Consd.* *Re Hopper, Barningham & Wrightson* (1867), L. R. 2 Q. B. 367. *Apld.* *Re Evans, Davies & Caddick* (1870), 22 L. T. 507. *Consd.* *Turner v. Goulden* (1873), L. R. 9 C. P. 57 ; *Re Dawdy* (1885), 15 Q. B. D. 426, C. A. *Mentd.* *Manson v. Thacker* (1878), 7 Ch. D. 620 ; *Re Turner & Skelton* (1879), 13 Ch. D. 130 ; *Brett v. Clowser* (1880), 5 C. P. D. 376 ; *Joliffe v. Baker* (1883), 11 Q. B. D. 255 ; *Palmer v. Johnson* (1884), 13 Q. B. D. 351, C. A. ; *Eastwood v. Ashton*, [1913] 2 Ch. 39.

**65. Assessing rent to be paid for real estate.]**—An order was made in an action referring the question in dispute, which was the rent to be paid under a lease of a mill, to two persons, who had acted as agents of the parties, as arbitrators, & in case of their disagreement to a person therein named as umpire. The arbitrators, having dis-

agreed, submitted the matter to the umpire. The latter, without giving any notice to the parties or their solrs., & without any witnesses being examined before him, but having merely heard the statement of the two arbitrators & inspected the premises, made his award in writing, in which he recited that he had “heard, examined, & considered the allegations, witnesses, & evidence of all the parties :—*Held* : it was evidently the intention of the parties that they should settle the value & not act as formal arbitrators.

The subject-matter of the reference is essentially one of valuation & opinion. The arbitrators were the paid agents of the parties interested, & it would be absurd to suppose that they were intended to sit with all the pomp of judges (*JAMES, L.J.*).—*BOTTOMLEY v. AMBLER* (1877), 38 L. T. 545 ; 26 W. R. 566, C. A.

**66. Assessing sum payable for release from agreement.]**—W., having agreed to take a lease of certain premises from C., subsequently wrote to the latter, stating that he was not prepared to carry out the agreement, & asked in effect to be released from it, offering to pay £50 by way of compensation. The result of further correspondence between the parties was that it was agreed that the amount to be paid to C. by W. by way of compensation for releasing him from the agreement for a lease should be fixed by M. M. having assessed the amount to be paid by W. at a certain sum, & that sum not having been paid, C., on the footing that there had been an arbn. & award by M. within the Act of 1889, applied for leave to enforce the award under s. 12 in the same manner as a judgment. The terms of the letters were relied upon by C. as constituting a submission to arbn. :—*Held* : there had been no submission of a dispute to arbn., but merely an agreement for a valuation, & the case did not come within s. 12 of the Act.—*Re COLMAN & WATSON*, [1908] 1 K. B. 47 ; 77 L. J. K. B. 121 ; 97 L. T. 857 ; 24 T. L. R. 39 ; 52 Sol. Jo. 28, C. A.

*Annotation* :—*Mentd.* *Miller, Gibb v. Smith & Tyrer*, [1916] 1 K. B. 419.

**67. Engineer's certificate — Assessment of damages for delay in completion.]**—P. contracted with pltf. co. by deed that on the execution thereof he would commence building a gas-holder tank & other works, the tank to be finished within three months from the date of the indenture, & the other works to be in a fit state for the tank on or before June 30, 1853, under a penalty, & that in default he would pay such liquidated damages as E., the co.'s engineer, should adjudge, & defts., as sureties for P., covenanted that he would observe & keep all the covenants in the deed contained on his part. In an action for damages awarded by E. upon non-completion of the works within the time specified, defts. pleaded (*inter alia*) that, before adjudication by E., defts. & P. had revoked any submission to arbn. contained in the deed :—*Held* : the plea was bad, because the adjudication by E. was an assessment of damages merely, & not a judicial award respecting any matter in dispute between the parties.

No judicial powers were entrusted to him. It was not referred to him to say whether the covenants were or were not broken, but solely to ascertain the reasonable compensation, assuming a default to have occurred (*per CUR.*).—*NORTHAMPTON GAS LIGHT CO. v. PARNELL* (1855), 15 C. B. 630 ; 24 L. J. C. P. 60 ; 24 L. T. O. S. 239 ; 1 Jur.

**65 i. Assessing rent to be paid for real estate.]**—A lease provided that at expiration the lessee should have a further term, & that the amount of the rent should be settled by the award of three parties, or of the majority of them, & that the award should be made before the expiration of the existing term. It

was provided that the expense of the arbn. should be borne equally. No provision was made for calling witnesses, & neither party offered to procure witnesses or contended witnesses should be called :—*Held* : from the language of the agreement & the nature of the subject-matter the parties intended a

valuation rather than an arbn.—*GRAY v. McMATH* (1902), 1 O. W. R. 445.—*CAN.*

*n. Assessing sum due under lease.]*—*Re IRWIN & CAMPBELL* (1913), 25 O. W. R. 172 ; 5 O. W. N. 229.—*CAN.*



**Sect. 3.—What constitutes a submission to arbitration: Sub-sect. 6. Sect. 4.]**

N. S. 211 ; 3 W. R. 179 ; 3 C. L. R. 409 ; 139 E. R. 572.

**68. — Certificate to have effect of award — “Judge.”]**—There was no arbn. clause in a contract for the construction of works, but the engineer was to be the exclusive judge upon all matters arising out of the contract, & his certificate was to have the force of an award:—*Held*: the use of the word “judge” was not conclusive, & since the duties of the engineer included administrative matters, he was not constituted an arbitrator.—*KENNEDY, LTD. v. BARROW-IN-FURNESS CORPN.* (1909), Hudson, Bldg. Contracts, 4th ed., Vol. II., p. 411, C. A.

*Annotation*:—*Apld. Monroe v. Bognor U. C.*, [1915] 3 K. B. 167, C. A.

**69. — All doubts, disputes, etc.]**—The specification in a building contract provided that “all doubts, disputes & differences upon any matter whatsoever relating to the construction, incidents & consequences of the specifications, schedule of quantities & drawings of this contract, & in regard to the execution of the work or otherwise, howsoever arising out of or connected with this contract, shall be referred to & be settled & decided by the engineers, with or without formal reference or notice to the parties, or either of them, & the certificate of the engineer under his hand shall, so far as it extends, be binding & conclusive on both parties”:—*Held*: the clause was not a submission to arbn. within the Act of 1889.—*JOWETT v. NEATH RURAL DISTRICT COUNCIL* (1916), 80 J. P. Jo. 207.

*See, further, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.*

**70. Architect's certificate — As to delay or unsatisfactory conduct.]**—By a written agreement pltf. agreed to build four houses on land of deft., deft. to grant pltf. a lease when the houses were completed; the architects for the time being of deft. were to certify as to the progress of the work, & if there should be any unnecessary delay or unsatisfactory conduct on the part of pltf. with regard to the erection of the buildings, or any matter or thing connected therewith (“the fact of such delay or unsatisfactory conduct to be ascertained & decided in writing by the architects, against whose decision there shall be no appeal”), then it should be lawful for deft. to employ other persons to execute the works, & to sell the buildings & lease the land to other persons. On application to make the agreement a rule of ct. under C. L. P. Act, 1854, s. 17:—*Seemle*: the agreement was not a submission to arbn.—*WADSWORTH v. SMITH* (1871), L. R. 6 Q. B. 332 ; 40 L. J. Q. B. 118 ; 19 W. R. 797.

*Annotation*:—*Distd. Chambers v. Goldthorpe, Restell v. Nye*, [1901] 1 K. B. 624, C. A.

**71. — As to amounts payable to contractor — Liability for negligence.]**—A building owner employed an architect for reward to supervise the erection of certain houses by a contractor. The building contract provided for payments on account of the price of the works during their progress, & for payment of the balance after their

completion, upon certificates of the architect, & that a certificate of the architect, showing a final balance due or payable to the contractor, should be conclusive evidence of the works having been duly completed, & that the contractor was entitled to receive payment of the final balance:—*Held* (ROMER, L.J., diss.): the architect, in ascertaining the amount due to the contractor & certifying for same under the contract, occupied the position of an arbitrator, & was not liable to an action by the building owner for negligence in the exercise of those functions.—*CHAMBERS v. GOLDTHORPE, RESTELL v. NYE*, [1901] 1 K. B. 624 ; 70 L. J. K. B. 482 ; 84 L. T. 444 ; 49 W. R. 401 ; 17 T. L. R. 304 ; 45 Sol. Jo. 325, C. A.

*Annotation*:—*Expld. Kennedy v. Barrow-in-Furness Corpn.* (1909), Hudson, Bldg. Contracts, 4th ed., Vol. II., p. 411.

*See, further, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.*

Liability for negligence, *see* Part II., Sect. 6, *post*.

**Whether decision of person appointed to adjudicate on dispute is an award for purpose of stamp duties.]**—*See* Part IV., Sect. 14, *post*.

#### SECT. 4.—WHAT MAY BE SUBJECT-MATTER OF A SUBMISSION.

**72. Terms of separation between husband & wife.]**—If a bond of submission to arbn. between the trustee of a wife & her husband recite that a suit for separation has been instituted between the husband & wife in the Commons, & that, in order to put an end to any contest about the terms of the separation, it has been agreed that all matters should be referred to J. S., & either of the parties should be “at liberty to apply to the ct.” to make the “award a rule of ct.,” such submission may be made a rule of the Ct. of Common Pleas under the Act of 1698, since many causes of action & suits in equity may arise out of the disputes stated in the recital.—*SOILLEUX v. HERBST* (1801), 2 Bos. & P. 444 ; 126 E. R. 1376.

*See, further, HUSBAND & WIFE.*

**73. Disputes arising out of gaming transactions — Reference to Jockey Club.]**—Pltf., in 1833, gave a *post obit* security on his expectancy in a certain fund, payable on the death of his father, to W., in consideration of certain gaming debts. He subsequently won a larger sum of W. by bets on horse-racing, & both parties having submitted to the arbn. of the Jockey Club, in 1837, the stewards decided that one debt should be set off against the other, & the security given up. W. refused to give up the security, & in 1842, assigned it to C. for valuable consideration, who gave notice to the trustees of the fund. Pltf. having filed his bill to have the security delivered up to be cancelled:—*Held*: the submission to the arbn. of the Jockey Club amounted to an agreement, which could not be impeached under the Acts against gaming, if any part of the account between the parties was legal.—*HAWKER v. WOOD* (1853), 1 W. R. 316.

*See, further, GAMING & WAGERING.*

**70 i. Architect's certificate—As to efficiency of work.]**—A party having contracted to execute work according to plans prepared by a professional person, by subsequent letter addressed to his employers bound himself to execute the work to the satisfaction of that person, or of such other professional person as the employers might appoint:—*Held*: this was a valid reference to the party named, excluding proof as to the sufficiency of the work.—*CHAPMAN & SON v. EDINBURGH PRISON BOARD*

(1841), 6 Dunl. (Ct. of Sess.) 1288. — SCOT.

**o. Accountant's certificate — Fixing balance due—No dispute.]**—Parties agreed to refer their whole cash transactions to the decision of a referee:—*Held*: as this was not a reference of a pending dispute, but was intended merely to extricate the true state of accounts, death of one party did not terminate the reference.—*CURROR (ALEXANDER'S TRUSTEES) v. KERR*

(DYMCK'S TRUSTEES) (1883), 10 R. (Ct. of Sess.) 1189.—SCOT.

#### PART I. SECT. 4.

**p. Differences in suit.]**—Whatever matters parties to a suit may agree to refer to arbn., they can only refer such matters or any of such matters as are in difference between them in the suit.—*TRUNATH CHOWDHURY v. MANICK CHUNDER DOSS* (1870), 14 W. R. 469.—IND.



**74. Future differences.]—Qu.:** whether, if at the time a submission to arbn. was entered into no actual differences existed between the parties, such submission could afterwards be made a rule of ct. under the Act of 1698.—*LINDLEY v. PAGET* (1848), 12 L. T. O. S. 107.

**75. —.]—Action on a contract containing a prospective agreement that, if any difference arose, it should be referred; averment, that a difference arose; breach, a refusal to refer it:—Held:** the action lay.

The agreement to refer prospective differences is not illegal in itself. In *Tattersall v. Groote* (1800), 2 Bos. & P. 131, it would appear that Lord Eldon rather inclined to think it was illegal; but I think it an important principle of law that parties are at liberty to make what contracts they please, so that they stipulate to do nothing but what they are at liberty to do. It is clear that the parties may lawfully & bindingly refer; & they may lawfully & bindingly agree to refer a dispute which has already arisen. It seems to me that they may lawfully & bindingly agree to refer such disputes when they shall arise (ERLE, J.).—*LIVINGSTONE (LIVINGSTON) v. RALLI* (1855), 5 E. & B. 132; 24 L. J. Q. B. 269; 25 L. T. O. S. 143; 1 Jur. N. S. 594; 3 W. R. 488; 3 C. L. R. 1096; 119 E. R. 430.

*Annotations:—Consd.* *Scott v. Liverpool Corpn.* (1857), 1 Giff. 216; *Pestonjee Nussurwangee v. Manockjee* (1868), 12 Moo. Ind. App. 112, P.C. *Mentd.* *Hodgkinson v. Fernie* (1857), 27 L. J. C. P. 66; *Hamlyn v. Talisker Distillery* (1894), 6 R. 188, H. L.

*See, now, Arbitration Act, 1889, s. 27.*

**76. Charity—Breach of trust—Leave of court to refer with consent of Attorney-General.]—In a suit by the A.-G., respecting a breach of trust as to property belonging to a charity, the ct. will permit a reference if the A.-G. consents, but not if the question is upon the construction of a will.—A.-G. v. FEA** (1819), 4 Madd. 274; 56 E. R. 707.

*Annotation:—Mentd.* *A.-G. v. Fishmongers' Co., Hulbert's Charity* (1837), Coop. Pr. Cas. 85.

**77. — Consent of Attorney-General.]—The ct. will not act under an award in a charity cause without the consent of the A.-G., or inquiring whether it is for the benefit of the charity. A reference in a charity cause was made to a particular person by name, not as arbitrator.—A.-G. v. HEWITT** (1804), 9 Ves. 232; 32 E. R. 591.

**78. Validity of rate imposed by statutory authority.]—By an agreement the validity of a poor rate, & the costs of the agreement & of the notice of appeal & of the preparations to resist the appeal & all matters relating thereto, were referred to arbn., & an award was made dealing with the rate & costs:—Held:** (1) the submission & award were bad, inasmuch as the arbitrators had no authority to determine as to the validity of the rate, it not being by law a subject-matter capable

**74 i. Future differences.]—A general agreement to refer future differences to arbn. comrs. within Civil Procedure Code (Act XIV. of 1882), s. 523, may be filed under that sect. The sect. is not confined to cases in which a dispute actually existing at the date of the agreement is agreed to be referred to arbn.—FAZULBHOY MEHRALI CHENOY v. BOMBAY & PERSIA STEAM NAVIGATION Co.** (1895), 1 L. R. 20 Bom. 232.—IND.

**74 ii. —.]—A reference of all disputes which might arise under an executory contract to one of the parties:—Held:** valid.—*BUCHAN v. MELVILLE* (1902), 4 F. (Ct. of Sess.) 620.—SCOT.

**r. Questions of law.]—Arbitrators are competent to decide matters of law.**

—*FOULIS v. KINNEAR* (1835), Ber. 26.—CAN.

**s. — Due execution of will.]—An exor., against whose application for probate a caveat has been entered, cannot submit to arbn. the question whether the will propounded by him was duly executed by the deceased.—GHELLABHAI ATMARAM v. NANDUBAI** (1895), 1 L. R. 20 Bom. 238.—IND.

**t. — Construction of will.]—Questions of law, including questions as to the construction of a will, may be validly referred to arbitrators.—SODAMINI GHOSH v. GOPAL CHANDRA GHOSH** (1914), 19 C. W. N. 948.—IND.

**u. Suggested alterations in form of will.]—An exor. cannot make a reference to arbn., with the avowed purpose that**

of reference to arbn.; (2) the decision as to the costs incurred was merely accessory to the decision of the principal question, & there was no sufficient consideration for the submission.—*THORPE (THORP) v. COLE* (1836), 1 M. & W. 531; 1 Gale, 443; 5 Tyr. 1047; 5 L. J. Ex. 281; 150 E. R. 545, Ex. Ch.

*Annotations:—Distd.* *Wallis v. Day* (1837), 6 L. J. Ex. 92 *Consd.* *Holdsworth v. Barsham* (1862), 2 B. & S. 480.

**79. Disputes involving trading with enemy.]—A contract for the supply by an English co. to German merchants of zinc concentrates contained a suspensory clause on certain events happening (war not being specified as a cause of suspension), & various provisions as to notices being given as to the payment, weighing, sampling & assaying the concentrates, & as to arbn. On the German merchants becoming alien enemies:—Held:** the clauses of the contract, including the arbn. clause, all pointing to the necessity of intercourse, though deliveries might be suspended under the terms of the contract, the further performance of the contract became illegal.—*ZINC CORPN., LTD. v. HIRSCH*, [1916] 1 K. B. 541; 85 L. J. K. B. 565; 114 L. T. 222; 32 T. L. R. 232; 21 Com. Cas. 273, C. A.

*Annotations:—Consd.* *Clapham S.S. Co. v. Naamlooze Vennootschap Handels-en Transport-Maatschappij Vulcan of Rotterdam*, [1917] 2 K. B. 639; *Stevenson (Hugh) v. Akt. für Cartonnagen Industrie*, [1917] 1 K. B. 842, C. A.; *Ertel Bieber v. Rio Tinto Co., Dynamit Act. v. Same, Vereinigte Königs & Laurahütte Act. v. Same* [1918] A. C. 260, H. L.; *Naylor, Benzoni v. Krainische Industrie Gesellschaft*, [1918] 1 K. B. 331. *Refd.* *Stevenson (Hugh) v. Akt. für Cartonnagen Industrie*, [1916] 1 K. B. 763; *British Assocn. of Glass Bottle Manufacturers v. Forster* (1917), 86 L. J. Ch. 489, C. A.; *Metropolitan Water Board v. Dick, Kerr*, [1917] 2 K. B. 1, C. A.; *Orconera Iron Ore Co. v. Fried Krupp Akt.* (1917), 86 L. J. Ch. 613; *Rio Tinto Co. v. Ertel Bieber* (1917), 116 L. T. 471; *Velthardt & Hall v. Rylands* (1917), 86 L. J. Ch. 604, C. A.; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *Re Coutinho Caro*, [1918] 2 Ch. 384.

**80. —.]—A contract for the supply by an English co. to German cos. of cupreous sulphur ore contained a suspensory clause in the event of war, & an arbn. clause. On the German cos. becoming alien enemies:—Semble:** the clause involved commercial intercourse with the enemy.

Though I agree that arbn. cannot be conducted without intercourse, it seems to me that arbn. is not a necessary, nor, indeed, a usual, part of the performance at a time when *ex hypothesi* all deliveries under the contract are suspended. There is nothing for the time being to arbitrate about (LORD DUNEDIN).—*ERTEL BIEBER & Co. v. RIO TINTO CO., DYNAMIT ACT. v. RIO TINTO CO., VEREINIGTE KÖNIGS & LAURAHÜTTE ACT. v. RIO TINTO CO.*, [1918] A. C. 260; 87 L. J. K. B. 531; 118 L. T. 181; 34 T. L. R. 208, H. L.

*Annotations:—Consd.* *Clapham S.S. Co. v. Naamlooze Vennootschap Handels-en Transport Maatschappij Vulcan of Rotterdam*, [1917] 2 K. B. 639; *Orconera Iron*

the terms of the will may be modified & arrangements made for the management & distribution of the estate contrary to the directions of testator.—*SODAMINI GHOSH v. GOPAL CHANDRA GHOSH* (1914), 19 C. W. N. 948.—IND.

**v. Appointment of guardian.]—The appointment of a guardian to a minor, not being a matter of private right as between parties, is not a question which can be settled by reference to arbn.—MAHADEO PRASAD v. BINDESHRI PRASAD** (1908), 1 L. R. 30 All. 137.—IND.

**w. Right to succeed to trusteeship.]—A trust for charitable purposes being a trust of a public character, the right to succeed to the trusteeship of such a trust is not a right which can be settled by arbn.—MUHAMMAD IBRAHIM KHAN v. AHMAD SAID KHAN** (1910), 1 L. R. 32 All. 503.—IND.

4.—*What may be subject-matter of a submission.*  
Sect. 5.]

Ore Co. v. Fried Krupp Akt. (1917), 86 L. J. Ch. 613. *Appl.* Naylor, Benzon v. Krainische Industrie Gesellschaft, [1918] 2 K. B. 486, C. A. *Refd.* Blackburn Bobbin Co. v. Allen [1918] 1 K. B. 540; Naylor, Benzon v. Krainische Industrie Gesellschaft, [1918] 1 K. B. 331; Orconera Iron Ore Co. v. Fried Krupp Akt. (1918), 87 L. J. Ch. 313, C. A. *Mentd.* County Hotel & Wine Co. v. L. & N. W. Ry. Co., [1918] 2 K. B. 251.

81. Statutory reference—Matters outside statute.]

—A submission under Lands Clauses Consolidation & Railways Clauses Consolidation (Scotland) Acts, 1845 (c. 19 & c. 33), may, by consent, be made to embrace incidents & to import powers not included in a reference proceeding simply on the statutory clauses. Such a reference may be based on the Acts & on the common law, & may derive efficacy from both.—*CALEDONIAN RY. CO. v. LOCKHART* (1860), 3 Macq. 808; 3 L. T. 65; 6 Jur. N. S. 1311; 8 W. R. 373, H. L.

*Annotations* :—*Appl.* Palmer v. Met. Ry. Co. (1862), 31 L. J. Q. B. 259. *Consd.* R. v. Poulter (1887), 20 Q. B. D. 132; R. v. Manley-Smith (1893), 63 L. J. Q. B. 171. *Refd.* Ringland v. Lowndes (1864), 17 C. B. N. S. 514; Stone v. Yeovil Corpn. (1876), 1 C. P. D. 691. *Mentd.* Bagnall v. L. & N. W. Ry. Co. (1862), 1 H. & C. 544, Ex. Ch.; Bottomley v. Ambler (1877), 38 L. T. 545, C. A.; Holliday v. Wakefield Corpn., [1891] A. C. 81, H. L.

Statutory references generally, see table of cross-references on p. 355, *post*.

82. Dismissal of servant.]—In an action for wrongful dismissal, on a contract to pay salary & also to give a share of the profits during a certain time, the contract contained a clause of reference to arbn. of disputes relating to the construction of the deed or as to the accounts, the contest being as to the right to dismiss for neglect of duty:—*Held*: the action was not referable.—*SMITH v. ALLEN* (1862), 3 F. & F. 156.

See also Nos. 148—152, 307, *post*.

83. Criminal matters—At common law — Indictment—Battery.]—An indictment for a battery cannot be referred to arbn.—*HORTON v. BENSON* (1675), 1 Freem. K. B. 204; 89 E. R. 145.

84. ——— Riot & assault.]—Cross bills of indictment for riot & assault having been preferred against certain parties, by consent all matters in dispute were referred to arbn. On a motion by the unsuccessful parties in the arbn. to have the award set aside, the ct. expressed surprise that a criminal prosecution should have been submitted to arbn.—*R. v. COOMBS, R. v. RANT* (1797), cited Kyd on Awards, 64.

*Annotation* :—*Consd.* Keir v. Leeman (1844), 6 Q. B. 308.

85. ——— Assault.]—If a party has preferred an indictment for an assault, he may submit the adjustment of the reparation to arbn., as well as the costs.—*BAKER v. TOWNSEND* (1817), 1 Moore, C. P. 120; 7 Taunt. 422; 129 E. R. 169.

*Annotations* :—*Consd.* Keir v. Leeman (1846), 9 Q. B. 371; R. v. Hardey (1850), 14 Q. B. 529.

86. ———.]—In all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit.—*KEIR v. LEEMAN* (1846), 9 Q. B. 371; 15 L. J. Q. B. 360; 7 L. T. O. S. 347; 11 J. P. 38; 10 Jur. 742; 115 E. R. 1315, Ex. Ch.

*Annotations* :—*Consd.* Rawlings v. Coal Consumers Assocn. (1874), 43 L. J. M. C. 111. *Refd.* R. v. Blakemore (1850),

4 Cox, C. C. 352; Windhill L. B. of Health v. Vint (1890), 45 Ch. D. 351, C. A. *Mentd.* Goodall v. Lowndes (1844), 6 Q. B. 464; R. v. Hardey (1850), 14 Q. B. 529; Rowlands v. Symonds (1850), 14 J. P. 290; Clubb v. Hutson (1865), 18 C. B. N. S. 414; Crooke v. Powerscourt (1868), 16 W. R. 969; Whitmore v. Farley (1881), 45 L. T. 99, C. A.; Flower v. Sadler (1882), 10 Q. B. D. 572; Windhill L. B. of Health v. Vint (1890), 6 T. L. R. 335; Jones v. Merionethshire Permanent Benefit Bldg. Soc., [1891] 2 Ch. 587.

87. ——— Removed by certiorari into Queen's Bench.]—*Qu.*: whether an order of reference to arbn. made upon the trial of an indictment removed by *certiorari* into Queen's Bench is a nullity, upon the ground that it includes matters which have been made the subject of indictment.—*HARDY v. DARTNELL* (1849), 18 L. J. Ch. 467; *sub nom.* HARDEY v. DARTNELL, 13 Jur. 727.

88. ——— Perjury & conspiracy.]—Two indictments, one for perjury, another for conspiracy, were removed into Queen's Bench by *certiorari*. The indictment for perjury came on for trial at *Nisi Prius*, when, under the advice of counsel, it was agreed that no evidence should be tendered, a verdict of not guilty taken on both indictments, & that all matters in difference between the prosecutor & deft. should be referred to a barrister, the costs of the indictments, reference & award to be in his discretion. An order of reference, as at *Nisi Prius*, in the usual form, was afterwards drawn up, & was made a rule of ct. After several meetings, deft. revoked his submission, & took steps in a Ch. suit, which was one of the matters in difference so referred. On motion to attach him for contempt, or to set aside the verdict on the indictments:—*Held*: (1) it would have been illegal to refer an indictment for perjury, or (*semble*) for conspiracy, but the indictments were not referred, & the verdicts of acquittal, given on the ground that no evidence was produced, must at all events stand; (2) there was nothing illegal in referring all matters in difference & at the same time consenting to a verdict of acquittal, unless there was a corrupt agreement to stifle a prosecution, which in the present case did not appear to be the fact.—*R. v. HARDEY (HARDY)* (1850), 14 Q. B. 529; 19 L. J. Q. B. 196; 15 L. T. O. S. 130; 14 J. P. 432; 14 Jur. 649; 117 E. R. 205.

*Annotations* :—*Distd.* R. v. Blakemore (1850), 14 Q. B. 544. *Mentd.* Williams v. Lewis (1857), 3 Jur. N. S. 1324; Harding v. Wickham (1861), 2 John. & H. 676.

89. ——— Non-repair of highway.] Indictment for non-repair of a public highway, alleging liability *ratione tenuræ*. The record (removed into Queen's Bench) was made up for trial, but, before a jury was impanelled, the prosecutor & deft. agreed upon leaving the question of liability to reference; & they did accordingly, by agreement of reference, submit all matters in difference relative to the subject matter of the indictment to a barrister, who was to have the same powers in all respects as the judge of assize at *Nisi Prius* would have had upon the trial; & a verdict was to be entered according to the result of such award, on the application of either party. It was agreed that the submission should & might be made a rule of ct., if the ct. should so please:—*Held*: the agreement was illegal, as referring an indictment to arbn., & an award having been made, the ct. refused, on motion, to order payment of costs in pursuance of the award, though the submission had been made a rule of ct. according to the agreement.—*R. v. BLAKEMORE* (1850), 14 Q. B. 544; 3 Car. & Kir. 97; 16 L. T. O. S. 233;

83 i. Criminal matters—Contravention of liquor laws.]—A prosecution for selling whisky without a licence cannot be referred.—*Re FRASER & ESCOTT* (1865), 1 C. L. J. O. S. 324.—CAN.

83 ii. ——— Information for false pretences.]—It is illegal to refer an information for false pretences to arbn.—*Re MEAKER & BROWN* (1878), 1 N. S. W. S. C. R. N. S. 59.—AUS.

89 i. ——— Indictment—Highway.] Right to refer an indictment & matters in difference between plffs. & defts. in respect of a public road, etc. *HUNGERFORD (TOWNSHIP) v.* (1886), 13 A. R. 315.—CAN.



4 Cox, C. C. 352; 14 J. P. Jo. 733; 117 E. R. 210.

*Annotations* :—*Mentd. R. v. Haughton* (1853), 1 E. & B. 501; *R. v. Nether Hallam* (1854), 6 Cox, C. C. 435; *Feversham v. Emerson* (1855), 11 Exch. 385; *Rundle v. Hearle*, [1898] 2 Q. B. 83.

**90. — Under Act of 1698 — Matter subject of indictment.]**—The ct. will not make a submission to an award a rule of ct. where part of the matter agreed to be referred has been made the subject of an indictment.

The words "controversies, suits, or quarrels" in the above Act mean only civil disputes between the parties.—*WATSON v. M'CULLUM* (1800), 8 Term Rep. 520; 101 E. R. 1524.

**91. Trial before under-sheriff—No power to refer cause.]**—Where on the trial of a cause before the under-sheriff a verdict was taken for pltf., subject to a reference, both parties consenting that the arbitrator should have power to order a verdict to be entered for either party, the ct. set aside the verdict & judgment, but not the award, on the ground that the parties had no authority to consent to a verdict being so entered, the sheriff being bound to try the cause, he having no power to delegate his authority.—*WILSON v. THORPE* (1840), 6 M. & W. 721; 9 L. J. Ex. 232; 151 E. R. 603.

*Annotations* :—*Consd. Spain v. Cadell* (1841), 8 M. & W. 129. *Distd. Harrison v. Greenwood* (1845), 15 L. J. Q. B. 92.

**92. — — —.]**—The under-sheriff has no power under a writ of trial to refer a cause to arbn.; & where a cause came on before the under-sheriff & a verdict was taken subject to a reference, & the parties not agreeing to an arbn., pltf. gave a fresh notice of trial, & in the absence of deft. obtained a verdict, the ct. set aside both verdicts.—*HARRISON v. GREENWOOD* (1845), 15 L. J. Q. B. 92; 6 L. T. O. S. 86, 157; 9 Jur. 1098.

#### SECT. 5.—PARTIES TO A REFERENCE.

Capacity to contract generally: *see* CONTRACT.

Capacity to contract on behalf of others:—

Agents: *see* AGENCY; INSURANCE.

Assignees or trustees of bankrupt: *see* BANKRUPTCY & INSOLVENCY.

Bankrupts: *see* BANKRUPTCY & INSOLVENCY.

Barristers: *see* BARRISTERS.

Company officials: *see* COMPANIES.

Corporation officers: *see* CORPORATIONS.

Executors or personal representatives of party signing: *see* EXECUTORS & ADMINISTRATORS.

Infants: *see* INFANTS & CHILDREN.

Married women: *see* HUSBAND & WIFE.

Masters of ships: *see* SHIPPING & NAVIGATION.

Partners: *see* PARTNERSHIP.

Solicitors: *see* SOLICITORS.

Trustees: *see* TRUSTS & TRUSTEES.

**93. Strangers to submission *prima facie* not bound.]**—An award cannot order any act to be per-

formed by a stranger.—*ECCLESTADE v. MALLIARD* (1582), Cro. Eliz. 4; 78 E. R. 270.

*Annotation* :—*Consd. Bird v. Bird* (1703), 1 Salk. 74.

**94. —.]**—An award made & a release given pursuant thereunto shall not affect those who are no parties to it.—*DAVIS v. REA* (1680), Cas. temp. Finch, 441; 23 E. R. 240.

**95. —.]**—By an agreement between master printers & journeymen, fixing the amount & mode of calculating the work done & the price paid for it, arbitrators were appointed to decide disputes. On a dispute between A., a journeyman, & B., a master printer, on the construction of a certain rule, the arbitrator decided in favour of the master. Pltf., a journeyman printer, after this decision, came into the employ of deft., a master printer, & raised the same question:—*Held*: he was not bound by the award between A. & B.—*HILL v. LEVEY* (1858), 3 H. & N. 702; 28 L. J. Ex. 80; 23 J. P. 36; 157 E. R. 650; *sub nom. LEVEY v. HILL*, 4 Jur. N. S. 589; 6 W. R. 691, Ex. Ch.

**96. —.]**—A. by articles previous to his marriage agreed to vest £1,000 in trustees, the interest thereof to be received by A. & his wife during their lives, & afterwards to be divided between their issue, & gave the trustees a warrant of attorney to confess judgment for that sum, which was entered up accordingly. A. entered into partnership with B. afterwards, & being indebted to the partnership estate in more than his interest in that estate, they submitted the difference between them to arbn., & part of the stock in trade was awarded to be deposited in the hands of a third party, any part to be delivered to either of the parties on making it appear any bond or other debt due from the partnership had been paid by either, the quantity to be delivered in proportion to the money paid. The trustees in the marriage articles having taken a moiety of the stock in trade as the property of A., in execution upon the judgment, upon a bill by the partnership creditors to set aside the execution & to have the stock appropriated for the payment of their debts:—*Held*: pltf. being neither parties to the submission nor privy to the transaction, & therefore, under no obligation to abide by the award, were not entitled to the benefit of the award.—*THOMSON v. NOEL* (1738), West temp. Hard. 304; 25 E. R. 951.

**97. — Even though interested & signing second submission.]**—A submission to an award between A. & B., the parties on the record, having been made a rule of ct., which award not having been made in time, the dispute had been referred to a second arbitrator by B. & C., the real parties in the suit, no attachment can issue against B. for not obeying the award made by the second arbitrator, because the reference should be made by the parties on the record; & even if it had, there should have been another rule to make the second submission a rule of ct., & as the ct. had no jurisdiction, they could not go into the merits, though B. consented to waive the objection.—

#### PART I. SECT. 5.

**a. Who may refer—Parties to suit.]**—The provisions of Code of Civil Procedure (VIII. of 1859), ss. 312, 325, were enabling, & were not intended to be restrictive or exclusive. Parties who are *sui juris* are competent, before decree, to make any agreement as to the settlement of the suit.—*JOGESSUR BANERJEE v. KULYANCE CHURN DEO* (1875), 24 W. R. 41.—IND.

**93 i. Strangers to submission *prima facie* not bound—Purchaser of land let under lease containing arbitration clause.]**—A lease of coal containing the usual clauses as to working same contained a

reference clause in general terms of any dispute respecting the intent & meaning of the lease or in any way relating thereto. The lands were sold. In an action by the purchaser to have an award reduced:—*Held*: he was bound by the award in reference to the matters therein decided, although he was a singular successor. (*v.*: how far an arbn. clause in general terms contained in a lease is *per se* binding on a singular successor.—*MONTGOMERIE v. CARRICK* (1848), 10 Dunl. (Ct. of Sess.) 1387.—SCOT.

**93 ii. — Trustee not bound by submission made by *cestui que trust*.]**—Pltf.

leased to M. for twenty-one years, renewable upon certain terms. The lease was assigned by M. to deft. as trustee for F. At the expiration of the first term arbn. bonds were entered into by F. & pltf. Deft. appeared & acted for F. at the arbn., & the arbitrators directed a renewal lease at an advanced rent, or that the lessor should pay a certain sum for improvements. The lessor elected to renew, & notified the lessee, who refused to accept at the new rent, & he then brought ejectment:—*Held*: deft. was not bound by the award, the submission being only by his *cestui que trust*.—*MCDONELL v. BOULTON* (1859), 17 U. C. R. 14.—CAN.



**Sect. 5.—Parties to a**

OWEN v.  
E. R. 346.

Rep. 643 ; 100

*Annotation* :—**Reid**. R. v. Christian (1842), Car. & M. 388.

**98. — No proof of agreement to be bound.]**—Pltf. called a witness to prove that when the other underwriters referred the causes commenced against them, on a policy, to arbn., deft. consented to be bound by the award, & that arbitrators had decided in favour of pltf. The witness not proving any agreement on the part of pltf. to be bound by the award :—**Held** : there was no mutuality, & deft.'s agreement was a mere *nudum pactum* & not binding upon him.—**KINGSTON v. PHELPS** (1794), Peake, 299.

*Annotation* :—**Mentd.** London Fishmongers v. Robertson (1842), 12 L. J. C. P. 185.

**99. Partner after retirement—Without knowledge of dispute.]**—The ct. will not grant an attachment, or make absolute a rule for payment of money found due by an award against a person who was made a party to the action, which was referred without his consent, & who did not authorise the action which was referred, nor the reference to arbn., & had no notice of it until after the award : & although he might be liable in law on an implied authority, by reason of the action & reference relating to partnership transactions in a firm of which he was a member, yet, if it appears that he then had retired from the firm, appct. will be left to enforce the award in an action, & the ct. will not enforce it by the exercise of a summary jurisdiction.—**ROBERTSON v. HATTON** (1857), 26 L. J. Ex. 293.

**100. — Contract still subsisting.]**—A contract was entered into by a mercantile firm with a joint-stock co. to manage the general shipping affairs of that co. Shortly afterwards one of the firm retired from the partnership, & it was agreed that he should be indemnified by the continuing partners, who carried out the objects of the contract with the joint-stock co. Disputes, however, arose between the co. & the continuing partners, which were subsequently referred to arbn., as provided for by the original contract. The result was that the mercantile firm were largely indebted to the co. The partner who retired was no party to the reference to arbn. The original contract had not been put an end to at the time of those transactions :—**Held** : (1) the partner who retired had not been absolved from his liabilities under the original contract with the co. ; (2) the continuing partners were his agents, & what they had

**102 i. — Unless acquiescing.]**—In a suit pending before arbitrators, a person who is made co-pltf. on application, & makes no objection to the arbn., is bound by the award.—**SHITANATH BISWAS v. KISHEN MOHUN MOKERJEE** (1866), 5 W. R. 130.—**IND.**

**102 ii. — What constitutes acquiescence.]**—A suit was referred to arbn. One deft. did not join in the reference, & did not take part in the proceedings before the arbitrators, although he, in obedience to a summons, sent his servant to produce a document before the arbitrators :—**Held** : his conduct was not such that it could be said that he was bound by the award by reason of acquiescence.—**BENI MADHUB MITTER v. PREONATH MANDAL** (1900), I. L. R. 28 Cal. 303 ; 5 C. W. N. 268.—**IND.**

**102 iii. — — — —.]**—A sum of money, paid by a customer as the result of a reference to arbn., in which the legal personal representatives of a deceased partner were no parties, having been brought into partnership accounts, the latter contended that not being parties to the reference they were not bound by

it :—**Held** : (1) the question whether the legal personal representatives of the deceased partner were bound by the agreement to refer was not a simple question of law to be decided without reference to the facts of the case ; (2) an agreement to refer not originally binding might become binding later on by the acquiescence of the party or his acceptance of benefits thereunder.—**DWARKA NATH SARKAR v. HAJI MAHOMED AKBAR** (1914), 18 C. W. N. 1025.—**IND.**

**102 iv. —.]**—An award is binding upon a party who has appeared & given evidence, although he has not signed the submission.—**LYON v. NORTH WEST TRUST CO. & MORGAN** (1916), 34 W. L. R. 485 ; 10 W. W. R. 630.—**CAN.**

**b. — "Parties"—Civil Procedure Code, ss. 525, 526.]**—Three parties agreed that in case of any dispute the matter should be referred to persons chosen by each party, & that in case any party should refuse to nominate an arbitrator, then the arbitrator named by the other party should nominate another arbitra-

tor, & the two should nominate a third person as umpire. Certain differences having arisen among the three, two of them called upon the exors. of the third to nominate an arbitrator, but they refused to do so. The first-mentioned parties then nominated an arbitrator, who in his turn nominated another, & these having appointed an umpire, made an award which was objected to by the exors. of one of the parties :—**Held** : (1) the word "parties," as used in s. 525, should not be confined to persons who are actually before the arbitrators ; (2) if persons by an agreement have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed, which under one state of circumstances may be adopted *in invitum*, they should, for the purposes of s. 525, be regarded as parties to that arbn. ; (3) there was sufficient reason to show that defts. were *prima facie* bound by the arbn., so as to bring them within the terms of s. 525 as parties thereto, who should be called on to show cause why the award should not be fled.—**JONES v. LEDGAR** (1886), I. L. R. 8 All. 340.—**IND.**

*Annotations* :—**Mentd.** Swire v. Redman (1876), 1 Q. B. D. 536 ; Rouse v. Bradford Banking Co., [1894] 2 Ch. 32, C. A.

**101. — Effect of attendance under protest.]**—In arbn. where a protest is made against jurisdiction the party protesting is not bound to retire ; he may go through the whole case subject to the protest he has made (LORD SELBORNE, C.).—**HAMLYN v. BETTELEY** (1880), 6 Q. B. D. 63 ; 50 L. J. Q. B. 1, C. A.

**102. — Unless acquiescing.]**—In an action brought against T. by defts. a verdict was taken against him for £10,000, subject to an award. T. then became bkpt., & afterwards the award was made, by which the amount of the damages was reduced :—**Held** : if the assignees of bkpt. attended the meetings under the reference to which bkpt. was a party, & made no objection to the proceedings, they must be considered as adopting them, & be bound by the award.—**DOD v. HERRING, Ex p. HERRING** (1830), 1 Russ. & M. 153 ; 39 E. R. 59 ; *varying* (1829), 3 Sim. 143.

**103. — — —.]**—A. having a claim on property, which he knew was the subject of a reference between C. & D., suffered the award to be made, without bringing forward his claim :—**Held** : he was bound by the award.—**GOVETT v. RICHMOND** (1834), 7 Sim. 1 ; 58 E. R. 737.

*Annotations* :—**Apprvd.** Boyd v. Belton (1844), 1 Jo. & Lat. 730. **Distd.** The Repulse (1845), 2 Wm. Rob. 398 ; Martin v. L. C. & D. Ry. Co. (1866), 1 Ch. App. 501, L. C.

**104. —.]**—An agreement provided that a question of boundary should be referred to an indifferent surveyor, & by a second agreement it was agreed the question should be settled by C., who went to the spot with the maps, with which he had been furnished by the parties by whom he was appointed, heard their statements, & staked out a boundary line. The question was, whether the surveyor had set out the boundary by the assent of defts., given either before or after the boundary was ascertained. A person was employed by the lessors of pltf. & the lessors of defts. to set out the boundary between the lands claimed by them respectively. Defts. were directly interested in the subject-matter of the inquiry. They knew that the boundary was about to be set out, & communicated with C. as the person by whom

it was to be set out. They accompanied him when the line was staked out, & before the decision was finally made they applied to pltf.' lessors for a lease of the spot in question, in case C.'s decision should be in favour of the latter :—*Held* : sufficient evidence that defts. assented to the setting out of the boundary line by C.—*TAYLOR v. PARRY* (1840), 1 Man. & G. 604 ; 1 Scott, N. R. 576 ; 9 L. J. C. P. 298 ; 4 Jur. 967 ; 133 E. R. 474.

*Annotations* :—*Reid*. *Holmes v. Powell* (1856), 8 De G. M. & G. 572. *Mentd*. *Fishmongers' Co. v. Dimsdale* (1852), 22 L. J. C. P. 44, Ex. Ch.

105. ———.]—By a judge's order made in a cause of A. v. B., it was ordered by consent of the parties & of C. (a stranger) that a verdict should be entered for pltf., damages £50, subject to the award of an arbitrator, who was to settle all matters in difference between the parties in the action, & also between B. & C. The arbitrator awarded that all proceedings in the action should cease, etc., & that pltf. had a good cause of action against deft. in the cause, & was entitled to a verdict therein, & assessed the damages at 40s., "to be paid by deft. to A. & C., who had consented to become a party to the cause." An action being brought by A. & C. against B. on the award :—*Held* : the award was good.—*HAWKINS v. BENTON* (1846), 8 Q. B. 479 ; 15 L. J. Q. B. 139 ; 7 L. T. O. S. 28 ; 10 Jur. 95 ; 115 E. R. 956.

106. ———.]—A consent to arbn. will be binding if acted upon & acquiesced in, notwithstanding it may have been informal.—*RAMNAD v. GETTIAPOORAM* (1859), 8 W. R. 9, P. C.

107. ———.]—The managing partner of a colliery worked beyond the boundaries of the colliery without proper inquiry as to such boundaries, &, after notice from the adjoining owner that he was committing a trespass, recklessly continued such workings without consulting his co-partners under the *bona fide* belief that the adjoining owner had no title to the disputed area. An action against him for trespass & damages by the adjoining owner was referred to arbn. The co-partners had no knowledge of the action until after the reference had been agreed to. They attended the reference, however, & did not object to it. The arbitrator found that a trespass had been committed & assessed the damages at £6,000. The co-partners refusing to contribute, the managing partner brought an action against them claiming a declaration that the £6,000 damages was a partnership debt, & that defts. were bound to contribute rateably to it :—*Held* : the co-partners had acquiesced in the arbn., & were bound by the award, which was equivalent to a verdict by a jury & the judgment of the ct. thereon.—*THOMAS v. ATHERTON* (1878), 10 Ch. D. 185 ; 48 L. J. Ch. 370 ; 40 L. T. 77, C. A.

108. ——— Except under statutory reference—*Affecting public property—Or rights of third parties.*]—Pltfs. & defts. were the owners of two adjoining houses in London. The houses were very old & had been built together so as to be mutually dependent upon one another for support. They were separated by a party wall. Defts., having resolved to rebuild their house, served upon pltfs. a party wall notice under London Building Act, 1894 (c. cxxiii.), & the parties, in accordance with s. 91 of that Act, appointed their respective surveyors. The house was pulled down & rebuilt 13 feet further back from the street, & defts. conveyed the vacant 13-foot strip to the county council, who dedicated

it to the public. The effect of setting the house back was that the party wall was left exposed to a depth of 13 feet & rendered unsafe by the withdrawal of the support of defts.' house. Subsequently to the dedication the surveyors made an award ordering defts. to erect on the edge of the strip so dedicated a pier for the support of the exposed portion of the party wall. In an action brought to enforce the award, & also to recover damages at common law for the withdrawal of the support afforded by the building pulled down :—*Held* : the award, in ordering the building of a pier on the vacant strip of land, was not bad, either by reason of the fact that the site had been dedicated to the public as a highway, or that, subject to the rights of the public, it was the property of third parties, for the public by the dedication, & the county council, by the conveyance, took subject to the statutory rights of pltfs. under the above Act.—*SELBY v. WHITBREAD & Co.*, [1917] 1 K. B. 736 ; 86 L. J. K. B. 974 ; 116 L. T. 690 ; 81 J. P. 165 ; 33 T. L. R. 214 ; 15 L. G. R. 279.

109. ——— & cannot claim — *Payments to strangers—Good if for benefit of party to submission.*]—An award that deft. shall acquit & discharge pltf. of & from a bond, in which others were jointly bound to a stranger, is good.—*BRADSEY v. CLYSTON* (1639), Cro. Car. 541 ; 79 E. R. 1066.

*Annotation* :—*Reid*. *Phillips v. Knightley* (1730), Fitz-G. 53.

110. ———.]—Arbitrators may award one of the parties to discharge the other from his undertaking to pay a debt to a third person.—*BECKETT v. TAYLOR* (1669), 1 Mod. Rep. 9 ; 86 E. R. 689.

*Annotation* :—*Reid*. *Lynch v. Clemence* (1699), 1 Lut. 571.

111. ———.]—By rule of the Liverpool Corn Trade Assocn. all disputes arising out of transactions connected with the trade were to be referred to two arbitrators, to be appointed by the parties, or, if they refused, by the chairman of the assocn. A broker having entered into a contract for the sale of corn per account of F. pursuant to the rules, F. denied that the broker was his agent, & refused to deliver the corn or appoint an arbitrator. The chairman having appointed arbitrators, & an award having been made :—*Held* : the ct. would not make the award a rule of ct. unless it was made clearly to appear that the broker was the agent of F.—*Re HENSHAW & FALK* (1865), 12 L. T. 638 ; 13 W. R. 870.

112. ——— Reference not authorised by plaintiff.]—Pltf., a merchant at Dublin, contracted with L., a shipbuilder at Quebec (for whom deft. was London agent), for a ship, particularly described in the contract, to be paid for by accepting a bill at six months, & if the vessel on her arrival at Dublin should exhibit any defect which should be so declared by any two competent persons, L. agreed to put it right at his own expense on her second voyage. The bill was sent for pltf. to accept, which he declined to do, having heard from Quebec that the vessel was defective, & he wrote to deft., "I only require the guarantee from you that L. shall perform his contract. If you agree to appoint one merchant, I will appoint the other. Let them agree to an umpire. Give me a letter of guarantee that L. will abide by the award & perform his part without delay." Deft. answered, "If you accept L.'s bill, & return it to us forthwith we

109 l. ——— & cannot claim—*Benefit of award.*]—An arbitrator's award declared the right of a member of a Hindu family jointly possessed of property, such member not being a party to the

arbn. He afterwards sued for separate possession. The award having been produced at the hearing :—*Held* : this member of the family, being a stranger to the submission to arbn., could not

avail himself of what the award contained in his favour.—*HIRA SINGH v. GANGA SAHAI* (1883), 1 L. R. 6 All. 322 ; L. R. 11 Ind. App. 20.—IND.



**Sect. 5.—Parties to a reference.]**

hereby agree to become personally responsible to you for the due fulfilment of the conditions of L.'s contract, & as C. & F. have the confidence of all parties we suggest that they should be appointed to decide what should be done in case upon the ship's arrival you have cause of complaint." Pltf. replied, "Relying on the guarantee you give me, I send inclosed the bill accepted for the full amount of the new ship." The bill was paid at maturity: the vessel arrived in Dublin, & was defective. A surveyor was appointed by pltf. & another by C. & F. to survey the vessel, who reported it would take £376 to make her equal to the contract; & C. & F. thereupon made their award, whereby they ordered deft. to pay that sum, which he refused to do:—*Held*: (1) pltf. never acquiesced in deft.'s proposal to refer the matter to C. & F.; (2) C. & F. never professed to act under any authority derived from pltf.; (3) pltf. was not entitled to recover in respect of the award.—*FAGAN v. HARRISON* (1849), 8 C. B. 388; 19 L. J. C. P. 105; 15 L. T. O. S. 182; 137 E. R. 560.

**113. ——— Cestui que trust not a stranger.]**—L. was trustee of T. & under a submission of matters in dispute between L. as such trustee & C., C. was ordered to pay T. £300:—*Held*: a *cestui que trust* was not a stranger in such a case, & T. might sue to enforce the award.—*LYNCH & TEMPLEMAN v. CLEMENCE* (1699), 1 Lut. 571; 125 E. R. 300.

**114. ——— Attorney of insolvent party seeking costs.]**—The attorney of one party to a cause & reference is not entitled to call upon the other to pay him, the attorney, the moneys awarded to be paid to his client.—*LLOYD v. MANSELL* (1853), Bail Ct. Cas. 130; 22 L. J. Q. B. 110.

*Annotation*:—*Refd.* *Brunsdon v. Allard* (1859), 28 L. J. Q. B. 306.

**115. Person becoming party to order of reference.]**—A stranger to an action, but interested in the subject-matter, may, by submitting to an order referring the action, be bound by the order.

A cause stood for trial at *Nisi Prius*. The action was for rent in arrear. One issue was on a plea of an eviction by P. by title paramount to that of pltf. P. was not a party to the cause, but claimed the reversion in the premises held by deft. P. became by parol party to an arrangement, by which the matter was to be settled by a reference of the cause to an arbitrator who was to determine (*inter alia*) on what terms pltf.'s interest in the premises should be purchased, & in what proportions P. should contribute to the payment, & to the amount of the damages. An order of *Nisi Prius* was drawn up incorporating these terms & containing a provision that P. should become a party to the reference; it was not expressed to be drawn up by his consent, but it was shown by other evidence that it was in fact by his consent. P. afterwards refused to be bound by this order:—*Held*: having submitted to the order in fact he was bound by it & could not retract, & the ct. had jurisdiction to enforce obedience in a summary manner.—*WILLIAMS v. LEWIS* (1857), 7 E. & B. 929; 29 L. T. O. S. 195; 3 Jur. N. S. 1324; 119 E. R. 1492.

**116. Several bonds by joint claimants.]**—Where

joint claimants submit to an arbn., & enter into separate bonds to the opposite party to abide by the award, if the award be general, that such joint claimants shall do an entire thing, each of them are bound for the performance of the whole award, although their bonds were several. The several bonds, although entered into because the parties will not be bound for each, are but one submission.—*HAYES v. HAYES* (1636), Cro. Car. 433; 79 E. R. 976.

*Annotation*:—*Refd.* *Lynch v. Clemence* (1699), 1 Lut. 571.

**117. Joint liability—Valuation between incoming & outgoing tenants.]**—Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbn., & jointly & severally promised to perform the award. The arbitrator awarded each of the two to pay a certain sum to the third:—*Held*: they were jointly responsible for the sum awarded to be paid by each.—*MANSELL v. BURRIDGE & ROBERTS* (1797), 7 Term Rep. 352; 101 E. R. 1015.

**118. Unauthorised agent signing on behalf of another.]**—If one of two partners sign an arbn. bond "for himself & partner," when the partner is not a party to the arbn., the non-signing partner is not bound to perform the award, but his failure to do so is a breach of the signing partner's promise.—*STRANGFORD v. GREEN* (1677), 2 Mod. Rep. 227; 86 E. R. 1041.

*Annotations*:—*Apld.* *Stead v. Salt* (1825), 3 Bing. 101. *Refd.* *Adams v. Bankart* (1835), 1 Cr. M. & R. 681.

**119. ———.]**—A submission bond recited that there were divers controversies between B. & D., as attorney for R., & D. bound himself to perform the award:—*Held*: R. was not bound because he was a stranger to the submission, but D. was bound because he had taken the obligation on himself.—*BACON v. DUBARRY* (DEBARRY) (1697), Holt, K. B. 78; 1 Ld. Raym. 246; Carth. 412; Comb. 439; 12 Mod. Rep. 129; 1 Salk. 70; Skin. 679; 91 E. R. 1060.

*Annotation*:—*Folld.* *Cayhill v. Fitzgerald* (1743), 1 Wils. 28.

**120. ———.]**—When one undertakes to submit to an award for another, he shall be bound by it. *Semble*: if a person submits to an award on behalf of a stranger, his bond shall be forfeit if the stranger does not perform the award.—*SHELF v. BAILY* (1709), 1 Com. 183; 92 E. R. 1025.

**121. ———.]**—A submission to an award was signed by three of five joint contractors:—*Held*: it would not bind the five, as it was not an act within the ordinary course of business of a trading firm, & there was no evidence that either of the parties had authority to bind the others to such a submission.—*STEAD v. SALT* (1825), 3 Bing. 101; 10 Moore, C. P. 389; 3 L. J. O. S. C. P. 175; 130 E. R. 452.

*Annotations*:—*Folld.* *Adams v. Bankart* (1835), 1 Cr. M. & R. 681. *Refd.* *Beckham v. Knight* (1838), 4 Bing. N. C. 243; *Hambidge v. Dela Crouée* (1846), 3 C. B. 742.

**122. ——— Repudiation of authority of counsel & attorney.]**—After an order of reference has been made with the consent of counsel & attorney the ct. will not set it aside on an affidavit by a party expressly denying his attorney's authority to refer,

**118 i. Unauthorised agent signing on behalf of another.]**—A party entered into a submission, as taking burden on himself for another party resident in England, & as taking burden on him for that party bound & obliged himself "to abide by" whatever the arbiter might determine:—*Held*: he was liable to implement the decree arbitral.—*WOODSIDE GARDNER'S TRUSTEES v.*

*CUTHBERTSON* (1848), 10 Dunl. (Ct. of Sess.) 604.—*SCOT*.

*c. Submission signed by chairman of board as individual.]*—A matter in dispute between W. & Co. & the N. Board was referred to arbn. The deed of arbn. was executed by E., the chairman of the board, simply under his personal signature. The award was in favour of W. & Co. & they sued E. on

the award:—*Held*: he was personally liable.—*ENGLISH v. WHITE* (1863), 2 W. & W. 14.—*AUS*.

*d. Executor bound individually.]*—One of several exors. being indebted to the estate, the matter was left by himself & his co-exors. to arbn.:—*Held*: though the award might not be binding on the estate, it was binding on the exor.—*KOELLA v. MCKENZIE* (1868), 15 Gr. 331.—*CAN*.



though the application be made before any step taken by the arbitrator, excepting the appointment of a meeting.

Here is an express agreement to refer properly entered into by counsel & attorney; it is now said that they had no authority to enter into that agreement; if so, deft.'s remedy is by action against her attorney. There would be no end to these applications if the ct. were to interfere; such interference would lead to collusion; when a party did not like the prospect of the reference, he would say that he had never given his attorney authority to refer (MANSFIELD, C.J.).—*FILMER v. DELBER* (1811), 3 Taunt. 486; 128 E. R. 192.

*Annotations*:—*Distd.* Stanhope v. Firmin (1837), 4 Scott, 39. *Consd.* Swinfen v. Swinfen (1857), 1 C. B. N. S. 364. *Refd.* Chambers v. Mason (1858), 5 C. B. N. S. 59.

See, generally, BARRISTERS; SOLICITORS.

**123. Submission voidable by infant—Valid as to other parties.**—An infant & one of full age, A., join in a bond to perform an award, & it is awarded that they or either of them shall pay £10, & that pltf. shall release to them after they have released to him. The bond is valid as to A., although voidable as to the infant, & the award good & mutual, although the infant cannot make a good release. An award that one of the parties & a stranger shall do an act is binding on the party, & void as to the stranger.—*GILL v. RUSSELL* (1672), 1 Freem. K. B. 139; 89 E. R. 101.

**124. —**—A parol submission was made by an infant pltf. to a reference, before trial, & an arbitrator made an award in favour of deft. On pltf.'s refusing to comply with the terms of such award:—*Held*: deft. might proceed to trial by proviso, after notice given to pltf. that the award had been made, & request made whether he would abide by it or not.—*GODFREY v. WADE* (1822), 6 Moore, C. P. 488.

*Annotation*:—*Apld.* Hansby v. Evans (1839), 4 M. & W. 565.

**125. —**—A cause was referred to an arbitrator who was to settle all matters in difference between the parties at law & in equity, so that he made his award by a certain day (with power of enlargement), to be delivered to the parties, or if either of them should be dead, to their personal representatives. The arbitrator was to be at liberty to make one or more awards at his discretion. At the time of the submission two equity suits were pending, in which the parties to the action & also certain infants were concerned. Before any award was made, one of the parties to one of the equity suits died. The arbitrator by his award ordered a verdict to be entered for pltf., damages £500, & also that defts. should pay to pltf. £350 for grievances not included in his declaration:—*Held*: the circumstances of infants being parties to those suits did not invalidate it.—*WRIGHTSON v. BYWATER* (1838), 3 M. & W. 199; 6 Dowl. 359; 1 Horn & H. 50; 7 L. J. Ex. 83; 150 E. R. 1114.

*Annotations*:—*Refd.* Doe d. Madkins v. Horner (1838), 8 Ad. & El. 235; *Harrison v. Creswick* (1852), 16 Jur. 315, Ex. Ch.; *Ex p.* Wyld (1860), 2 De G. F. & J. 642.

**126. — Award not set aside for want of mutuality on application of trustees signing for infant.**—An award made upon a submission by exors., who are trustees for infants & married women, referring matters relating to the estate of the person they represent, will not be set aside by the ct., at their instance, for want of mutuality.—*Re WARNER & FARNELL & NORRIS* (1844), 2 Dow. & L. 148; 13 L. J. Q. B. 370; 8 Jur. 1097.

See, generally, INFANTS & CHILDREN.

**127. Effect of insolvency—Rights of attorney of**

**insolvent party.**—Pltf. & deft. referred the cause to arbn., to which reference C. was a party. C. was ordered by the award to pay a certain sum to pltf. Pltf. became bkpt. Pltf.'s attorney in the action claimed the sum awarded from C. as in part payment of his bill of costs:—*Held*: the ct. would not, at the instance of the attorney, order C. to pay the sum awarded to him, although he claimed a larger sum as due to him in respect of his bill of costs.—*HOLCROFT v. MANBY* (1844), 7 Man. & G. 843; 2 Dow. & L. 319; 8 Scott, N. R. 473; 13 L. J. C. P. 208; 3 L. T. O. S. 282; 135 E. R. 342.

*Annotations*:—*Folld.* Lloyd v. Mansell (1853), Ball Ct. Cas. 130. *Refd.* Dunn v. West (1850), 10 C. B. 420.

**128. —**—Cross-actions were brought by M. & G. During the pending of these actions a judge's order was made, by consent, in G.'s action, referring to the reference to arbn. of M.'s action, & providing for the set-off of the amount of any award in the arbn. in M.'s favour against the debt & costs in G.'s action. Before the order of reference was obtained, a fiat issued against G. under which he was declared bkpt. G.'s assignees refused to be bound by the above-mentioned proceedings, & commenced an action against M.:—*Held*: (1) although assignees were not bound by a mere agreement of bkpt. to refer to arbn., yet the order for reference was a deliberate contract, not merely requiring a reference then pending, but providing that, in the event of the arbitrators awarding any sum to be paid by bkpt. to petitioners, such sum might be set off against the debt due to bkpt., & bkpt. was bound by that contract; (2) the assignees were equitably bound by it, & it would not be just for the assignees, by bringing an action in their own names, to get that which they could not get by proceeding in the former action, & thus defeat the equities of M.—*Re GEDDES, Ex p. MICHIE* (1840), 1 Mont. D. & De G. 181; 9 L. J. Bcy. 23; 4 Jur. 490.

*Annotation*:—*Distd.* Pennell v. Walker (1856), 18 C. B. 651.

**129. —**—A. accepted a bill of exchange, but became bkpt. before it fell due. On its coming due, B. paid it for the honour of A., but there was no protest of the bill for non-payment, nor did B. make any formal statement that he paid it for the honour of A. B. then claimed to prove for the amount of the bill. The question whether he was entitled to prove was referred by him and the assignees to arbn., without any such authority as required by Bkpcy. Law Consolidation Act, 1849 (c. 106), s. 153. B. never repudiated the reference, but argued the case on its merits before the referee, & took up the award, by which the referee decided that there was no right of proof:—*Held*: whether an award under such a reference could have bound the estate of the bkpt. or not, B., having taken the chance of having a decision in his favour, could not object to the validity of the award on the ground of the non-compliance with the Act.

The reference being unauthorised, this award could not have bound the estate nor the Comr. (TURNER, L.J.).—*Re WYLD, Ex p. WYLD* (1860), 2 De G. F. & J. 642; 30 L. J. Bcy. 10; 3 L. T. 794; 7 Jur. N. S. 294; 9 W. R. 421.

See, generally, BANKRUPTCY & INSOLVENCY.

**130. Effect of absence beyond the jurisdiction.**—By consent of pltf. & deft. within the jurisdiction, the partnership accounts, etc., & all matters in difference, were referred to arbn., notwithstanding the absence beyond the jurisdiction of the other deft., who had been a partner with pltf. & deft. before the ct. Form of order of reference.—*DUXBURY v. ISHERWOOD* (1864), 10 L. T. 712; 12 W. R. 821.

## SECT. 6.—CONSTRUCTION OF SUBMISSION.

## SUB-SECT. 1.—IN GENERAL.

**131. Transposition or rejection of words.]**—To support the condition of an arbn. bond the ct. will transpose or reject insensible words, & construe it according to the obvious intent of the parties.

An arbn. bond provided that, on disagreement of the arbitrators, they should choose an umpire, & that they should stand to his judgment:—*Held*: (1) any words by which the intention of the parties could appear were sufficient to make a condition of an obligation; (2) the condition on its true construction was that the parties, & not the arbitrators, should stand to the umpire's judgment.—*BUTLER v. WIGGE* (1667), 1 Saund. 65; 2 Keb. 204; 85 E. R. 74.

*Annotation*: —*Apld.* *Winter v. White* (1819), 1 Brod. & Bing. 350.

**132. "Either" party construed as "both."]**—A submission, so as the award be delivered to either of the parties, means both.—*BLOCK v. PALGRAVE* (1600), Cro. Eliz. 797; 78 E. R. 1026.

**133. "Shall or may."]**—In an agreement of reference it was agreed that the arbitrator "shall or may" award a certain matter, with a proviso, etc., etc.:—*Held*: the words "shall or may" were imperative on the arbitrator, & he was bound to insert the proviso in his award, the context of the agreement & the situation of the parties requiring such a construction.—*CRUMP v. ADNEY* (1833), 1 Cr. & M. 355; 3 Tyr. 270; 2 L. J. Ex. 150; 149 E. R. 436.

## PART I. SECT. 6, SUB-SECT. 1.

**e. Submission strictly construed.]**—Arbn., having the effect of withdrawing matters from the ordinary cts., constitutes a derogation from the common law & ought to be confined most strictly within the limits of the rules which the law has laid down.—*McKAY v. MACKEDIE* (1897), Q. R. 11 S. C. 513.—CAN.

**f. —.]**—*Held*: an agreement, which in express terms contemplated an award by two valuers in two events, must be construed as it stood.—*MASSIE v. CAMPBELLFORD, LAKE ERIE & WESTERN RY. CO.* (1914), 6 O. W. N. 457; 26 O. W. R. 421.—CAN.

**g. Will not be construed to defeat object of deed containing submission.]**—Where a deed contains a clause stipulating a reference to arbn. in the event of dispute, such clause is not to be construed so as to defeat an essential object of the parties to the deed.—*SHAW v. JEFFREY* (1860), 10 L. C. R. 340, P. C.—CAN.

**131 i. Transposition or rejection of words.]**—In order to support the condition of an arbn. bond, the ct. will transpose or reject insensible words, & construe it according to the obvious intent of the parties.—*GREENE v. BRACKEN* (1851), 2 I. C. L. R. 176, 182.—IR.

**h. "In a summary way."]**—An agreement provided that matters disputed were to be referred "in a summary way" to M. under R. S. O., c. 174, for decision:—*Held*: by "a summary way" the parties meant a reference without ceremony or delay, the words "under R. S. O., c. 174," merely introducing the procedure under that Act.—*SALE v. LAKE ERIE & DETROIT RIVER RY. CO.* (1900), 20 C. L. T. 332; 32 O. R. 159.—CAN.

**k. "To be ascertained & fixed by arbitration."]**—A lease contained a provision that the lessees should have the right of a renewal at a rent to be ascertained & fixed by arbn.:—*Held*: if the lessees elected to take a renewal, the rent had to be fixed in the manner

prescribed by Arbn. Act, 1908.—*GISBOURNE HARBOUR BOARD v. HARKER & BARKER* (1910), 29 N. Z. L. R. 801, C. A.—N.Z.

**l. "The judge."]**—*Held*: where a reference is directed to "the judge" of a certain county, the senior judge is the person referred to.—*ELORA AGRICULTURAL CO. v. POTTER* (1876), 7 P. R. 12.—CAN.

**m. "At such increased rent."]**—A lease contained a covenant by the lessor to renew for a further term "at such increased rent as may be determined upon as hereinafter mentioned." The lease provided for the appointment of arbitrators to determine the rent to be paid under the renewal lease:—*Held*: (1) the arbitrators were bound to award an increased rent, but might award a nominal increase if they thought proper; (2) the increase was to be based upon the rent reserved for the whole term, & not for any particular year or years of it; (3) it might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past.—*Re GEDDES & COCHRANE* (1902), 22 C. L. T. 54; 3 O. L. R. 75; 1 O. W. R. 15.—CAN.

**n. Submission construed with prior deed.]**—A proprietor agreed with a co. to allow the co. to take land included in certain notices, of which he had previously disputed the legality, it being stipulated that no other land should be taken, & that no land within the notices should be taken for other purposes than those therein described, "except in so far as an arbiter to be thereafter named should direct, & under such conditions as he might fix." A submission was thereafter entered into, whereby the parties referred to the decision of an arbiter "all demands, claims, & questions at the instance of the proprietor against the co.":—*Held*: the submission was to be construed by the prior deed of agreement.—*RENTON v. N. B. RY. CO.* (1847), 19 Sc. Jur. 524.—SCOT.

**134. "Wilful delay."]**—Covenant on a mtge. deed. Pleas *non est factum* & payment referred to arbn. The submission stipulated that "if either party, by affected delay or otherwise, should wilfully delay or otherwise wilfully prevent the arbitrator from making the award, he should pay costs," & gave the ct. power to remit to the arbitrator if either party disputed the validity of the award:—*Semble*: the clause relating to "wilful delay" did not apply to cases where an award had, in fact, been made, but to those cases only where the completion of the award was prevented.—*BRADLEY v. PHELPS* (1851), 6 Exch. 807; 21 L. J. Ex. 310; 155 E. R. 810.

**135. "In the usual manner."]**—An arbn. clause in a contract for the supply of chemical materials was in these terms: "Any dispute on the contract to be settled by arbn. in the usual manner, for which purpose it may be made a rule of ct.":—*Held*: the words "in the usual manner" did not mean, as a matter of law, "in accordance with the Act of 1889," but merely referred to the habitual form of arbn. in fact adopted in cases of the kind in question.—*BRIGHT & BROTHERS v. GIBSON & CO.* (1916), 32 T. L. R. 533.

**136. Affidavits not admissible to vary terms.]**—A cause was brought by an administrator, who declared on a promise made to him as administrator, & the cause was referred to arbn., the costs to abide the event. The arbitrator awarded that pltf. had no cause of action:—*Held*: pltf. was liable personally for the costs, & the terms of the submission could not be varied by affidavits showing that it was not the intention to make him

**o. Correspondence not admissible to construe submission.]**—*Semble*: it is not competent to construe a formal deed of submission by previous letters which have passed between the parties.—*MOWBRAY v. DICKSON* (1848), 20 Sc. Jur. 405.—SCOT.

**p. Cannot be qualified by terms of different agreement between same parties.]**—Differences arose in Dec., 1903, as to the ports of call to be visited by a steamer during 1904, & were referred to arbn. under a submission signed by the parties:—*Held*: the submission empowered the arbitrators to settle the ports to be visited by the steamer irrespective of any ports visited by her at any former period, & did not limit the arbitrators to determine what ports (if any) should be visited by the steamer within the time allowed by the contract in addition to those visited in previous years.—*Re REID-NFLD. CO. & THE GOVERNMENT* (1904), 9 Nfld. L. R. 34.—NFLD.

**q. Evidence admissible to construe technical words—"Permanent improvements."]**—Where lessors, in case of refusal to renew at expiration of the term, were to pay the lessee "such reasonable sum" as "the buildings & permanent improvements" on the demised premises might then be worth:—*Held*: in an arbn. to fix their value, evidence was admissible to explain the meaning of the words "permanent improvements."—*DALTON v. TORONTO* (1906), 8 O. W. R. 154; 12 O. L. R.

**r. Custom admissible to construe submission.]**—A contract for sale of oil provided that disputes should be referred to arbn. in the usual way. Sellers maintained that procedure must be by way of formal reference. Buyers maintained that arbiters should proceed informally, & presented a petition for appointment of an arbiter under Arbn. (Scotland) Act, 1894, s. 3:—*Held*: on the evidence the usual practice of the oil trade was that the arbiters proceeded informally, & prayer of petition must be granted.—*HIGHGATE (HUGH) & CO. v. BRITISH OIL & GUANO CO., LTD.* (1914), 2 S. L. T. 241.—SCOT.



personally liable. — *SPIVY v. WEBSTER* (1833), 2 Dowl. 46, Ex. Ch.

**137. Effect of Act of 1889.]**—The above Act does not override the express terms of a submission, but merely applies so as to introduce provisions into a submission, unless the contrary has been provided, or unless the intention that they should not be added has been expressed (*MATHEW & A. L. SMITH, JJ.*).—*Re WILSON & SON & EASTERN COUNTIES NAVIGATION & TRANSPORT CO.*, [1892] 1 Q. B. 81; 61 L. J. Q. B. 237; 65 L. T. 853; 8 T. L. R. 78; 36 Sol. Jo. 79; *affd.* 8 T. L. R. 264, C. A.

#### SUB-SECT. 2.—WHETHER ARBITRATION CLAUSE IS INCORPORATED.

**138. Clause in charterparty — Incorporation in bill of lading.]**—An action was brought by ship-owners against consignees of the cargo & indorsees of the bill of lading, for freight due under the bill of lading. The charterparty provided that any dispute which might arise under it was to be settled by arbn. at the port where the dispute arose. On the bill of lading the words "All other terms & conditions as per charterparty" were stamped:—*Held*: the arbn. clause in the charterparty did not apply to a dispute arising on the bill of lading. The rule in such a case is to read the conditions of the charterparty *verbatim* into the bill of lading, as though they were there printed in *extenso*, & then disregard any which, if so read, are inconsistent with the bill of lading.—*HAMILTON & CO. v. MACKIE & SONS* (1889), 5 T. L. R. 677, C. A.

*Annotations*:—*Follid.* *Runciman v. Smyth* (1904), 20 T. L. R. 625. *Expld.* *Temperley Steam Shipping Co. v. Smyth*, [1905] 2 K. B. 791, C. A. *Distd.* *The Portsmouth*, [1910] P. 293. *Follid.* *The Portsmouth*, [1911] P. 54, C. A.; *Thomas v. Portsea S.S. Co.*, [1912] A. C. 1, H. L. *Mentd.* *Serrano v. Campbell*, [1891] 1 Q. B. 283, C. A.

**139.** —.]—A charterparty dated in May, 1903, contained a clause that any dispute arising thereunder should be settled by arbn., & a clause for cessation of the charterers' liability on completion of shipment of the cargo & payment of any demurrage in loading. Goods were shipped for delivery to defts. or their assigns under a bill of lading dated in Aug., 1903, which contained, in print, in the margin, "All other conditions as per charterparty":—*Held*: notwithstanding the parties to the charterparty & the bill of lading were the same, the arbn. clause was not incorporated in the bill of lading.—*RUNCIMAN & CO. v. SMYTH & CO.* (1904), 20 T. L. R. 625, D. C.

*Annotations*:—*Overd.* *Temperley Steam Shipping Co. v. Smyth*, [1905] 2 K. B. 791, C. A. With all deference to the learned judges who decided it, I think *Runciman & Co. v.*

**137 i. Effect of Arbitration Act.]**—Where it is desired to exclude the above Act from the submission:—*Held*: it must appear clearly that it was intended to exclude same.—*HOLMES v. TAYLOR* (1900), 33 N. S. L. R. 415.—CAN.

#### PART I. SECT. 6, SUB-SECT. 2.

**a. Clause in contract — Incorporation in sub-contract.]**—Defts., one of the parties to a contract, entered into a sub-contract with pursuers. The sub-contract contained the following provision: "The whole work to be executed to the satisfaction of the engineers of the railway co." (the other party to the principal contract) "& according to plans & specifications, & to be finished within the period mentioned in the specification." The specification contained an arbn. clause, by which all disputes were referred to arbn. Disputes having arisen between the parties to the sub-contract:—*Held*: the arbn. clause had not been imported into the

sub-contract *quoad* matters outside the subject-matter of the principal contract.—*GOODWINS, JARDINE & CO., LTD. v. BRAND & SON* (1905), 42 Sc. L. R. 806.—SCOT.

**b. Clause in agreement — Incorporation in subsequent agreement extending time for performance.]**—An agreement between T. & Copper Co. contained an arbn. clause. T. assigned his interest in the agreement to M. Co., who entered into an agreement supplemental to the above-mentioned agreement with Copper Co. for an extension of time for performance on stated terms:—*Held*: the arbitration clause in the first-mentioned agreement applied to the second agreement.—*TASMANIA COPPER CO., LTD. v. METALS EXTRACTION CO., LTD.* (1912), 8 Tas. 57.—AUS.

**c. Clause in trade association's rules — Incorporation in mercantile contract.]**—A contract was embodied in a sale note which bore the following side note: "Any dispute under this contract

*Smyth & Co.* is not supported by the authority relied upon & is not in accordance with principle (*COLLINS, M.R.*). *Mentd.* *Morrison Tinplate Co. v. Brooker Dore*, [1908] 1 K. B. 403.

**140. — Cesser clause.]**—It was provided by clause 39 of a charterparty, by which pltf's. vessel was chartered by defts. for the carriage of a cargo of wheat from Bahia Blanca to a port in the United Kingdom, that, if the loading of the cargo were delayed by reason of certain causes therein specified, the time so lost should not be counted as part of the lay-days, & that, if any dispute arose under that clause in the loading of the ship, the same should be settled in the Argentine Republic by arbn. in the manner therein mentioned. The charterparty contained the usual cesser clause providing that the charterers' liability should cease upon shipment of the cargo, provided the cargo was worth the bill of lading freight, dead freight, & demurrage at the port of shipment, & that the vessel should have a lien on the cargo for recovery of all such bill of lading freight, dead freight, demurrage, & all other charges whatsoever. A full cargo was shipped by defts. under the charterparty, & bills of lading were given in respect thereof, by which the cargo was made deliverable to defts. or their assigns, they paying freight for the goods against delivery, in cash, at a rate of freight in accordance with the charterparty. The bills of lading stated that all the terms & exceptions contained in the charterparty were therewith incorporated & formed part thereof, & gave the shipowners an absolute lien on the cargo for the recovery of freight & demurrage & all other charges whatsoever. There was no dead freight, & the cargo shipped was worth the freight & charges. A dispute within the meaning of clause 39 having arisen with regard to delay in the loading of the ship between pltf's. & defts. after the completion of the loading:—*Held*: notwithstanding the cesser clause, & the fact that defts. were the holders of the bills of lading, the provision for arbn. in clause 39 of the charterparty remained operative as between pltf's. & defts., & an action brought by pltf's. after the ship's arrival in the United Kingdom, claiming a declaration that they were entitled to a lien on the cargo for demurrage at the port of loading, should be stayed under s. 4 of the Act of 1889. *Runciman & Co. v. Smyth & Co.*, No. 139, *ante*, *overd.*—*TEMPERLEY STEAM SHIPPING CO. v. SMYTH & CO.*, [1905] 2 K. B. 791; 74 L. J. K. B. 876; 93 L. T. 471; 54 W. R. 150; 21 T. L. R. 739; 10 Asp. M. L. C. 123; 10 Com. Cas. 301, C. A.

*Annotations*:—*Expld.* *The Portsmouth*, [1911] P. 54, C. A. *Mentd.* *The Portsmouth*, [1910] P. 293.

**141. —.]**—A bill of lading provided that the goods shipped thereunder should be delivered

to be settled according to the rules of the Glasgow Flour Trade Asscn." The rules of the asscn. provided (*inter alia*) that all disputes, etc., should be referred to arbiters. Defender was not a member of the asscn. No copy of the rules was sent to him & he knew nothing about them:—*Held*: defender did not receive reasonable notice that he was giving up his common law rights & was agreeing to submit to arbn., & the contract did not bind defender to submit to arbn. with regard to the matter in dispute.—*MCCONNELL & REID v. SMITH* (1911), 48 Sc. L. R. 564; 1 S. L. T. 333.—SCOT.

**d. —.]**—Where a contract contains an arbn. clause, by which it is agreed that any dispute arising out of the contract shall be referred to the arbn. of the Bengal Chamber of Commerce, the rules of the asscn. are imported into the contract & are binding on the parties.—*CHATTRAM RAMBILAS BRIDHICHAND KERRICHAND* (1915) 1 L. R. 42 Cal. 1140.—IND.



**Sect. 6.—Construction of submission: Sub-sects. 2**

to the shipper or to his assigns, "he or they paying freight for the goods, with other conditions as per charterparty," & in the margin was written, in ink, "Deck load at shipper's risk, & all other terms & conditions & exceptions of charter to be as per charterparty, including negligence clause." The charterparty provided that "Any dispute or claim arising out of any of the conditions of this charter shall be adjusted at port where it occurs, & same shall be settled by arbn."—*Held*: the arbn. clause was not incorporated in the bill of lading.—**THOMAS & Co., LTD. v. PORTSEA S.S. Co., LTD.**, [1912] A. C. 1; 12 Asp. M. L. C. 23, H. L.; *affg.* S. C. *sub nom.* **THE PORTSMOUTH**, [1911] P. 54, C. A.

**142. Clauses in colliery agreement—Incorporation in charterparty.**—A charterparty provided that a ship should proceed to a named port & "there load in the usual & customary manner a full & complete cargo of Ferndale coal, as ordered by charterers, which they bind themselves to ship subject to colliery guarantee. . . . The vessel to be loaded as customary, but subject in all respects to the colliery guarantee." The colliery guarantee provided that any question arising under the guarantee should be referred to arbn. The shipowners commenced an action against the charterers for demurrage at the port of loading:—*Held*: the arbn. clause in the colliery guarantee was incorporated into the charterparty, & the action must be stayed.—**WEIR & Co. v. PIRIE & Co.** (1898), 3 Com. Cas. 263.

*Annotation*:—**Distd.** **Clink v. Hickie, Borman** (1898), 3 Com. Cas. 275, C. A.

**143. ———.**—A charterparty provided that a ship should proceed to a named port & there load "in the usual & customary manner, always afloat, in days to be arranged, colliery working days, as per colliery guarantee form, a full & complete cargo of Ferndale coal" which the charterers, "subject to such warranty," bound themselves to provide.

**PART I. SECT. 6, SUB-SECT. 3.**

**144 i. Clause in partnership agreement—Withdrawal of one partner—Dispute arising after withdrawal.**—Pursuer & fifteen others entered into an agreement to effect an amalgamation of the businesses carried on by them. By art. 19 all disputes during the subsistence of the agreement, or during any continuation thereof, or after its dissolution or termination, or relating to the meaning of the agreement & the rights & liabilities arising therefrom, were referred to arbn. On pursuer's resigning, the remaining parties subscribed a "memorandum of continuation" of the agreement, & continued the business under the same name, firm & style. On a dispute arising between pursuer & the remaining partners as to whether the former was entitled to carry on business in competition with the partnership:—*Held*: (1) the partnership originally formed had been dissolved; (2) the new partnership agreement was not a continuation of the original agreement; (3) the arbn. clause did not apply to a dispute between the retiring partner & the new partnership.—**MACGREGOR v. LEITH & GRANTON BOATMEN'S ASSOCN.** (1917), 1 S. L. T. 13.—**SCOT.**

**145 i. Repudiation of liability on principal contract—Insurance.**—Defts. required pltf. to proceed to arbn. to ascertain the amount of loss under a policy issued by defts., which contained the statutory condition as to reference to arbn. Pltf. was willing to arbitrate as to amount provided defts. would admit liability for the loss. This defts. refused to do:—*Held*: defts. not entitled to a stay of proceedings until the amount

had been ascertained by arbn.—**HUGHES v. LONDON ASSURANCE Co.** (1883), 4 O. R. 293.—**CAN.**

**145 ii. ———.**—A reference to arbn. in terms of a policy is not a condition precedent to recovering on the policy, where the insurer has repudiated the contract.—**IRVING v. SUN INSURANCE OFFICE** (1906), O. R. C. 24.—**S. AF.**

**145 iii. ———.**—In an action brought to recover a sum alleged to be due under a policy, defts. moved to stay proceedings & refer the matter to arbn. under an arbn. clause contained in the policy. It appeared from the correspondence between the parties that defts. repudiated liability on certain grounds:—*Held*: such a dispute could not be referred to arbn.—**BALLASTY v. ARMY, NAVY & GENERAL ASSURANCE ASSOCN., LTD.** (1916), 50 I. L. T. 114.—**IR.**

**145 iv. ———.**—*Repudiation not amounting to rescission.*—A contract for the insurance of cattle contained an arbn. clause providing that any dispute between the parties as to the construction of the contract should be referred to an arbitrator. The insurers, having taken exception to certain actings of the firm, declined to do further business with them. In an action of damages by the firm against the insurers for breach of contract:—*Held*: the parties had not treated the contract as rescinded, & the arbn. clause was still binding.—**HEGARTY & KELLY v. COSMOPOLITAN INSURANCE CORPN., LTD.**, [1913] S. C. 377.—**SCOT.**

**e. ———.**—*Contract.*—A. contracted to supply plant to B., but being unable

The colliery guarantee provided that any question arising under the guarantee should be referred to arbn. The shipowners commenced an action against the charterers for demurrage at the port of loading:—*Held*: the arbn. clause in the colliery guarantee was not incorporated into the charterparty.—**CLINK v. HICKIE, BORMAN & Co.** (1898), 3 Com. Cas. 275, C. A.

*Annotation*:—**Mentd.** **Saxon S.S. Co. v. Union S.S. Co.** (1899), 68 L. J. Q. B. 914, C. A.

**SUB-SECT. 3.—WHETHER ARBITRATION CLAUSE IS IN FORCE AND APPLICABLE.**

**144. Clause in partnership for period—Continuation after expiry of period.**—Articles for a partnership for one year contained an arbn. clause. The partnership was continued beyond the year & ultimately dissolved:—*Held*: the arbn. clause was in force.—**GILLET v. THORNTON** (1875), L. R. 19 Eq. 599; 44 L. J. Ch. 398; 23 W. R. 437.

*Annotations*:—**Apld.** **Cope v. Cope** (1885), 52 L. T. 607. **Refd.** **Walmsley v. White** (1892), 67 L. T. 433, C. A. **Mentd.** **Compagnie du Sénégal et de la Côte Occidentale D'Afrique v. Smith & Woods** (1883), 49 L. T. 527.

**145. Repudiation of liability on principal contract—Insurance.**—One of the conditions in a policy of insurance against fire stated that, if any difference should arise on any claim, it should be immediately submitted to arbn., & after directing how the arbitrators should be chosen, added that no compensation should be payable until after an award determining the amount thereof should be duly made:—*Held*: the assured might maintain an action on such policy notwithstanding the condition, where it appeared that the insurers denied the general right of the assured to recover anything, & did not merely question the amount of damage.—**GOLDSTONE v. OSBORN** (1826), 2 C. & P. 550.

to complete the contract intimated the fact to B., stating that the letter was not to be taken as an admission of breach. B. replied that he would hold the contract at an end & claim damages, & on so doing was met by the arbn. clause in the contract. B. maintained that the contract had been terminated & that defender was not entitled to found on the arbn. clause:—*Held*: the contract still subsisted as a measure of damages.—**JOHANNESBURG MUNICIPAL COUNCIL v. STEWART (D) & Co.** (1909), 46 Sc. L. R. 657.—**SCOT.**

**f. Clause in contract—Contract subsequently varied.**—A contract named an arbiter for the settlement of all disputes. The contract was varied, & the contractors executed the deviation according to plans furnished:—*Held*: the arbn. clause in the original contract remained effectual in reference to the making of the deviation, as well as the other portions of the work.—**BARK & Co. v. STIRLING & DUNFERMLINE Ry. Co.** (1855), 17 Dunl. (Ct. of Sess.) 582.—**SCOT.**

**g. ———.**—*Within limits of variation anticipated by parties.*—A contract to execute certain works contained an arbn. clause & a stipulation that alterations, additions or modifications made on the original plans during the execution of the works should be deemed part of the contract, etc. After the works were executed, with certain departures from the original plans, the contractor sued for a further sum which he alleged to be due in consequence of these alterations, amounting to independent works:—*Held*: the alterations were of the nature anticipated in the contract, & the clause applied

**146.** .]—A claim was made for indemnity for the loss of goods by fire under a policy, the conditions of which provided (1) that if the claim were fraudulent, or if the loss were occasioned by the wilful act or with the connivance of the insured, all benefit under the policy should be forfeited, & (2) that if any difference arose as to the amount of any loss such difference should, independently of all other questions, be referred to arbn., & that it should be a condition precedent to any right of action upon the policy that the award of the arbitrator or umpire of the amount of the loss, if disputed, should be first obtained. The insurance co. repudiated the claim *in toto* on the ground of fraud & arson:—*Held*: the repudiation of the claim on a ground going to the root of the contract precluded the co. from pleading the arbn. clause as a bar to an action to enforce the claim.—*JUREIDINI v. NATIONAL BRITISH & IRISH MILLERS INSURANCE CO., LTD.*, [1915] A. C. 499; 84 L. J. K. B. 640; 112 L. T. 531; 31 T. L. R. 132; 59 Sol. Jo. 205, H. L.

*Annotation*:—*Reid. Wall v. Rederlaktiebolaget Luggude*, [1915] 3 K. B. 66.

**147.** .]—Appct. made to resps., an insurance co., a proposal for insurance. The proposal contained a declaration by appct. that his statements were true & an agreement that the

proposal should be the basis of the contract. The policy recited that the proposal was the basis of the contract, & provided that compliance with the conditions indorsed on it should be a condition precedent to resps.' liability. One of the conditions was that if a false declaration was made in support of a claim, all benefit under the policy should be forfeited. The policy also provided that "all differences under this policy" should be referred to arbn. Appct. made a claim under the policy, & resps. required that it should be referred to arbn. Before the arbitrator resps. resisted the claim on the ground that appct. had made untrue statements in the proposal form. Appct. contended that the arbitrator had no power to determine any matters which called in question the validity of the policy. The arbitrator stated a case as to whether the truth or untruth of the statements in the proposal had been referred to him:—*Held*: as resps. were not seeking to avoid the policy, but were relying upon the provision that the truth of the statements should be the basis of the contract, the answer to the question was in the affirmative.—*STEBBING v. LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD.*, [1917] 2 K. B. 433; 86 L. J. K. B. 1155; 117 L. T. 247; 33 T. L. R. 395.

**148. Dismissal of servant**—*Clause in employment contract.*]—A contract to pay salary, & also to give a share of the profits during a certain time, con-

—*MACKAY v. PROVINCIAL BOARD OF BARRY* (1883), 20 Sc. L. R. 697.—*SCOT.*

**h.** *Extension of time for completion.*] A contract, which stipulated that the work contracted for should be finished by a certain date, contained a clause submitting all disputes to an arbiter. The execution of the work was suspended by the desire of the employers, but was afterwards resumed by the contractor, though not till long after the expiry of the time originally stipulated for its completion:—*Qu.*: whether the submission clause of the contract remained in force after the expiry of that time.—*ANDERSON v. ABERDEEN RY. CO.* (1850), 12 Duul. (Ct. of Sess.) 781.—*SCOT.*

**k.** .]—One of the conditions of a contract provided that the contractor should complete the whole of the works on a certain day & contained an arbn. clause in exhaustive terms. Subsequently it was agreed to extend the time for completion, & by an indenture between the parties the condition for completion on a certain day was rescinded & a new condition was substituted identical in terms except that a new date for completion was inserted. The employer, after the original date for completion & before the new date, purported to determine the contract in pursuance of conditions in that behalf. An action having been brought by the contractor claiming (*inter alia*) damages for breach of contract, for wrongful prevention of due & complete performance & for wrongful determination of the contract, & upon a *quantum meruit* for work & labour done:—*Held*: the matters in dispute were referable to arbn., notwithstanding that the original time for completion had passed when the contract was determined.—*BURTON v. BAIRNSDALE (SHIRE PRESIDENT)* (1908), 7 C. L. R. 76.—*AUS.*

**l.** ——— *Variation amounting to new contract.*]—Where an application under an arbn. clause in a contract was made to stay proceedings, & it was contended by the opposite party that for the original contract a new agreement had been substituted, inasmuch as both parties had agreed to an extension of time:—*Held*: a mere extension of time did not operate so as to rescind the original contract, but where a new term for the inspection of the goods before delivery had also been introduced, the

original contract was replaced by the new agreement, to which the arbn. clause in the original contract could not apply, & the application must, therefore, be refused.—*LACHMINARIAN BHARRODAN v. HOARE, MILLER & CO.* (1914), 1 L. R. 41 Calc. 35.—*IND.*

**m.** ——— *Contract finished*—*Whether clause executorial.*]—*Held*: a clause of reference referring to the decision of "the architects all disputes connected with the contract," that might arise at any time, either previous to the commencement, during the progress, or after the completion of the contract, was "executorial" of the contract, & did not constitute an arbn. embracing the question of the price to be paid for the work.—*MCCORD v. ADAMS* (1861), 34 Sc. Jur. 41.—*SCOT.*

**n.** ——— .]—*Held*: an action by a contractor against his employer for payment due under a building contract, & for damages from his employer having illegally taken possession of machinery & materials, was not excluded by a clause in the contract referring to arbn. all disputes or differences concerning the work or relating to the quantity or quality of material employed, or in any other matter or thing connected with the contract "either during the progress of the work or after the completion thereof."—*TOUGH v. DUMBARTON WATERWORKS COMRS.* (1872), 11 Macph. (Ct. of Sess.) 236.—*SCOT.*

**o.** ——— .]—A clause in a contract whereby parties agreed to refer all disputes between them "connected with this contract or the execution of the work" does not apply to disputes about the measurement of the work after its completion.—*KIRKWOOD v. MORRISON* (1877), 15 Sc. L. R. 51.—*SCOT.*

**p.** ——— .]—An agreement for the construction of cars contained a clause of reference providing that any difference as to its meaning, or as to the construction of the cars, or materials employed therein, or the implementing the provisions of the contract, should be submitted to arbn. After the cars had been delivered & used, a dispute arose as to whether the cars conformed to specification:—*Held*: such a clause of reference was intended to be confined to questions arising during the progress of the work.

—*SAVILE STREET FOUNDRY CO., LTD. v. ROTHESAY TRAM. CO., LTD.* (1883), 20 Sc. L. R. 562.—*SCOT.*

**q.** ——— .]—A contract contained an arbn. clause providing that any difference in regard to the true meaning of the plans, etc., or the manner in which the work was to be executed, or any matter arising thereout or connected therewith, should be submitted to B. After completion of the contract the employer disputed the accuracy of the measurements. The contractor then raised an action to have it declared that the dispute fell within the clause of reference:—*Held*: such clause of reference applied only to disputes arising during the execution of the contract, & requiring to be immediately disposed of, & the dispute, which related to completed work, did not fall within it.—*BEATTIE v. MACGREGOR* (1883), 20 Sc. L. R. 729.—*SCOT.*

**r.** *Termination*  
*virtue of reserved power to that effect.*]—A contract for the execution of certain works provided that it should be lawful for the engineer of the employers, in certain events, to determine the contract on certain conditions, & all disputes were to be referred to the arbn. of B., whose decision should be binding. The employers determined the contract, & proceeded themselves with the works, but the works were not completed for nearly three years. The contractors brought an action, claiming an account of what was due to them on the contract, & damages for breach thereof, or to have the contract specifically performed:—*Held*: whatever might be the effect of the arbn. clause, if a dispute arose after the engineer had made a valuation & certificate, there was then no dispute or difference within the arbn. clause.—*SWINEY & M'LARNON v. BALLYMENA TOWN COMRS.* (1888), 23 L. R. Ir. 122, 129.—*IR.*

**s.** ——— .]—Under a contract, power was given to the architect to declare the contract at an end. An arbn. clause referred questions to the architect, who exercised his power to declare the contract at an end. In an action by the contractors against the owners:—*Held*: the arbn. clause was operative notwithstanding the action of the architect in declaring the contract at an end.—*SCOTT v. GERRARD* (1916), 2 S. L. T. 42.—*SCOT.*



*Sect. 6.—Construction of submission: Sub-sects. 3*

tained a clause of reference to arbn. of disputes relating to the construction of the deed or as to the accounts. In an action for wrongful dismissal, the contest being as to the right to dismiss for neglect of duty:—*Held*: the action was not referable.—*SMITH v. ALLEN* (1862), 3 F. & F. 156.

149. ———.]—Pltf., who had been engaged by contract under seal to conduct deft.'s business for five years as manager, having been dismissed during the term for mismanagement, sued upon the contract, which provided that in case any dispute or question should arise between the parties in respect of the carrying on of the business, or otherwise, or any matters connected with the contract, the same should be referred to arbn.:—*Held*: a judge at chambers had jurisdiction under C. L. P. Act, 1854, s. 11, to stay the proceedings in the action & refer it to arbn., & in so doing he properly exercised his discretion.

It appearing that matters of account were involved:—*Qu.*: as to the jurisdiction under s. 3 as to compulsory reference of questions "wholly or partly" matter of account.—*WICKHAM v. HARDING* (1859), 28 L. J. Ex. 215; 33 L. T. O. S. 138.

150. ———.]—Deft. agreed to employ pltf. as his agent for carrying on his business in a specified district for fifteen years, & the agreement contained a clause for referring to arbn. any disputes as to the construction of the agreement, or any payment, act, or thing relating to or arising out of the agreement. Before the term expired, deft. dismissed pltf. from his employment for alleged misconduct, & gave notice to refer the matters in dispute between them to arbn., but among the matters in dispute he did not specify his dismissal of the agent. Both parties appointed arbitrators, but before anything more was done pltf. brought an action against deft. to restrain him from dismissing him & from appointing another agent. Deft. moved to stay proceedings in the action on the ground of the agreement to refer all matters to arbn.:—*Held*: (1) deft. having taken upon himself to dismiss pltf. without waiting the decision of the matters in difference by arbn., the ct. ought not to exercise their power of staying proceedings in the action; (2) it was too late after the commencement of the action for deft. to withdraw his dismissal of pltf., in order that it might be included in the arbn.—*DAVIS v. STARR* (1889), 41 Ch. D. 242; 58 L. J. Ch. 808; 60 L. T. 797; 37 W. R. 481, C. A.

*Annotations*:—*Distd.* *Renshaw v. Queen Anne Mansions Co.*, [1897] 1 Q. B. 662, C. A. *Expld.* *Parry v. Liverpool Malt Co.*, [1900] 1 Q. B. 339, C. A.

151. ———.]—A contract for the employment of pltf. by defts. for five years provided, among other things, that defts. might dismiss pltf. if he were guilty of gross misconduct, & that, if any dispute should arise between defts. & pltf. touching their or his rights or liabilities under the contract, it should be referred to arbn. Defts. dismissed pltf. on the ground of alleged misconduct,

& pltf. brought an action against defts. claiming damages for wrongful dismissal:—*Held*: (1) the dispute was within the terms of the arbn. clause in the contract; (2) defts. being willing to refer the whole dispute to arbn., the action should be stayed & the matter referred in accordance with the submission.—*RENSHAW v. QUEEN ANNE RESIDENTIAL MANSIONS CO., LTD.*, [1897] 1 Q. B. 662; 66 L. J. Q. B. 496; 76 L. T. 611; 45 W. R. 487.

*Annotation*:—*Folld.* *Parry v. Liverpool Malt Co.*, [1900] 1 Q. B. 339, C. A.

152. ———.]—A contract for the employment of pltf. by defts. as their agent for the sale of maize & other products for seven years, at a remuneration by commission, provided that "any dispute arising in connection with" the contract should be referred to arbn. pursuant to the arbn. clause in the bye-laws of the Liverpool Corn Trade Assn. The arbn. clause in those bye-laws provided that "all disputes arising out of transactions connected with the trade" should be referred to arbitrators, & that neither contracting party should bring any action against the other in respect of any dispute until the dispute had been settled by the arbitrators. Disputes as to pltf.'s conduct as agent were subsequently referred to arbitrators, who made an award adverse to pltf., whereupon defts. dismissed him. Pltf. then brought an action against defts. for damages for wrongful dismissal:—*Held*: the dispute in the action was within the arbn. clauses in the contract & bye-laws, & defts., having always been "ready & willing" to refer the dispute to arbn., were entitled to have the action stayed under s. 4 of the Act of 1889.—*PARRY v. LIVERPOOL MALT CO.*, [1900] 1 Q. B. 339; 69 L. J. Q. B. 161; 81 L. T. 621; 44 Sol. Jo. 118, C. A.

*See, also*, No. 307, *post*.

153. *Clause in lease—Express tenancy at will created after expiry of period in lease.*]—A colliery lease gave the lessees a right to carry foreign coal over the surface by means of a tramway, & provided that any controversy relating to the lease should be referred to arbn. Just before the lease expired, the lessees wrote to the lessors asking for an extension of the lease for six months on the same terms, & the lessors wrote, in reply, that the lessees might consider themselves tenants at will of both mine and wayleave until an arrangement could be arrived at. No arrangement was arrived at, & the lessors terminated the tenancy at will by notice, & afterwards brought an action against the lessees for damages for the use of the wayleave during the tenancy at will. The lessees applied for a stay of proceedings under s. 4 of the Act of 1889:—*Held*: an express tenancy at will was created on the terms of the lease so far as they applied to such a tenancy, including the arbn. clause, & the proceedings ought to be stayed.

Where a tenant holds over after the termination of a lease & an express tenancy at will is created, all the terms & conditions of the original lease apply to the tenancy at will, including an arbn. clause, so far as they are consistent with such

153 i. *Clause in lease—Claims arising after termination.*]—A lease of minerals referred to a mining engineer "any disputes or differences" that should arise "as to the meaning or execution of these presents":—*Held*: the clause was "executorial" for the purpose of carrying out the stipulations of the lease, & did not embrace a claim made after its expiration.—*PEARSON v. OSWALD* (1859), 31 Sc. Jur. 229.—*SCOT*.

153 ii. ——— *Lease surrendered.*]—A memorandum of lease provided that any doubt, difference, or dispute arising

between the parties touching "these presents," or any matter, clause, or thing therein contained, should be determined by arbitrators in manner provided by Arbn. Act, 1890:—*Held*: the arbn. clause was still effective, notwithstanding that no claims for breaches of covenants had been made until after the surrender of the lease.—*TROUTBECK v. TANNER* (1910), 29 N. Z. L. R. 1171.—*N.Z.*

153 iii. ——— *Lands sub-let—Whether applicable as between landlord & sub-tenant.*]—A lease provided that, at the expiry thereof, the buildings should be

valued by persons, one chosen by each party, & in the case of variance between them, by an oversman. The tenant sublet a portion of the ground, with the houses thereon, to the War Office, & assigned to the sub-tenant the whole clauses & obligations incumbent on the proprietor under the principal lease. The War Office brought an action against the proprietor, concluding for decree ordaining him to nominate a neutral person in terms of the principal lease:—*Held*: defender must do so.—*LORD ADVOCATE v. HOME (EARL)* (1891), 18 R. (Ct. of Sess.) 397.—*SCOT*.



tenancy (COZENS-HARDY, M.R.). — *MORGAN v. HARRISON (W.), LTD.*, [1907] 2 Ch. 137; 76 L. J. Ch. 548; 97 L. T. 445, C. A.

*Annotation* :—*Mentd. A.-G. v. Cory, Kennard v. Cory* (1918), 34 T. L. R. 621.

**154. Where no dispute arises.]—**A., being possessed of certain plant & materials for the construction of a canal & other engineering works in Holland, in Mar., 1853, agreed, by parol, to sell same to B., & two persons were sent to the spot to value them. An inventory was accordingly made, & on Mar. 31, A. & B. signed the following memorandum at the foot thereof: "Agreed between B. & myself, £4,509 12s." On May 8, a written contract for the sale of the plant & materials was executed by A. & B., by which it was agreed "that A. should sell & B. should purchase all such parts of the plant, materials & things then on or about the works of the canal, which belonged to A., & that the price to be paid for same should be the fair amount of the value thereof, such amount to be settled, in case the parties should differ as to same, by arbn.," in manner therein provided; "and that B. should pay to A. the amount of such price or value within two calendar months after such price or value should have been fixed & determined as aforesaid." B. was let into possession of the plant immediately after Mar. 31, & remained in possession. No arbn. was ever demanded, or any dissatisfaction expressed by B. at the price fixed by the valuers:—*Held*: the event upon which the arbn. clause of the contract of May 8 was to take effect, viz., the parties differing as to the value, never having arisen, the parties were remitted to a sale at a fair value, & A. was entitled, at the expiration of two months from that date, to recover the value agreed on by the memorandum of Mar. 31.—*CANNAN (CANAAN) v. FOWLER* (1853), 14 C. B. 181; 23 L. J. C. P. 48; 2 W. R. 101; 2 C. L. R. 43; 139 E. R. 75.

#### SUB-SECT. 4.—WHAT LAW GOVERNS CONSTRUCTION OF ARBITRATION CLAUSE.

**155. Contract between English & Scotch firm—Which law governs.]—**A vendor resident in Scotland, & a purchaser resident in England, agreed for the sale & purchase of goods to be delivered in Scotland. The agreement contained a clause that any dispute should be "settled by arbn. by two members of the London Corn Exchange, or their umpire, in the usual way." The vendor brought an action against the purchaser in the

Scotch ct. for non-acceptance of the goods according to contract. The purchaser pleaded the arbn. clause, which, being an agreement for reference to unnamed arbitrators, was, as the Scotch law then stood, invalid:—*Held*: (1) the intention of the parties, as gathered from the whole contract, was that it should be governed by English law; (2) the arbn. clause, being good in English law, & not fundamentally opposed in principle to the law of Scotland, was a good defence to the action.—*HAMLIN & CO. v. TALISKER DISTILLERY*, [1894] A. C. 202; 71 L. T. 1; 58 J. P. 540; 10 T. L. R. 479; 6 R. 188, H. L.

*Annotations* :—*Apld. Crosland v. Wrigley* (1895), 73 L. T. 60; *South African Breweries v. King*, [1899] 2 Ch. 173; *Royal Exchange Assce. Corp'n. v. Sjöforsakrings Akt. Vega*, [1902] 2 K. B. 384, C. A. *Folld. Spurrier v. La Cloche*, [1902] A. C. 446, P. C. *Apld. Hansen v. Dixon* (1906), 96 L. T. 32; *British South Africa v. De Beers Consolidated Mines*, [1910] 1 Ch. 354; *Pena Copper Mines v. Rio Tinto Co.* (1911), 105 L. T. 846, C. A.; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578; *Cameron v. Cuddy*, [1914] A. C. 651, P. C. *Reid. Hicks v. Maxton* (1907), 1 B. W. C. C. 150. *Mentd. Déclène v. City of Montreal* (1894), 11 R. 319, P. C.

**156. Insurance by English company of Jersey risk—Reference to Act of 1889.]—**A fire insurance policy, made in Jersey by the agents of an English co. on the goods of a resident of Jersey, provided (*inter alia*) that the co. should pay what might become due in case of loss out of its capital stock & funds, & contained an arbn. clause specifically referring to the above Act:—*Held*: the nature of the transaction, the language in which the policy was expressed, & the terms of the agreement & of the conditions, all showed that the contract between the parties was an English contract, & that, wherever sued upon, its interpretation & effect ought, as a matter of law, to be governed by English & not by Jersey law.

The reference to the English Arbn. Acts shows that the arbn. proceedings were to be conducted according to English law, & no other (LORD LINDLEY).—*SPURRIER v. LA CLOCHE*, [1902] A. C. 446; 71 L. J. P. C. 101; 86 L. T. 631; 51 W. R. 1; 18 T. L. R. 606, P. C.

**157. Contract between English companies carrying on business in Spain—Reference to Act of 1889.]—**A contract between English cos. carrying on business in Spain provided that the contract should be "constructed & take effect as a contract made in England & in accordance with the laws of England," & that the rights, duties, or liabilities of the parties thereto should be referred to arbn. in conformity with the provisions of the above Act:—*Held*: having regard to the express language of the contract, the parties contracted with reference to the law of England, & it was the intention of both parties that all their

#### PART I. SECT. 6, SUB-SECT. 4.

**a. Contract between Scotch & Belgian firm—What law governs.]—**A contract between a merchant in Scotland & a mercantile firm in Antwerp, to be implemented in Scotland, provided: "Arbn. Any dispute on this contract to be settled by friendly arbn. in London in the usual way":—*Held*: the question whether the clause was valid & effective fell to be determined by the law of England.—*ROBERTSON v. BRANDES, SCHONWALD & Co.* (1906), 43 Sc. L. R. 635.—SCOT.

**b. Contract between Scotch & South African firm—What law governs.]—**A contract, whereby a firm in Scotland undertook to supply plant for Johannesburg, provided: "In case any dispute or difference shall arise between the purchasers & the contractors . . . it shall, after the complete delivery of the material, be referred to the arbn. of a single arbiter or umpire to be mutually agreed upon between the parties, or, failing agreement, to be nominated by the president for the time being of the

Institution of Civil Engineers of London, or, in the case of disputes arising with local contractors in Johannesburg, to be nominated by the Lieutenant-Governor of the Transvaal . . . & the arbn. shall be an arbn. within the Act of 1889 & shall be conducted in all respects as therein provided." The main contract was subsequently modified by a second or "running" contract which provided: "In the event of any dispute between the contractors & the council . . . the matter in dispute shall be referred to a single arbiter or umpire to be mutually agreed upon, or, failing agreement, to be nominated by the Lieutenant-Governor of the Transvaal, & to hold the arbn. in Johannesburg . . . & the arbn. shall be deemed to be an arbn. within Transvaal Ordinance of 1904, & shall be conducted in all respects as therein provided." The main contract provided: "This contract shall be deemed for all purposes an English contract enforceable in & subject to the jurisdiction of the English cts." In an action for damages for breach of the two contracts, ques-

tions arose as to whether these claims were covered by the arbn. clauses:—*Held*: the scope & validity of the arbn. clauses fell to be determined by the law of England.—*JOHANNESBURG MUNICIPAL COUNCIL v. STEWART & Co.*, [1909] S. C. 860.—SCOT.

**155 i. Contract between English & Scotch firm—Which law governs.]—**A contract of sale between Glasgow engineers & a London co. contained an arbn. clause in English form providing for the appointment of an arbiter under the Act of 1889. The purchasers rejected certain plant, & on being sued contended that it was for the English ct. to determine the scope of the reference & pleaded *forum non conveniens*:—*Held*: as defenders had failed to show it would be more suitable for the interests of all parties & for the ends of justice that the case should be tried in England, there was no reason why the case should not remain in the Scottish cts.—*HOWDEN & Co., LTD. v. POWELL, DUFFRYN STEAM COAL CO., LTD.* (1912), 49 Sc. L. R. 605.—SCOT.

*Sect. 6.—Construction of submission: Sub-sects. 4, 5, 6 & 7, A.]*

rights under the contract should be governed by that law, & that the procedure for determining their rights should be an English procedure under an English stat. in accordance with English statutory provisions.—*PENA COPPER MINES, LTD. v. RIO TINTO CO., LTD.* (1911), 105 L. T. 846, C. A. See, generally, *CONFLICT OF LAWS*.

**SUB-SECT. 5.—WHETHER ARBITRATION IS CONDITION PRECEDENT.**

*A. To Right to sue.*

See Sect. 9, *post*.

*B. To other Remedies.*

**158. Right to remove plant as set-off against debts—Question of account.]**—By the contract between a railway co. & a contractor it was provided that, if the contractor made default, the co. might themselves complete the line, & that the plant, etc., upon the line belonging to the contractor should become the property of the co., & be set off against the debts (if any) due from him to the co., & that the contractor should not hinder the co. from using the same. Default having been made, the co. completed the line, & were proceeding to remove the plant, etc. An arbn. was pending to decide the questions of account between the contractor & the co.:—*Held*: the co. must be enjoined from removing the plant before award given.—*GARRETT v. SALISBURY & DORSET JUNCTION RY. CO.* (1866), L. R. 2 Eq. 358; 14 L. T. 693; 12 Jur. N. S. 495; 14 W. R. 816.

**159. Right to give notice to terminate contract.]**—Defts. were carrying out a scheme for a water supply, & had contracted with pltf. to sink certain wells. The work was to be performed to the satisfaction of defts.' engineer, & any dispute was to go to arbn., & if in the judgment of the engineer sufficient dispatch was not used, defts. or their engineer might dismiss the contractors & their workmen. Difficulties having arisen in carrying out the work & delay being thereby occasioned, defts. gave notice dismissing the contractors & their men. On a motion to restrain defts. from acting on the notice:—*Held*: (1) the provision for arbn. was part of the contract, & the contractors were not bound to give up to the engineer the decision of every question; (2) the ct. ought to imply that defts. would not act upon the summary clauses until the arbitrators had affirmed the judgment of the engineer; (3) an injunction should be granted.—*FOSTER & DICKSEE v. HASTINGS CORPN.* (1903), 87 L. T. 736; 19 T. L. R. 204.

**160. —.]**—Where parties to a continuing contract agree that it shall be terminable by giving notice on the happening of an event, & the question as to whether that event has happened is left to the decision of an agreed arbitrator, a decision by the arbitrator, or by some other properly appointed tribunal, is a condition precedent to giving a valid notice.—*HARROWBY (EARL) v. LEICESTER CORPN.*

**PART I. SECT. 6, SUB-SECT. 5.—B.**

*c. Right of distress.]*—Deft. leased land to pltf. on certain terms providing (*inter alia*) that the lessor might sell any part of the farm, making a reasonable deduction from the rent therefor, to be determined by arbn. in case of dispute. A railway co. gave notice to deft. that they required a portion of the

land, which he conveyed to them after an arbn. as to price:—*Held*: that after the sale the lessor could not distrain without first arranging or offering to arbitrate as to the amount to be deducted.—*BICKLE v. BEATTY* (1858), 17 U. C. R. 465.—*CAN.*

**PART I. SECT. 6, SUB-SECT. 6.**

*d. Admission of liability on proof of*

(1915), 85 L. J. Ch. 150; 114 L. T. 129; 80 J. P. 92; 14 L. G. R. 42.

**SUB-SECT. 6.—WHETHER THERE IS CONDITION PRECEDENT TO ARBITRATION.**

**161. Particulars of loss—Reference to average stater—On dissatisfaction reference to arbitration.]**—In an action for a partial loss on a policy of insurance, embodying a regulation that all claims for partial losses should be adjusted by an average stater, & that in case the co. were dissatisfied with his adjustment, it should be referred to arbitrators, etc., the award to be final, a plea that, although the claim was referred to an average stater, & he made an adjustment, yet the co. have been & are dissatisfied with the adjustment, & desirous of referring it to arbitrators, etc., but pltf. refused, etc., was allowed to be pleaded, since the plea was not so untenably bad as to entitle the ct. to shut defts. out from an opportunity of having its validity deliberately discussed. — *JOHNSON v. HOPPER* (1858), 4 Jur. N. S. 882.

**162. — Supplied by assured—Any differences referred to arbitration.]**—A fire insurance policy provided: "When a fire takes place, if & whenever any difference arises under the policy as to any claim for loss or damage, etc., or any matter arising under the policy, such differences shall be referred to arbitrators," etc. The policy also contained a condition that, when any fire took place, the co. might insist on having particulars delivered to them of the loss sustained, etc., & that, if the co. should contend that the policy was defeated or the insured deprived of the benefits of it by reason of breach of any of the conditions of it, then they might revoke any submission to arbn. The co. demanded, & pltf. supplied, particulars, but the co. deemed this insufficient, & declined to proceed with an arbn., insisting that pltf. was not yet entitled to it. On his issuing a writ they applied to stay the action on the ground that he was not entitled to proceed by action, but was bound to go to arbn.:—*Held*: the proper course for pltf. to pursue was to take steps to compel the co. to proceed to arbn., which it was admitted he could do.—*KENWORTHY v. QUEEN INSURANCE CO.* (1892), 8 T. L. R. 211.

**163. Absence of agreement as to occurrence giving rise to dispute.]**—Pltf.'s vessel & deft.'s vessel were insured in a mutual insurance co., by the rules of which it was provided that, in the event of a collision occurring between two vessels insured in the co., the owners of such vessels should immediately submit a statement of the whole circumstances of the collision, & the directors, after receiving such statement, should have power to arbitrate on the matter, & their decision should be final:—*Semle*: the rules must be taken to mean that it should be a condition precedent to an arbn. that both parties had agreed as to the fact of a collision having taken place.—*THE WARWICK* (1890), 15 P. D. 189; 63 L. T. 561; 6 Asp. M. L. C. 545, D. C.

*Annotation.—Mentd. Re Margetts & Ocean Accident & Guarantee Corpn., [1901] 2 K. B. 792.*

*loss.]*—An insurance policy provided that any dispute, arising after proof of loss & damage had been duly given, should be referred to arbn. In an action on the policy:—*Held*: before an arbn. could be had defts. after receiving proofs would have to admit their liability.—*BOWES v. NATIONAL INSURANCE CO.* (1880), 20 N. V. R. 437.—*CAN.*



**164. Demand of reference within limited time.]—**

Pltfs. bought of deft. jute of a particular mark, to arrive from Calcutta, deft. guaranteeing the jute to be of the average quality of that mark as hitherto imported, & promising that if found to be inferior a fair allowance should be made to pltfs. The quality, as alleged by pltfs., was found to be inferior, & damages were claimed accordingly. Deft. stated in defence that pltfs.' purchase was subject to a term that, in the event of any dispute arising out of the contract, it was to be referred to jute brokers for arbn., & that any reference to arbn. was to be demanded within fourteen days of final landing of the jute. Deft. alleged that this was a dispute arising out of the contract, & no reference was demanded within the stipulated time:—*Held*: this was a good defence to the action, the effect of the contract being that no allowance for inferior quality was to be made unless a reference was demanded within fourteen days of the landing of the jute.—*POMPE v. FUCHS* (1876), 34 L. T. 800.

**165. Arbitration to be "held" within limited time.]—**

A contract for the sale of cotton-seed to be delivered in sound & merchantable condition to buyers' craft alongside steamer at Hull, contained an arbn. clause, which provided for arbn. "to be held within six weeks from date of ship's reporting, unless buyers' & sellers' arbitrators, or umpire, agree in writing to extend the time." The ship containing the cotton-seed was reported on June 23, & delivery was taken by resps. In due course resps. claimed arbn. upon the question of quality. The arbitrators met at the offices of the Oil Seed Assocn., London, on July 25, with a view to proceeding with the arbn., but, finding no samples there, they verbally adjourned the arbn. to enable the samples to be produced:—*Held*: the arbitrators having met on July 25, & having adjourned for the production of the evidence, the arbn. had been "held" within six weeks from the date of the ship's reporting, & the buyers had not lost the right to arbitrate.—*Re VARIPATI & Co. & OLYMPIA OIL & CAKE CO.*, [1914] W. N. 208.

**164 i. Demand of reference within limited time—"Written demand."]**—A clause in an accident policy provided that, in case of any difference regarding any claim, it should be in the option of the assocn. to have the difference decided by arbn., & the assocn. should declare within ten days after written demand whether same should be decided by arbn., & in case the assocn. should decline to refer the difference to arbn., or should give no answer to the demand therefor within fourteen days, the insured might proceed by action, provided that if no written demand for arbn. as above mentioned were made within six months, the insured should be held to have waived & abandoned all claims against the assocn.:—*Held*: the words "written demand" meant a written demand for an arbn., & where a written demand for payment without mention of arbn. was the only demand made on the co. within six months of the date of the accident, the clause barred any claim on the policy.—*SCOTT'S EXECUTOR v. SOUTHERN LIFE ASSOCN.* (1909), T. H. 223; L. L. R. 91.—S. AF.

**164 ii. ———.]**—In an action on a policy, the co. pleaded that pltf. had failed to make a written demand for arbn. in terms of one of the conditions of the policy, which provided that, if no written demand for arbn. were made by the insured within six months from the date of the accident, the insured should be held to have waived & abandoned all claim against the co., whose liability to the insured should thereupon absolutely cease & determine. The action was tried before a jury, who awarded the

sum of £500 to pltf. An objection was taken on behalf of the co. that, as pltf. admitted that no written demand for arbn. had been sent, the judgment should be entered for the co., but the presiding judge decided, as a matter of law, that the condition did not apply, & judgment was entered for pltf.:—*Held*: judgment should be entered for the co.—*SOUTHERN LIFE ASSOCN. v. TROLLIP* (1907), 3 Buch. A. C. 188; 17 C. T. R. 1016.—S. AF.

**6. Conditions not precedent to arbitration.]**—In an action to set aside an award it was contended that the agreement to arbitrate was conditional, & that the conditions had not been performed:—*Held*: the so-called conditions were not conditions precedent to arbn., but simply undertakings that certain things should be done.—*Re GRAVES & TENTLER* (1911), 19 W. L. R. 361; 21 Man. L. R. 417.—CAN.

**1. Notice within certain time after dispute arises—"When dispute "arises."]**—In a contract between buyers & sellers an arbn. clause contained the following words: "provided that no such dispute or difference shall be deemed to have arisen or be referred to arbn., unless one party has given notice in writing to the other after the existence of such dispute within seven days after it arises." The buyers rejected the goods, & the sellers more than seven days thereafter repudiated the rejection & sued the buyers for the price:—*Held*: the dispute did not arise until the date of pursuers' letter repudiating the rejection, but the letter of repudiation was itself notice of the

## SUB-SECT. 7.—WHAT IS REFERRED.

## A. Who decides.

**166. The court.]**—Articles of partnership between pltf. & other persons for performing a contract contained an agreement that any dispute between the partners should be settled by arbn., but there was no agreement that the submission to arbn. might be made a rule of ct. One of the partners became a liquidating debtor, & deft. was appointed his trustee, & he elected to carry on the contract. Deft. claimed to have purchased the shares of pltf. & the other partners in the undertaking. Pltf. brought an action against deft. asking for an account of the partnership dealings. The main questions at issue were whether the shares of the other partners were purchased on behalf of pltf. & deft. or of deft. alone, & whether deft. had purchased the share of pltf. as well as of the other partners. Deft. moved for an order under C. L. P. Act, 1854, s. 11, staying all proceedings in the action, & referring the matters in question to arbn., but before the motion was heard pltf. revoked the agreement for arbn.:—*Held*: the question whether the matters in dispute were within the agreement for arbn. was one which the ct. would decide, & would not leave to the arbitrator.—*PIERCY v. YOUNG* (1879), 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 845, C. A.

*Annotations*:—*Consd. & Apld.* *Fraser v. Ehrensperger* (1883), 12 Q. B. D. 310, C. A.; *De Ricci v. De Ricci*, [1891] P. 378. *Distd.* *Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 106 L. T. 451, C. A.

**167. —.]**—By an agreement entered into between the L. co. & the N. co., it was agreed that the N. co. should, subject to the bye-laws from time to time in force of the L. co., have running powers over the L. co.'s line upon certain terms. The agreement contained a provision for reference to arbn. in case of dispute. No limit as to the duration of the agreement was expressed, nor was power given to either co. to determine it:—*Seemle*: the question whether or not the agreement was revocable could not be determined under the arbn. clause after a notice by one of the parties

existence of the dispute & the arbn. clause was applicable.—*HOWDEN & Co., LTD. v. POWELL DUFFRYN STEAM COAL CO., LTD.* (1912), 49 Sc. L. R. 605.—SCOT.

**g. Notice of dispute required.]**—When in a contract it is covenanted that one or other of the parties may have recourse to arbn. by giving a notice in writing to the other party & to the arbitrator, such notice is to be considered a condition precedent to binding the parties by the decision of such arbitrator.—*DRUMMONDVILLE v. SIMONEAU* (1912), Q. R. 23 K. B. 392.—CAN.

## PART I. SECT. 6, SUB-SECT. 7.—A.

**166 i. The court.]**—On a motion to stay an action, on the ground that the matters in dispute come within a clause in a contract for the execution of works agreeing to refer matters in dispute, arising in the settlement of the accounts, to arbn., the construction of the clause is for the ct.—*WORKMAN v. BELFAST HARBOUR COMRS.*, [1899] 2 I. R. 234.—IR.

**166 ii. —.]**—*Held*: upon an application made to it under s. 525 of the Code of Civil Procedure, the ct. has jurisdiction to & is bound to inquire into the question whether the parties had or had not referred the matter in question to arbn.—*GANESH SINGH v. KASHI SINGH* (1906), I. L. R. 28 All. 621.—IND.

**166 iii. Question of fact.]**—The question whether a particular matter is within scope of a submission is for the jury.—*MACADAM v. KICKBUSH* (1904), 10 B. C. R. 358.—CAN.



## ARBITRATION.

### Sect. 6.—Construction of submission: Sub-sect. 7, A. & B.]

purporting to revoke the agreement, since, if the notice were operative, the arbn. clause would have been equally revoked with the rest of the agreement.—**LANELLY RAILWAY & DOCK CO. v. LONDON & NORTH WESTERN RY. CO.** (1873), 8 Ch. App. 942; 42 L. J. Ch. 884; 29 L. T. 357; 21 W. R. 889, L.JJ.: *affd.* (1875), L. R. 7 H. L. 550, H. L.

**Annotations**.—**Mentd.** *Levy v. Creighton* (1874), 31 L. T. 1, C. A.; *Cochrane v. Exchange Telegraph Co.* (1896), 12 T. L. R. 197; *Re Lindrea, Lindrea v. Fletcher* (1913), 109 L. T. 623.

#### 168. Unless covered by terms of reference.]

—The lease of a mine contained an agreement to refer disputes between the lessors & three lessees to arbitrators or their umpire. Disputes having arisen with regard to minerals drawn by the lessees from their adjoining mine through the demised mine:—**Held**: on the construction of the lease, the ct. would not decide, but would leave it to the arbitrators to decide whether the matters in dispute between the parties were within the agreement to refer.

The words in the arbn. clause with respect to the rights, duties, & liabilities of either party “in connection” with the premises, evidently are apt to include & were intentionally used to include everything relating to the demised property & the use of it, even things which might arise out of collateral matters between the parties (**LORD SELBORNE, C.**).—**WILLESFORD v. WATSON** (1873), 8 Ch. App. 473; 42 L. J. Ch. 447; 28 L. T. 428; 37 J. P. 548; 21 W. R. 350, L.C. & L.JJ.

**Annotations**.—**Consd.** *Plews v. Baker* (1873), L. R. 16 Eq. 564; *Wade-Gery v. Morrison* (1877), 37 L. T. 270. **Consd. & Apld.** *Law v. Garrett* (1878), 8 Ch. D. 26, C. A. **Consd.** *Piercy v. Young* (1879), 14 Ch. D. 200, C. A.; *Minifie v. Railway Passengers Assce.* (1881), 44 L. T. 552; *Compagnie du Senegal v. Woods* (1883), 53 L. J. Ch. 166. **Consd. & Apld.** *Lyon v. Johnson* (1889), 40 Ch. D. 579; *De Ricci v. De Ricci*, [1891] P. 378. **Consd.** *Rowe v. Crossley* (1912), 108 L. T. 11, C. A. **Refd.** *Gillett v. Thornton* (1875), L. R. 19 Eq. 599. **Mentd.** *Russell v. Russell* (1880), 14 Ch. D. 471; *Brighton Marine Palace & Pier Co. v. Woodhouse* (1893), 62 L. J. Ch. 697; *Hickman v. Kent or Romney Marsh Sheep-Breeders' Assn.*, [1915] 1 Ch. 881.

169. —.]—Deft. submitted all matters in difference to arbn., & the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books & papers, & an attachment was moved for against him for not producing them:—**Held**: he could not by affidavit bring before the ct. the question whether those books related to matters in difference between pltf. & deft. or not, though it was expressly sworn that the books merely related to old accounts which had been long since settled, & which it had been agreed between them should form no part of the reference, because by the general terms of the submission of “all matters in difference” it was left in the discretion of the arbitrators to say what were matters in difference & what were not.

By submitting to the arbitrators all matters in difference, deft. has submitted to the discretion of the arbitrators the question, what are the matters in difference, & he must be concluded by their opinion (**ALDERSON, B.**).—**ARBUCKLE v. PRICE** (1835), 4 Dowl. 174.

170. —.]—An attorney appeared for a corpn. in an action of debt & consented to a judge's order referring “all claims made in the action” to an arbitrator. The arbitrator having awarded

to pltf. a sum actually claimed in the action:—**Held**: the question whether that sum was a debt or not was submitted to the arbitrator, & his decision on the point was final, even if erroneous.—**FAVIELL (FARRILL) v. EASTERN COUNTIES RY. CO.** (1848), 2 Exch. 344; 6 Dow. & L. 54; 17 L. J. Ex. 297; 11 L. T. O. S. 204; 154 E. R. 525.

**Annotations**.—**Folld.** *Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189. **Refd.** *May v. Mills* (1914), 30 T. L. R. 287. **Mentd.** *Smith v. Troup* (1849), 7 C. B. 757; *Chambers v. Mason* (1858), 5 C. B. N. S. 59; *Kirk & Randall v. East & West India Dock Co.* (1886), 55 L. T. 245, C. A.; *Neale v. Gordon-Lennox* (1902), 71 L. J. K. B. 536, C. A.

171. —.]—A partnership was continued after the expiration of the term specified in the articles of partnership. The articles contained an arbn. clause, providing, in effect, that all disputes or questions respecting the partnership affairs, or the construction of the articles, should be referred to arbn. There were also clauses providing for the purchasing by the continuing partners of the share of a deceased partner. An action having been brought by the exors. of a deceased partner against the surviving partner for the winding-up of the partnership, deft. moved for a stay of proceedings & a reference of the matters in difference between the parties to arbn. One of the questions was, whether it was for the ct. or for the arbitrators to determine which of the clauses in the articles, & in particular, whether the purchasing clauses, applied to the partnership so carried on after the expiration of the term:—**Held**: it was for the arbitrators, & not for the ct., to determine which of the articles applied, & there must be a stay of proceedings & a reference of all matters in difference to arbn.—(**COPE v. COPE** (1885), 52 L. T. 607.

172. —.]—**Conditions precedent to arbitrator's jurisdiction.**—An arbitrator cannot give himself jurisdiction by a wrong decision, collateral to the merits, as to facts on which the limit to his jurisdiction depends.

In a case where it was a condition precedent to the arbitrator's jurisdiction that the dispute should have arisen during a tenancy between pltf. & deft., & where the arbitrator was not authorised by the submission to decide this preliminary question:—**Held**: the arbitrator could not clothe himself with jurisdiction by finding this preliminary fact in favour of pltf., so as to bind deft.—**MAY v. MILLS** (1914), 30 T. L. R. 287.

### B. To what date Claims are to be Assessed.

173. **Differences up to time limited.**—A submission to an award of all controversies to that day is made on Nov. 30, so that the award be made before Dec. 10; the award is made on Dec. 5. This is good, for the only differences are supposed to be before Nov. 30.—**MOOR & BEDELL'S CASE** (1587), Jenk. 264; 145 E. R. 189.

174. **Differences up to day before submission.**—If an award decides all matters until the day before that on which the submission is dated, it shall not be intended that any new controversy arose in the meantime.—**BARNES v. GREENWEL** (1601), Cro. Eliz. 858; 78 E. R. 1084.

175. —.]—**Release of actions.**—An award that the parties shall execute mutual releases of all actions, suits, & demands, before such a day, is good, though that day is the day before the date of the submission, for it shall not be intended that any new controversy arose on the intervening

### PART I. SECT. 6, SUB-SECT. 7.—B.

**h. Submission of accounts to specific date.**—A reference was specific, of accounts rendered up to Dec. 31, 1864; the award went far beyond this:—**Held**: the award must be set aside.—

*Re ROBERTS & LORIMER* (1866), 2 C. L. J. O. S. 11.—**CAN.**

200 i. **Matters arising after submission**—**Partnership dissolution.**—Where arbitrators were authorised to dissolve a

partnership:—**Held**: they might, in order to adjust the terms of the dissolution, award upon disputes arising as to the partnership subsequent to the submission.—**THIRKELL v. STRACHAN** (1847), 4 U. C. R. 136.—**CAN.**

day.—WARD *v.* UNCORN (1631), Cro. Car. 216 ; 79 E. R. 789.

*Annotation* :—*Reid*. Lee *v.* Elkins (1701), 12 Mod. Rep. 585.

**176. Matters arising up to date of award—Release of actions.**—If arbitrators award a release of all actions till the day of the award made, it is void, for it extends to actions beyond the time of the submission.—STAINS *v.* WILD (1614), Cro. Jac. 352 ; 79 E. R. 301.

**177.** ———.]—Arbitrators award that deft. should pay £20 to pltf. in satisfaction of all trespasses, & that they should give mutual releases to the time of the award. If further trespasses were committed between the times of the submission & award, the award, although it may be void as to the releases, is good for the rest.—AYLAND *v.* NICHOLLS (1679), 1 Freem. K. B. 265 ; 89 E. R. 191.

**178.** ———.]—An award of releases to the time of the award is void only as to the time subsequent to the submission.—MARKS (MARKES) *v.* MARRIOT (MARRYOTT) (1696), 1 Lut. 520 ; 1 Ld. Raym. 114 ; 91 E. R. 972.

**179.** ———.]—An award of releases to the date of the award is good. Tender of a release to the time of submission is good, though the award mentions releases to the time of the award, for it shall be good for so much as the arbitrators have authority to do, though they exceed their authority.—KEEN *v.* GODWIN (1728), Bunb. 250 ; 145 E. R. 663.

*Annotation* :—*Consd.* Pickering *v.* Watson (1776), 2 Wm. Bl. 1117.

**180. — Whether relating to action or to other matters in difference.**—The terms of submission referring a cause & all matters in difference gave the arbitrator power to decide “all matters & questions to do justice between the parties,” & “power to order & direct what shall be done by either or both of the parties, either immediately or prospectively, whether relating to the action or to other matters in difference” :—*Held* : those words plainly authorised the arbitrator to award up to the time of the award, because, if he was only to deal with matters arising up to the time of the reference, all he could do would be to order payment of damages, & he could not order any compensation.

This absurdity would follow, that, although he could order damages up to the time of the submission & order the weir to be repaired, he could deal in no way with compensation to pltf. between the time of the submission & the time of the award, because he could award neither immediately nor prospectively, whether relating to the action or to the matters of difference (BRAMWELL, B.).—LEWIS *v.* ROSSITER (1875), 44 L. J. Ex. 136 ; 33 L. T. 260 ; 23 W. R. 832.

*Annotation* :—*Mentd.* Met. Dist. Ry. Co. *v.* Sharpe (1880), 5 App. Cas. 425, H. L.

**181. New matters between submission & award.**—If two parties do submit themselves for all matters in difference arising before June 1, & the arbitrators make an award of all matters till the time of the award, which is in July, if no new matter arise after June 1, it is good enough.—ANON. (1672), 1 Freem. K. B. 51 ; 89 E. R. 40.

**182.** ———.]—If arbitrators award releases of all actions to the time of the award, it shall be intended that no new matters happened between the submission & award, unless shown.—MAKING *v.* WELSTROP (1678), 1 Freem. K. B. 462 ; 89 E. R. 346.

**183.** ———.]—A submission was of all things in difference till May 10 ; a release was awarded of all differences till May 20. If there are no

differences between those two days, the award is good, & the ct. will not intend against it, if such differences be not pleaded.—HILL *v.* THORN (1678), 2 Mod. Rep. 309 ; 86 E. R. 1090.

**184.** ———.]—A release awarded to be made to the time of the award, is good, for it is not to be intended that any new difference has arisen between the time of the submission & of the award.—ABRAHAM *v.* BRANDON (1714), 10 Mod. Rep. 200 ; 88 E. R. 693.

**185. — Award void only as to residue beyond time of submission.**—Submission to arbn. of all suits, etc., up to Mar. 18. Award with respect to all suits, etc., to the date of award, June 7 :—*Held* : a bad award, because not within the submission, though good in part.—MAWE *v.* SAMUEL (1618), 2 Roll. Rep. 1 ; 81 E. R. 619.

**186.** ———.]—*Held* : notwithstanding the submission was of all matters until July 1, & the award was of all matters until July 20, this was a good award, for if anything had happened after July 1, it could be shown on the other side, & if there was, the award was only void *pro tanto*.—ROUS *v.* NUN (1663), 1 Sid. 154 ; 82 E. R. 1028.

**187.** ———.]—A submission to arbitrators or an umpire was “of all actions, suits & demands” to the time of submission. An award was made by the umpire, that the parties should release all demands to each other to the time of the umpirage :—*Held* : (1) till the contrary was shown, it should be presumed that no matter arose between the submission & the making of the award ; (2) if other matters had arisen, yet the award was only void as to such new matters.—HOOPER *v.* PIERCE (1697), 12 Mod. Rep. 116 ; 88 E. R. 1204.

**188.** ———.]—An award to make general release of all demands to the time of the award, is good for so much as goes to the time of the submission, & void for the residue.—SIMON *v.* GAVIL (1703), 1 Salk. 74 ; 91 E. R. 70 ; *sub nom.* SQUIRE *v.* GREVETT, Holt, K. B. 81 ; 6 Mod. Rep. 33 ; 2 Ld. Raym. 961.

*Annotations* :—*Distd.* Bradford *v.* Brien (1741), 7 Mod. Rep. 349. *Consd.* Banfill *v.* Leigh (1800), 8 Term Rep. 571. *Reid.* Pickering *v.* Watson (1776), 2 Wm. Bl. 1117.

**189.** ———.]—On a bill brought for setting aside an award, defts. admitted that part of the sum awarded to be paid was for matter subsequent to the submission :—*Held* : the award was void, but because the awarding this part of the sum appeared to be through a mere mistake, & the substantial part of the award was clearly fair & proper, the parties should agree that the award should be confirmed, & the whole sum awarded paid by pltf.—JOHNSON *v.* WARREN (1730), 1 Barn. K. B. 430 ; 94 E. R. 289.

**190. Award covering longer period than submission—Good *prima facie*.**—An award covering a longer period than the submission is good *prima facie*. There is a distinction between the submission of a particular matter & a general submission.—MANNING *v.* WARREN (1665), 1 Sid. 252 ; 82 E. R. 1089.

**191. — Unless objected to.**—All causes then depending were referred to the arbitrament of S., the award to be made before, etc., in writing. In debt upon an obligation pltf. pleaded an award that pltf. should release to deft. an action of account then depending & deft. to pay pltf. £10, which award was in writing, etc., but deft. had not paid, etc. Deft. pleaded no arbitrament. Issue was taken upon the arbitrament & found for pltf. In arrest of judgment it was moved that in pltf.'s plea “action of account then depending” meant at the time of the award, whereas the submission referred to actions depending at the time of the submission :—*Held* : the judgment should be stayed until the other party answered it.—



*Sect. 6.—Construction of submission: Sub-sect. 7, B. & C.]*

WRENCH'S CASE (1583), Cro. Eliz. 13 ; 78 E. R. 279.

**192. — Unless cause be shown to have arisen out of time.]**—If arbn. exceed the time of submission, yet no cause shall be presumed to have arisen out of time, if it be not shown.—LEE v. ELKINS (1701), 12 Mod. Rep. 585 ; 88 E. R. 1536.

**193. Releases up to date of bond causing dispute.]**—An award that the one party should pay the other a sum of money, & that he should deliver up a bond (which gave rise to the dispute) to be cancelled, & that each party should give the other a mutual release to the day of the date of the bond, is good.—BELL v. GIPPS (1705), 2 Ld. Raym. 1141 ; 92 E. R. 255.

**194. Rent due after award.]**—An award made on June 23, ordering one of the parties to pay so much for rent that will become due on June 24, is void.—BARNARDISTON v. FOWLER (1714), 10 Mod. Rep. 204 ; 88 E. R. 694.

*Annotation :—Mentd. Lewis v. Rossiter (1875), 44 L. J. Ex. 136.*

**195. Assignment of debts & power of attorney to refer—Claims arising after assignment.]**—A. & B. in 1797 assigned to pltf. all debts due to them, & gave him a power of attorney to receive & compound for same, under which pltf. in 1799 submitted to arbn. the matters in difference then subsisting between his principals & defts., & pltf. & defts. promised to each other to perform the award. The arbitrators having awarded a sum to be paid to pltf. :—*Held* : the ct. would not presume that the matters in difference submitted to arbn. arose subsequent to the indenture of assignment & power of attorney from the principals to pltf., but such matter might be pleaded by way of defence to the action.—BANFILL v. LEIGH (1800), 8 Term Rep. 571 ; 101 E. R. 1552.

*Annotation :—Mentd. Jenkin v. Peace (1840), 6 M. & W. 722.*

**196. Interest to date of amended submission.]**—WATKINS v. PHILLPOTTS, No. 1173, *post*.

**197. Future & contingent claims excluded—Unless within terms of submission.]**—A canal co. agreed with B. for the use of an engine constructed by him, during a term of years, they paying a stipulated annual sum. In the course of the term, disputes arising, the parties put an end to the agreement & referred all matters in difference between them to arbn. On the reference B. claimed, among other things, compensation for future loss, in respect of the part of the term unexpired. The co. stated a set-off. The arbitrators, by their award, reciting the submission to arbn., & that they had heard & considered all the evidence of each party, & investigated all the accounts & vouchers touching the matters in difference, adjudicated (not saying that they did so of & concerning the matters referred) that there was due from the co. to B. £515, which they directed the co. to pay him. On motion to set aside the award, on the ground (*inter alia*) that it was not final, inasmuch as no decision appeared touching the future damage :—*Held* : the award was sufficient.

An arbitrator on a reference of matters in difference has power over all matters down to the period of the submission, but cannot award on future & contingent claims. The parties, however, may give him such a power if they think fit, & the arbitrator will then award what is due on each account. That power being given here, it is said that the award ought to have shown what was due at the time of the submission, & what was the claim for future damage. I see no reason for that

(LITLEDAL, J.).—*Re BROWN & CROYDON CANAL Co.* (1839), 9 Ad. & El. 522 ; 1 Per. & Dav. 391 ; Will. Woll. & H. 124 ; 8 L. J. Q. B. 92 ; 112 E. R. 1309.

*Annotation :—Mentd. Re Beaufort & Swansea Harbour Trustees (1860), 8 C. B. N. S. 146.*

**198. Expenses of voyage current at date of arbitration.]**—Upon a reference of a cause & of all matters in difference between pltf. & deft., the main question was, which of them should pay the expenses of a ship, in which they had been jointly interested, incurred after Mar. 24, 1838. The arbitrators directed pltf. to pay them, & to give deft. a bond of indemnity against the payment of such expenses :—*Held* : the award was good.

The first objection is that the arbitrators had no authority to deal with what was paid for providing a new master on a voyage pending at the date of the submission. I think the objection ought not to prevail. All matters in difference are referred, & if any sum of money is found to be due from deft., it is to be paid at such time & place as the arbitrators shall direct. That seems to refer to past debts ; but the next power given seems to treat this growing demand as if it were bygone ; for the words are, that the arbitrators shall award to pltf., if they think fit, such sum as he may be entitled to, if any, in consequence of his providing another master for the brig on her then present voyage, in order to have the matters in difference brought to a speedy conclusion. It is laid down in Com. Dig. Arbn., E. 9, "There shall not be a constrained construction to make it to be out of the submission" (TINDAL, C.J.).—BROWN v. WATSON (1839), 6 Bing. N. C. 118 ; 8 Dowl. 22 ; 8 Scott, 386 ; 133 E. R. 46.

*Annotation :—Apld. Re Goddard & Mansfield (1850), 1 L. M. & P. 25.*

**199. Arrears of annuity accruing after cause of action referred arose.]**—R., in 1805, bequeathed to S., the wife of J., an annuity of £20 (without expressly limiting it to her sole & separate use), charged upon certain estates. J. & his wife were at the date of the will living apart. The annuity was for many years paid to the wife under an order made in a suit in Ch., instituted for the purpose of carrying into effect the trusts of the will. In 1839, a distress was taken in the name of J. & his wife for £50, arrears of the annuity, J. permitting his name to be used under an indemnity. The distress was replevied, & after several abortive attempts on the part of J. (in collusion, as was suggested, with the tenant for life of the property upon which the annuity was charged) to render the distress fruitless, a reference was agreed to of "the cause & all matters in relation to the annuity in question." The arbitrator by his award directed that judgment should be entered for defts. in the replevin suit, & that pltf. should pay to the wife £50 as & for the arrears of the annuity that were due at the time of the distress, & a further sum of £40 for arrears accruing between that time & the date of the order of reference :—*Held* : the arbitrator had not exceeded his authority in dealing with the arrears accruing after the cause of action arose.—WYNNE v. WYNNE (1841), 4 Man. & G. 253 ; 3 Scott, N. R. 435 ; 10 L. J. C. P. 301 ; 134 E. R. 104.

**200. Matters arising after submission—"Anything in anywise relating thereto" does not include.]**—A submission of all existing differences, & "anything in anywise relating thereto," does not extend the power of the arbitrators to matters arising after the submission ; the matters relating to the existing differences must themselves exist at the same time with the existing differences (COLERIDGE, J.).—*Re MORPHETT* (1845), 2 Dow. & L. 967 ; 14 L. J. Q. B. 259 ; 10 Jur. 546.



**201. — Balance due on date of award.]—**Motion to set aside an award for that the award exceeded the powers given, by finding the balance due upon the day of the award, not upon the day of the submission. A rule *nisi* was granted.—*Re NEALE & LOCKE* (1847), 9 L. T. O. S. 125.

**202. Order of reference by consent—Counter-claim not payable till after date of action & judge's order.]—**To an action brought on June 27 deft. pleaded, by way of set-off, a claim against pltf., which was not payable till Aug. 1, though the consideration had been received by pltf. before her action was commenced. Under a judge's order of July 27, "by consent of both sides all matters in difference between the parties, including the claim of deft. in her set-off in the action," were referred to arbn.:—*Held*: the claim made in the set-off was properly entertained by the arbitrator as a matter in difference, though not payable till after the date of the action & the judge's order.—*PETCH v. FOUNTAIN* (1839), 5 Bing. N. C. 442; 7 Scott, 441; 8 L. J. C. P. 305; 3 Jur. 436; 132 E. R. 1169.

**203. — Award of damages beyond date of action—Nominal damages not affecting costs.]—**An arbitrator gave a shilling damages, which he declared to be in full satisfaction for the injury which pltf. had sustained up to the time of making the award:—*Held*: the arbitrator had exceeded his authority in giving damages beyond the commencement of the action, but, as the damages themselves were (& *a fortiori* the excess was) merely nominal, & could not affect the costs, the award was good.—*HARDING v. HARRISON* (1827), 5 L. J. O. S. K. B. 249.

**204. — Action against personal representatives—Matters arising after testator's death—Outside submission.]—**Actions were brought against defts. in their personal & representative capacity, which, with all matters in difference, were referred, by order of *Nisi Prius*, to a barrister, & it was a condition of the order that all matters in difference between pltf. & the heir-at-law of testator should be referred in like manner. The arbitrator in his award decided that pltf. had no claim whatever against the heir-at-law, but that a certain sum was due to pltf. by defts., though part of the work for which the demand was made, & to which the award referred, had been performed since the death of testator:—*Held*: in so awarding, the arbitrator had exceeded his jurisdiction.—*JONES v. CORRY (CORRIE)* (1839), 5 Bing. N. C. 187; 7 Dowl. 299; 1 Arn. 459; 7 Scott, 106; 8 L. J. C. P. 89; 3 Jur. 149; 132 E. R. 1076.

#### C. Disputes between what Parties and in what Capacity.

**205. A. & B. on one part & C. on other—Award between B. & C. only.]—**A. & B. of the one part & C. of the other submitted to arbn., & the award was between B. & C. only:—*Held*: a void award.—*BEAN v. NEWBURY (NEWBERRY)* (1664), 1 Lev. 139; 1 Keb. 832, 859; 83 E. R. 337.

*Annotation*:—*Expld. & Distd. Wood v. Adcock* (1852), 7 Exch. 468.

**206. — A. & B. jointly—A. & B. severally—Disputes between A. & B.]—**If A. & B. on one part & C. on the other submit to arbn., the arbitrators may make an award, not only of matters in difference between A. & B. jointly, or A. & B. separately, & C., but also of matters

between A. & B.—*CARTER v. CARTER* (1684), 1 Vern. 259; 23 E. R. 454.

*Annotation*:—*Apld. Winter v. White* (1819), 1 Brod. & Bing. 350.

**207. "All suits, etc., between A. & B."—Suits between A. & B. & others excluded.]—**Submission of "all suits, etc., between A. & B." The award pursued the very words of the submission, viz.: "that all suits, etc., between A. & B. should cease":—*Held*: neither the parties to the award, nor the arbitrators, designed the former that their submission, or the latter that their award, should extend to suits depending between A. & B. & others.—*BARNARDISTON v. FOWLER* (1714), 10 Mod. Rep. 204; 88 E. R. 694.

*Annotation*:—*Mentd. Lewis v. Rossiter* (1875), 44 L. J. Ex. 136.

**208. "All matters in difference"—All matters which either party had jointly or severally against each other.]—**A submission of all matters in difference imports all matters which either party had jointly or severally against each other.—*ATHELSTON v. MOON* (1736), 2 Com. 547; 92 E. R. 1201.

*Annotations*:—*Mentd. Winter v. White* (1819), 1 Brod. & Bing. 350; *Dowse v. Coxe* (1825), 3 Bing. 20; *Adcock v. Wood* (1851), 2 L. M. & P. 501.

**209. "All matters in difference between A. & B."—Matters between A. & B. & C. & D. jointly.]—**Under a submission of all matters in difference between A. & B., an award on matters in difference between A. & B., C. & D. jointly, directing A. to pay B. a certain sum as a compensation for coals gotten by A. belonging to B., or to B. & others, & directing B. to give A. a bond to indemnify him against the claims of C. & D., is bad.—*FISHER v. PIMBLEY* (1809), 11 East, 188; 103 E. R. 976.

*Annotations*:—*Distd. Hickes v. Cracknell* (1837), 3 M. & W. 72. *Consd. Gisborne v. Hart* (1839), 5 M. & W. 50. *Distd. Falkingham v. Victorian Railways Comr.*, [1900] A. C. 452, P. C. *Mentd. R. v. Grant* (1849), 14 Q. B. 43; *Adcock v. Wood* (1851), 2 L. M. & P. 501; *Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482, Ex. Ch.; *Beckett v. Mid. Ry. Co.* (1866), L. R. 1 C. P. 241; *May v. Mills* (1914), 30 T. L. R. 287.

**210. Four partners—Reference of accounts—Several accounts.]—**Pltf. & three other persons were partners in some Govt. victualling contracts, & the accounts amongst themselves becoming involved, they entered into a deed of covenant for a reference of all matters in difference to two arbitrators. The arbitrators by their award found sums due by each of the partners, not only on partnership account, but on separate account. In an action of trover, where the sole question was upon a debt, which in turn depended upon the validity of the award, the deed of covenant appeared, on the face of it, to have been executed by all the partners, but could only be proved to have been executed by pltf. & one other partner. It being objected that the award could not be received in evidence for want of proving the deed executed by all the partners, the judge non-suited pltf.:—*Held*: (1) this was a reference of the aggregate accounts between all & each of the partners, & the consideration to each for entering into the submission was that each party's account should be liquidated, not only as to one, but as to all, & each should have a termination of all accounts with all, & they mutually stipulated with each other that the arbitrators should liquidate not only partnership accounts, but also separate accounts between any two of them;

#### PART I. SECT. 6, SUB-SECT. 7.—C.

**k. A. on one side & deft., a: executor of B., on the other.]—**On a submission between A. & deft., described as exor. of B., of all matters in difference between

the parties in reference to the business carried on by A. & B. in partnership, with liberty to the arbitrators to order & determine what they should think fit to be done by either of the parties

respecting the matters referred:—*Held*: the arbitrators could order a sum to be paid by deft. absolutely, not merely as exor.—*MULLIGAN v. WRIGHT* (1858), 16 U. C. R. 408.—*CAN.*

**Sect. 6.—Construction of submission: Sub-sect. 7, C.**

(2) the nonsuit was right.—**ANTRAM v. CHACE** (1812), 15 East, 209; 104 E. R. 823.

**211. Six partners—Three giving joint & several bond to other three.**—Six partners entered into two bonds of submission to arbn.; in the one, three gave a joint & several bond to the other three, conditioned for the due performance of the award, & the three latter gave a similar bond to the three former. The arbitrator awarded that one of the three former should pay a certain sum to one of his co-obligors. In an action of debt on the award brought by the one against the other alone:—**Held**: he might recover the sum awarded.—**WINTER v. WHITE** (1819), 1 Brod. & Bing. 350; 3 Moore, C. P. 674; 129 E. R. 758.

**Annotation**:—**Mentd.** **Rees v. Waters** (1847), 16 M. & W. 263.

**212. All matters in difference between A. on one part & B., C., D. on other part—Disputes between A. & B.**—**Qu.**: whether, on a reference of a cause & “all matters in difference between the parties,” they being A. on the one part, & B., C. & D. on the other, an arbitrator must award on a cause & matter of difference pending between A. & B. only.—**REES v. WATERS** (1847), 16 M. & W. 263; 4 Dow. & L. 567; 153 E. R. 1187.

**213. “All differences between A. on one side & B. & C. on other”—Differences between A. & B. & C. severally & jointly.**—Where all differences between A. on the one side, & B. & C. on the other, are referred, the arbitrator may award as to differences which A. has with B. or C. severally, as well as those which he has with them jointly.—**WOOD v. ADCOCK** (1852), 7 Exch. 468; 21 L. J. Ex. 204;

18 L. T. O. S. 332; 16 Jur. 251; 155 E. R. 1033, Ex. Ch.

**Annotations**:—**Folld.** **Roper v. Levy** (1851), 21 L. J. Ex. 28. **Distd.** **Roberts v. Eberhardt** (1857), 27 L. J. C. P. 70. **Mentd.** **Buchanan v. Kinning** (1851), 20 L. J. C. P. 252, Ex. Ch.; **Re Laing & Todd** (1853), 13 C. B. 276.

**214. All suits, controversies & demands betwixt parties—Debt due by wife of one party as executrix.**—On a submission to arbitrators of all suits, controversies & demands betwixt the parties, a debt due from the wife of one of the parties as extrix. is within the submission.—**LUMLEY v. HUTTON** (1817), Cro. Jac. 447; 1 Roll. Rep. 268; 79 E. R. 383.

**Annotations**:—**Mentd.** **See v. Elkins** (1701), 12 Mod. Rep. 585; **Ellitson v. Comyns** (1740), 7 Mod. Rep. 361.

**215. All actions between A. & B.—Debt due by B.'s wife as executrix.**—Submission “of all actions, etc., between pltf. & deft.” Award “of all actions between pltf. & deft. & his wife,” wherein deft. & his wife were ordered to pay £20 to pltf. on such a day, in full satisfaction of all law-charges due to him by deft.'s wife as extrix. of her first husband:—**Held**: the award was good.—**MORSE v. SURY** (1724), 8 Mod. Rep. 212; 88 E. R. 152.

**216. General submission—Demand as executrix.**—A demand as extrix. is within a general submission to an award.—**ELLETSON (ELLITSON) v. CUMMINS (COMYNS)** (1740), 2 Stra. 1144; 7 Mod. Rep. 361; 93 E. R. 1090.

*See, also, Sect. 5, ante; Part IV., Sect. 8, Subsect. 2, post.*

**D. Meaning and Effect of various Expressions.**

**217. “All suits, controversies & demands.”**—On a submission to arbitrators of “all suits, controversies, & demands, betwixt the parties,” a

**PART I. SECT. 6, SUB-SECT. 7.—D.**

**l. “All claims, questions, disputes,” etc., “of every kind,” etc.**—A landlord & tenant agreed that all claims, questions, disputes & differences of every kind depending & subsisting between them, upon any account, transaction or action whatever, preceding the date of the agreement, should be referred to arbn. The arbiters discerned in favour of the tenant for a large sum inasmuch as the lands had been greatly improved by him:—**Held**: the submission was sufficiently ample to include every subject of claim or dispute which existed between the parties, & every obligation incumbent on the landlord as constituted by the lease or otherwise was referred to arbn.—**PITCAIRN v. DRUMMOND** (1822), 1 Sh. (Ct. of Sess.) 431.—**SCOT.**

**m. “Any difference concerning import of articles or implement thereof.”**—It being declared in articles of roup that any difference between the exposor & the purchaser “concerning the import of the articles, or the execution & implement thereof,” should be referred to arbn.:—**Held**: an objection to the sale, on the part of the highest offerer, that fictitious offers had been made in order to raise the price, fell under the operation of the clause.—**EWING v. LAWRIE** (1825), Fac. Coll. Jan. 13.—**SCOT.**

**o. All questions between the parties.**—A reference of “all questions between the parties,” by the practice in Scotland, is confined to the questions in the particular actions referred.—**BAILLIE v. EDINBURGH OIL GASLIGHT CO.** (1835), 3 Cl. & Fin. 639; 6 E. R. 1577, H. L.—**SCOT.**

**p. Repairs to be executed “to the satisfaction of arbiters.”**—Where in a lease the landlord was bound to put the houses & fences in repair “to the satisfaction of arbiters named”:—**Held**: the arbiters were entitled to commute the landlord's obligation into a sum of money.—**M'GREGOR v. STEVENSON**

(1847), 9 Dunl. (Ct. of Sess.) 1056.—**SCOT.**

**q. “Regarding intent & meaning of these articles.”**—A subject was exposed to sale under articles, which contained a clause enumerating a progress of titles, of which the purchaser was bound to satisfy himself before the roup, & also a clause to submit any questions which might arise “regarding the intent & meaning of these articles.” The purchaser raised doubts as to whether the interest of the sellers had vested, & refused to arbitrate, alleging that the question raised by him did not fall within the submission:—**Held**: the question fell within the terms of the submission.—**WATT v. SHAW** (1849), 11 Dunl. (Ct. of Sess.) 970.—**SCOT.**

**r. “Regarding true intent & meaning of these presents.”**—Pursuer agreed to sell to defenders the goodwill, etc., belonging to him. The agreement contained a reference clause that, should any question arise “regarding the true intent & meaning of these presents,” same was thereby referred, etc. In an action for the price of the goodwill, it was argued that the meaning of turnover was a question arising out of the true intent & meaning of the contract & referable to arbn.:—**Held**: the questions raised in the action were not questions upon the true intent & meaning of the contract.—**MILLER & SON v. OLIVER & BOYD** (1906), 13 S. L. T. 789.—**SCOT.**

**s. “Relative to true intent & meaning of contract”—“Or rights of parties under same.”**—In a contract to build steamships it was stipulated that failing prompt delivery the builders should pay damages at a certain rate. The contract provided: “In case any questions or differences shall arise between the parties hereto relative to the true intent & meaning of this contract, or the rights of parties under same, they shall be submitted” to arbiters named. Prompt delivery was not made, & the builders, being sued,

pleaded the clause of reference:—**Held**: the question fell within the clause of reference.—**LEVY & CO. v. THOMSONS** (1883), 20 Sc. L. R. 753.—**SCOT.**

**t. Dispute “as to true intent & meaning of” specification—“Or in adjusting contract referred to, etc.”**—The specification for a contract provided: “The whole of the works when finished shall be remeasured & paid for at the schedule rates. Any other description of works ordered shall be measured & paid for at rates to be fixed by the engineer, & no reference shall be made to any arbiter to fix such rates for additional or altered work, the engineer's decision being final & binding on all parties with respect to the character, description, execution, & measurement of the works to be executed under this contract & the rates to be paid therefor.” . . . “Should any dispute arise as to the true intent & meaning of this specification, or as to the adjustment & terms of the contract deed to follow hereupon . . . or as to any other matter connected with this contract to follow hereon (except as to maintenance or matters otherwise specially provided to be settled by the engineer solely), same shall be referred to the decision of S.” etc. There was a provision in the contract subsequently executed “that all disputes & differences in any way connected with, or arising out of the execution of, or failure to execute the works hereby contracted for” should be referred to arbn. In an action (1) for the price of certain extra or altered work involving remeasurement of some unadjusted items, & (2) for damages incurred in erecting a temporary bridge rendered necessary by the failure of the engineer to furnish the plans for the permanent bridge within a reasonable time:—**Held**: the first claim was excluded by the arbn. clause, but the second was not excluded.—**M'ALPINE v. LANARKSHIRE & Ayrshire Ry. Co.** (1889), 17 R. (Ct. of Sess.) 113.—**SCOT.**

**u. “As to meaning of contract.”**—A contract contained a clause referring



debt due from the wife of one of the parties as extrix. is within the submission.—*LUMLEY v. HUTTON* (1817), Cro. Jac. 447; 1 Roll. Rep. 268; 79 E. R. 383.

*Annotations* :—*Folld. Ellitson v. Comyns* (1740), 7 Mod. Rep. 361. *Mentd. Lee v. Elkins* (1701), 12 Mod. Rep. 585.

218. "All debts, trespasses, & injuries."—On a submission of all debts, trespasses & injuries, the award directed releases of all actions, debts, duties, trespasses & demands :—*Held* : the award did not go beyond the submission, & was valid.—*CABLE v. ROGERS* (1825), 3 Bulst. 311; 81 E. R. 259.

219. "All controversies."—On a general submission of "all controversies," an award to pay a sum of money in satisfaction of a debt due from a third person is bad.—*ADAMS v. STALEY* (STATHAM) (1879), 2 Show. 61; 2 Lev. 235; 89 E. R. 793.

220. "All matters in difference between parties in cause"—All matters in dispute in cause between parties.]—A submission to arbn. of "all matters in difference between the parties in the cause" (which is merely a description of the persons) is not confined to the subject-matter in the particular action then depending, but will extend to cross demands between the parties, though not pleaded by way

dispute or difference "as to the meaning of the contract" to the decision of the architect as sole arbiter. The contract stipulated that lime should be mixed up with sharp fresh water sand & pure fresh water. The builder used "shivers" :—*Held* : a dispute as to the meaning of "sharp fresh water sand" was not a dispute within the submission.—*GREENOCK P. B. v. COGHILL & SON* (1878), 5 R. (Ct. of Sess.) 732.—SCOT.

v. "In regard to import & effect of any clause therein or as to obligations & rights," etc.]—A lease stipulated that any disputes arising "in regard to the import & effect of any clause therein, or as to the obligations & rights" of either party thereunder, or as to carrying same into effect, should be submitted to the decision of M. The landlords raised an action for payment of the cost of removing certain workshops under a clause in the agreement. Defenders founding upon a clause, which provided that pursuers should supply water for their works, & that defenders should provide pipes for carrying same, averred that, when the agreement was entered into, it was understood that the mode of carrying same into effect was to be by giving a permanent supply from H. pit, but that pursuers had offered them a supply from a pit some distance off, & defenders were entitled to be reimbursed for the expense incurred by them in connecting their works with such supply :—*Held* : (1) as far as regarded pursuers' claim, the subject of the dispute fell within the reference clause of the agreement; (2) as regarded defenders' counter-claim, it did not, that claim being founded, not upon the agreement, but upon an understanding collateral thereto.—*SHORTS IRON CO. v. DEMPSTERS* (1891), 29 Sc. L. R. 40.—SCOT.

x. "As to construction of this agreement or any matter arising out of same," etc.]—Defenders, an insurance co., entered into an agreement which was intended to indemnify pursuers against loss arising from the live-stock which they sold being condemned as unfit for food. The contract provided that "any dispute or difference between the insurers & the sellers as to the construction of this agreement or any matter arising out of or in connection with same shall be referred to an arbitrator," etc. In an action pursuers claimed damages through defenders having refused to insure any of their live-stock. The dispute which defenders contended ought to be decided by arbn. arose out of a clause which, as construed by defenders, bound pursuers to pay

of set-off; & the costs being to abide the event makes no difference. But a reference of all matters in dispute in the cause between the parties is confined solely to the matters in dispute in that trial.

Assignees of a bkpt. having received £1,500 from a debtor to bkpt. as a debt due to his estate, & having commenced an action against him for a further demand on the same account, to which he had only pleaded the general issue, agreed with him to refer their differences to arbn. The submission provided "that all matters in difference between the parties in the cause be referred" :—*Held* : the arbitrator had power to award that the assignees should repay a part of the sum already received, if it appeared to have been paid by mistake.—*MALCOLM v. FULLARTON* (1788), 2 Term Rep. 645; 100 E. R. 347.

221. —.—.]—The distinction between a reference "of all matters in dispute between the parties in the cause" & "of all matters in dispute in the cause between the parties," although clearly & fully understood, is too refined for the general understanding of mankind, & the terms of the reference ought to be amended by making the former a reference "of all matters in difference

premiums upon all live-stock which they sold, & did not entitle them to insure bad and doubtful animals, while refusing to pay premiums on good ones :—*Held* : the reference clause applied to the dispute.—*HEGARTY & KELLY v. COSMOPOLITAN INSURANCE CORPN., LTD.* (1913), 1 S. L. T. 18.—SCOT.

y. "Any dispute as to quality or delivery."—A. sold ground to B., who became bound to furnish A. with coals, at certain prices, to be delivered before a certain date. Any dispute as to the "quality or delivery" of the coals was referred to an arbiter. For a considerable time no deliveries were made, & the time having elapsed without A. taking full delivery, B. refused to deliver more at the agreement prices. The arbiter held the agreement, *quoad* delivery of coals, forfeited, & no longer binding on B. :—*Held* : same was a competent judgment, within his powers as arbiter, & a reduction of the award refused.—*MILLER v. HOWIE* (1851), 23 Sc. Jur. 272.—SCOT.

a. "All differences"—Partnership dispute.]—A submission clause in a contract of co-partnery, referring "all differences" between the partners to arbn., does not apply to an action for reparation & implement of the contract at the instance of the one partner against the other.—*LAUDER v. WINGATE* (1852), 1 Stuart, 594.—SCOT.

b. "In regard to quantities & qualities" & "generally all disputes," etc.]—A clause of reference in a contract specially referred disputes "in regard to the quantities and qualities of material" to be furnished, & generally all disputes & differences that might arise in regard to the execution of the work contracted for :—*Held* : (1) a dispute in regard to the construction of the agreement was thereby referred; (2) the arbiter, under the general terms of the submission, had no power to assess damages for breach of contract.—*ABERDEEN RY. CO. v. BLAIKIE* (1852), 15 Dunl. (Ct. of Sess.) 20.—SCOT.

c. "Any difference arising in any way relating to the premises."—Subjects were exposed to sale under articles, which provided that the purchaser should grant bond for the price, with interest till the date when the price was payable, & declared that, "in case of any difference arising between the exposor & offerers in any way relating to the premises, same" should be decided by an arbiter. The purchaser placed the price in a bank the day after the sale, & proposed to the seller to take the deposit receipt & conclude the matter as a ready money transaction.

The seller refused :—*Held* : the matter fell under the arbn. clause.—*TURNBULL v. MACBRIDGE* (1858), 30 Sc. Jur. 278.—SCOT.

d. "All claims, debts & demands."—*Held* : a deed by which a truster & trustee, under a voluntary trust for creditors, & the creditors submitted to arbn. "all claims, debts, & demands" against the truster's estate, excluded an ordinary action of reduction, on the ground of fraud, of documents of debt held by one of the creditors.—*KINTORE (EARL) v. UNION BANK OF SCOTLAND* (1863), 1 Macph. (H. L.) 11.—SCOT.

e. "Connected with this contract or execution of work."—A contract provided : "Should a dispute or difference of opinion arise betwixt the contracting parties connected with this contract or the execution of the work, same shall be & is hereby referred to B., whose decision shall be final." After the work was completed the builder had it measured & priced. The employer challenged the measurements, & maintained that an action was excluded by the clause of reference :—*Held* : the question between the parties, being merely as to the measurement of the completed work, was not a dispute or difference of opinion "connected with this contract or the execution of the work" within the clause of reference.—*KIRKWOOD v. MORRISON* (1877), 5 R. (Ct. of Sess.) 79.—SCOT.

f. "All matters relating to co-partnership," etc.]—Where a contract of co-partnership between five persons provided that "In all matters relating to the co-partnership, whether during its subsistence or at & after its dissolution, & also in all matters relating to the meaning of these presents, where any question or dispute or difference of opinion shall arise between the partners, or between any of them, & the representatives of a deceased bkpt. or insolvent partner, & which is not otherwise herein specially provided for, every such question, dispute or difference shall be & is hereby referred to," etc. :—*Held* : a dispute in which a majority of the partners desired to appoint a new manager (an office provided for in the contract) did not fall within the reference, as it was a matter relating to the internal arrangements of the business, & was not a question which would have been within the jurisdiction of a ct. of law had there been no reference.—*LANDALE v. GOODALL* (1879), 16 Sc. L. R. 434.—SCOT.

k. "In respect of accounts for goods & workmanship supplied."—An arbiter, appointed to decide "in respect



**Sect. 6.—Construction of submission: Sub-sect. 7,**

between the parties," omitting the other words "in the cause," & the latter a reference "of all matters in difference in the cause," omitting "between the parties" (BULLER, J.).—SMITH v. MULLER (1790), 3 Term Rep. 624; 100 E. R. 769.

*Annotation*:—Mentd. Rowles v. Lawrence (1826), 11 Moore, C. P. 338.

**222. "All matters in difference" between partners & "terms & conditions on which co-partnership should be dissolved."**—By submission to arbn. it was agreed between A. & B., who carried on the business of surgeons & apothecaries at H., to dissolve partnership, & that all matters in difference between them, & the terms & conditions

of accounts for goods & workmanship supplied "by A. to B., issued an award in which he set off against the amount of these accounts payments to account said to have been made by bills, & a debt alleged to be due upon an independent transaction. The set-off brought out a balance against A., & B. sued for payment:—*Held*: the arbirer had no jurisdiction under the terms of the reference to entertain pleas of compensation, & the scope of the reference had not been extended by the parties.—WILSON v. PORTER (1880), 17 Sc. L. R. 675.—SCOT.

**l. "In relation to execution, construction," etc.—Clause in exhaustive terms.**—A specification provided that the contractor would get possession "immediately after acceptance of tender," & that he must enter into a formal contract. A formal contract was executed, which, while declaring that the specification was incorporated, reserved right "to appoint the time when the contractor may enter on the lands & proceed with the works." The contract further provided that in the event of any dispute arising "in relation to the execution, construction, or completion of the whole works contracted for, or any of them, or any part or portion thereof, or as to the quality or quantity of the work or the materials thereof, or as to the settling of accounts, or as to any points or matter whatever in regard to the works, or as to the contract, or the true intent, meaning, or effect thereof, or of the plans, drawings, specifications, or conditions," same should be referred to the decision of an arbirer. The contractors did not get prompt entry & claimed damages, maintaining that the question whether prompt entry had been given should be referred to the arbirer:—*Held*: that question did not fall to be referred to the arbirer.—MACKAY & SON v. LEVEN POLICE COMRS. (1893), 30 Sc. L. R. 919.—SCOT.

**n. "Any disputes that may arise between partners in any way relating hereto."**—A contract of co-partnership for the carrying on of a watchmaker's & jeweller's business provided that "any disputes that may arise between the partners in any way relating hereto" should be referred to arbn. A question having arisen as to whether certain proposed additions to the business fell within scope of a watchmaker's & jeweller's business, for which alone the co-partnership existed:—*Held*: the question was one relating to the construction of the contract, & fell under the clause of reference.—MUIR v. MUIRS (1906), 43 Sc. L. R. 240.—SCOT.

**p. "Claim in this case & all matters in difference between the parties in this cause."**—*Semble*: a reference of "pltf.'s claim in this case, & all matters in difference between the parties in this cause," refers only the matters in dispute in the cause.—BLANCHARD v. SNIDER (1868), 28 U. C. R. 210.—CAN.

**q. "All manner of causes, etc., controversies, etc., & demands whatsoever,"**

—Arbitrators were chosen to arbitrate, award, order, judge & determine upon & concerning the possession of a certain lot of land & all manner of causes, etc., controversies, etc., & demands whatsoever from the beginning of the world to the date thereof:—*Held*: under the general words of the submission, authority was given to the arbitrators to arbitrate as to the fee simple of the land in dispute, if that were a matter in difference.—BENEDICT v. PARKS (1850), 1 C. P. 370.—CAN.

**r. Cause & all matters in difference.**—Where a cause & all matters in difference had been referred, & an award made:—*Held*: all questions of law as well as fact were submitted.—MCCOLLUM v. MCKINNON (1862), 22 U. C. R. 175.—CAN.

**s. "All disputes concerning affairs of society."**—Pltfs., a building society, advanced to deft. money on the security of mtges. Deft. claimed that he was entitled to a release of a portion of the mtged. property under a certain rule. Pltfs. refused such release, & refused to submit the matter to arbn., as demanded under a rule providing "that the board, for the time being, . . . shall determine all disputes concerning the affairs of the society, . . . which shall or may hereafter arise between the trustees, officers, or other shareholders of the society, . . . & if the decision be not satisfactory, reference shall be made to arbn.":—*Held*: the demand & refusal of such release did not constitute a "difference" or "dispute" which deft. could insist on having referred to arbn.—ALMON v. FAIRBANKS (1876), 1 R. & C. 407.—CAN.

**t. "Any legal or what right in each claim," etc.**—Authority to determine whether pltf. has "any legal or what right in each claim or claims, & the nature & extent of such rights," extends to rights legal or equitable, in fee, life or years, & whether in possession, remainder or reversion.—MILNER v. BRYDGES, MILNER v. LUTTRELL (1876), 2 P. & B. 87.—CAN.

**x. "Any other matter relating to the insurance."**—By an arbn. clause in a policy, arbitrators were to decide any differences which might arise "as to the loss or damage, or any other matter relating to the insurance" in accordance with the terms & conditions of the policy & the laws of Canada:—*Held*: a question as to the payment, or default in payment, of the premium was a difference "relating to the insurance" within the policy.—ANCHOR MARINE INSURANCE CO. v. CORBETT (1882), 9 S. C. R. 73.—CAN.

**y. "All matters which may hereafter come into dispute," etc.**—An agreement provided that "all matters which may hereafter come into dispute" between the assocn. or board of directors thereof, or any member or members, relative to "the original agreement of assocn., or any alleged breach or non-

observance thereof, or of any of the rules or regulations made, or to be made, by the board thereunder, & all matters of complaint by any member or members against any other member or members in respect of the premises," should be referred to arbn. Acting under the agreement, the board fixed a sum of three cents per gallon to be paid to the assocn. by the parties thereto on the sale of lubricating oil. A dispute having arisen as to whether the three cents were payable on sales made by one member to another, & whether the rate was payable upon distilled petroleum used in making axle grease:—*Held*: these matters were properly within scope of the arbitrator, though they amounted to a dispute upon the construction of the agreement, & the rules made under it.—WOODWARD v. McDONALD (1887), 13 O. R. 671.—CAN.

**223. Question of value & all matters in difference—Questions of law.**—K. entered upon the death of S. & died, devising his real estates, charged with his debts, & bequeathing his personal estate to T. K., against whom a bill was filed, charging that K., during his possession of the lands, had committed equitable waste, by cutting trees planted, etc., for ornament, & praying that an account might be taken out of the trees cut, & the value,

observance thereof, or of any of the rules or regulations made, or to be made, by the board thereunder, & all matters of complaint by any member or members against any other member or members in respect of the premises," should be referred to arbn. Acting under the agreement, the board fixed a sum of three cents per gallon to be paid to the assocn. by the parties thereto on the sale of lubricating oil. A dispute having arisen as to whether the three cents were payable on sales made by one member to another, & whether the rate was payable upon distilled petroleum used in making axle grease:—*Held*: these matters were properly within scope of the arbitrator, though they amounted to a dispute upon the construction of the agreement, & the rules made under it.—WOODWARD v. McDONALD (1887), 13 O. R. 671.—CAN.

**z. "Should any dispute arise from any cause whatever during continuance of contract."**—The expression "should any dispute arise from any cause whatever during the continuance of the contract" is most comprehensive & should be read as meaning "all disputes that may arise between the parties in consequence of this contract having been entered into." The contract should be held to "continue" until all payments under it have been made.—NORTHERN ELECTRIC CO. v. WINNIPEG CITY (1913), 24 W. L. R. 547; 4 W. W. R. 221; 10 D. L. R. 489.—CAN.

**a. "Or on any other grounds whatsoever"**—*Rule of ejusdem generis.*—A contract contained a stipulation that the sellers would not sell similar goods to other traders, & contained a clause providing for the reference of any disputes with regard to the quality of the goods "or on any other grounds whatsoever." The sellers in breach of their obligation sold similar goods to other traders. The purchasers refused to accept the goods & to appoint an arbitrator:—*Held*: (1) the question whether the sellers had committed a breach of the stipulation was not properly a subject of reference under the arbn. clause; (2) the general words "or on any other grounds whatsoever" meant any other grounds of a like character & did not include questions of law.—CARLISLES' NEPHEWS & Co. v. RICKNAUTH BUCKTEARMALL (1822), 1 L. R. 8 Calc. 809.—IND.

**b. "Compensation . . . to be determined in usual mode of arbitration."**—A clause in a contract for the sale of land, & the erection of a house by the vendor in a specified manner, provided that "no error or misdescription of the property shall annul the sale, but compensation shall be made or given, as the case may require, to be determined in the usual mode of arbn.":—*Held*: the clause related only to the physical condition of the land at the date of the contract & was not applicable to an alleged breach of the contract to erect the house in the manner specified.—Re

& that T. K., as representative of K., might pay the amount out of his assets. A decree was made according to the prayer of the bill. But before the master had proceeded under the decree, the question of value, & all matters in difference between the parties, were by an order of the ct., by consent, referred to an arbitrator, appointed by the master under the order, & arbn. bonds were executed by the parties:—*Semble*: such a reference as above stated submitted the law, as well as the facts, to the arbitrator.—*BUTLER v. KYNERSLEY* (1828), 2 Bli. N. S. 374; 4 E. R. 1171, H. L.

**224. "Cause & all matters in difference including equity suit"—Power to "direct verdict & determine what should be done."**—A cause & all matters in difference, including an equity suit, were referred to arbn., with power to the arbitrator to direct such verdict as he thought proper, & to determine what should be done by either party touching the matters in dispute. The costs of the cause & equity suit were to abide the event of the award, the costs of the reference & award to be in the arbitrator's discretion. The bill in equity, filed by defts. in the action against plffs., prayed, among other things, an injunction against further proceeding in the action. The arbitrator directed that a verdict should be entered for plffs. at law, with damages, on some issues in the cause, & for defts. on the others; but he ordered that no execution should be taken out by plffs., & that, after entering of the verdict as above, & any judgment thereon, all proceedings on the judgment by either party to the action should be stayed. But for such directions the verdict would have entitled plffs. to the general costs. He also directed that the suit in equity should cease:—*Held*: no excess of the arbitrator's authority.—*REEVES v. M'GREGOR* (1839), 9 Ad. & El. 576; 1 Per. & Dav. 372; 2 Will. Woll. & H. 127; 8 L. J. Q. B. 177; 112 E. R. 1330.

**225. "All disputes & differences which existed between parties"—Following recital of specific claim.**—By articles of submission to arbn., after reciting that plffs. claimed a balance of £201 9s. 10d. to be due to them from deft., with interest, it was agreed that all disputes & differences which existed between the parties should be referred to the arbn. of B., to determine the account between them. An account of the balance claimed by plffs. up to a certain date had been previously delivered, & plffs. afterwards sent to deft. a subsequent account, which deft. contended was not intended to be a subject of the reference:—*Held*: the recital of the specific claim did not limit the general power given to the arbitrator to decide all matters in difference between the parties.—*CHARLETON v. SPENCER* (1842), 3 Q. B. 693; 12 L. J. Q. B. 23; 6 Jur. 1013; 114 E. R. 672.

**226. "Matters in difference in cause"—Arbitrator to determine what he shall think fit to be done, etc.**—Where, by an order of reference, the arbitrator was to determine what he should think fit to be done by either of the parties:—*Held* (PARKE, B., *diss.*): he was not bound to direct affirmatively that something should be done, unless he should so think fit.

The matters in difference in the cause are the

matters raised upon the issues on the record, & which are necessary to the determination of the cause. Upon these the arbitrator has decided. If there were other grievances of a more general kind, not in issue in the cause, the party ought, according to the requisition of the arbitrator, to have submitted them to him in writing, & desired him to adjudicate upon them (PARKE, B.).—*ANGUS v. REDFORD* (1843), 11 M. & W. 69; 12 L. J. Ex. 180; 152 E. R. 719.

*Annotations*:—*Consd. & Apld.* *Toby v. Lovibond* (1848), 5 C. B. 770. *Refd.* *Grenfield v. Edgecombe* (1845), 14 L. J. Q. B. 322; *Nicholls v. Jones* (1851), 6 Exch. 373. *Mentd.* *Miller v. De Burgh* (1850), 4 Exch. 809; *Richardson v. Worsley* (1850), 5 Exch. 613.

**227. —Overpayments.**—An order was obtained by consent that all matters in difference in an action should be referred; before this order deft. alleged in an affidavit under R. S. C., Ord. 14, that plff. had been overpaid:—*Held*: the arbitrator had jurisdiction to consider such overpayment under the terms of the order of reference.—*WEALL v. JAMES* (1893), 68 L. T. 54; 37 Sol. Jo. 194; 5 R. 157.

**228. Cause & all matters in difference—Subject to special provisions.**—In *assumpsit* for goods sold & delivered, money lent, etc., defts. pleaded *non assumpsit* & Stat. Limitations. The cause & all matters in difference were afterwards referred, upon the terms, amongst others, that "the action should be decided according to the pleadings, but that, under the reference, so far as it related to matters in difference, the plea of Stat. Limitations was not to be set up by either party." The arbitrator directed a verdict to be entered for plff. for a sum excluding items that were barred by the stat., & he allowed those items as matters in difference. The ct. refused to disturb the award.—*SLOWMAN v. WIGGINS* (1848), 6 C. B. 276; 136 E. R. 1257.

**229. —Matters decided which might have arisen but did not arise out of cause.**—An arbitrator does not exceed his jurisdiction, when a cause & all matters in difference are referred to him, by making an award "in respect of matters in difference" which could not have been decided at the trial of the action, but might have arisen out of it.—*COX v. KERSLAKE, KERSLAKE v. COX* (1867), 16 L. T. 396.

**230. "This cause & all matters in difference in this cause & in the cause of etc."**—W. & M., who had contracted to cover wires with gutta percha for R., who supplied the wires, afterwards assigned their business to C., & gave him a power of attorney authorising him in their names to bring any action or suit or other proceeding to enforce any existing contracts, & otherwise to deal in respect thereof as he might think proper. C. himself, after the assignment, covered wires with gutta percha for R. Afterwards C. brought two actions for debt against R., one in his own name, the other in the name of W. & M., to recover the balance due for covering the wires. Deft. pleaded in each action the general issue, payment & set-off. Issue was not joined in the second action. On the trial of the first action, an order of reference by consent of C. & R. was made in the cause C. v. R., & professed to refer "this cause, & all matters in difference in this

HALLORAN (1904) 4 S. R. (N. S. W.) 630.—AUS.

c. "Touching the lease or any matter, clause or thing therein contained."—An agreement for a lease provided that any doubt, difference, or dispute arising between the parties thereto touching the lease or any matter, clause or thing therein contained should be determined by arbitrators in manner provided by Arbn. Act, 1890:—*Held*: the determination of the lessee's

for breach of covenant under such agreement was within scope of the reference to arbn.—*TROUTBECK v. TANNER* (1910), 29 N. Z. L. R. 1171.—N.Z.

d. "Difference arising out of contract."—A contract giving a concession to build a railway provided that, if the line was not completed within a certain time, the agreement should cease & appct. might enter upon the uncompleted line. A clause in the contract provided that differences arising out of

the contract should be settled by arbn. The line not having been completed within the time fixed, appct. applied for an order declaring that the agreement had ceased & authorising him to enter upon & take over the line:—*Held*: the right to such order was a question of law going to the root of the contract & could not be regarded as a difference arising out of the contract.—*COLONIAL GOVERNMENT v. HILLS* (1903), 20 S. C. 292; 13 C. T. R. 504.—S. AF.



**Sect. 6.—Construction of submission: Sub-sect. 7, D. & E. Sect. 7.]**

cause, & in the cause of W. & M. v. R., & all matters in difference between the parties, & all matters in difference in the cause of W. & M. v. R. between those parties." After the reference a rule for a discontinuance having been obtained in the action of W. & M. v. R., the order of reference was amended by consent, & it was ordered "that the rule for a discontinuance should be suspended, & left to the decision of the arbitrator." R. before the arbitrator made a claim for damages in respect of some wires spoilt by W. & M. in covering them. The award, among other things, decided that the claim was not valid, & awarded a discontinuance in the action of W. & M. v. R. M. was called by R. as a witness before the arbitrator:—*Held*: there was no excess of jurisdiction in awarding on the claim by R. against W. & M. for spoilt wires, as it was a cross-claim under the contract, & one which C. had authority to settle by virtue of the power of attorney.—*HANCOCK v. REID (REEDE)* (1851), 2 L. M. & P. 584; 21 L. J. Q. B. 78; 15 Jur. 1036.

**231. "Should any dispute arise"—Questions of law included.]**—A contract entered into between plffs. & defts. for the purchase of some wheat contained the following clause: "Should any dispute arise, the same to be submitted for settlement to the arbn. of two London corn factors respectively chosen, whose decision shall be final & binding":—*Held*: (1) the clause in question formed part of the consideration for the contract, & was intended to include questions of law as well as of fact which might arise upon the construction of the contract.—*FORWOOD & Co. v. WATNEY* (1880), 49 L. J. Q. B. 447.

**232. "In matters of detail."]**—By an agreement between two telegraph cos., whose submarine lines were not then constructed, for the exclusive working of their undertakings in unison for twenty years, & for payments each to the other of a proportion of their gross receipts in manner therein-after mentioned, it was arranged, amongst other things, that either party might, after five years, claim to have the agreement or any of the provisions thereof modified in matters of detail by arbn. In case the parties should not agree upon a sole arbitrator the matter was to be referred to a sole arbitrator to be appointed in accordance with Railway Cos. Arbn. Act, 1859 (c. 59), & the provisions of that Act were to apply to every reference to arbn. under the agreement, & as if the parties to the reference were railway cos. Amongst other things, one of the two cos. claimed, after five years, to vary the proportion of gross receipts to be paid to each other, & the other co. refused to agree to an arbn. The Board of Trade, upon application, refused to appoint an arbitrator under the above Act. A master's order was obtained appointing an arbitrator under C. L. P. Act, 1854, s. 12:—*Held*: (1) the order was within the jurisdiction of the ct. given by that sect.; (2) the claim to vary the proportion of gross receipts was not a matter of detail, & in respect of this modification the order would not be confirmed.—*Re BRAZILIAN SUBMARINE TELEGRAPH CO., LTD. & WESTERN & BRAZILIAN TELEGRAPH CO., LTD.* (1880), 42 L. T. 234.

**233. "All usual terms as to access to children, etc."]**—Cross petitions for divorce by husband & wife were withdrawn at the hearing, upon terms which included the execution of a separation deed to be settled by a counsel agreed upon in cases of difference, & to contain "all usual terms as to access to children, etc." The parties could not agree, & the counsel settled a deed providing that the wife should have the sole custody of the children, two boys of thirteen & fourteen, for half their vacations. In an action by the wife for specific

performance of the agreement:—*Held*: (1) these provisions related to the custody & not access, & it was beyond the powers of the counsel to insert them; (2) the ct. had power to settle the proper form of deed instead of referring it back.—*EVERSHED v. EVERSHED* (1882), 46 L. T. 690; 30 W. R. 732.

**234. "All disputes are to be settled by," etc.]**—A contract for the sale of locomotives provided for payment of the price upon the certificate of the engineer that the locomotives were in perfect working order at C., & by a subsequent clause, that "all disputes are to be settled by" arbn. The locomotives were delivered at C., but the engineer refused to certify or to give his reasons for not certifying. The vendors thereupon proceeded under the arbn. clause, the purchasers taking part under protest. An award having been given in favour of the vendors:—*Held*: a dispute had arisen within the arbn. clause, & whether the arbitrator was right or wrong, as he had not exceeded his jurisdiction, the ct. would enforce the award.—*Re HOHENZOLLERN ACT. FÜR LOCOMOTIVBAN & CITY OF LONDON CONTRACT CORPN.* (1886), 54 L. T. 596; 2 T. L. R. 470, C. A.

**235. "All other questions"—Rule of ejusdem generis.]**—In a suit by a wife for dissolution of marriage, the parties, at the hearing, agreed on certain terms of separation which were made an order of ct., & it was referred to the registrar to draft a deed of separation embodying these terms with the usual clauses, & with full power to determine "all questions as to the form of the deed, & all other questions arising out of the terms of the settlement." The parties, English subjects, had been married in Paris, & the marriage contract declared that they adopted the French law as ruling the civil conditions of their marriage. The contract stipulated that the parents of petitioner, as her dowry, should pay over to the husband & wife a sum of 200,000 francs, & that they should, further, pay an annuity of 30,000 francs for the benefit of the wife & her children, same to lapse if the donors died before the recipient & the children of the marriage, & in the case of the death of the wife without children before her parents, they contracted to pay the husband an annuity of 12,500 francs. The contract also contained various conditions as to the investment & devolution of property acquired by the wife at & after her marriage, the power of disposing of property, moveable & immoveable, by the husband & wife mutually in each other's favour, the mutual liability for debts contracted by either, etc. The deed of separation prepared by the registrar proposed that the income of 30,000 francs secured by the marriage contract should hereafter be deemed to be the sole property of the wife, & that all real & personal property, moveable or immoveable, now belonging or hereafter accruing to the wife, should be her separate property, independent of the control of her husband, & that all such property not disposed of by her by will or gift should go to such persons as would have been entitled to it if the husband had died in her lifetime. It also required the husband to relinquish all rights conferred on him by the marriage contract, as to the investment of property acquired by the wife after marriage, & as to the rights of inheritance of the survivor to the property of the party who died first, & finally, it stipulated that either of the parties should be at liberty to apply to the proper French tribunal for the ratification of the deed or of any of its provisions. The husband refused to execute the deed, on the ground that it was *ultra vires* as varying the conditions of the marriage contract:—*Held*: under the terms of the agreement, the registrar had power to determine the questions



arising under the French law as to whether a separation of bodies effected a separation of goods, or whether a separation of goods was brought about by the agreement, even though a contrary effect might be inferred from its terms, & also, whether an intention that separation of goods should not take place could be gathered from the agreement, even if the words "all other questions" were to be taken *ejusdem generis* with the "form of the deed," which was doubtful.—*DE RICCI v. DE RICCI*, [1891] P. 378; 61 L. J. P. 17.

**236. "Dispute."**—By a berth note it was agreed between plffs., shipowners of Cardiff, & defts., grain merchants of London & Marioupol, that plffs.' steamship should proceed to the Sea of Azov, & there load from defts.' nominees a cargo of grain, & discharge same in the United Kingdom or on the Continent, defts. to do the stevedoring at rates as per margin, & (clause 10) "in case of any dispute arising at loading ports under this berth note, it is to be submitted to the Rostof-on-Don Bourse Ct. of Arbn., whose decision is to be final." The vessel loaded a cargo of wheat, barley & rye at Marioupol, & for stevedoring, defts. charged 40 roubles per thousand chetverts, in accordance with the tariff in the margin of the berth note, & deducted the amount from advance freight. On the accounts being received by their London agents, plffs. contended that defts. had overcharged them by not reckoning, in the customary way, the number of poods for barley & rye to the chetvert, & they commenced a ct. ct. action against defts. to recover the difference:—*Held*: (1) "dispute" meant, not "disputation," but "matter in dispute"; (2) clause 10 in the berth note applied, as the matter in dispute was, "What are the proper charges for stevedoring at Marioupol?" & the dispute arose where the stevedoring was done, & where the charges in dispute were made; (3) the proceedings in the action must be stayed.—*THE DAWLISH*, [1910] P. 339; 79 L. J. P. 111; 103 L. T. 315; 11 Asp. M. L. C. 496.

**237. "If any dispute upon or in relation or in connection with contract."**—Pltf., a contractor, entered into a written contract with defts. for the construction of certain sewerage works, the contract containing a clause that "if at any time any question, dispute or difference shall arise between the council or their engineer & the contractor upon, or in relation to, or in connection with, the contract, the matter shall be referred to & determined by the engineer. . . ." After he had done certain work under the contract, pltf. refused to complete the work, alleging that he had been induced to enter into the contract by fraudulent misrepresentations made in the specification as to the nature of the subsoil of the ground where the work was to be done, & he brought an action to recover damages for the alleged misrepresentations, & to have the contract declared void. Defts. having

taken out a summons, under s. 4 of the Act of 1889, to stay the proceedings & refer the dispute to arbn. under the arbn. clause in the contract:—*Held*: the dispute was not a dispute "upon, or in relation to, or in connection with, the contract" within the above clause, & defts. were not entitled to have the proceedings stayed.—*MONRO v. BOGNOR URBAN DISTRICT COUNCIL*, [1915] 3 K. B. 167; 84 L. J. K. B. 1091; 112 L. T. 969; 79 J. P. 286, C. A.

**238. Any differences as to "meaning & intentions of charter."**—Pltf. let to defts. a tug under a charterparty, which provided that on default of payment of hire by defts. pltf. was to be at liberty to withdraw the tug, & that any differences between the parties as to the "meaning & intentions of the charter" should be referred to arbn. Disputes in which pltf. alleged (*inter alia*) default in payment of hire were referred to arbn., & in due course the arbitrators awarded that pltf. had a right to withdraw the tug from the service of defts. In their defence to an action by pltf. on the award for delivery up of the tug & damages for its detention, defts. contended that, under the agreement to refer, the jurisdiction of the arbitrators was limited to "the construction of the charter involving the rights of the parties under that document, & did not include any application of the conditions of the charter to the facts which had given rise to the dispute," that is to say, that the arbitrators had no jurisdiction to determine whether the hire was or was not in arrear & to make the award:—*Held*: this construction was too narrow, & the words gave the arbitrators power to apply the provisions of the charter to facts which had arisen, & to determine those facts.—*RICHARDS v. PAYNE & Co.* (1916), 86 L. J. K. B. 937; 115 L. T. 225; 13 Asp. M. L. C. 446.

#### E. Other Cases.

See cases, *infra*.

### SECT. 7.—EFFECT OF SUBMISSION ON RIGHTS OF PARTIES.

Effect of agreement to refer on jurisdiction of the Court, *see* Sect. 8, *post*.

Effect of agreement to refer on right to sue, *see* Sect. 9, *post*.

**239. Imports covenant to perform award.]**—A submission to an award imports a covenant to perform.—*LUPART v. WELSON* (1708), 11 Mod. Rep. 170; 88 E. R. 960.

**240. No waiver of defence—Reference of quantum of damages.]**—A party by agreeing to refer the *quantum* of a demand to arbn. does not thereby waive any objection to the illegality of it, in case

### PART I. SECT. 6, SUB-SECT. 7.—E.

**e. Onus of proof.]**—The *onus* of proving that a dispute falls within the terms of an agreement to refer to arbn. is on the person who applies to have the dispute referred.—*TRANSVAAL MINES LABOUR CO., LTD. v. ROBINSON GROUP OF MINES* (1911), W. L. D. 191.—S. AF.

**f. Arbitration clause in partnership deed.]**—*Held*: terms of a clause of arbn. in a contract of co-partnery did not exclude an action for exhibition of accounts against one of the partners.—*WYLLIE v. WYLLIE & HILL* (1866), 2 Sc. L. R. 166.—SCOT.

**g. Contract providing for acceptance of disputed goods — & subsequent reference of dispute to selling brokers.]**—A

contract by L. & Co., brokers, "on account of our principals" & B. & Co., stipulated that, should any dispute arise in connection with it, the buyers should nevertheless take delivery of the goods as shipped, making due payment as therein agreed, & such dispute should be referred to L. & Co., whose decision as independent parties between seller & buyer should be final. B. & Co. refused to take delivery on the ground of quality, & L. & Co. raised an action for the price:—*Held*: B. & Co. were bound to take delivery & make payment, inasmuch as the arbn. clause applied.—*LEARY & Co. v. BRIGGS & Co.* (1904), 41 Sc. L. R. 681.—SCOT.

**h. Clause in insurance policy.]**—Defences which go to vary the validity & legal existence of a contract of insurance do not fall under an arbn. clause,

no matter how widely such clause be expressed.—*IRVING v. SUN INSURANCE OFFICE* (1906), O. R. C. 24.—S. AF.

### PART I. SECT. 7.

**240 i. No waiver of defence.]**—Submission to an arbitrator does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter, & a party to the reference may take exception to its legality.—*SOUDAMINI GHOSH v. GOPAL CHANDRA GHOSH* (1914), 19 C. W. N. 948.—IND.

**k. Agreement to refer as ground for new trial.]**—Where justice had been done, the ct. refused a new trial upon the ground that it had been agreed that a third person should have been applied to to settle the matter, he being under

**Sect. 7.—Effect of submission on rights of parties.]**

he is sued for the sum awarded to be due.—**STEERS v. LASHLEY** (1794), 6 Term Rep. 61; 101 E. R. 435.

**Annotations** :—**Mentd.** **Brown v. Turner** (1798), 7 Term Rep. 630; **Aubert v. Maze** (1801), 2 Bos. & P. 371; *Ex p.* **Bulmer** (1807), 13 Ves. 313; **Clayton v. Dilly** (1811), 4 Taunt. 165; **Day v. Stewart** (1820), 3 Moo. & P. 334; **M'Callan v. Mortimer** (1842), 9 M. & W. 636, Ex. Ch.

**241.** ———.]—Agreeing to refer the *quantum* of damages to arbn., after a question of law has been reserved by the judge at the trial, does not waive an objection to deft.'s liability in the action after the arbitrator has made his award.—**OXENHAM v. LEMAN** (1823), 2 Dow. & Ry. K. B. 461.

**Annotation** :—**Mentd.** **Tate v. Hitchins** (1849), 7 C. B. 875.

**242. Reference of cause—Operates as stay.]**—If you say you will refer the cause to such a man *ex consequente* the cause must stay because that man is made judge; & the staying of the cause is

no legal liability to do so.—**NEVILS v. WILLCOCKS** (1825), Tay. 265.—**CAN.**

**l. Submission by sheriff of action for escape—No bar to recovery from debtor.]**—**Held**: a submission by the sheriff to arbn. in an action against him for an escape could not bar his recovery from the debtor.—**RUTTAN v. ASHFORD** (1841), 6 O. S. 280.—**CAN.**

**m. Equivalent to deed—Partnership dissolution.]**—A partnership deed provided dissolution should only be by deed:—**Held**: this provision was complied with by a general submission to arbn. of all matters in difference between the partners, & an award (both under seal) that all the partnership effects should be vested in A. as a trustee to wind up the concern.—**HUTCHINSON v. WHITFIELD** (1830), Hayes, 78.—**IR.**

**n. Reference of dispute without assent of surety to bond fees surety.]**—Where, after proceedings have been commenced on the bond, the parties to the *replevin* go to arbn. without the assent of the surety, all further proceedings against the surety will be stayed. *Aliter*, where the reference is with his assent.—**HUTT v. GILLELAND, HUTT v. KERR** (1845), 1 U. C. R. 540.—**CAN.**

**o.** ———.]—An action of *replevin* with all matters in difference was referred to arbn. & decided in favour of deft., who sued the sureties on the *replevin* bond. On motion to stay proceedings, on the ground that they were discharged by the reference, defts. swore that they had not consented to the reference, & pltf. in answer showed that they were aware of it & did not object, but attended at the arbn., & that one of defts. had asked pltf.'s attorney for time:—**Held**: as consent on these affidavits, could not be assumed, defts. were discharged.—**HURKE v. GLOVER** (1861), 21 U. C. R. 294.—**CAN.**

**p. Not defence to action on recognisance.]**—Bail cannot plead to an action on the recognisance a reference of the original suit to arbn.—**SHARP v. CONNELL** (1846), 3 Kerr. 125.—**CAN.**

**q. Effect of reference of cause on bail.]**—Where a cause is, by consent of both parties, referred to arbn.:—**Held**: the bail in the original action is discharged.—**ALLISON v. DES BRISAY** (1859), Cochran, 19.—**CAN.**

**r. Submission bar to further action.]**—A. had two claims, one of which fell within Lands Clauses Consolidation Act, while the other did not. For the one not falling under the stat. he raised an action but afterwards entered into a submission of both claims—the deed declaring that the submission was to be taken as a submission within the stat. The arbiters accepted, but the

implied in the reference (**TWISDEN, J.**).—**ANON.** (1669), 1 Mod. Rep. 24; 86 E. R. 702.

**243.** ——— **Not unless provided for in rule of reference.]**—It was a rule of the Ct. of King's Bench that no reference whatsoever of any cause depending in that ct. should stay the proceedings of that ct. unless it was expressed in the rule of reference to be agreed that all proceedings in that ct. should stay.—**ANON.** (1702), 2 Ld. Raym. 789; 7 Mod. Rep. 38; 92 E. R. 27.

**244.** ——— **Even without agreement to that effect.]**—An agreement to refer a cause to arbn. may operate as a stay of proceedings, although it is not part of the agreement that it should so operate.—**WILLIAMS v. GWYNNE** (1836), 2 Har. & W. 312.

**245.** ——— **Injunction against proceeding in action.]**—Where the parties, on the eve of the trial of a suit by the wife for judicial separation by reason of cruelty, agreed that the cause should not be moved, & that arbn. should be resorted to, the ct. refused to allow petitioner to proceed with the

w. No bar to action for breach of *different* covenant in same deed.]—An independent covenant to refer all disputes to arbn. does not prevent a party from suing for breach of another covenant in the same deed.—**LOCKE v. COLLINS** (1877), 3 V. L. R. 40.—**AUS.**

**x. Consent to arbitration equivalent to abandonment of defences then known.]**—When an insurance co. consents to an arbn. for the determination of damages, it gives up thereby its right of invoking every cause of forfeiture known by it before the naming of the arbitrators.—**LA COMPAGNIE D'ASSURANCE MUTUELLE v. VILLENEUVE** (1886), 2 M. L. R. 89; 9 L. N. 146.—**CAN.**

**y. May amount to estoppel.]**—At deft.'s request it was agreed to refer to arbn. disputes as to the division line between land owned by pltf. & land of which deft. appeared on the records to be the owner:—**Held**: deft. might not as between himself & pltf. deny the truth of that which he had alleged under seal in the submission.—**CLISH v. FRASER** (1895), 28 N. S. L. R. 163.—**CAN.**

**z. Clause in assignment for creditors—No abridgment of creditors' rights.]**—A deed of assignment for the benefit of creditors contained a clause under which all disputes & matters in difference between the executing creditors & the assignee were required to be submitted to arbn.:—**Held**: the clause did not constitute a departure from the ordinary course of ascertaining claims, & was not an abridgment of the creditors' rights.—**HART v. MAGUIRE** (1896), 29 N. S. L. R. 181; *affd. sub nom.* **MAGUIRE v. HART**, 28 Can. Cas. 272.—**CAN.**

**a. Does not absolve party from making detailed claims.]**—A contract between a railway co. & a quarrymaster provided that the co. should execute certain work, & that the quarrymaster should pay the cost of the labour incurred & interest, the amount of such cost & interest to be determined by the co.'s engineer. The co. brought an action against the quarrymaster for payment of *inter alia* a lump sum certified by the engineer. Defender maintained that no details were ever furnished to him:—**Held**: the contract did not absolve the co. from furnishing to defender a properly detailed account.—**NORTH BRITISH Ry. Co. v. WILSON** (1911), 48 Sc. L. R. 620.—**SCOT.**

**b. Legal rights prior to agreement extinguished.]**—After an agreement to arbitrate has been come to, legal rights which may have existed prior to the agreement cannot be revived.—**R. JAVA, CHINA & JAPAN LUN & OLOF WIJK & Co. CHINA AGENCIES, LTD.** (1911), 6 Hong Kong L. R. 122.—**HONG KONG,**

time for decision having expired without a decision being pronounced, the parties endorsed on the deed a minute of renewal. The time fixed again expired without a decision. Thereafter A. insisted in a wakening of the action, for the non-statutory claim:—**Held**: the submission subsisted so as to bar any further procedure in the action.—**HILL v. DUNDEE, PERTH & ABERDEEN Ry. JUNCTION Co.** (1852), 1 Stuart, 1094.—**SCOT.**

**s. Claim to treble damages under 2 Will. & Mar. c. 5, s. 4, barred.]**—A reference to arbn. disentitles pltf. from recovering treble damages, & costs under 2 Will. & Mar. c. 5, s. 4, the word "recover" used in the stat. meaning "recover by the verdict of a jury."—**CLARK v. IRWIN** (1862), 8 L. C. L. J. 21.—**CAN.**

**t. Reference after default equivalent to waiver of default.]**—Pltf. agreed to convey to deft. certain land, the right to purchase which had been assigned by deft. to him, on payment by deft. of certain sums, & that deft. should occupy until default. After default pltf. & deft. referred all matters in difference:—**Held**: the instrument executed by pltf. created a demise, or a re-demise, in favour of deft., which could have been absolutely avoided by pltf. on the default made by deft., but the reference after default waived it.—**BLACK v. ALLAN** (1866), 17 C. P. 240.—**CAN.**

**u. Where agreement to refer alters position of parties under previous agreement.]**—K., who held logs claimed by P., sold them to H., who placed the money in the hands of deft., both parties agreeing that if not replevied by P. in six days it was to be paid to K. P. was about to replevy, but before the six days expired, K. agreed with him to submit the matter to arbn. After the time elapsed, K. refused to arbitrate, & claimed the money under the first agreement. In an action against deft. on the first agreement for the money:—**Held**: as the substituted agreement altered the position of the parties, it was an answer to the action.—**KERR v. SKINNER** (1869), 1 Han. 584.—**CAN.**

**v. May be admission of liability.]**—A contract for sale of sheep provided that any deficiency in number should be allowed to the purchaser at 5s. per head, & also for the reference of matters in dispute to arbn. There was a very large deficiency. The arbitrator to whom the matter was referred allowed more than 5s. per head for the number deficient:—**Held**: by sending the case to arbn. the vendor admitted the deficiency to be such as entitled the purchaser to more than the 5s. per head.—**RYAN v. BROUGHTON** (1871), 2 V. L. R. 49.—**AUS.**



original suit, she having wilfully interposed obstacles to the progress of the arbn.—**HOOPER v. HOOPER** (1861), 3 Sw. & Tr. 251; 30 L. J. P. M. & A. 49.

*Annotations*:—**Distd.** **Hall v. Hall & Richardson** (1879), 27 W. R. 664. **Mentd.** **Newsome v. Newsome** (1871), L. R. 2 P. & D. 306; **Phillips v. Barnet** (1876), 45 L. J. Q. B. 277.

**246. Does not preclude defences arising after reference.**—Deft. does not, by referring a cause, preclude himself from availing himself before the arbitrator of a defence that has arisen after the reference.—**ALDER v. PARK** (1836), 5 Dowl. 16; 2 Har. & W. 78.

**247. As regards liability for costs.**—A. sold goods to B., who resold them to pltf., who resold them to defts., who resold them to the ultimate purchasers. All the contracts were in similar terms & contained similar arbn. clauses. The ultimate purchasers claimed the right to reject the goods as not being in accordance with their contract, & each purchaser in turn claimed the right to throw back the goods on his immediate vendor. Defts. agreed with pltf. that, as between themselves & pltf., they would be bound by the result of an arbn. between A. & B.:—**Held**: they had not thereby impliedly agreed to pay to pltf. any costs pltf. might be liable to pay to B.—**JACKSON & Co., LTD. v. HENDERSON, CRAIG & Co., LTD.** (1916), 115 L. T. 36.

**248. Reference of all matters in difference—No waiver of solicitor's lien.**—**Held**: a reference of all matters in difference between parties could not affect the attorney's lien.—**COWELL v. BETTELEY, COWELL v. SNOW** (1834), 10 Bing. 432; 2 Dowl. 780; 4 Moo. & S. 265; 3 L. J. C. P. 148; 131 E. R. 972.

*Annotations*:—**Expld.** & **Distd.** **Dunn v. West** (1850), 10 C. B. 420. **Refd.** **Little v. Philpotts** (1862), 2 B. & S. 383. **Mentd.** **Pringle v. Gloag** (1879), 27 W. R. 574.

**249. Agreement to refer matters of action—Accord & satisfaction.**—Several matters in difference existing between pltf. & defts., some of which were the subject of an action, it was agreed between them that, in consideration that defts. would consent to refer to arbn. the matters of the action, pltf. would accept such agreement in satisfaction of all damages sustained by him in respect of the other matters:—**Held**: the agreement & its performance was a good bar to an action in respect of the last-mentioned matters.—**WILLIAMS v. LONDON COMMERCIAL EXCHANGE Co.** (1854), 10 Exch. 569; 156 E. R. 565.

**250. — Sufficient consideration for promise to pay.**—**Assumpsit** lies on a promise that, if pltf. would submit his accounts to A., deft. would pay as much as should be found due from his wife as extrix. of her former husband, for the submission of the accounts to inspection of the arbitrator is sufficient consideration, being a trouble to pltf. & more than he needed to have done.—**MARCH v. CULPEPPER** (1627), Cro. Car. 70; 79 E. R. 662.

*Annotation*:—**Distd.** **Whitehead v. Greetham** (1825), M'Cle. & Yo. 205, Ex. Ch.

**251. — Waiver of peremptory undertaking to try.**—After default in going to trial at the assizes, at which pltf. was bound by a peremptory undertaking to try, the parties agreed to refer the cause, & the arbitrator was not bound to make his award until after the following term. No award being made:—**Semble**: the peremptory undertaking was waived by the reference.—**SPURR v. RAYSON**

(**RAYNER**) (1839), 5 M. & W. 339; 7 Dowl. 467; 8 L. J. Ex. 276; 3 Jur. 681; 151 E. R. 144.

*Annotations*:—**Consd.** **Bordier v. Barnett** (1845), 10 Jur. 35; **Waddy v. Barnett** (1845), 15 L. J. Q. B. 8. The report of **Spurr v. Rayson** in Dowl. is a little different from that in Meeson & Welsby; & Parke B. seems to be of opinion that the agreement to refer operated as a waiver by deft. of the undertaking, which was peremptory to try after a default had been made, & a motion for judgment as in case of nonsuit (**PATTESON, J.**).

**252. Agreement to refer salvage claim—No admission of services.**—Unless all the parties negotiating are fully apprised of all the circumstances of the case, negotiation to refer a claim of salvage to arbn. is no conclusive admission of salvage services rendered, or negation of a defence on the ground of the salvors' misconduct.—**THE MARTHA** (1859), Sw. 489.

**253. Not acknowledgment within Statute of Limitations.**—An agreement in writing to refer disputed accounts to arbn. in order "to ascertain the amount due," the amount to be paid "at such times & in such portions as the arbitrator might appoint":—**Held**: not an unqualified acknowledgment that any amount was due, & not an acknowledgment in writing sufficient to bar the operation of Stat. Limitations.—**HALES v. STEVENSON** (1863), 8 L. T. 798; 11 W. R. 952, Ex. Ch.

*Annotations*:—**Refd.** **Re River Steamer Co., Mitchell's Claim** (1871), 6 Ch. App. 825. n.; **Skeet v. Lindsay** (1877), 2 Ex. D. 314.

**254. No waiver of Statute of Limitations.**—A submission to arbn. does not *per se* exclude the right of either party to raise the defence of the above Act, but if it be intended to exclude such a defence, an express term to that effect must be imported into the agreement of submission.—**Re ASTLEY & TYLDESLEY COAL & SALT Co. & TYLDESLEY COAL Co.** (1899), 68 L. J. Q. B. 252; 80 L. T. 116; 15 T. L. R. 154, D. C.

**255. Express waiver of defence of fraud.**—An agreement between the parties to a building contract that the valuations, certificates, orders & awards of the architect shall be final & binding, & shall not be set aside or attempted to be set aside on any ground, or for any reason, or for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy, is, in the absence of fraud on the part of either party, a valid agreement, & not void as being against public policy.—**TULLIS v. JACSON**, [1892] 3 Ch. 441; 61 L. J. Ch. 655; 67 L. T. 340; 41 W. R. 11; 8 T. L. R. 691; 36 Sol. Jo. 646.

*Annotation*:—**Refd.** **Pearson v. Dublin Corpn.** [1907] A. C. 351, H. L.

**256. Submission by administrators or executors—Whether admission of assets.**—Where deft. bound himself as administrator to abide by an award to be made touching matters in dispute between his intestate & another, & the arbitrators awarded that he as administrator should pay, etc.:—**Held**: he could not plead *plene administravit* to debt on the bond.—**BARRY v. RUSH** (1787), 1 Term Rep. 691; 99 E. R. 1324.

*Annotations*:—**Expld.** **Pearson v. Henry** (1792), 5 Term Rep. 6. **Refd.** **Childs v. Monins** (1821), 2 Brod. & Bing. 460.

**257. — — —**—A submission to an award by an administrator is not an admission of assets.—**PEARSON v. HENRY** (1792), 5 Term Rep. 6; 101 E. R. 3.

*Annotations*:—**Distd.** **Worthington v. Barlow** (1797), 7 Term Rep. 453. **Mentd.** **Riddell v. Sutton** (1828), 2 Moo. & P. 345.

**256 i. Submission by administrators or executor—Whether admission of assets.**—An exor. or administrator may by a submission to arbn. preclude himself from pleading *plene administravit*, & thus ren-

der himself personally liable.—**REID v. REID** (1865), 16 C. P. 247.—**CAN.**

**256 ii. — — —**—exor.'s submission to arbn. is not *per se* an

admission of assets.—**MOCHER v. FRAZER & REED** (1817), Beat. 578.—**IR.**

*c. Agreement for arbitration may be waived.*—**HOWAY & REED v. DOMINION PERMANENT LOAN Co.** (1899), 6 B. C. R. 551.—**CAN.**



7. of submission on rights of parties.  
Sect. 8.]

258. —. —.]—If an arbitrator, under a reference between A. & B., administrators, award that B. shall pay a certain sum as the amount of A.'s demand, B. cannot afterwards object that he had no assets, but may be attached for non-payment.—*WORTHINGTON v. BARLOW* (1797), 7 Term Rep. 453; 101 E. R. 1072.

*Annotations*:—*Refd.* Childs v. Monins (1821), 2 Brod. & Bing. 460; Riddell v. Sutton (1828), 2 Moo. & P. 345.

259. —. —.]—If an exor. or administrator think fit to refer generally all matters in dispute to arbn., without protesting against the reference being taken as an admission of assets, it will amount to such an admission (*LORD ELDON, C.*).—*ROBSON v. —* (1813), 2 Rose, 50.

260. —. —.]—Where an extrix. referred to arbn. to be finally determined on certain disputes & differences respecting certain unsettled accounts, & the arbitrators, without finding assets, awarded her to pay a certain sum:—*Held*: *plene administravit* was no bar to an action on the award.

If a reference be submitted to by an exor., & he does not protest in the first instance that he has no assets, he should not be afterwards allowed to say so, because in that case the opposite party will have been put to the expense of an arbn. to no purpose. The arbn. should be placed on the same footing as an action, in which, if an exor. omit to plead that he is without assets, he cannot afterwards set up that ground of defence (*BEST, C.J.*).—*RIDDELL v. SUTTON* (1828), 5 Bing. 200; 2 Moo. & P. 345; 7 L. J. O. S. C. P. 60; 130 E. R. 1037.

261. —. —.]—A deft. exor. does not preclude himself, by referring a cause, from availing himself of a plea of judgment recovered *puis darrein* continuance, while the reference was pending, although it appears from affidavits that he has a certain amount of assets in his hands.—*ALDER v. PARK* (1836), 5 Dowl. 16; 2 Har. & W. 78.

262. *Trustee of insolvent debtor—Whether admission of assets.*—Trustees of an insolvent debtor, entering into an arbn. bond, by which they refer all matters in difference & agree to pay what shall be awarded, admit that they have assets, & may be directed to pay costs.—*Re WANSBOROUGH, WANSBOROUGH v. DYER* (1815), 2 Chit. 40.

SECT. 8.—EFFECT OF AGREEMENT TO REFER ON JURISDICTION OF THE COURT—OUSTER OF JURISDICTION.

263. *General rule—Jurisdiction not ousted—Action on policy.*—It is a principle of law that par-

ties cannot by contract oust the cts. of their jurisdiction.—*SCOTT v. AVERY* (1856), 5 H. L. Cas. 811; 25 L. J. Ex. 308; 28 L. T. O. S. 207; 2 Jur. N. S. 815; 4 W. R. 746; 10 E. R. 1121, H. L.

*Annotations*:—*Consd.* Livingston v. Ralli (1855), 24 L. J. Q. B. 269; Russell v. Pellegrini (1856), 6 E. & B. 1020. *Expld. & Distd.* Scott v. Liverpool Corp'n. (1858), 3 De G. & J. 334; Horton v. Sayer (1859), 4 H. & N. 643. *Distd.* Roper v. London (1859), 1 E. & E. 825. *Apld.* Braunstein v. Accidental Death Insee. (1861), 1 B. & S. 782. *Expld.* Lee v. Page (1861), 30 L. J. Ch. 857. *Consd. & Expld.* Turnbull v. Woolfe (1861), 4 L. T. 236. *Folld.* Tredwen v. Holman (1862), 1 H. & C. 72. *Consd.* Stokoe v. Hall (1864), 3 New Rep. 566. *Folld.* Wright v. Deley (1866), 4 H. & C. 209. *Consd.* Cooke v. Cooke (1867), L. R. 4 Eq. 77. *Expld.* Elliott v. Royal Exchange Assee. (1867), L. R. 2 Exch. 237. *Consd.* Dawson v. Fitzgerald (1876), 1 Ex. D. 257, C. A.; Edwards v. Aberayron Mutual Ship Insee. Soc. (1876), 1 Q. B. D. 563, Ex. Ch.; Collins v. Locke (1879), 4 App. Cas. 674, P. C.; Hart v. Hart (1881), 18 Ch. D. 670. *Expld. & Distd.* Minifie v. Ry. Passengers Assee. (1881), 44 L. T. 552. *Consd.* Babbage v. Coulbourn (1882), 52 L. J. Q. B. 50, C. A. *Expld.* Spackman v. Plumstead Board of Works (1885), 10 App. Cas. 229, H. L. *Consd.* Met. Dist. Ry. Co. v. Met. Ry. Co. (1886), 5 Ry. & Can. Tr. Cas. 126. *Folld.* Trainor v. Phoenix Fire Assee. (1891), 65 L. T. 825; Scott v. Mercantile Accident & Guarantee Insee. (1892), 66 L. T. 811, C. A.; Caledonian Insee. v. Gilmour, [1893] A. C. 85, H. L. *Consd. & Apld.* Spurrier v. La Cloche, [1902] A. C. 446, P. C. *Consd.* Pena Copper Mines v. Rio Tinto Co. (1911), 105 L. T. 846, C. A. *Distd.* Juraidini v. National British & Irish Millers Insee. (1914), 84 L. J. K. B. 640. *Folld.* Lock v. Army, Navy & General Assee. Assocn. (1915), 31 T. L. R. 297. *Distd.* Dynamit Act. v. Rio Tinto Co., [1918] A. C. 292, H. L. *Refd.* Scott v. Liverpool Corp'n. (1857), 1 Giff. 216; Pestonjee Nussurwanjee v. Manookjee (1868), 12 Moo. Ind. App. 112, P. C.; Gray v. Pearson (1870), 23 L. T. 416; Wright v. Ward (1871), 24 L. T. 439; Mulkern v. Lord (1879), 48 L. J. Ch. 745, H. L.; Parry v. Liverpool Malt Co., [1900] 1 Q. B. 339, C. A.; Toronto Ry. Co. v. National British & Irish Millers Insee. (1914), 111 L. T. 555, C. A.; Ertel Bieher v. Rio Tinto Co., [1918] A. C. 260, H. L. *Mentd.* Northampton Gas Light Co. v. Parnell (1855), 15 C. B. 630; Coker v. Young (1860), 2 F. & F. 98.

264. —. —.]—An action on a policy of insurance lies, though the policy says the matter shall be referred in case of a loss or dispute.

*Qu.*: whether it would have been otherwise, if there had been a reference depending, or made & determined.

The agreement of the parties cannot oust the jurisdiction of the ct. (*per CUR.*).—*KILL v. HOLISTER* (1746), 1 Wils. 129; 95 E. R. 532.

*Annotations*:—*Consd.* Street v. Rigby (1802), 6 Ves. 215. *Expld.* Scott v. Avery, Avery v. Scott (1853), 8 Exch. 487. *Refd.* Mitchell v. Harris (1793), 2 Ves. 129; Scott v. Avery (1856), 5 H. L. Cas. 811, H. L.

265. *Dispute as to meaning of lease.*—If parties agree that all disputes that may arise between them shall be referred to arbn., that will not prevent either of them bringing an action against the other.

By a lease of a coal-mine it was agreed between the parties that, if any difference or question

withstanding this clause.—*ASPEGREN & Co. v. POLLY & WHITE* (1909), 13 O. W. R. 422.—*CAN.*

263 vi. —. —. *Clause in feu charter—Exception.*—A feu charter reserved to the grantor "mines, minerals, etc., & full power to work same, upon payment of surface damages, as same should be ascertained by two arbitrators, etc." Minerals had been worked under this reserved power, & considerable damage had been sustained by the heritable subjects erected thereon:—*Held*: the parties had agreed to create a tribunal of their own to ascertain or assess the damages arising from exercise of the power to work the minerals, & the jurisdiction of the ct. was excluded.—*DEWAR v. HALLPENNY* (1898), 6 S. L. T. 30.—*SCOT.*

265 i. *Dispute as to meaning of lease.*—Mineral tenants, who had the

PART I. SECT. 8.

263 i. *General rule—Jurisdiction not ousted.*—The arbn. clause, by which the parties to a contract agree that all the differences resulting therefrom shall be decided by a designated person whose decision shall not be subject to revision by the cts., is null & does not bind the parties.—*PETERS v. LES COMMISSAIRES DU HAVRE DE QUÉBEC* (1889), 15 Q. L. R. 277, S. C.—*CAN.*

263 ii. —. —. *Clause in contract.*—A contract contained a clause referring all differences & disputes to two men of skill, as arbiters, with power to them to choose an oversman, whose determination was to be final:—*Held*: an agreement to refer all disputes to arbiters did not bar an action in ct.—*MILNE, ETC. v. EDINBURGH MAGISTRATES* (1770), 2 Pat. App. 209.—*SCOT.*

263 iii. —. —. —. —.] — (*u.*: a right of action exists, although

a contract contains a clause that all matters in dispute between the parties shall be referred to arbn.—*ROYAL ELECTRIC CO. v. THREE RIVERS CITY* (1894), 23 S. C. R. 289.—*CAN.*

263 iv. *Exception.*—A contract provided that disputes should be referred to A., who subsequently received the appointment of manager to one of the parties. In an action under the contract by the other party:—*Held*: it was necessary, before proceeding therein, that the submission should be set aside by reduction.—*PHIPPS v. EDINBURGH & GLASGOW RY. CO.* (1843), 5 Dunl. (Ct. of Sess.) 1025.—*SCOT.*

263 v. —. —. *Clause in bought & sold notes.*—Bought & sold notes contained the following clause: "Any difference arising under this contract to be settled by arbn.":—*Held*: the ct. had jurisdiction to try the action not-

should arise between them touching any covenant, matter or thing expressed in the lease, or the meaning thereof, it should be settled by two arbitrators, with mutual covenants to obey & perform the award, & not to bring any action at law or in equity without first submitting all matters to arbn.:—*Held*: as the agreement & covenants to refer were absolute to oust the jurisdiction of the superior cts., they were void for that purpose.—*HORTON v. SAYER* (1859), 4 H. & N. 643; 29 L. J. Ex. 28; 33 L. T. O. S. 287; 5 Jur. N. S. 989; 7 W. R. 735; 157 E. R. 993.

*Annotations*:—*Consd.* *Lee v. Page* (1861), 7 Jur. N. S. 768. *Distd.* *Tredwen v. Holman* (1862), 1 H. & C. 72. *Consd.* *Elliott v. Royal Exchange Assce.* (1867), L. R. 2 Exch. 237; *Edwards v. Aberayron Mutual Ship Insee. Soc.* (1876), 1 Q. B. D. 563, Ex. Ch.

**266. — Bill for account in partnership—Exception to rule.**—Plea, to a bill for an account of a partnership, that all matters in controversy were to be determined by arbitrators, allowed.—*HALFHIDE v. FENNING (JENNING)* (1788), 2 Bro. C. C. 336; *Dick*. 702; 29 E. R. 187.

*Annotations*:—*Consd.* *Tattersall v. Groote* (1800), 2 Bos. & P. 131. *Expld.* *Street v. Rigby* (1802), 6 Ves. 815. *Dbtd.* *Waters v. Taylor* (1808), 15 Ves. 10. With reference to the case of *Halfhide v. Fenning*, I admit that upon the best authority the opinion expressed by Lord Kenyon in that case is wrong, as there are against it the concurrent opinions of Lord Hardwicke, Lord Thurlow, Lord Rosslyn, & of Lord Kenyon himself. As a general proposition, therefore, it is true that an agreement to refer disputes to arbn. will not bind the parties even to submit to arbn. before they come into ct. (*LORD KELDON, C.*); *Scott v. Avery, Avery v. Scott* (1853), 8 Exch. 487, Ex. Ch. *Consd.* *Scott v. Avery* (1856), 5 H. L. Cas. 811, H. L.; *Cooke v. Cooke* (1867), L. R. 4 Eq. 77; *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112, P. C. *Refd.* *Michell v. Harris* (1793), 4 Bro. C. C. 311.

**267. Bill for discovery in partnership suit—Rule reaffirmed.**—One partner brought a bill against another to discover & be relieved against frauds, etc. Deft. pleaded an agreement that in case any difference should arise between them it was to be referred, & that the matters in pltf.'s bill related only to the partnership, & yet had never been submitted to arbn., nor had he ever proposed a reference, though deft. offered, & was always ready to do it. Lord Hardwicke disallowed the plea, for as it was a bill to discover & be relieved against frauds, the arbitrators could not examine on oath, which, by the agreement, they should have had a power of doing.—*WELLINGTON v. MACKINTOSH* (1743), 2 Atk. 569; 26 E. R. 741.

*Annotations*:—*Consd.* *Tattersall v. Groote* (1800), 2 Bos. & P. 131. *Expld.* *Scott v. Avery* (1856), 5 H. L. Cas. 811, H. L. *Refd.* *Street v. Rigby* (1802), 6 Ves. 815.

**268. — — — — —**—Plea, to a bill for a discovery of frauds in breach of articles, that there was a clause in the articles that all matters in difference should be referred to arbn., overruled.—*MICHELL (MITCHELL) v. HARRIS* (1793), 4 Bro. C. C. 311; 2 Ves. 129; 29 E. R. 908.

*Annotations*:—*Consd.* *Tattersall v. Groote* (1800), 2 Bos. & P. 131. *Expld.* *Scott v. Avery, Avery v. Scott* (1853), 8

usual powers of working the minerals, had also power to make use of any pits they might sink for winning coal in adjoining lands. Any disputes that might arise between the parties with regard to the true import of the lease were to be referred to the decision of arbitrators named. The proprietors raised an action to prevent the tenants from using the roads on the lands for carrying materials to & from their works on adjoining lands, & from making other uses of the lands for the purposes of these works. Defenders pleaded that the action was excluded by the arbn. clause:—*Held*: the action was not so excluded.—*MUNGLE v. YOUNG* (1872), 10 Macph. (Ct. of Sess.) 901.—*SCOT*.

*Distribution of assets.*—An award regulating the distribution of a deceased's assets is void, as it ousts the jurisdiction of the cts.—*COAKLEY v. COAKLEY* (1897), 31 L. L. T. 404.—*IR*.

*e. — — — — — Arbitration clause in bye-laws adopted under private Act—Provisions of Friendly Societies Acts excluded.*—A society enrolled rules in pursuance of Friendly Societies Acts. One rule provided that all matters in dispute between the society & any individual member should be referred to arbn. The society was afterwards incorporated by a private Act, which gave the society power to make bye-laws so far as applicable. The society adopted the former

Exch. 487, Ex. Ch. *Refd.* *La Purisima Concepcion* (1849), 13 Jur. 545; *Doleman v. Ossett Corp.*, [1912] 3 K. B. 257, C. A.

**269. Action on covenant—Courts of law or equity.**—To covenant in a deed (made for the performance of several matters) deft. cannot plead that in the deed there is a covenant that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by three arbitrators to be chosen, etc., & that he offered to refer the matter in dispute, but that pltf. refused, etc.

It has been decided again & again that an agreement to refer all matters in difference to arbn. is not sufficient to oust the cts. of law or equity of their jurisdiction (*LORD KENYON, C.J.*).—*THOMPSON v. CHARNOCK* (1799), 8 Term Rep. 139; 101 E. R. 1310.

*Annotations*:—*Consd.* *Thomas v. Fredericks* (1847), 16 L. J. Q. B. 393; *Livingston v. Ralli* (1855), 5 E. & B. 132; *Scott v. Avery* (1856), 5 H. L. Cas. 811, H. L.; *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112, P. C. *Refd.* *Michell v. Harris* (1793), 4 Bro. C. C. 311; *Williams v. Gwynne* (1836), 2 Har. & W. 312; *La Purisima Concepcion* (1849), 13 Jur. 545; *Scott v. Liverpool Corp.* (1858), 3 De G. & J. 334; *Blythe v. Lafone* (1859), 28 L. J. Q. B. 164; *Cooke v. Cooke* (1867), L. R. 4 Eq. 77; *Doleman v. Ossett Corp.*, [1912] 3 K. B. 257, C. A.

**270. Bill for discovery & relief.**—Plea, to a bill for discovery & relief, of an agreement to refer to arbn., overruled.—*STREET v. RIGBY* (1802), 6 Ves. 815; 31 E. R. 1323.

*Annotations*:—*Consd.* *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112, P. C. *Expld.* *Penrice v. Williams* (1883), 23 Ch. D. 353. *Refd.* *La Purisima Concepcion* (1849), 13 Jur. 545; *Blythe v. Lafone* (1859), 28 L. J. Q. B. 164. *Mentd.* *South Wales Ry. Co. v. Wythes* (1854), 3 Eq. Rep. 153; *British Empire Shipping Co. v. Simes* (1857), 3 K. & J. 433.

**271. Unless dispute peculiarly adapted for arbitration.**—Although an agreement to refer disputes to arbn. is, generally, no objection to a suit in a Ct. of Equity, yet upon the nature of the subject, the management of the Opera House, & the anxious provision of the parties for arbn., the ct. refused upon motion to interfere before they had taken that course. The ct., therefore, would not upon motion appoint a manager, etc., of the Opera House, except upon the principle, applicable to any other partnership, as necessary to the relief, a foreclosure, taking into consideration also the difficulties from the nature of the subject & the contract, an anxious provision for arbn., & that one party was by the express contract manager.—*WATERS v. TAYLOR* (1808), 15 Ves. 10; 33 E. R. 658.

*Annotations*:—*Mentd.* *Gourlay v. Somerset* (1815), 19 Ves. 429; *Roberts v. Eberhardt* (1853), Kay. 148; *Automatic Self Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34, C. A.

**272. Building contract dispute.**—Pltf. entered into a contract with defts. to remove 10,000 cubic yards of the bed of the Mersey contiguous to Seacombe Ferry, for £5,000, & to finish completely the work, under the direction & to the satisfaction of defts.' engineer, by Oct. 1, 1878,

rules as bye-laws:—*Held*: the provision of Friendly Societies Acts had ceased to apply to the society, & the jurisdiction of the ct. was not ousted by the arbn. clause.—*IRVINE v. PRESBYTERIAN WIDOWS' FUND ASSOCN.* (1855), 5 I. Ch. R. 1.—*IR*.

*f. Suit in equity—Exception.*—A suit in equity cannot be sustained after an agreement to refer to arbn. (naming the arbitrators, & containing a covenant not to sue, & power to examine witnesses, & to make the submission a rule of ct.), while the arbn. might be proceeded with.—*DIMSDALE v. ROBERTSON* (1844), 7 I. Eq. R. 536; 2 Jo. & Lat. 58.—*IR*.



**Sect. 8.—Effect of agreement to refer on jurisdiction of the court—Ouster of jurisdiction.]**

subject to such an extension of time as the engineer might think reasonable, in case a temporary staging then erected on the site of the work should not be removed within such a time as would enable pltf. to complete the work by Oct. 1, 1878. Defts. were to make monthly payments on the certificate of the engineer to the amount of 80 per cent. of the value of the work done during each month, & pay the balance of the sum of £5,000 on the completion of the work. There was also a clause in the contract providing that, if any difference should arise between defts. & pltf. concerning the work contracted for, or concerning anything in connection with the contract, such difference should be referred to the engineer, & his decision should be final & binding on defts. & pltf. The work was completed on Nov. 11, 1879, & then a correspondence took place between pltf. & the engineer with reference to pltf.'s claims against defts. The engineer admitted pltf. was entitled to compensation for the expense caused by delay in consequence of the non-removal of the staging, & agreed to allow £15 10s. per day for thirty-eight days, but they could not agree upon the amount due to pltf. for extra work & other expenses. In June, 1880, the engineer sent a certificate to the works committee of defts., stating the work was finished to his satisfaction, & that £1,065 19s. was due to pltf., & defts. sent pltf. a cheque for £962 6s. 2d., being the balance of the sum certified after making certain deductions. Pltf., after giving credit for this sum, brought an action against defts. for £2,489 13s. 11d.:—*Held*: the clause referring differences to the engineer could not be set up in answer to the action.—**LAWSON v. WALLASEY LOCAL BOARD** (1883), 48 L. T. 507; 47 J. P. 437, C. A.

*Annotations*:—*Refd.* City of Dublin Steam Packet Co. v. R. (1908), 24 T. L. R. 657. *Mentd.* Porter v. Tottenham U. D. C., [1914] 1 K. B. 663.

**273. — “Without further suit or trouble.”]**—*Semble*: a covenant to refer all matters in difference between shareholders of a co. to arbn., the submission & award to be binding & conclusive on the parties, “without further suit or trouble,” is no bar to a suit in a Ct. of Equity between the same parties & for the same matters.—**BENSON v. HEATHORN** (1842), 1 Y. & C. Ch. Cas. 326; 62 E. R. 909.

*Annotations*:—*Mentd.* Smith v. Lay (1856), 3 K. & J. 105; Imperial Mercantile Credit Assn. v. Coleman (1871), 6 Ch. App. 558, L. C.; *Re* Cape Breton (1885), 29 Ch. D. 795, C. A.; Costa Rica Co. v. Forwood, [1900] 1 Ch. 756; Rowland v. Chapman, Rowland v. Corrie, Rowland v. Brandreth (1901), 17 T. L. R. 669; Transvaal Lands Co. v. New Belgium Transvaal Land & Development Co., [1914] 2 Ch. 488, C. A.

**274. — Arbitration clauses in deeds.]**—Arbn. clauses in deeds are not binding on the parties, so as to oust the jurisdiction of the ct.—**MEXBOROUGH (EARL) v. BOWER** (1843), 7 Beav. 127; 49 E. R. 1011; *affd.* 2 L. T. O. S. 205.

*Annotation*:—*Mentd.* Bowser v. Maclean (1860), 2 De G. F. & J. 415.

**275. — Where covenant not to sue—Forum in which plea tenable.]**—An agreement to submit the affairs of a partnership to arbn., & that the submission shall be made a rule of a ct. of common law, cannot be pleaded in bar to a suit in equity, seeking discovery, complaining of pltf. being sued in actions & praying for a receiver, although before the bill was filed arbitrators were appointed, & since bill filed the submission has been made a rule of the ct. The jurisdiction of the superior cts. in such a case is not ousted by C. L. P. Act, 1854.

*Qu.*: whether, if the agreement to submit also contains a covenant not to take proceedings at

law or in equity, in that case the submission may be pleaded in bar of proceedings in any superior ct., except that before which the reference is pending.

Where, in a reference under the Act of 1698, an award has been made, the jurisdiction in the matters of the award of every superior ct., except that before which the reference is pending, is excluded.

Leave may be given to amend a plea of submission in special circumstances.—**COOKE v. COOKE** (1867), L. R. 4 Eq. 77; 36 L. J. Ch. 480; 16 L. T. 313; 15 W. R. 981.

*Annotations*:—*Consd.* Law v. Garrett (1878), 8 Ch. D. 26, C. A. *Refd.* Edwards v. Aberayron Mutual Ship Insce. Soc. (1876), 1 Q. B. D. 563, Ex. Ch.

**276. Pendency of arbitration no defence.]**—To a declaration for goods sold & delivered, & on an account stated, deft. pleaded that, before action brought, disputes had arisen between pltf. & deft. whether deft. was indebted to pltf. in any & what sum for the causes of action declared upon, which disputes they submitted themselves to refer, & did refer, to arbn., & mutually promised to fulfil the award; that the arbitrators, before action brought, took upon them the reference; that the matters in dispute were still under their consideration; & that a reasonable time had not elapsed for making the award:—*Held*: (1) the plea could not be considered as a plea in abatement informally pleaded; (2) as a plea in bar, it was bad, the pendency of an arbn. being no answer to an action for recovery of a debt.—**HARRIS v. REYNOLDS** (1845), 7 Q. B. 71; 14 L. J. Q. B. 241; 5 L. T. O. S. 53; 9 Jur. 808; 115 E. R. 414.

*Annotations*:—*Refd.* Wood v. Copper Miners in England Co. (1876), 17 C. B. 561; Doleman v. Ossett Corp., [1912] 3 K. B. 257, C. A.

**277. — .]**—By an agreement under seal, reciting (*inter alia*) that pltf. had erected a factory, etc., for the purpose of carrying on the manufacture of patent fuel, etc., & that defts. had agreed to grant a lease of the land, etc., to pltf., & to enter into certain other arrangements “for the supply of coal for the manufactory,” & otherwise, on the terms therein mentioned, it was agreed (*inter alia*) that all the coals consumed by pltf. for the purpose of his manufacture during a certain term should be purchased of defts., & that defts. should not be compelled to supply more than 500 tons weekly. In an action against defts. for a breach of the implied contract to deliver 500 tons of coals weekly, defts. pleaded, for a defence on equitable grounds, that, before the accruing of the causes of action in the declaration mentioned, & before the passing of Copper Miners Act, 1851 (c. cv.), to wit, on Jan. 24, 1848, an action was brought by pltf. against defts. for certain alleged breaches of the contract, which action was depending at the time of the passing of that Act; that the cause & all matters in difference were referred to an arbitrator, who, by the order of *Nisi Prius* & a subsequent rule of ct., was empowered to make two several awards, raising by the first points of law for the opinion of the ct., & to assess damages upon the view the ct. might take, & who was also empowered “to order the determination of the contract, & the terms on which such determination should take place.” neither of the parties to enforce payment of anything which might be found by the arbitrator to be due to him or them under the award so to be first made until the arbitrator should have made & published his final award between the parties. The plea then went on to allege that the arbitrator made his first award, raising certain questions for the opinion of the ct.; that afterwards, & before the passing of the Act, the ct. ordered judgment to be entered for pltf.; that no final award was ever made by the arbitrator, & the



reference was still pending; that, at & after the statement of the case by the arbitrator, & before the passing of the Act, the affairs of defts. were in a state of insolvency, & that certain creditors of defts., with their concurrence, introduced into Parliament a bill for settling their affairs, the passing of which bill was opposed by pltf.; that, whilst the bill was in committee, negotiations took place between pltf. & the promoters, which resulted in an agreement that pltf. should withdraw his opposition, that the contract between pltf. & defts. should be determined by the arbitrator, who should assess the sum to be paid by defts. as the value of the contract, that pltf. should bring no further actions against defts. upon the contract, & that a clause approved by pltf. should be introduced into the bill whereby it should be enacted that pltf. should be deemed & considered a creditor of defts. within the Act for such sum as should be assessed by the arbitrator, & that until the arbitrator should have made his final award pltf. should be deemed & considered a creditor of defts. for £2,272 2s.; that, in pursuance of the agreement, & in order to give effect to same, a clause approved of by pltf. was introduced into the bill; that defts. had always been ready & willing to give effect to the agreement, & everything had been done entitling them to the performance and fulfilment of same by pltf.; that the bill was thrown out, & that, before the commencement of the suit, a bill to a similar effect was introduced (which was afterwards passed); & that thereupon an agreement was entered into between pltf. & defts. & the other persons, with respect to the last-mentioned bill, & the contract, & the determination thereof by the arbitrator, & the assessment of the sum to be paid to pltf. as the value of the contract, & with respect to any actions being brought by pltf. upon the contract, & with respect to the clause to be inserted in the last-mentioned bill, to the like effect, as the agreement thereinbefore mentioned; & that a clause (s. 12) was inserted in the Act accordingly. The plea then went on to aver that defts. had always acted in good faith & upon the terms of the last-mentioned agreement, & had always been, & still were, ready & willing to abide by the final award of the arbitrator, & in all things to perform the agreement on their part, & that all things had been done & had happened entitling them to the performance & fulfilment of same by pltf., but that pltf. had refused to abide by the agreement, & had brought his action in violation of same; & that, after the passing of the Act, & before the commencement of the suit, the debts & claims in the Act in that behalf mentioned were duly converted into stock of the co., in pursuance of the provisions of the Act, & that pltf., as a creditor of defts. for the sum of £2,272 2s., in s. 12, applied for an allotment of stock in respect of the sum, & had same allotted to him by defts., & had had the full benefit, use, & advantage of such allotment, wherefore defts. said that in equity pltf. was barred from bringing his action:—*Held*: not a good equitable plea, inasmuch as it disclosed no ground upon which a ct. of equity would grant a perpetual unqualified injunction to restrain pltf. from suing upon the contract.—*WOOD v. COPPER MINERS IN ENGLAND Co.* (1856), 17 C. B. 561; 25 L. J. C. P. 166; 139 E. R. 1195.

**278. Award after action commenced.]**—Where an action has been commenced upon a contract containing a provision for reference to an arbitrator of any dispute arising under the contract, & is pending, no application to stay the action having been made under s. 4 of the Act of 1889, or such an application having been refused, an award made by the arbitrator under the pro-

vision for reference upon the subject matter of the action, subsequent to the commencement thereof, & without the consent of pltf., is invalid, & will not afford a defence to the action.

By a clause in a contract between pltf. & defts., a municipal corpn., for the execution by the former of certain sewerage works, it was provided that, in case of any dispute, doubt, or difference arising or happening, touching or concerning the works, or relating to quantities, qualities, description or manner of work done, executed, or to be done & executed by the contractors, or in any wise whatever relating to the interests of the corpn. or of the contractors, such doubts, disputes or differences should from time to time be referred to, & settled & decided by, defts.' engineer, who should be competent to enter upon the subject matter of such doubts, disputes or differences with or without formal reference or notice to the parties to the contract or either of them, & who should judge, decide, order & determine thereon. Pltf. brought an action against defts. for sums which they alleged to have become due to them from defts., under the contract, & for damages for wrongful termination of the contract by defts. Defts. did not apply for a stay of proceedings in the action under the above sect. Subsequent to the commencement of the action, defts.' engineer under the before mentioned clause, without giving notice to the parties, & without the knowledge or consent of pltf., made an award purporting to decide the matters which were the subject of the action, & defts. pleaded his award in bar to pltf.' claim in the action:—*Held*: it was not competent for the engineer to determine the matters in question, pending the action, & his award was no bar to pltf.' claim in the action.

The jurisdiction of the cts. is left untouched by an arbn. clause, or by the appointment of a specific arbitrator to decide the matter, or even by proceedings having been commenced under a submission (*FLETCHER MOULTON, L.J.*).—*DOLEMAN & SONS v. OSSEY CORPN.*, [1912] 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915, C. A.

**279. — Disputed accounts—Arrest of ship.]**—A foreign ship was driven by stress of weather into B., where W. undertook the management of the ship & her concerns, & subsequently sent in his accounts. These were disputed by the master, & an agreement was then made to refer them to arbn. The master signed the agreement on Mar. 17, 1848, W. on Mar. 5, & the ship was arrested in a cause of salvage on behalf of W. on Mar. 12:—*Held*: the agreement was no bar to the action.—*THE PURISIMA CONCEPCION* (1849), 7 Notes of Cases, 150; 13 Jur. 545.

**280. — Partnership dissolution—Agreement no effect on costs.]**—A deed of dissolution of partnership contained a provision for referring all disputes to arbn.:—*Held*: this was no bar to a suit, & the refusal of an offer to refer to arbn. was no reason for depriving pltf. of his costs.—*LEES v. LAFOREST* (1851), 14 Beav. 250; 51 E. R. 283.

**281. — Partnership dispute.]**—Articles of partnership between W. & C. provided that either partner might give written notice determining the partnership within one month of his becoming aware of a breach of the articles by the other partner, such partner giving notice having the option to purchase the share of the other as if he had died. In the event of dispute as to the presents in any matter affecting the partnership, such dispute was to be reduced to writing & submitted to arbn. C. served notice of dissolution on W., who filed a bill to have it declared void, & to restrain C. from advertising the dissolution. On the same day, C.

**Sect. 8.—Effect of agreement to refer on jurisdiction of the court—Ouster of jurisdiction. Sect. 9: Subsect. 1.]**

served W. with a notice to appoint an arbitrator. W. declined, & C. served a notice of his intention, in default, to appoint a second arbitrator. W. then moved to restrain C. from proceeding with the arbn.:—*Held*: nothing in the articles ousted the jurisdiction of the ct., & the arbn. must be restrained.—*WITT v. CORCORAN* (1871), L. R. 8 Ch. Ap. 476, n.

**Annotations:—***Expld.* *Plews v. Baker* (1873), L. R. 16 Eq. 564. *Refd.* *Willesford v. Watson* (1871), L. R. 14 Eq. 572.

**282. Not good as plea in bar.]—**A plea to an action that the parties have agreed to refer matters arising out of a contract is not a ground for granting a perpetual injunction to restrain pltf. from suing upon the contract.—*WOOD v. COPPER MINERS IN ENGLAND CO.* (1856), 17 C. B. 561; 25 L. J. C. P. 166; 139 E. R. 1195.

**283. — Arbitration clause in will.]—**A testator by his will appointed arbitrators, & declared that if any dispute arose between his devisee it should be referred to them, & that if any devisee took proceedings at law or in equity, the estate devised to him should go over:—*Held*: (1) such a clause was repugnant & inconsistent with the gifts; (2) it could not oust the jurisdiction of the ct.—*RHODES v. MUSWELL HILL LAND CO.* (1861), 29 Beav. 560; 30 L. J. Ch. 509; 4 L. T. 229; 7 Jur. N. S. 178; 9 W. R. 472; 54 E. R. 745.

**Annotation:—***Mentd.* *Re Williams, Williams v. Williams*, [1912] 1 Ch. 399.

**284. Agreement as to terms of separation—Court's power to settle deed.]—**Pltf., wife of deft., claimed specific performance of an agreement for a separation deed entered into upon the compromise of a suit in the Divorce Ct., which was instituted by the husband against the wife for a divorce on the ground of adultery. The agreement was signed by both husband & wife, after the husband's evidence in support of his case had been heard, & before the wife's defence had been commenced, & contained (*inter alia*) these terms:—"Petition & answer dismissed. Deed of separation with usual covenants. In case of difference in working out these terms, matter to be referred to [the leading counsel on each side]":—*Held*: the agreement on the face of it being complete, the arbn. clause could only come into force in case of difference between the parties, & did not oust the jurisdiction of the ct. to settle the deed itself.—*HART v. HART* (1881), 18 Ch. D. 670; 50 L. J. Ch. 697; 45 L. T. 13; 30 W. R. 8.

**Annotations:—***Mentd.* *Bradley v. Bradley* (1882), 51 L. J. P. 87; *Harrison v. Harrison* (1887), 12 P. D. 130; *Wood v. Wood* (1891), 64 L. T. 586, C. A.

**285. — Arbitration clause legal—Clause withdrawing question from courts invalid.]—**Articles of partnership comprised an agreement to submit all disputes to arbn., & until such arbn. should have taken place, neither party was to be at liberty to sue the other with reference to the affairs of the partnership:—*Held*: although an arbn. clause was legal, there might not be a negative clause

**282 i. — Not good as plea in bar.]—**A fire policy contained an agreement to refer matters in difference to arbn., the performance of which agreement was not, according to the true construction of the policy, a condition precedent to defts.' liability. In an action on the policy defts. pleaded that a difference arose & that they were ready & willing to refer:—*Held*: these allegations constituted no defence to the action.—*GORMAN v. HAND-IN-HAND INSURANCE CO.* (1877), 11 I. C. L. R. 224.—*IR.*

**g. Submission to be made rule of English court—Jurisdiction of Court of Chancery in Ontario not ousted.]—**Where a submission contained a clause that it should be made a rule of the Ct. of Queen's Bench in England, & all proceedings thereunder should be governed, as in Great Britain, by the English C. L. P. Act:—*Held*: this formed no objection to the jurisdiction of the Ct. of Chancery in Ontario.—*DIRECT UNITED STATES CABLE CO., LTD. v. DOMINION TELEGRAPH CO. OF CANADA* (1883), 8 A. R. 416.—*CAN.*

superadded to withdraw the decision of the question from the tribunals of the country.—*LEE v. PAGE* (1861), 30 L. J. Ch. 857; 7 Jur. N. S. 768; 9 W. R. 754.

**Annotations:—***Mentd.* *Atwood v. Maude* (1868), 3 Ch. App. 369, L. C.; *Wilson v. Johnstone* (1873), L. R. 16 Eq. 606; *Belfield v. Bourne*, [1894] 1 Ch. 521.

**286. Mutual insurance society rules—Decision of directors.]—**By r. 39 of a mutual insurance society, incorporated in a policy, it was provided that the directors should have full power to determine all disputes arising between the society & its members concerning insurance, & that the decision of the directors should be final & conclusive, & that no member of the society should be allowed to bring any action, except as was provided, etc.; r. 84 prescribed the means by which a member dissatisfied with the decision of the directors might obtain a reconsideration of his claim. In an action on his policy, the directors having decided that pltf. had no claim:—*Held*: pltf. was entitled to recover on the ground (*inter alia*) that the rules were intended to prevent the insured from maintaining any claim at all in the ordinary cts. in respect of any dispute arising on the policy, & were invalid & did not prevent pltf. from maintaining his action.—*EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY, LTD.* (1876), 1 Q. B. D. 563; 34 L. T. 457; 3 Asp. M. L. C. 154, Ex. Ch.

**Annotation:—***Expld.* *Trainor v. Phoenix Fire Assco.* (1891), 65 L. T. 825.

**287. — Arbitration clause no ground for non-suit.]—**Pltf. claimed damages from deft. for failing to deliver a dog bought by pltf. from deft. at a dog show. By r. 18 of the schedule of the show the Kennel Club Committee were to decide all disputes & their decision was final, & any person entering any dog for such show was deemed to have agreed with the Kennel Club Committee to refer all cases under the provisions of the Act of 1889 & any stat. modifying same. The ct. judge nonsuited pltf., holding that he must be deemed to have acquiesced in the regulations regulating the show:—*Held*: there was no ground for nonsuiting, as an application under the Act of 1889, s. 4, was the proper remedy.—*DICKENS v. SPENCE* (1908), *Times*, April 13.

**288. Statutory reference—Jurisdiction ousted.]—**Under an agreement, legislatively confirmed, the parties were bound to settle by arbn. all differences that might arise between them as to the meaning & effect of the agreement, or as to the mode of carrying it out:—*Held*: the jurisdiction of the cts. was, by this agreement, excluded, & all disputes arising under it must be settled by arbn.

We have here no room for the application of the doctrine as to voluntary agreements, but have simply to consider the case arising upon an Act of Parliament forcing the parties to have their disputes settled, not by the ordinary tribunals of the country, but by arbn. (*LORD CAIRNS, C.*).—*CALEDONIAN RY. CO. v. GREENOCK & WEMYSS BAY RY. CO.* (1874), L. R. 2 Sc. & Div. 347, H. L.

**Annotations:—***Distd.* *G. W. Ry. Co. v. Halesowen Ry. Co.* (1883), 52 L. J. Q. B. 473. *Consd.* *Halesowen Ry. Co. v.*

**h. Partnership dispute—Agreement to refer to foreign court.]—**A clause in a partnership agreement provided that all disputes arising under it were to be referred to the exclusive jurisdiction of the German ct. Pltfs., three of the partners, brought an action in Hong Kong against deft., the fourth partner, for dissolution:—*Held*: the jurisdiction of the Hong Kong ct. was ousted, & the action must be dismissed.—*SCHWER v. VAN UFFEL* (1905), 1 Hong Kong L. R. 35.—*HONG KONG.*



G. W. Ry. Co. & Mid. Ry. Co. (1883), 48 L. T. 710; R. v. G. W. Ry. Co. (1887), 51 J. P. 550. *Expld.* R. v. Mid. Ry. Co. (1887), 19 Q. B. D. 540. In *Caledonian Ry. Co. v. Greenock & Wemyss Bay Ry. Co.*, Lord Cairns observes (I use my own language) that the effect of the (statutory) provision is to give to the agreement the character of an Act of Parliament (STEPHEN, J.) *Consd.* L. C. & D. Ry. Co. v. S. E. Ry. Co. (1888), 40 Ch. D. 100, C. A. I cannot believe, on reading the case carefully, that Lord Cairns meant to decide or meant to indicate his own opinion to the effect that the jurisdiction of the *cts.* was ousted; I think his language must be taken *secundum subjectam materiam* (BOWEN, L.J.). *Distd.* Manchester Ship Canal Co. v. Manchester Racecourse Co., [1900] 2 Ch. 352. *Expld.* Crossfield v. Manchester Ship Canal Co., [1904] 2 Ch. 123, C. A. I think a careful examination of the *Caledonian Railway Case* shows that Lord Cairns did mean to decide & indicate that the jurisdiction of the *ct.* was ousted in respect of the particular matter in question (VAUGHAN WILLIAMS, L.J.). *Refd.* Cale. Ry. Co., Campbell & Firth of Clyde Steam Co. v. Greenock & Wemyss Bay Ry. Co. & Greenock & Wemyss Bay Ry. & Pier Traffic (1882), 4 Ry. & Can. Tr. Cas. 135; Jersey v. G. W. Ry. Co., [1893] 3 Ch. 625, n.; Barry Ry. Co. v. Taff Vale Ry. Co., [1895] 1 Ch. 128, C. A.; R. v. Marylebone County Court Judge & G. W. Ry. Co., *Ex p.* Phillips, [1906] 2 K. B. 426.

289. —.]—European Arbn. Amendment Act, 1875, s 3, provided that an appeal should not lie from any determination or order given or made previous to the passing of the Act by the arbitrator, unless he expressly certified in writing that, by reason of differences between previous decisions on matters of principle, it was desirable that an appeal be brought:—*Held*: the *ct.*, in the absence of such an express certificate, had no jurisdiction to entertain an appeal in respect to certain resps. to a special case, on appeal from the arbitrator, whose rights had been previously decided, but had been again reviewed by the arbitrator.—*Re* EUROPEAN SOCIETY ARBITRATION ACTS, *Ex p.* BRITISH NATION LIFE ASSURANCE ASSOCN. LIQUIDATORS (1878), 8 Ch. D. 679; 39 L. T. 136; 27 W. R. 88; *sub nom.* *Re* EUROPEAN ASSURANCE SOCIETY ARBITRATION, BRITISH COMMERCIAL INSURANCE Co. v. BRITISH NATION LIFE ASSURANCE ASSOCN., 48 L. J. Ch. 118, C. A.

*Annotation*:—*Mentd.* Davies' Case (1890), 45 Ch. D. 537.

— — — — Agricultural holdings.]—See AGRICULTURE.

— — — — Compulsory purchase of land.]—See COMPULSORY PURCHASE OF LAND & COMPENSATION.

— — — — Electric lighting.]—See ELECTRIC LIGHTING & POWER.

— — — — Factories & workshops.]—See FACTORIES & SHOPS.

— — — — Friendly societies.]—See FRIENDLY SOCIETIES.

— — — — Gasworks.]—See GAS.

— — — — Housing of working classes.]—See COMPULSORY PURCHASE OF LAND & COMPENSATION; PUBLIC HEALTH & LOCAL ADMINISTRATION.

#### PART I. SECT. 9. SUB-SECT. 1.

290 i. *Provision making arbitration condition precedent is valid.*—Agreements which exclude the jurisdiction of the *cts.* until an award is made, as in *Scott v. Avery* (1856), 5 H. L. C. 811, are not illegal.—*CORINGA OIL Co. v. KOEGLER* (1875), 1 L. R. 1 Calo. 466.—*IND.*

290 ii. — — — — *Ascertainment of amount due on policy.*—A. insured in a mutual insurance club, the rules of which contained a clause to the effect that if any difference should arise between the parties, such difference should be referred to arbn., & such arbn. was a condition precedent to the right of the insured to maintain an action. The insured insisted on prosecuting an action for his insurance, contending that the arbn. clause was illegal & void & ousted the *ct.* of its jurisdiction:—*Held*: no action could be brought until every dispute that might arise under the policy had been settled by arbn.—*M.*

v. *GRIEVE* (1888), 7 Nfld. L. R. 312.—*NFLD.*

290 iii. — — — —.]—It was provided in a policy that if any dispute arose touching the insurance, or any of the conditions or stipulations of the policy, "then all or any such matters in difference shall be referred, etc., etc., & this condition shall be deemed & taken to be a condition precedent to the issue of this policy." A dispute having arisen pursuer raised an action to recover the amount of the insurance:—*Held*: the dispute must go to arbn.

This case must be decided according to the law before the passing of Arbn. (Scotland) Act, 1894 (c. 13), but taking it on that footing it is clear, from the opinions delivered in the House of Lords in *Caledonian Insurance Co. v. Gilmour*, [1893] A. C. 85, that such an agreement to refer is legal. Here the agreement to refer is expressly declared to be a condition precedent to the policy being issued, that is to defenders

— — — — Husband & wife.]—See HUSBAND & WIFE.

— — — — Industrial disputes.]—See TRADE & TRADE UNIONS.

— — — — Lunatic asylums.]—See LUNATICS & PERSONS OF UNSOUND MIND; PUBLIC HEALTH & LOCAL ADMINISTRATION.

— — — — National Health Insurance.]—See WORK & LABOUR.

— — — — Public health.]—See PUBLIC HEALTH & LOCAL ADMINISTRATION.

— — — — Railways.]—See CARRIERS; RAILWAYS & CANALS.

— — — — Savings banks.]—See BANKERS & BANKING.

— — — — Telegraphs & telephones.]—See TELEGRAPHS & TELEPHONES.

— — — — Tramways.]—See TRAMWAYS & LIGHT RAILWAYS.

— — — — Waterworks.]—See COMPULSORY PURCHASE OF LAND & COMPENSATION; WATER SUPPLY.

— — — — Workmen's compensation.]—See MASTER & SERVANT.

#### SECT. 9.—WHETHER SUBMISSION IS CONDITION PRECEDENT TO RIGHT TO SUE.

##### SUB-SECT. 1.—VALIDITY.

290. *Provision making arbitration condition precedent is valid—Ascertainment of amount due on policy.*—Any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself & the other party to the covenant.

A. effected in a mutual insurance co. a policy of insurance on a ship, one of the conditions of which was that the sum to be paid to any insurer for loss should in the first instance be ascertained by the committee, but if a difference should arise between the insurer & the committee "relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance," the difference was to be referred to arbn. in a way pointed out in the conditions: "provided always that no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy," until the matter has been decided by the arbitrators, & "then only for such sum as the arbitrators shall award," & the obtaining the decision of the arbitrators was declared a condition precedent to the maintaining of an action:—*Held*: these conditions were lawful, & (even should the difference relate to other matters than those of mere amount) till award made no action was maintainable.—

undertaking any obligation to pay under the policy, & therefore, the condition must be purified before the action can be allowed to proceed. An examination of the opinions in *Scott v. Avery* (1856), 5 H. L. C. 811 shows how narrow is the distinction between agreements to refer, which are held not to oust the *cts.* of law, & those which are held to do so. But the law is now settled that an agreement to refer to arbn. a dispute as to a term or condition of contract on which liability to pay depends, as a condition precedent to suing for payment, is legal (*per Cur.*).—*BIDSON v. DOG, POULTRY, ETC. INSURANCE Co.* (1895), 2 S. L. T. 588.—*SCOT.*

290 iv. — — — —.]—A condition in an insurance policy that in case of a loss the amount shall be determined by arbitrators, & that no action shall be brought until the amount of the loss is so determined, is a legal condition.—*PEARAND v. LANCASHIRE INSURANCE Co.* (1900), 18 Q. R. S. C. 35.—*CAN.*



*Sect. 9.—Whether submission is condition precedent*

SCOTT v. AVERY (1856), 5 H. L. Cas. 811; 25 L. J. Ex. 308; 28 L. T. O. S. 207; 2 Jur. N. S. 815; 4 W. R. 746; 10 E. R. 1121, H. L.

*Annotations:—*Consd. Scott v. Liverpool Corpn. (1858), 3 De G. & J. 334. Distd. Roper v. London (1859), 1 E. & E. 825; Horton v. Sayer (1859), 4 H. & N. 643. Consd. Lee v. Page (1861), 30 L. J. Ch. 857; Turnbull v. Woolfo (1861), 4 L. T. 236. Follid. Braunstein v. Accidental Death Insce. (1861), 1 B. & S. 782. Apld. Tredwen v. Holman (1862), 1 H. & C. 72. Follid. Wright v. Deley (1866), 4 H. & C. 209. Consd. Cooke v. Cooke (1867), L. R. 4 Eq. 77. Apld. Elliott v. Royal Exchange Assce. (1867), L. R. 2 Exch. 237. Consd. Edwards v. Aberayron Mutual Ship Insce. Soc. (1876), 1 Q. B. D. 563, Ex. Ch.; Collins v. Locke (1879), 4 App. Cas. 674, P. C.; Hart v. Hart (1881), 18 Ch. D. 670; Minifie v. Railway Passengers Assce. (1881), 44 L. T. 552. Apld. Babbage v. Coulbourn (1882), 52 L. J. Q. B. 50, C. A. Consd. Met. Dist. Ry. Co. v. Met. Ry. Co. (1886), 5 Ry. & Can. Tr. Cas. 126. Follid. Trainor v. Phoenix Fire Assce. (1891), 65 L. T. 825; Scott v. Mercantile Accident & Guarantee Insce. (1892), 66 L. T. 811, C. A.; Caledonian Insce. v. Gilmour, [1893] A. C. 85, H. L.; Spurrier v. La Cloche, [1902] A. C. 446, P. C. Consd. Pena Copper Mines v. Rio Tinto Co. (1911), 105 L. T. 846, C. A. Distd. Jureidini v. National British & Irish Millers Insce. (1914), 84 L. J. K. B. 640, H. L. Follid. Lock v. Army, Navy & General Assce. Asscn. (1915), 31 T. L. R. 297. Consd. Dynamit Act. v. Rio Tinto Co., [1918] A. C. 292, H. L. Refd. Russell v. Pellegrini (1856), 6 E. & B. 1020; Stokoe v. Hall (1864), 3 New Rep. 566; Dawson v. Fitzgerald (1876), 1 Ex. D. 257, C. A.; Spackman v. Plumstead Board of Works (1885), 10 App. Cas. 229, H. L.; Parry v. Liverpool Malt Co., [1900] 1 Q. B. 339, C. A. Ertel Bieber v. Rio Tinto Co., [1918] A. C. 260, H. L. Mentd. Livingston v. Ralli (1855), 24 L. J. Q. B. 269; Northampton Gas Light Co. v. Parnell (1855), 15 C. B. 630; Scott v. Liverpool Corpn. (1857), 1 Giff. 216; Coker v. Young (1860), 2 F. & F. 98; Pestonjee Nussurwanjee v. Manockjee (1868), 12 Mood. Ind. App. 112, P. C.; Gray v. Pearson (1870), 23 L. T. 416; Wright v. Ward (1871), 24 L. T. 439; Mulkern v. Lord (1879), 48 L. J. Ch. 745, H. L.; Toronto Ry. Co. v. National British & Irish Millers Insce. (1914), 111 L. T. 555, C. A.

291. ———.]—A policy of insurance against accident contained a condition that, in case of a difference of opinion as to the amount of compensation payable in any case, the question should be referred to a person to be named by the secretary for the time being of the Master of the Rolls, & his award made in such arbn. was to be taken as a final settlement of the question & might be made a rule of ct.:—*Held*: a reference to arbn. in the manner prescribed was a condition precedent to bringing an action for an injury within the policy.—BRAUNSTEIN v. ACCIDENTAL DEATH INSURANCE CO. (1861), 1 B. & S. 782; 31 L. J. Q. B. 17; 5 L. T. 550; 8 Jur. N. S. 506; 121 E. R. 904.

*Annotation:—*Apld. Elliott v. Royal Exchange Assce. Corpn. (1867), 36 L. J. Ex. 129.

292. ———.]—A marine policy of insurance was made in a mutual assurance assocn. (managed by a committee of members), subject to the following rule: "All average claims & claims of abandonment shall be adjusted & settled conformably to the custom of Lloyd's or the Royal Exchange by a professional average-stater, but should the committee or the assured be dissatisfied with such adjustment, they may refer same to two professional average-staters, or to two other competent persons, with power to such two persons to appoint an umpire, & the award of such three persons shall be final, & all other causes of dispute of whatever nature shall be referred in like manner, but the committee & assured, by mutual consent, may refer all such adjustments or disputes to one person only, whose award shall also be final, & no action at law shall be brought until the arbitrators have given their decision":—*Held*: this was a valid agreement, & the reference to arbn. or offer to refer was a condition precedent to a claim on the policy

for a total loss, & an action could not be maintained on the mere refusal to pay the claim.—TREDWEN v. HOLMAN (1862), 1 H. & C. 72; 31 L. J. Ex. 398; 7 L. T. 127; 8 Jur. N. S. 1080; 10 W. R. 652; 1 Mar. L. C. 245; 158 E. R. 805.

*Annotations:—*Distd. Wright v. Ward (1871), 24 L. T. 439. Follid. Dawson v. Fitzgerald (1873), L. R. 9 Exch. 7. Apld. Dawson v. Fitzgerald (1876), 1 Ex. D. 257, C. A. Consd. Edwards v. Aberayron Mutual Ship Insce. Soc. (1876), 1 Q. B. D. 563, Ex. Ch.; Minifie v. Railway Passengers Assce. (1881), 44 L. T. 552.

293. Even though fraud charged.]—A policy of fire insurance contained a clause providing that, in case any difference should arise between the insured & the co. in respect of any claim for any loss or damage, such difference should be referred to arbn., & the co. should not be liable in respect of any claim for any loss or damage "unless & until the liability of the co., & the amount of its liability in respect of the claim, shall, if not admitted, have been referred to & determined by such arbitrators, whose award thereon shall be a condition precedent to any liability of the co. or any right of action against the co. in respect of such claim":—*Held*: (1) this condition in the policy was a good condition precedent, so that no cause of action arose, & no action could be maintained, until after the condition had been fulfilled by the liability of the co. & the amount of such liability being ascertained by the arbitrators; (2) it made no difference that a charge of fraud was made against the assured.—TRAINOR v. PHOENIX FIRE ASSURANCE CO. (1891), 65 L. T. 825; 8 T. L. R. 37.

*Annotation:—*Follid. Kenworthy v. Queen Insce. (1892), 8 T. L. R. 211.

294. Not applicable to set off.]—One of the rules of a mutual marine insurance assocn. provided that, if any difference arose between the committee & any subscriber relative to the settling of any loss or damage, or to a claim for average, or any other matter relating to his insurance, arbitrators should be appointed whose decision should be conclusive; & it was by the rule declared to be a part of the contract of insurance between the subscribers that no subscriber, who refused to accept the amount of any loss as settled by the committee in full satisfaction of such loss, should be entitled to maintain any action on his policy until the matter in dispute should have been referred to & decided by arbitrators, & then only for such sum as they might award, & the obtaining the decision of such arbitrators in the matter in dispute was thereby declared to be a condition precedent to the right of any subscriber to maintain any such action or suit. A ship insured by pltf., who was one of the subscribers of the assocn., having been lost, the committee settled the amount of such loss at £600, but they claimed to set off against this sum certain liabilities incurred in respect of losses upon other policies. This pltf. disputed their right to do, & sued deft., who was a member of the assocn., for his proportion of the £600:—*Held*: pltf. was entitled to maintain his action, as he had not refused to accept the amount of his loss as settled by the committee, & it was only the settlement of such amount which the rule made a condition precedent to the right to sue.—STOKOE v. HALL (1864), 3 New Rep. 566.

## SUB-SECT. 2.—CONSTRUCTION AND EFFECT.

295. Waiver of condition by conduct—Omission to notify or hear plaintiff.]—By r. 39 of a mutual

## PART I. SECT. 9, SUB-SECT. 2.

295 i. Waiver of condition by conduct—No request for arbitration.]—A policy

provided that all disputes should, after proof thereof, be submitted to arbitrators to determine the amount, but not the liability, & that an action should

not be sustainable until after an award fixing the amount, & defts. covenanted to pay the loss within sixty days after the loss had been ascertained & proved

insurance society, incorporated in a policy, it was provided that the directors should have full power to determine all disputes arising between the society & its members concerning insurance, & that the decision of the directors should be final & conclusive, & that no member of the society should be allowed to bring any action, except as was provided, etc.; r. 84 prescribed the means by which a member dissatisfied with the decision of the directors might obtain a reconsideration of his claim. In an action on his policy, the directors having decided that pltf. had no claim:—*Held*: pltf. was entitled to recover on the ground (*inter alia*) that, although the action could not have been maintained if the investigation had been properly concluded, yet, in the circumstances, the conduct of the directors in adjudicating against pltf.'s claim without hearing him or giving him an opportunity of being heard did not bind pltf., & the defts. could not take advantage of the wrong done by their agents by setting up the defence of condition precedent.—*EDWARDS v. ABERAYRON MUTUAL*

in accordance with the terms of the policy. The assured furnished defts. with proof of the loss on Apr. 5, to which defts. made no objection until June 11, when they served a written request for an arbn. upon the assured, who refused to arbitrate, & pltf., to whom the claim was assigned, brought an action:—*Held*: even if the condition were available as a defence, it had not been broken, as in the absence of a request to arbitrate within the sixty days, the loss must be considered as "ascertained & proved," & pltf. had a right of action on the expiration of that period.—*MCINTYRE v. NATIONAL INSURANCE CO.* (1880), 5 A. R. 580.—CAN.

295 ii. ———.]—A policy provided that, in case of difference as to amount of loss, etc., such difference should at the request of either party be submitted to arbitrators, & that no action or suit for the recovery of any claim should be sustainable "until after an award . . . as above provided":—*Held*: in the absence of a request by the co. the submission to arbn. was not a condition precedent to pltf.'s right of action.—*BISHOP v. NORWICH UNION FIRE INSURANCE SOCIETY* (1893), 25 N. S. L. R. 492.—CAN.

295 iii. ———.]—*Failure to comply with conditions.*—Pltfs. sued defts. on a policy, which provided that "if any difference shall arise with respect to any claim & no fraud be suspected, & the co. does not elect to replace same, such difference shall be submitted to arbitrators, & the co. shall not be liable in respect of any claim for loss or damage until the amount of its liability in respect of the claim shall, if not admitted, have been determined by arbitrators, whose award thereon shall be a condition precedent to any liability of the co. or any right of action against it in respect of such claim." Defts. without alleging that no fraud was suspected & that they did not elect to rebuild, set out the latter portion of the clause:—*Held*: the clause could not be divided into separate parts, but must be read together, & inasmuch as defts. had not brought themselves within its operation by alleging that no fraud was suspected, & that they did not elect to rebuild, etc., they could not rely upon the latter portion thereof as a condition precedent to pltf.'s right to sue.—*RIORDAN v. GLASGOW & LONDON INSURANCE CO., LTD.* (1890), 16 V. L. R. 320.—AUS.

295 iv. ———.]—*Failure to plead in lower court.*—An objection as to arbn. being a condition precedent to an action for damages, which has been waived or abandoned in the Ct. of Queen's Bench, cannot be invoked on an appeal to the

Supreme Ct.—*HAMELIN v. BANNERMAN* (1901), 31 S. C. R. 534.—CAN.

296 i. *Ascertainment of amount due on policy—No action maintainable till liability ascertained.*—A policy provided that "if any difference shall arise in the adjustment of any claim, the amount shall . . . be submitted to arbn., etc., . . . & the assured shall not be entitled to commence or maintain any action at law . . . upon this policy until the amount of the loss shall have been determined as hereinbefore provided":—*Held*: an adjustment of the claim by arbn. was a condition precedent to pltf.'s right to bring an action on the policy.—*BARNETT v. CITY MUTUAL FIRE INSURANCE CO.* (1882), 3 N. S. W. L. R. 285.—AUS.

296 ii. ———.]—Where an insurance policy provides that disputes shall be settled by arbn., & that no action shall be brought, except for the sum found due under arbn., proceedings in ct. will be stayed.—*BROWN v. NORTHERN ACCIDENT ASSURANCE CO.* (1894), 1 L. T. 49.—IR.

296 iii. ———.]—A condition in a policy provided that no action should be maintainable for any claim thereunder, until after an award fixing the amount of the claim:—*Held*: the making of such award was a condition precedent to any right of action to recover for a loss under the policy.—*GURRIN v. MANCHESTER FIRE ASSURANCE CO.* (1898), 29 S. C. R. 139.—CAN.

296 iv. ———.]—In an action on a policy containing a condition that, in case any question should arise, every such difference should be referred to arbn., etc., & stipulating that the obtaining of an award should be a condition precedent to the liability or obligation of the corpn. to pay any claim under the policy, providing that compliance with the stipulations was a condition precedent to the right to recover:—*Held*: no action lay, nor did the amount payable under the policy become due, until the determination of the arbitrator, & the condition was not in contravention of R. S. O. (c. 203), s. 80.—*NOLAN v. OCEAN ACCIDENT & GUARANTEE CORPN.* (1902), 23 C. L. T. 187; 5 O. L. R. 544; 1 O. W. R. 77; 2 O. W. R. 98, 272.—CAN.

296 v. ———.]—*Claim fraudulent.*—A policy provided the insured should cause that all differences should be referred, & the obtaining an award should be a condition precedent to any liability or right of action against the insurers in respect of any matter in difference. Insured property having been damaged by fire, a claim was duly sent in, & arbitrators were duly appointed. The award found that the

SHIP INSURANCE SOCIETY, LTD. (1876), 1 Q. B. D. 563; 34 L. T. 457; 3 Asp. M. L. C. 154, Ex. Ch.

*Annotation*:—*Expld. Trainor v. Phoenix Fire Assce.* (1891), 65 L. T. 825.

296. *Ascertainment of amount due on policy—No action maintainable till liability ascertained.*—In a policy of fire insurance entered into by pltf. with defts. the covenant for payment was made subject to certain articles, one of which provided that, on a loss occurring, the assured should within fifteen days send in particulars of his loss, "which loss or damage, after same shall be adjusted, shall immediately be paid in money by" defts., with an option to them to reinstate, & a proviso that "in case any difference shall arise touching any loss or damage, such difference shall be submitted" to arbitrators, "whose award in writing shall be conclusive & binding on all parties, but if there shall appear any fraud or false swearing, claimant shall forfeit all benefit of his claim." In an action brought on this policy to which defts. pleaded this article, & that pltf. had not submitted the matter

claim was fraudulent, & all benefit under the policy was forfeited:—*Held*: an award respecting all differences under such a condition was a condition precedent to the maintenance of an action, & pltf. could not sue upon the policy.—*GAW v. BRITISH LAW FIRE INSURANCE CO.*, [1908] 1 I. R. 245, 252.—IR.

k. ———.]—*Effect of No. 15 of statutory conditions.*—No. 15 of the statutory conditions does not make the reference to arbn. a condition precedent to an action.—*ULRICH v. NATIONAL INSURANCE CO.* (1877), 42 U. C. R. 141.—CAN.

l. *Reference of all disputes under policy—No action till after arbitration.*—In a policy it was provided that any dispute arising as to the insurance, or as to the conditions of the policy, or in connection therewith, should be referred to arbitrators & that this condition should be deemed a condition precedent to the issue of the policy:—*Held*: the effect of this provision was to make the reference to arbitrators a condition precedent to the co. undertaking any liability to pay under the policy.—*BIDSTON v. DOG, POULTRY ETC. INSURANCE CO.* (1895), 32 Sc. L. R. 516.—SCOT.

m. *Provision for settling disputes by reference—No action till amount of damages ascertained.*—In an agreement it was provided that all damages claimed by either party for non-compliance with the contract should be decided by arbitrators, whose award should be final. In an action for work done under the contract:—*Held*: it was a condition precedent to bringing the action that the amount of damages should be ascertained by arbn.—*MYERS v. ST. ANDREWS RY. CO.* (1863), 5 All. 577.—CAN.

n. *Provision for ascertaining who liable for repairs.*—Defts. had insured a vessel, sunk while being towed by pltf. for her owners. An agreement was entered into between pltf. & defts.; by which pltf. undertook to raise her for a sum named, & to submit to arbn. by whom the expenses of repairing the vessel should be borne. Defts. refused to arbitrate, & pltf. sued them for work & labour:—*Held*: they could not recover, as defts. had agreed only to pay in the event of the arbitrators deciding that they were liable.—*CALVIN v. PROVINCIAL INSURANCE CO.* (1870), 27 U. C. R. 403.—CAN.

o. *Disputes as to cost of maintenance of party walls.*—Under separate agreements made by them respectively with Govt., pltf. & deft. held adjoining plots of land for building. Both agreements contained the following stipulation: "All disputes regarding the cost of maintenance of party walls to be decided by the Govt. surveyor, whose



*Sect. 9.—Whether submission is condition precedent to right to sue: Sub-sect. 2.]*

to arbn. :—*Held*: the covenant was only a covenant to pay the adjusted loss, & pltf. had no cause of action.—*ELLIOTT v. ROYAL EXCHANGE ASSURANCE CO.* (1867), L. R. 2 Exch. 237; 36 L. J. Ex. 129; 16 L. T. 399; 15 W. R. 907.

*Annotations* :—*Consd. Dawson v. Fitzgerald* (1876), 1 Ex. D. 257, C. A. *Apld. Viney v. Bignold* (1887), 20 Q. B. D. 172. *Refd. Edwards v. Aberayron Mutual Ship Insce. Soc.* (1876), 1 Q. B. D. 563, Ex. Ch.

297. — — —.]—The rules of a mutual shipping assurance assocn. provided that “in case of its becoming necessary to make any payment in respect of any loss or damage happening to any ship insured, the amount to be borne & paid by each member of the assocn. should, upon each & every such occasion, be assessed & apportioned by the committee upon & amongst the members of the assocn. liable to contribute thereto,” etc. In an action for loss, the declaration set out the policy & the above rule, & averred that pltf. had “always been ready & willing that the amount to be borne & paid by each respective member of the assocn. in respect of the loss should be assessed & apportioned by the committee of the assocn., according to the regulations of the policy,” & that pltf. had “requested deft. & the committee to assess & apportion same, but they had neglected & refused so to do, although a reasonable time for that purpose had long since elapsed,” & that “except as aforesaid, all conditions had been fulfilled,” etc. It then alleged, as a breach, non-payment by deft. of his proportion of the sum insured :—*Held*: the declaration did not show any liability on the part of deft.

To the above declaration deft. pleaded “that by the regulations annexed to the policy, it was declared that a committee ‘tenth’ should be appointed, who should meet quarterly, at the discretion of the managers, to audit the accounts, settle claims, & order payment of same by the managers’ draft, & that the managers should have full power to settle all claims on policies, & that the claim of pltf. had not been settled in manner provided, etc., nor had payment of same by the managers’ draft been ordered,” & “that by the regulations it was declared that all average claims should be adjusted by a professional average-stater, according to the usage of Lloyd’s, etc., & that the only claim of pltf. was an average claim within the regulations, & that same had never been adjusted as provided for, & pltf. had never been ready & willing to have same adjusted” :—*Held*: the pleas were good.—*WRIGHT v. WARD* (1871), 24 L. T. 439; 20 W. R. 21; 1 Asp. M. L. C. 25.

298. — — —.]—A fire policy was made subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbn., & the insured should not be entitled to commence or maintain any action upon the policy until the amount of the loss should have been referred to & determined as therein provided, & then only for the amount so determined :—*Held*: the determination of the

decision shall be binding on both parties” :—*Held*: the ct. was not competent to determine a question of deft.’s set-off or other points raised by pleadings, which were matters to be decided by the Govt. surveyor, whose certificate was a condition precedent to pltf.’s right to sue & upon which the ct. might give judgment.—*COVERJI LUDHA v. MORARJI PUNJA* (1885), L. L. R. 9 Bom. 183.—*IND.*

*p. Provisions for paying ascertained damage—No action till ascertained—Mineral lease.*—The landlord of a mineral field sought to recover from

his tenant B. a sum as damages for coal lost through improper workings. The conclusions of the action were supported by averments that the sum sued for was due under a stipulation in the lease that in the event of damage being occasioned to the workings . . . by operations which might be carried on by B. then, B. should be bound to make payment thereof to the party suffering such damage, as same should be ascertained by arbiters :—*Held*: (1) the obligation to refer to the arbiters was a condition precedent to the obligation to pay damages; (2) as the landlord’s claim did not emerge until the

amount by arbn. was a condition precedent to the right to recover on the policy.—*VINEY v. BIGNOLD* (1887), 20 Q. B. D. 172; 58 L. T. 26; 36 W. R. 479; 4 T. L. R. 128; *sub nom. VINEY v. NORWICH UNION FIRE INSURANCE SOCIETY*, 57 L. J. Q. B. 82.

*Annotation* :—*Refd. Toronto Ry. Co. v. National British & Irish Millers Insce.* (1914), 111 L. T. 555.

299. — — —.]—A policy of insurance against loss by burglary or theft in pltf.’s shop contained a clause that, if any dispute should arise between the assured & the insurance co. as to any claim in any way relating to the policy, it should be referred to arbn., & the co. should not be liable in respect of any such claim “unless & until the liability of the co. & the amount thereof, if not admitted, shall have been determined by such arbitrator, arbitrators, or umpire, whose award thereon shall be a condition precedent to any liability of the co. or any right of action against the co. in respect of such claim, & the award only shall be sued on.” In an action on the policy before pltf.’s claim had been determined by arbn. defts. pleaded the above-mentioned clause :—*Held*: the action could not be maintained, a decision in an arbn. being a condition precedent to a right of action by pltf. in respect of a claim arising under the policy.—*SCOTT v. MERCANTILE ACCIDENT & GUARANTEE INSURANCE CO., LTD.* (1892), 66 L. T. 811, C. A.

300. — — —.]—A policy of fire insurance provided (*inter alia*) that “where the co. did not claim to avoid its liability under the policy on the ground of fraud, or non-fulfilment of any of the conditions therein set forth, but a difference at any time arose between the co. & the insured as to the amount payable in respect of any alleged loss or damage by fire, every such difference when & as the same arose should be referred to the arbn. of persons chosen by the parties”; & it was expressly “declared to be a condition of the making of the policy,” where the co. did not deny liability on the ground of fraud or non-fulfilment, “that the insured should not be entitled to commence any action at law till the amount should have been awarded as thereinbefore provided,” & that the “obtaining such an award should be a condition precedent to the commencement of any action upon the policy” :—*Held*: the condition to ascertain the damages by arbn. was incorporated with & formed an integral part of the contract of indemnity, & was a condition precedent to the bringing of any action upon the policy.—*CALEDONIAN INSURANCE CO. v. GILMOUR*, [1893] A. C. 85; 57 J. P. 228; 9 T. L. R. 146; 1 R. 110, H. L.

*Annotations* :—*Apld. Spurrier v. La Cloche*, [1902] A. C. 446, P. C. *Distd. Dynamit Act. v. Rio Tinto Co.*, [1918] A. C. 292, H. L. *Refd. Jureidini v. National British & Irish Millers Insce.*, [1915] A. C. 499, H. L.

301. — — —.]—A policy of insurance against fire was made subject to a condition that no action should be brought for any money payable under the policy until the liability & the amount had been settled by arbn.; & it was further provided that the submission to arbitrators should be subject to the Act of 1889, & might be made a rule of the

damages were assessed by the arbiters, his action was premature.—*ANSTRUTHER v. BURNS* (1893), 1 S. L. T. 421.—*SCOT.*

*q. Ascertainment of quality—Condition precedent to action on warranty.*—Pltfs. contracted with defts. for purchase of timber, warranted to be of fair average quality. The contract provided that should any difference arise thereunder, it should be referred :—*Held*: a valid award was a condition precedent to enforcing liability under the warranty.—*GREGG v. FRASER*, [1906] 2 L. R. 545, 570.—*IR.*



High Ct. of Justice:—*Held*: no action could be brought upon the policy until the liability & the amount had been settled by arbn. in accordance with the condition.—*SPURRIER v. LA CLOCHE*, [1902] A. C. 446; 71 L. J. P. C. 101; 86 L. T. 631; 51 W. R. 1; 18 T. L. R. 606, P. C.

302. ———.]—A policy of insurance contained a clause that any dispute between the insured & insurers should be referred to arbn. under the Act of 1889, & that an award under that Act should be a condition precedent to any right of action against the assured:—*Held*: (1) in the case of bkpcy. or winding-up of an insured employer, Workmen's Comp. Act, 1906 (c. 58), s. 5, only gave the workman the same right against the insurers as the employer would have had; (2) a workman could not take proceedings to have compensation awarded until the matter had been referred to arbn. under the Act of 1889 & an award obtained.—*KING v. PHOENIX ASSURANCE CO.*, [1910] 2 K. B. 666; 80 L. J. K. B. 44; 103 L. T. 53; 3 B. W. O. C. 442, C. A.

*Annotations*:—*Mentd.* *Daff v. Midland Colliery Owners' Mutual Indemnity Co.* (1913), 82 L. J. K. B. 1340, H. L.; *Craig v. Royal Insce.* (1914), 84 L. J. K. B. 333.

*See, generally*, INSURANCE.

303. Provision for fixing contract price by reference to engineer—Until certificate made no enforceable right created.]—Where parties to an agreement provide for the settlement of disputes arising out of the contract by the arbn. of persons mentioned in the agreement, or to be determined when the disputes arise, this does not oust the ordinary tribunals of jurisdiction in such disputes. But where a contract provides for the determination of the contractor's claims & liabilities by the judgment of a particular person, everything depends on his decision, & until he has spoken no right arises which can be enforced either at law or in equity.

Pltfs. contracted with L. corpn. to perform certain works, & the corpn. agreed to pay for them in a specified manner, with a proviso that no sum should be considered due, nor should pltfs. make any claim on account of any work executed by them, unless the engineer of the corpn. should certify the amount thereof, & that pltfs. were reasonably entitled thereto. The corpn. also had the power of determining the contract if pltfs. should not in the opinion & according to the determination of the engineer exercise due diligence, & thereupon the engineer was to fix the amount earned by pltfs. There was a general clause for referring all disputes & differences to the final arbn. of the engineer. The contract having been determined by the corpn., pltfs. filed a bill for an account:—*Held*: the certificate of the engineer not having been given, & not being shown to have been fraudulently withheld, the bill must be dismissed with costs.—*SCOTT v. LIVERPOOL CORPN.* (1858), 3 De G. & J. 334; 28 L. J. Ch. 230; 32 L. T. O. S. 265; 5 Jur. N. S. 105; 7 W. R. 153; 44 E. R. 1297.

*Annotations*:—*Apld.* *Russell v. Sa Da Bandeira* (1862), 13 G. B. N. S. 149. *Refd.* *Ormes v. Beadel* (1860), 2 Giff. 166; *Stadhard v. Lee* (1863), 3 B. & S. 364; *Wadsworth v. Smith* (1871), L. R. 6 Q. B. 332; *Lawrence v. Morgan* (1872), 7 Ch. App. 554, n.; *Hart v. Hart* (1881), 18 Ch. D. 670; *Botterill v. Ware Grdns.* (1886), 2 T. L. R. 621, C. A.; *Mentd.* *Bliss v. Smith* (1865), 34 Beav. 508; *Re Brighton Club & Norfolk Hotel Co.* (1865), 35 Beav. 204; *Goodyear v. Weymouth & Melcome Regis Corpn.* (1865),

3031. Provision for questions being settled by engineer—Action of damage for loss caused by delay.]—In an action by contractors for damages for losses incurred in performance of a contract, due to the delay of deft. in supplying material thereunder, deft. set up the following clause in the contract: "To prevent all disputes & litigation the engineer shall determine all questions

in relation to the work & the construction thereof, & shall decide every question which may arise relative to the execution of the work, & his estimate & decision shall be a condition precedent to the commencement of any action to recover any moneys under the contract, or any damages on account of any illegal breach thereof." The contractors had offered to submit to arbn. & to accept

1 Har. & Ruth. 67; *Cooke v. Cooke* (1867), L. R. 4 Eq. 77; *Threxton v. Edmonston* (1868), 37 L. J. Ch. 329; *Hood v. N. E. Ry. Co.* (1870), 19 W. R. 266; *Edwards v. Aberayron Mutual Ship Insce. Soc.* (1876), 1 Q. B. D. 563, Ex. Ch.

304. ———.]—A contract for building a steamship contained a provision that the engineer for the time being should have power to direct extra works, & that the value of all such works should be ascertained & added to the contract price. There was also a clause for the reference to the engineer of all differences relating (amongst other things) to extra works. In an action in respect of certain extra works:—*Held*: the ascertainment of the value of the extra works was a condition precedent to the right of pltfs. to sue in respect of them. *Semble*: in case of difference, the engineer was the person to ascertain this value under the arbn. clause (*WIGHTMAN, J.*).—*WESTWOOD v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1863), 1 New Rep. 262; 7 L. T. 736; 11 W. R. 261.

*Annotations*:—*Distd.* *Roberts v. Bury Improvement Comrs.* (1869), L. R. 4 C. P. 755. *Distd. & Expld.* *Jones v. St. John's College, Oxford* (1870), L. R. 6 Q. B. 115. *Refd.* *Stadhard v. Lee* (1863), 3 B. & S. 364. *Mentd.* *Roberts v. Bury Improvement Comrs.* (1870), L. R. 5 C. P. 310, Ex. Ch.; *Tew v. Newbold-on-Avon United District School Board* (1884), Cab. & El. 260; *Dodd v. Churton*, [1897] 1 Q. B. 562.

305. ———.]—The engineer of a railway co. prepared a specification of the works on a proposed railway, & certain contractors fixed prices to the several items in the specification, & offered to construct the railway for the sum total of prices affixed to the items. A contract under seal was thereupon made between the contractors & the co., by which the contractors agreed to construct & deliver the railway completed by a certain day at a sum equal to the sum total above mentioned. If the contractors failed to proceed with the works the co. might take possession & proceed with them, in which case a valuation should be made by the engineer or, if either party required it, by arbn. The contract contained provisions making the certificate of the engineer conclusive between the parties, & it was provided that all accounts relating to the contract should be submitted to & settled by the engineer, & that his certificate for the ultimate balance should be final & conclusive; it was further provided that all questions, except such as were to be determined by the engineer, were to be referred to arbn. The railway was completed, & the engineer gave his final certificate as to the balance due to the contractor. The contractors filed a bill against the co., making claims on several grounds & praying an account & payment:—*Held*: (1) in the absence of fraud on the part of the engineer, & where his certificate was made a condition precedent to payment, his certificate must be conclusive between the parties; (2) where a contract provided that the certificate of the engineer or of an arbitrator should be a condition precedent to payment, the ct. did not obtain jurisdiction because of the power to refer to arbn.—*SHARPE v. SAN PAULO RY. CO.* (1873), 8 Ch. App. 597; 29 L. T. 9, L.JJ.

*Annotations*:—*Expld.* *Re Hohenzollern Act. fur Locomotiv-bau & City of London Contract Corpn.* (1886), 54 L. T. 596, C. A. *Refd.* *Meldrum v. Scorer* (1887), 56 L. T. 471; *Re Ford & Benrose* (1902), 18 T. L. R. 443, C. A.

*See, further*, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.

the decision of the arbitrator, "if same were just & reasonable" but the arbitrator refused to proceed on such terms, & there was no determination of the matters in dispute by the arbitrator:—*Held*: the right to maintain an action was lost by reason of the non-fulfilment of the condition precedent.—*MCDUGALL & CO. v. PENTICTON MUNICIPALITY* (1914), 20 B. C. R. 401.—CAN.

*Sect. 9.—Whether submission is condition precedent to right to sue: Sub-sects. 2 & 3. Sect. 10: Sub-sects. 1 & 2.]*

**306. Sugar association—Appeal to council.]**—By a contract made in July, 1914, pltf., who carried on business in England, purchased 1,000 bags of beet-root sugar f.o.b. Hamburg, Aug. delivery. The contract was expressed to be in accordance with the rules & regulations of the Sugar Assocn. of London & subject to the regulations of the London Produce Clearing House, Ltd. By r. 491A of the rules of the Sugar Assocn. of London, in the event of Germany being involved in war with England the contract, unless previously closed, was to be deemed to be closed on certain terms. By r. 491B "For the purposes of the war clause a contract against which a tender has been made shall be deemed a closed contract. Should the state of war prevent shipment or warehousing &/or passing of documents, then any party to the contract shall be entitled to appeal to the council [of the Assocn.] for a decision which shall be binding on all concerned":—*Held*: the obtaining of an award under r. 491B was not a condition precedent to the right to sue in respect of a claim arising under a contract.—*JAGER v. TOLME & RUNGE & LONDON PRODUCE CLEARING HOUSE*, [1916] 1 K. B. 939; 85 L. J. K. B. 1116; 114 L. T. 647; 32 T. L. R. 291, C. A.; *revsg.*, S. C. (1915), 31 T. L. R. 381.

*Annotation*:—*Consd. Grey (Edward) v. Tolme & Runge* (1915), 31 T. L. R. 551.

**307. Dismissal of servant—Arbitration clause in contract of employment.]**—Under an agreement be-

tween S. & L. for the appointment of L. by S. as auditor & manager of an estate, a retiring pension was to be paid to L. if S. should revoke the appointment without adequate cause, or if L. should resign upon adequate causes, the adequacy of the course in either cause to be determined by a referee. L. was dismissed, as he alleged wrongfully, & sued for the retiring pension:—*Held*: (1) the stipulation for reference was not void as ousting the cts. of their jurisdiction; (2) the *onus* of proving the adequacy of the cause of dismissal was upon S., who, as a condition precedent to exercising the power of dismissal without incurring the liability for the pension, should have obtained the decision of the referee; (3) the decision not having been obtained L. could sue for the pension.—*LOWNDES v. STAMFORD & WARRINGTON (EARL)* (1852), 18 Q. B. 425; 21 L. J. Q. B. 371; 19 L. T. O. S. 227; 16 Jur. 903; 118 E. R. 160; *subsequent proceedings*. *STAMFORD & WARRINGTON (EARL) v. LOWNDES*, 16 Jur. 973.

*See, also*, Nos. 148—152, *ante*.

**308. Collateral agreement of reference—Not condition precedent—Policy.]**—A policy of insurance against fire contained, among others, conditions that the amount of loss should be paid immediately after same should be established to the satisfaction of the directors, & in case any difference or dispute should arise between the insured & the co., touching the loss or damage, such difference should be referred to arbn., & the award of the arbitrators be conclusive on all parties:—*Held*: (1) the agreement to refer was collateral, & not a condition precedent; (2) it could not be pleaded in bar to an

**308 i. Collateral agreement of reference—Not condition precedent—Policy.]**—A clause in a policy provided that if any difference should arise & no fraud be suspected, such difference should be submitted to arbitrators:—*Held*: the agreement to refer was collateral & not a condition precedent to the right to bring an action.—*STIBBARD v. STANDARD FIRE & MARINE INSURANCE CO. OF NEW ZEALAND* (1905), 5 S. R. N. S. W. 473.—*AUS.*

**308 ii.** ——— *clause in a policy of fire insurance providing for arbn., in the event of a difference as to the amount of the loss, did not make an arbn., a condition precedent to the bringing of an action.*—*PATERSON v. CENTRAL CANADA INSURANCE CO.* (1910), 15 W. L. R. 123; (1911), 16 W. L. R. 647.—*CAN.*

**308 iii.** ——— *Total loss.]*—A policy contained the following provisions: that in case of any difference arising, touching any loss or damage, same should, at the written request of either party, be submitted to impartial arbitrators, & that defts. should not be sued for any claim until after an award fixing the amount of the claim, in the manner above prescribed. In an action upon the policy for a total loss:—*Held*: the covenant was collateral & was not a condition precedent to pltf.'s right of action, the loss being total.—*ADAMS v. NATIONAL INSURANCE CO.* (1881), 20 N. B. R. 569.—*CAN.*

**308 iv.** ——— *Employment contract.]*—Deft. hired pltf. for five years, but provided that the agreement might be terminated at deft.'s option, & pltf. should be responsible to deft. in damages for any failure in his duties, & in case any dispute should arise as to the sufficiency of pltf.'s performance, same should be referred to three arbitrators, chosen in the manner stated, their decision to be final. In an action for wrongful dismissal by pltf.:—*Held*: the agreement to refer, being collateral, & not a condition precedent to pltf.'s right to sue, could not bar the action.—*GRIGGS v. BILLINGTON* (1868), 27 U. C. R. 520.—*CAN.*

**308 v.** ——— *Contract.]*—A contract contained a clause that, in case

of difference between the parties, the award of the architect in all matters connected with the works, etc., should be final & conclusive, & such award should be a condition precedent to any proceeding whatever in respect of any matter which could be the subject of such award:—*Held*: the architect's award was not a condition precedent to an action by the employer against the contractor for not completing the contract.—*MANSFIELD v. DOOLIN* (1869), 4 I. C. L. R. 17.—*IR.*

**308 vi.** ——— *Pltfs. contracted to excavate works for defts. subject to the condition (inter alia) that "in the event of any doubt, dispute or difference arising concerning the works, etc., or respecting any other matter or thing not thereinbefore left to the decision or determination of the chief engineer, every such doubt, dispute or difference should be referred to & be decided by the chief engineer."* In an action on the contract assigning four breaches defts. pleaded (1) that under the above condition they were ready to refer in pursuance of the condition; (2) that the matters had been referred under the condition to the chief engineer & that he had decided that pltf. had no claim for damage; (3) that disputes arose as to whether or not the claims were or were not within the above condition & that defts. were always ready to have same decided by the chief engineer; & (4) that such last-mentioned disputes had been decided by the chief engineer & he had determined that the claims were within the above clause & that pltf. were not entitled to any compensation in respect thereof:—*Held*: as the above condition did not contain any negative words or in terms make the decision of the chief engineer a condition precedent to either party bringing an action for a breach of the contract, it was a mere collateral agreement & formed no defence.—*YOUNG v. BOARD OF LAND & WORKS* (1872), 3 V. L. R. 110.—*AUS.*

**308 vii.** ——— *The conditions of a contract provided (1) that payments were to be made during the progress of the work; (2) that in the event of any dispute between the parties*

as to any matter "arising in any way under or out of this contract," the question should be referred to arbn., without any legal proceedings being first brought. Default having been made in one of the progress-payments, pltf. sued:—*Held*: the reference to arbn. was not a condition precedent to pltf.'s right to bring an action.—*BELL v. KEESING* (1888), 7 N. Z. L. R. 155.—*N.Z.*

**308 viii.** ——— *Deft. in an action on a contract admitted the claim, but counterbalanced for £20 damages. The contract contained a provision that the contractor should pay to the employer £1 per day damages for every day that the works should remain unfinished after the time specified, & that in case any question, dispute, or difference should arise between the parties as to the construction of the contract, etc., such dispute should be settled by the award of one referee, etc. The magistrate gave judgment for deft. on his counterclaim, & pltf. took action for prohibition:—Held: the decision of the magistrate was right, & the right to damages for delay was regulated & the amount fixed, & a reference to arbn. was not a condition precedent to deft.'s right to recover on his counterclaim.*—*COLEMAN v. PATTERSON* (1910), 30 N. Z. L. R. 353.—*N.Z.*

**308 ix.** ——— *Reference of shortage—Timber limits.]*—A contract for the sale of timber limits contained a clause providing for arbn. in case of dispute as to the amount of shortage in the quantity of timber guaranteed to be upon the limits:—*Held*: an award by arbn. had not been made a condition precedent to recovery of the amount of deficiency.—*DAVID v. SWIFT* (1910), 44 S. C. R. 179.—*CAN.*

**308 x.** ——— *Lease.]*—A lease contained a covenant that any dispute should be referred to arbn., the lease being deemed a submission under Arbn. Act, 1892 (56 Vict., No. 8). In an action for rent:—*Held*: the covenant to refer was independent & did not constitute a condition precedent to action.—*MADSEN v. MOREY* (1916), 12 Tas. L. R.—*AUS.*



action on the policy.—*ROPER v. LONDON* (1859), 1 E. & E. 825; 28 L. J. Q. B. 260; 5 Jur. N. S. 491; 7 W. R. 441; 120 E. R. 1120.

*Annotations*:—*Consd.* *Elliott v. Royal Exchange Assco.* (1867), L. R. 2 Exch. 237; *Edwards v. Aberayron Mutual Ship Insc. Soc.* (1876), 1 Q. B. D. 563, Ex. Ch. *Distd.* *Viney v. Bignold* (1887), 20 Q. B. D. 172.

*Sec, generally, INSURANCE.*

**309.** ———.]—A clause in an agreement stipulated that all matters in difference which should arise touching the agreement should be submitted to arbn., & prohibited any action being brought in respect of the matters so submitted, except for the amount of the award:—*Held*: (1) the clause was a collateral & independent agreement; (2) an award thereunder was not a condition precedent to an action, except as regarded such sums as under the agreement were not payable until the amount thereof had been ascertained by an award.—*COLLINS v. LOCKE* (1879), 4 App. Cas. 674; 48 L. J. P. C. 68; 41 L. T. 292; 28 W. R. 189, P. C.

*Annotations*:—*Consd.* *Viney v. Bignold* (1887), 20 Q. B. D. 172. *Mentd.* *Davies v. Davies* (1887), 36 Ch. D. 359, C. A.; *Swaine v. Wilson* (1889), 24 Q. B. D. 252, C. A.; *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630, C. A.; *Allen v. Flood*, [1898] A. C. 1, H. L.; *Gorney v. Bristol, etc., Trade & Provident Soc.*, [1909] 1 K. B. 901, C. A.; *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439.

**310.** ——— **Compensation.**]—A lessee covenanted with the lessor that he would keep such a number only of hares & rabbits as would do no injury to the crops, & that, in case he kept such a number as should injure the crops, he would pay a fair & reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators or an umpire. The lessor having brought an action for breach of covenant, alleging that the lessee had not kept such a number only of hares & rabbits as would do no injury, but had kept such a number as did injury, & had neglected to pay any compensation:—*Held*: the covenant to refer the amount of compensation was a collateral & distinct covenant, & the action was maintainable, although there had been no arbn.—*DAWSON v. FITZGERALD* (1876), 1 Ex. D. 257; 45 L. J. Q. B. 893; 35 L. T. 220; 24 W. R. 773, C. A.

*Annotations*:—*Distd.* *West London Dairy Soc. v. Abbott* (1881), 44 L. T. 376; *Viney v. Bignold* (1887), 20 Q. B. D. 172. *Consd.* *Harrowby v. Leicester Corpn.* (1915), 85 L. J. Ch. 150. *Refd.* *Edwards v. Aberayron Mutual Ship Insc. Soc.* (1876), 1 Q. B. D. 563, Ex. Ch.; *Babbage v. Coulburn* (1882), 9 Q. B. D. 235.

### SUB-SECT. 3. EFFECT OF REPUDIATION.

*See* Nos. 144—152, 307, *ante*.

### PART I. SECT. 10, SUB-SECT. 1.

**311 i.** "Any court"—*Local court.*]—Any ct. before which an action is brought has jurisdiction to stay the action, where there has been a prior agreement between the parties to refer the subject-matter to arbn. Such jurisdiction is not, by Arbn. Act, 1895, s. 6, limited to the Supreme Ct. Pltfs. claimed from defts. a sum for car mileage, in respect of the operation by them of the tramway lines within defts.' municipality, & sued in the local ct.:—*Held*: the local ct. had jurisdiction to stay.—*FREMANTLE MUNICIPAL TRAMWAYS & ELECTRIC LIGHTING BOARD v. NORTH FREMANTLE MUNICIPALITY* (1909), 11 W. A. R. 97.—AUS.

### PART I. SECT. 10, SUB-SECT. 2.

**a. Proceedings in courts of petty sessions.**]—Arbn. Act (55 Vict., No. 32), s. 3, which provides that if any party to a submission commences legal proceedings in any ct. against the other party, that ct. or a judge thereof may stay the proceedings, does not apply to cts. of petty sessions.—*Ex p. VINCENT* (1897), 18 N. S. W. L. R. 321.—AUS.

**b. Proceedings in Small Cause Court.**]—N. agreed to purchase from R. 150 tons of sugar. A clause in the agreement provided for arbn. in the event of disputes arising in connection with the agreement. A dispute arose, & N. filed a suit in the Small Cause Ct. R. by a petition to the High Ct. prayed that the proceedings in the Small Cause

### SECT. 10.—STAY OF PROCEEDINGS

*See, now, Arbitration Act, 1889, s. 4.*

#### SUB-SECT. 1.—TO WHAT COURT APPLICATION MAY BE MADE.

**311.** "Any court"—*County court.*]—A ct. judge has jurisdiction, under s. 4 of the Act of 1889, to stay any legal proceedings in his ct. by any party to a submission against another party in respect of any matter agreed to be referred.

The words "any ct." in the above sect. are not limited to the High Ct. To indicate the High Ct. the expression "ct. or a judge thereof" is used.—*MORRISTON TINPLATE CO. v. BROOKER, DORE & CO.*, [1908] 1 K. B. 403; 77 L. J. K. B. 197; 98 L. T. 219; 24 T. L. R. 224; 52 Sol. Jo. 210.

*Annotation*:—*Refd.* *Austin & Whiteley v. Bowley* (1913), 108 L. T. 921.

#### SUB-SECT. 2.—IN REGARD TO WHAT PROCEEDINGS.

**312. Cross claim.**]—By an agreement in writing, a ship was chartered at a fixed sum per month. It was provided that, "should any difference of opinion arise between the parties to this contract, either in principle or detail, same" should be referred. The charterer claimed from the shipowner damages for an alleged breach of an implied warranty of seaworthiness, & desired to have this claim referred. The shipowner did not comply. Then the charterer commenced an action. The monthly hire having become due, the shipowner demanded it from the charterer, & on his refusal to pay, commenced an action against him. The ground of refusal was that the charterer desired to have all matters referred together, whereby he would have the benefit of a set-off. On a rule obtained by the charterer to stay proceedings in the shipowner's action:—*Held*: (1) though there was no dispute as to the subject-matter of the action itself, viz., the hire, which was admittedly due, the circumstances gave the ct. jurisdiction under C. L. P. Act, 1854, s. 11; (2) the ct. being satisfied, notwithstanding the pendency of the cross-action, that the charterer had always been desirous to refer all matters, & that the application was *bonâ fide*, & that justice would be done by staying the action, would make the rule to stay proceedings absolute.—*RUSSELL v. PELLEGRINI* (1856), 6 E. & B. 1020; 26 L. J. Q. B. 75; 28 L. T. O. S. 121; 3 Jur. N. S. 183; 119 E. R. 1144; *sub nom.* *BROWN v. PELLEGRINI*, 5 W. R. 71.

*Annotations*:—*Dbtd.* *Daunt v. Lazard* (1858), 27 L. J. Ex. 399. *Folid.* *Seligmann v. Le Bontillier* (1866), L. R. 1 C. P. 681. *Apld.* *Minifie v. Railway Passengers Assce.* (1881), 44 L. T. 552, D. C.

**313.** When not available to party seeking stay.]—In an action on a charterparty against a surety for freight, deft. was not allowed a reference

Ct. should be stayed:—*Held*: under Arbn. Act, s. 19, the High Ct. had power to stay proceedings in the Small Cause Ct. & the proceedings should in the circumstances be stayed.

The language of s. 19 of the Act is quite clear & it gives jurisdiction to the High Ct. to stay proceedings in any ct. subordinate to its jurisdiction. The sect. in the beginning refers to a party to a submission commencing any legal proceedings; then it goes on to refer to such legal proceedings, & then provides for staying the proceedings. Nowhere is there any indication in the sect. or the Act that the legal proceedings contemplated must be proceedings in that ct. (*per CUR.*)—*RALLI v. NOOR MAHOMED* (1906), 1 L. R. 31 Bom. 236.—IND.



**Sect. 10.—Stay of proceedings: Sub-sects. 2 & 3, A. & B.]**

under C. L. P. Act, 1854, s. 11, of a claim for compensation for a breach of a warranty of the capacity of the vessel, that being a claim of which the principal, the charterer, only could take advantage, & not the surety. *Qu.*: whether the ct. will allow a reference of a matter not available as a defence, or in reduction of damages in the same action, but only a ground for a cross-claim in another action.—**DAUNT v. LAZARD** (1858), 27 L. J. Ex. 399.

**314.** —.]—A charterparty provided that, "should any dispute arise between the owner & the charterer, the matters in dispute shall be referred to," etc. The shipowner having brought an action for freight, & the charterer having preferred a cross-claim for damages for the captain's refusal to ship a reasonable amount of cargo & for general disobedience of orders, & being willing to refer all matters to arbn.:—*Held*: it was a case for the interference of the ct. under C. L. P. Act, 1854, s. 11.—**SELIGMANN v. LE BOUTILLIER** (1866), L. R. 1 C. P. 681.

*Annotations*:—**Folld.** *Minifie v. Railway Passengers Assce.* (1881), 44 L. T. 552; *Rowe v. Crossley* (1912), 108 L. T. 11, C. A. **Mentd.** *Willesford v. Watson* (1872), 42 L. J. Ch. 90.

**315.** —.]—Where there is an agreement to refer the subject-matter of a counterclaim, pltf. can apply to stay the counterclaim, & if he succeeds:—*Semble*: the action will be stayed, pending reference of the counterclaim.—**SPARTALI & CO. v. VAN HOORN** (1884), Bitt. Rep. in Ch. 216.

**316. Counterclaim.]**—Pltf. brought an action for work done under a building contract, which contained a general submission to arbn. of all disputes arising out of the contract. Deft. counter-claimed for damages arising out of breaches of the contract. Subsequent to the delivery of the counterclaim pltf. took out a summons for particulars of the counterclaim, which was afterwards amended. Subsequently pltf. obtained leave to administer interrogatories to deft. Pltf. subsequently discontinued his action, & proposed to refer the whole matter to arbn., & upon deft. refusing to allow the counterclaim to be referred, took out a summons under s. 4 of the Act of 1889 to stay the proceedings on the counterclaim:—*Held*: the delivery of the counterclaim was "the commencement of a legal proceeding" within the sect., & the delivery of the amended counterclaim was a fresh commencement of legal proceedings.—**CHAPPEL v. NORTH**, [1891] 2 Q. B. 252; 60 L. J. Q. B. 554; 65 L. T. 23; 40 W. R. 16; 7 T. L. R. 563, D. C.

*Annotations*:—**Folld.** *Brighton Marine Palace & Pier v. Woodhouse*, [1893] 2 Ch. 486. **Consd.** *Ives & Barker v. Willans*, [1894] 1 Ch. 68. **Apld.** *Bartlett v. Ford's Hotel Co.*, [1895] 1 Q. B. 850, C. A.; *County Theatres & Hotels v. Knowles*, [1902] 1 K. B. 480, C. A.

**Claims for wrongful dismissal.]**—See Nos. 148—152, 307, *ante*.

**Matters arising out of dissolution of partnership.]**—See PARTNERSHIP.

**SUB-SECT. 3.—IN REGARD TO WHAT SUBMISSIONS.**

Whether arbitration clause in force & applicable, see Nos. 144—154, *ante*.

Whether arbitration clause incorporated, see Nos. 138—143, *ante*.

Necessity for written submission, see Nos. 15—18, 20, 21, *ante*.

**A. Under Common Law Procedure Act, 1854 (c. 125), s. 11.**

**317. Agreement to refer not forming part of original contract.]**—If an action is brought for

breach of an agreement in a deed or other instrument, which does not contain a clause to refer disputes to arbn., there is no power given by the above sect. to stay the action, though the parties may have agreed, subsequent to the breach arising, to refer the dispute.—**BLYTH (BLYTHE) v. LAFONE** (1859), 1 E. & E. 435; 28 L. J. Q. B. 164; 32 L. T. O. S. 255; 5 Jur. N. S. 364; 7 W. R. 189; 120 E. R. 973.

*Annotations*:—**N.F.** *Mason v. Haddan* (1859), 6 C. B. N. S. 526. **Overd.** *Randell v. Thompson* (1876), 1 Q. B. D. 748, C. A.

**318. Mere executory memorandum — Formal document prepared but not signed.]**—By a memorandum it was agreed that all matters in difference in relation to the W. Railway between A. & B. & between A. & W. Ry. Co., & also between C. & B. & between C. & the W. R. Co., whether retrospective or prospective, present or future, should be referred to an arbitrator. This memorandum was signed by B. for himself & also as agent for the co. A formal deed of reference was afterwards prepared & executed by B., but by none of the other parties:—*Held*: assuming the agreement to be within the above sect., at all events it was not one which the ct. ought in its discretion to enforce by staying the proceedings in an action brought by B. against A., in respect of a matter in difference included within it.—**MASON v. HADDAN** (1859), 6 C. B. N. S. 526; 33 L. T. O. S. 163; 141 E. R. 562.

*Annotation*:—**Consd.** *Randell v. Thompson* (1876), 1 Q. B. D. 748, C. A.

**319. Letters from one party.]**—Parties continued dealing under the terms of an expired agreement, which contained a clause for reference to arbn., by virtue only of a letter from one party, in which was the following expression: "This voyage to be on the same terms as the former one." The other party did not reply to the letter. On an application for a stay of proceedings under the above sect., it was objected that the Act required an instrument in writing, & there was no writing to which the other party was a party:—*Held*: as the parties had evidently gone on dealing on the terms of the original agreement, which contained a clause for referring disputes to arbn., the case was fairly within the Act.—**HATTERSLEY v. HATTON** (1862), 3 F. & F. 116.

**320. Agreement to refer revoked.]**—A dispute having arisen between pltf. & deft. as to the balance due to pltf. for work done for deft., they referred the matter, by an instrument in writing, to a specific arbitrator, W. No time was fixed for making the award, & there was no clause as to making the submission a rule of ct. W. proceeded in the matter at once, & held his last sitting within three months. Several months having afterwards elapsed, & no award having been made, pltf., having given notice to W. & deft. that they revoked the submission, brought an action against deft. for the alleged balance. Deft. having applied for a stay of proceedings in the action under the above sect.:—*Held*: (1) such an agreement of reference (although not contained in the original instrument under which the matters in dispute arose) was within the sect.; (2) in order to bring the case within the sect. there must be an existing reference capable of being carried into effect, & the submission having been validly revoked, there was no such existing reference. *Blyth v. Lafone*, No. 317, *supra*, *overd.*—**RANDELL (RANDALL) v. THOMPSON** (1876), 1 Q. B. D. 748; 45 L. J. Q. B. 713; 35 L. T. 193; 24 W. R. 837, C. A.

*Annotations*:—**Distd.** *Moffat v. Cornelius* (1878), 39 L. T. 102, C. A. **Apld.** *Deutsche Springstoff Act. v. Briscoe* (1887), 20 Q. B. D. 177. **Refd.** *Fraser v. Ehrensperger* (1883), 12 Q. B. D. 310, C. A. **Mentd.** *Re Smith & Service & Nelson* (1890), 59 L. J. Q. B. 533, C. A.

## PART I.—THE SUBMISSION.

**321.** .]—Pltf. bought a cargo of maize from defts. The contract contained a clause that if any dispute should arise, "the contract not to be void, it being agreed to leave same to be settled by two London corn-factors, whose decision should be final," & the stipulation might be made a rule of ct. Pltf., having paid £650 on account, afterwards rejected the maize, as not being of the crop & quality contracted for, & sued defts. to recover the £650. Defts. obtained an order for stay of proceedings under the above sect. :—*Held* : the order to stay was properly made.—*MOFFAT v. CORNELIUS* (1878), 39 L. T. 102, C. A.

*Annotation* :—*Refd. Percy v. Young* (1879), 42 L. T. 710, C. A.

**322.** .]—An arbn. clause in an agreement between pltf.s. & deft. provided that, if any dispute should arise between the parties touching that agreement, the dispute should be referred to two named arbitrators, or their umpire, the provisions of C. L. P. Act, 1854, to apply to the reference. A dispute having arisen in respect of moneys alleged to have become due & payable from deft. to pltf.s. under the agreement, deft. gave notice to proceed to arbn. Pltf.s. thereupon brought an action for the moneys & revoked their submission to the arbitrators :—*Held* : deft. was not entitled to have the proceedings in the action stayed under the above sect., because, after pltf.s.' revocation of the submission, there was, in respect of the particular dispute which had arisen, no subsisting agreement to refer capable of being carried into effect.—*DEUTSCHE SPRINGSTOFF ACT. v. BRISCOE* (1889), 20 Q. B. D. 177 ; 57 L. J. Q. B. 4 : 30 W. R. 557.

**Agreement terminated by dismissal of servant.]**  
—*See* Nos. 148—152, 307, *ante*.

**323. Agreement to refer in lease—Not also in supplemental deed.]**—A farming lease contained an agreement to refer to arbn. all matters in dispute "touching these presents, or any clause, matter, or thing herein contained, or the construction hereof, or anything to be done under the covenants or agreements herein contained, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties, liabilities of either party in connection with the premises." By a supplemental deed of even date, which contained no arbn. clause, the lessor released the lessee from the observance of certain of the restrictive covenants in the lease. The assignees of the lessor having brought ejectment for alleged breaches of covenant, deft. moved for a stay of proceedings & that the matter might be referred :—*Held* : (1) the lease & supplemental deed must be read & construed as one instrument, &, although the alleged breaches arose under the supplemental deed, the matters in dispute came within the arbn. clause & would be left to the decision of the arbitrator.—*WADE-GERY v. MORRISON* (1877), 37 L. T. 270.

*Annotation* :—*Distd. Turnock v. Sartoris* (1889), 43 Ch. D. 150, C. A.

**324. Agreement to refer to foreign court.]**—An agreement between four British subjects for carrying on a business in partnership in Russia provided that all disputes should be referred to the St. Petersburg Commercial Ct., whose decision should be final. An action in respect of the partnership having been brought in England :—*Held* : (1) the agreement to refer all disputes to a foreign ct. was within the above sect. ; (2) defts. were entitled to a stay of proceedings & a reference to the St. Petersburg Commercial Ct. ; (3) any of the parties could apply as to continuing the action & generally on the result of the proceedings in the St. Petersburg Ct. being known.—*LAW v. GARRETT*

(1878), 8 Ch. D. 26 ; 38 L. T. 3 ; 26 W. R. 426, C. A.

*Annotations* :—*Apld. Halsey v. Windham*, [1882] W. N. 108. *Consd. Kirchner v. Gruban*, [1909] 1 Ch. 413. *Folld. The Cap Blanco*, [1913] P. 130, C. A. *Mentd. Compagnie Du Senegal v. Wood* (1883), 53 L. J. Ch. 166.

*See, also*, Nos. 329—331, *post*.

**325. Agreement impugned—Each party to bear costs in any event.]**—A fire insurance policy contained an arbn. clause, which provided that each party should bear his own costs in any event. The assured refused an offer in respect of a loss made by the co. & commenced an action, whereupon the co. moved for a stay of proceedings :—*Held* : (1) there was nothing at all unreasonable in the clause as to costs ; (2) there was "no sufficient reason" for not enforcing the reference to arbn., & a stay should be granted.—*STEPHENS v. COMMERCIAL ASSURANCE CO.* (1888), 4 T. L. R. 406.

*See, also*, Nos. 145—152, 307, *ante*.

*B. Under Arbitration Act, 1889 (c. 49), s. 4.*

**326. Reference to three arbitrators.]**—Where an agreement to refer disputes to arbn. provides for a reference to three arbitrators, one to be appointed by each of the parties & the third by the two so appointed, & one of the parties refuses to appoint an arbitrator & brings an action against the other party to the submission, the ct. has, under the above sect., power to stay the action notwithstanding that it has no power to order the party in default to appoint an arbitrator.—*MANCHESTER SHIP CANAL CO., LTD. v. PEARSON & SON, LTD.*, [1900] 2 Q. B. 606 ; 69 L. J. Q. B. 852 ; 83 L. T. 45 ; 48 W. R. 689, C. A.

**327. Agreement by agent without authority.]**—The masters of two steamships signed an agreement known as "Lloyd's salvage agreement," by clause 1 whereof they agreed to perform salvage services to another steamship for a fixed sum, & that in the event of any dispute arising as to the adequacy or otherwise of such sum, the remuneration should be fixed by the committee of Lloyd's. The owners of the salving steamers instituted salvage actions in the Admlty. Ct., whereupon defts. applied to have the actions stayed under the above sect. :—*Held* : in refusing to stay the actions Barnes, J. had rightly exercised the discretion given him by the sect., because there was great doubt whether the master of a vessel had authority to bind his owners to arbn.—*THE CITY OF CALCUTTA* (1898), 79 L. T. 517 ; 15 T. L. R. 108 ; 8 Asp. M. L. C. 442, C. A.

**328. Reference to named engineer or other the engineer for time being—Resignation.]**—A clause in a contract for the construction of a railway was as follows : "Any disputes which may arise under this contract shall, on the completion of the work & not before, be referred to [C.], or other the engineer for the time being," of the railway co. C. began the hearing of a dispute, but resigned his post as engineer almost immediately & declined to go on. A new engineer was appointed. The contractor's solr. gave notice to the co. to concur in the appointment of an arbitrator & suggested three names. The co. replied saying that the new engineer would become the arbitrator. The contractor commenced an action for the balance due to him under the contract. On an application by the co. to stay the proceedings :—*Held* : (1) the clause was not applicable in the circumstances, & the new engineer was not substituted as arbitrator ; (2) by consent an order should be made referring all matters in dispute to an engineer as arbitrator.—*STRACHAN v. CAMBRIAN RAILWAYS* (1905), Hudson's Bldg. Contracts, 4th ed., Vol. II., p. 374.



**Sect. 10.—Stay of proceedings: Sub-sect. 3, B. & C.; sub-sects. 4 & 5.]**

**329. Reference to foreign court.]—**A policy effected on the life of a foreigner with an English co. contained a condition that the interested parties expressly agreed to submit all disputes which might arise out of the contract of insurance to the cts. having jurisdiction in such matters in Budapest:—*Held*: (1) this was a submission within ss. 4, 27 of the Act of 1889; (2) an action on the policy in England would be stayed.—**AUSTRIAN LLOYD S.S. Co. v. GRESHAM LIFE ASSURANCE SOCIETY, LTD.**, [1903] 1 K. B. 249; 72 L. J. K. B. 211; 88 L. T. 6; 51 W. R. 402; 19 T. L. R. 155; 47 Sol. Jo. 222, C. A.

*Annotation*:—**Folld.** The Cap Blanco, [1913] P. 130, C. A.

**330. —.**—An agreement to refer disputes to a foreign tribunal entitles deft. to a stay of proceedings in England unless a case is made out for an injunction.

Pltfs., who carried on business at Leipsic, entered into a contract with deft. to engage him as their sole agent for England, Scotland, & Ireland. It was provided that disputes should be referred to the exclusive jurisdiction of the cts. at Leipsic. Deft. left pltfs.' service & entered that of a rival firm. Pltfs. thereupon commenced an action & applied for an injunction. Deft. applied for a stay of proceedings. The two applications came on together:—*Held*: as there was no case for an injunction, deft. was entitled to a stay of proceedings.—**KIRCHNER & Co. v. GRUBAN**, [1909] 1 Ch. 113; 78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo. 151.

*Annotations*:—**Folld.** The Cap Blanco, [1913] P. 130, C. A. **Mentd.** L. C. & D. Ry. Co. & S. E. & C. Ry. Co. v. Spiers & Pond (1916), 32 T. L. R. 493.

**331. —.**—Ten cases of gold coin were shipped at Hamburg by pltfs. on a German steamship to be carried to Montevideo or Buenos Ayres. The bill of lading on the terms of which the cases were carried gave the shipowner liberty to call at intermediate ports, & provided that any disputes as to its interpretation were "to be decided in Hamburg according to German law." The steamship called at Southampton & then went on to Montevideo, where only nine cases of gold coin were delivered. The steamship put into Southampton on her voyage back from Montevideo to Hamburg. The owners of the missing case arrested the steamship at Southampton, alleging that damage had been done to goods carried into a port in England by breach of duty or contract on the part of the owner,

master, or crew of the steamship. There was no evidence as to where the case was lost. The owner of the ship, having entered an appearance under protest, took out a summons asking (*inter alia*) that the action should be stayed under the above sect.:—*Held*: the action should be stayed, as the clause in the bill of lading that disputes as to its interpretation were to be decided in Hamburg was a submission to arbn. within the sect.—**THE CAP BLANCO**, [1913] P. 130; 83 L. J. P. 23; 109 L. T. 672; 29 T. L. R. 557; 12 Asp. M. L. C. 399.

*See, also*, No. 324, *ante*.

### C. Under Colonial Statutes.

**SUB-SECT. 4.—PARTIES AT WHOSE INSTANCE AND AGAINST WHOM STAY WILL BE GRANTED.**

**332. Application for stay by—Two of three defendants.]—**The lease of a mine contained an agreement to refer disputes between the lessors & three lessees to arbitrators or their umpire, pursuant to C. L. P. Act, 1854. The lessees sank a shaft, & through the shaft drew minerals from an adjoining mine. The lessors filed a bill to restrain the lessees from so doing. Two of the three lessees applied for an order to stay proceedings in the suit, & that the matter might be referred to arbn.:—*Held*: it was no objection to the application that two only of three defts. were parties to it.—**WILLESFORD v. WATSON** (1873), 8 Ch. App. 473; 42 L. J. Ch. 447; 28 L. T. 428; 37 J. P. 548; 21 W. R. 350, L.C. & L.J.J.

*Annotations*:—**Reid.** Piercy v. Young (1879), 14 Ch. D. 200, C. A. **Mentd.** Plews v. Baker (1873), L. R. 16 Eq. 564; Gillett v. Thornton (1875), L. R. 19 Eq. 599; Wade-Gery v. Morrison (1877), 37 L. T. 270; Law v. Garrett (1878), 8 Ch. D. 26, C. A.; Russell v. Russell (1880), 14 Ch. D. 471; Minifie v. Railway Passengers Assco. (1881), 44 L. T. 552; Compagnie Du Senegal v. Woods (1883), 53 L. J. Ch. 166; Lyon v. Johnson (1889), 40 Ch. D. 579; De Ricci v. De Ricci, [1891] P. 378; Brighton Marine Palace & Pier Co. v. Woodhouse (1893), 62 L. J. Ch. 697; Rowe v. Crossley (1912), 108 L. T. 11, C. A.; Hickman v. Kent or Romney Marsh Sheep-Breeders' Asscn., [1915] 1 Ch. 881.

**333. — Trustee in liquidation.]—Qu.**: whether the trustee in the liquidation of a liquidating debtor was a "person claiming through or under" debtor within C. L. P. Act, 1854, s. 11, so as to be able to apply to have an action stayed.—**PIERCY v. YOUNG** (1879), 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 845, C. A.

*Annotations*:—**Mentd.** Fraser v. Ehrensperger (1883), 12 Q. B. D. 310, C. A.; De Ricci v. De Ricci, [1891] P. 378;

### PART I. SECT. 10, SUB-SECT. 3.—C.

**c. Arbitration clause in policy.]—**By a condition indorsed on a policy of insurance the co. reserved the power of having the loss or damage submitted to arbitrators. An action having been brought on the policy, an application was made under C. L. P. Act, s. 167, to stay proceedings:—*Held*: the agreement between the parties was not void for want of mutuality, & the case came within scope of the stat., & proceedings must be stayed.—**MCINNES v. WESTERN ASSURANCE CO.** (1870), 5 P. R. 242; 30 U. C. R. 580.—**CAN.**

**d. Verbal submission — Partly acted on.]—**Where parties agreed to refer a matter in dispute to arbn., & appointed an arbitrator, but differed as to whether the arbitrator should be at liberty to take evidence not upon oath, no instrument of reference having been drawn up or executed:—*Held*: the ct. had power under Arbn. Act (31 Vict., No 15), s. 3, to order a stay of proceedings in an action brought as to the subject-matter of the agreement to refer.—**CAMPBELL v. VICKERY** (1885), 6 N. S. W. L. R. 209.—**AUS.**

**e. Arbitration clause in English form.]—**A firm in Glasgow agreed to erect for a London co. certain plant in Wales. The contract was executed in England, & contained an arbn. clause in English form providing (*inter alia*) for the appointment of an arbiter under the English Act of 1889. In an action at the instance of the Glasgow firm against the co., who had rejected the plant:—*Held*: the action must be sisted *in hoc statu* in order that the matters in dispute might be settled by arbn. in terms of the contract.—**HOWDEN & Co., LTD. v. POWELL DUFFRYN STEAM COAL CO., LTD.** (1912), 49 Sc. L. R. 605.—**SCOT.**

**f. Agreement not amounting to "submission."]**—A contract provided that, in case disputes about certain named matters should arise between the parties, they should enter into a written agreement to submit such disputes to the award of some arbitrator, & concluded with a provision that, if either party should "not, upon being called upon so to do, execute such agreement or submission," he should pay to the other party a named sum by way of

damages:—*Held*: the condition was not itself a submission within Arbn. Act, 1890, & the employer was, therefore, not entitled to an order under s. 6 of that Act staying proceedings.—**CARMICHAEL v. JOHNSTON** (1899), 17 N. Z. L. R. 565.—**N.Z.**

**g. Submission extended informally so as to amount to new parol submission.]—**A submission to arbn. was under seal, & bound the parties to abide by the award so as it was made on or before Oct. 30, 1904, or any subsequent day to which the arbitrators should in writing extend the time. The arbitrators continued the arbn., with the assent of the parties, for nearly two years, but did not by writing extend the time. Pltff. brought an action in respect of the matters referred, the arbn. being still uncompleted:—*Held*: (1) the assent of the parties to the arbn. being proceeded with after the time had expired was equivalent to a parol submission only; (2) Arbn. Act, s. 6, applied to submissions in writing only, & therefore, the arbn. proceedings afforded no answer.—**RYAN v. PATRIARCHE** (1906), 8 O. W. R. 811; 13 O. L. R. 94.—**CAN.**



*Den of Airline S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 106 L. T. 451, C. A.

**334. Application for stay of action brought by—Assignees in bankruptcy.]**—The ct. will not stay proceedings in an action by the assignee of an insolvent debtor, on the ground that an action brought by the insolvent for the identical cause has been referred, by order of *Nisi Prius*, to an arbn., & the reference is still pending.—*STURGES v. CURZON* (1851), 7 Exch. 17; 21 L. J. Ex. 38; 155 E. R. 837.

*Annotation*:—*Folld. Pennell v. Walker* (1856), 18 C. B. 651.

**335.** —.]—F. & S. having brought an action against W. to recover the price of timber delivered under a contract, & W. having brought a cross-action in which he sought to recover damages against F. & S. for alleged breaches by them of the same contract, the two actions & all matters in difference between the parties were referred to arbn. Before anything was done under the reference F. & S. became bkpts., & the assignees brought a fresh action against W. for the price of the timber. Upon a motion under C. L. P. Act, 1854, s. 11, to stay the proceedings in the last-mentioned action:—*Held*: it was not a case in which the ct. would interfere, assuming they had the power so to do. *Semble*: (1) the above sect. did not apply to such a case; (2) the assignees were not “persons claiming through or under” bkpt. within the sect.—*PENNELL v. WALKER* (1856), 18 C. B. 651; 26 L. J. C. P. 9; 27 L. T. O. S. 237; 139 E. R. 1525.

**336. — Mortgagees.]**—A partnership deed between three partners contained a power for any two partners by notice to determine the partnership so far as the third partner was concerned, if he did not keep up his capital. It also contained a clause providing for arbn. in the usual way, “if any difference shall arise between the partners or between one or more of them & the exors. or administrators of the others or other of them or between their respective exors. or administrators.” Two of the partners had given notice to the third, & it was admitted that the partnership had been determined so far as he was concerned. Before this determination the outgoing partner had mtged. his share. Questions had arisen as to the right of the continuing partners to purchase the outgoing partner’s share, & the amount of his interest in the goodwill, which depended on the construction of the partnership deed. The continuing partners gave notice to the outgoing partner that they had appointed an arbitrator & requiring him to do the same. He did this, & the arbitrators agreed on an umpire, but nothing more was done in the arbn. The mtgees. brought an action against all three partners for an account of the outgoing partner’s share from the date of dissolution. The continuing partners moved for a stay of proceedings under s. 4 of the Act of 1889:—*Held*: (1) the right of the mtgees. to an account was an independent right, given by Partnership Act, 1890 (c. 39), & not depending upon the partnership deed; (2) the arbn. clause not including in terms persons claiming under the partners, the mtgees. were not bound

by the clause & would not be bound by any account taken in the arbn., & their action for an account could not be stayed.—*BONNIN v. NEAME*, [1910] 1 Ch. 732; 79 L. J. Ch. 388; 102 L. T. 708.

*Annotation*:—*Reid. Rowe v. Crossley* (1912), 108 L. T. 11, C. A.

#### SUB-SECT. 5.—POWERS OF THE COURT.

**337. Agreement to refer not to be lightly set aside.]**—An agreement to refer is not to be lightly set aside even in equity, where there is machinery to adjust accounts which does not exist at common law. But if fraud is alleged that is a different matter.

Pltf. & deft., on dissolving partnership in 1866, agreed to refer matters in dispute to arbn. Arbitrators were appointed in 1869, who held their first meeting in May, 1870. Pltf.’s arbitrator shortly afterwards died, & pltf. refused to appoint another, but filed his bill to have the partnership wound up in Ch. The time for making the award had been enlarged to Mar. 25, 1872. On motion by deft. to stay proceedings:—*Held*: proceedings should be stayed till further order, with liberty to both parties to apply if no award were made before Mar. 25, 1872.—*KITCHEN v. TURNBULL* (1871), 20 W. R. 253, L.C. & L.JJ.

**338. *Primâ facie* duty to act on agreement to refer.]**—Where parties have chosen to determine for themselves that they will have a domestic forum instead of resorting to the ordinary cts., then since C. L. P. Act, 1854, a *primâ facie* duty is cast upon the cts. to act upon the agreement.—*WILLESFORD v. WATSON* (1873), 8 Ch. App. 473; 42 L. J. Ch. 447; 28 L. T. 428; 37 J. P. 548; 21 W. R. 350, L.C. & L.JJ.

*Annotations*:—*Appld. Wade-Gery v. Morrison* (1877), 37 L. T. 270; *Law v. Garrett* (1878), 8 Ch. D. 26, C. A. *Distd. Piercy v. Young* (1879), 14 Ch. D. 200. *Consd. Minifie v. Railway Passengers Assoc.* (1881), 44 L. T. 552. *Consd. & Expld. Compagnie Du Senegal v. Woods* (1883), 53 L. J. Ch. 166. *Appld. Lyon v. Johnson* (1889), 40 Ch. D. 579; *Rowe v. Crossley* (1912), 108 L. T. 11, C. A. *Reid. Plews v. Baker* (1873), L. R. 10 Eq. 564; *Gillett v. Thornton* (1875), L. R. 19 Eq. 599; *De Ricci v. De Ricci*, [1891] P. 378; *Hickman v. Kent or Romney Marsh Sheep-Breeders’ Assocn.*, [1915] 1 Ch. 881. *Mentd. Russell v. Russell* (1880), 14 Ch. D. 471; *Brighton Marine Palace & Pier Co. v. Woodhouse* (1893), 62 L. J. Ch. 697.

**339. Onus on plaintiff.]**—By Railway Passengers Assurance Co.’s Act, 1864, it was provided (s. 3) that any question arising under any policy should, if either the co. or the assured or the representatives of the assured required it, be referred to arbn. under the Act, & (s. 33) that if a policy-holder or his representatives commenced any action, a judge might, on the application of the co., “upon being satisfied that no sufficient reason exists why the matter cannot be or ought not to be referred to arbn.,” stay the proceedings in the action. The co. disputed their liability on a policy, & an action was commenced by the representatives of the policy-holder to recover the sum assured. The co. obtained an order to stay proceedings in the action in order that the dispute might be referred to

#### PART I. SECT. 10, SUB-SECT. 4.

**334 i. Application for stay of action brought by—Assignees in bankruptcy.]**—By a contract it was agreed that all matters in dispute should be settled by arbn. C. became insolvent, & a suit was brought by the assignee. Upon the application of defts. under C. L. P. Act (C. S. U. C., c. 22), s. 167, an order was granted staying all proceedings in the suit.—*JOHNSON v. MONTREAL & OTTAWA Ry. Co.* (1875), 6 P. R. 230.—CAN.

**334 ii. — Insured.]**—By a policy of insurance, the co. reserved to itself the

power of having the loss or damage submitted to arbitrators. An action having been brought on the policy, & an application made under C. L. P. Act, s. 167, to stay proceedings:—*Held*: pltf. was a party within that sect.—*MCINNES v. WESTERN ASSURANCE CO.* (1870), 5 P. R. 242; 30 U. C. R. 580.—CAN.

*h. The Crown.]*—There was a clause in a policy providing for submission to arbn. to ascertain the amounts to be paid thereunder, & that such submission was to be a condition precedent to any action. An applica-

tion was made by the co. to stay proceedings. On appeal:—*Held*: there was no power to stay proceedings against the Crown under Arbn. Act, 1895, s. 6.—*THE CROWN v. THE COLONIAL MUTUAL INSURANCE CO.* (1903), 5 W. A. R. 46.—AUS.

#### PART I. SECT. 10, SUB-SECT. 5.

**339 i. Onus on plaintiff.]**—Where parties to a contract have bound themselves to refer all matters in dispute thereunder, the jurisdiction of the ct. to stay depends upon there being no sufficient reason for not referring.—

**Sect. 10.—Stay of proceedings: Sub-sect. 5.]**

arbn., & pltf. appealed:—*Held*: the burden lay on pltf. to show that some sufficient reason existed why the dispute should not be referred to arbn., & not on the co. to show that no such reason existed, & as no such reason had been shown the order to stay proceedings was right.—*HODGSON v. RAILWAY PASSENGERS' ASSURANCE Co.* (1882), 9 Q. B. D. 188, C. A.

*Annotation*:—*Distd. Fox v. Railway Passengers Assce.* (1885), 54 L. J. Q. B. 505, C. A.

**340.** —.]—The ct. made an order under s. 4 of the Act of 1889, staying all further proceedings in an action for an account to recover commissions retained by an underwriter, upon the ground that members of Lloyd's were the most convenient tribunal to decide the fact whether the alleged custom to take commissions at Lloyd's existed.

Under the above Act the *onus* of proof is on the party who wants to keep out of arbn. (*EVE, J.*).—*SKINNER v. UZIELLI (E.) & Co., LTD.* (1908), 24 T. L. R. 266.

**341. Under Railway Passengers Assurance Company's Act, 1864, s. 16.]**—The above Act provided (s. 16) that, if there was any question or difference as to the liability of the co., it should, if either the co. or the persons claiming required it, & as a condition precedent to the enforcing of any claim to which the question or difference related, be referred to arbn. By s. 33 it was provided that, if any policy-holder or his representatives began any action against the co. in respect of the matters to be referred to arbn. under the Act, the ct. or a judge, on application by the co., after appearance, "upon being satisfied that no sufficient reason exists why the matters cannot be or ought not to be referred to arbn., & that the co. were, at the time of the bringing of the action or suit, & still are ready & willing to concur in all acts necessary & proper for causing the matters to be decided by arbn.," might make an order staying all proceedings in the action or suit. The representatives of a policy-holder in the co. made a claim against the co. The co. disputed it, but did not give notice that they required the question to be referred to arbn. Claimants then brought an action, whereupon the co. took out a summons to stay proceedings in the action:—*Held*: it was a question of discretion in each case whether the action ought or ought not to be stayed.—*FOX v. RAILWAY*

*PASSENGERS' ASSURANCE Co.* (1885), 54 L. J. Q. B. 505; 52 L. T. 672, C. A.

*See, also, No. 359, post.*

**342. Question better decided in High Court.]**—Pltf. & deft., who were surgeons, agreed to carry on business together in partnership. By the articles of partnership it was provided that all salaries, remunerations, or other profits, & "all pecuniary presents & gratuities from patients, & all other professional emoluments whatever, which may be received by the partners, or either of them," should be treated as profits of the business, & accounted for accordingly, & that all differences with regard to the construction of the articles of partnership should be referred to arbn. In Nov., 1888, a patient who had been attended by pltf. died, having by her will dated in July, 1887, appointed him exor., & leaving him a legacy of £100 & the residue of her personal estate. Deft. claimed half of such legacies as pecuniary presents, & desired to refer the question arising thereon to arbn., & appointed an arbitrator. Pltf. thereupon issued a writ asking to have the matter determined by the High Ct. Deft. then moved to stay proceedings in the action:—*Held*: (1) the two questions whether testatrix was a patient, & whether the legacies were pecuniary presents or gratuities, were questions which would be better decided by the High Ct., although they were clearly within the agreement to refer disputes to arbn.; (2) *prima facie* it was the duty of the ct. to stay the action, but the ct. had a discretion, & in the exercise of that discretion it would decline to stay the proceedings.—*LYON v. JOHNSON* (1889), 40 Ch. D. 579; 58 L. J. Ch. 626; 60 L. T. 223; 37 W. R. 427.

*Annotation*:—*Refd. Rowe v. Crossley* (1912), 108 L. T. 11, C. A.

**343.** —.]—Before the outbreak of war between England & Germany pltf. contracted to buy from defts. a quantity of sugar, which was in Hamburg & which was to be shipped by defts. The contracts provided that in the event of Germany being involved in war with England, they should be deemed to be closed, & that if war should prevent shipment, any party should be entitled to go to arbn. Owing to the outbreak of war defts. were unable to ship the sugar, & pltf. brought an action against defts., claiming a declaration that the contracts were suspended or dissolved & an injunction restraining defts. from proceeding

*MARTIN v. BOARD OF LAND & WORKS* (1879), 5 V. L. R. 117.—AUS.

**339 ii.** —.]—A contract contained an arbn. clause. Pltf. alleged that they had acted in accordance with the contract, & sued for the amount payable under it. Before pleading, defts. moved, under Arbn. Act, 1911, s. 6, for a stay of proceedings, pending a reference, as provided for in the contract. Pltf. relied on the allegations in their statement of claim, but filed no affidavits to show that anything not arising directly under the contract would have to be considered, or that the city engineer might have to be a witness, or that anything he might have to say, or even that any views he might have formed, would be contradicted by testimony of any kind, or that he should, for any cause, be considered disqualified to act as an arbitrator:—*Held*: the proceedings should be stayed as asked for by defts. If there was any reason why the matters should not be referred to arbn., it was the duty of pltf. to bring it forward & present it to the judge.—*NORTHERN ELECTRIC & MANUFACTURING Co. v. WINNIPEG* (1913), 24 W. L. R. 547; 4 W. W. R. 221; 10 D. L. R. 489.—CAN.

**k. Onus on defendant.]**—Jurisdiction under C. L. P. Act, 1865 (No. 274), s. 266, to stay proceedings where there has been an agreement to refer is discretionary; before exercising it the ct. must be satisfied (1) that no sufficient reason exists why the matters in dispute should not be referred, & (2) that deft. is willing to concur in all acts necessary for the arbn. The burden of satisfying the ct. upon these points rests upon deft.—*THOMSON v. TASMANIAN FIRE INSURANCE Co.* (1885), 11 V. L. R. 54.—AUS.

**l. Matter better decided otherwise.]**—Upon a special case stated by an arbitrator the ct. refused to stay proceedings on condition of deft. restoring the machinery, etc., taken by him, & held to be fixtures, because it was not a case in which they could properly take that course.—*GOODERHAM v. DENHOLM* (1859), 18 U. C. R. 203, 214.—CAN.

**m.** —.]—The ct. will not stay an action when it is of opinion that in the exercise of its judicial discretion it ought not to refer the matters in dispute to arbn.—*WORKMAN v. BELFAST HARBOUR COMRS.*, [1899] 2 I. R. 234.—IR.

**n. Where arbitration would involve indefinite delay.]**—In Mar., 1914, pltf. had contracted with the agents in Hong Kong of the Norddeutscher Lloyd for a return passage to England. On payment of the fare he received a passage ticket to England, & also an order for a return passage. He was unable to procure a return passage from the co., owing to the outbreak of war, & eventually returned by another line, & sued defts. as liquidators of the co. under the Alien Enemies (Winding Up) Ordinance, 1914, for damages for breach of contract. Defts. took out a summons under s. 541 of the Code for a stay of proceedings, on the ground that the matter in dispute should be submitted to arbn., under a clause in the conditions on the ticket as follows: "This contract should be construed & the rights of the parties thereunder determined in Bremen according to the laws of Germany":—*Held*: the indefinite delay, owing to the existence of the war, which would attend any attempt to arbitrate was in itself sufficient reason for the ct. declining to grant stay.—*BESWICK v. LOWE, BINGHAM & MATTHEWS* (1916), 11 Hong Kong L. R. 97.—HONG KONG.



with arbn. On an application by defts. for an order that the action be stayed under s. 4 of the Act of 1889, the judge refused to make the order:—*Held*: as the question between the parties was whether the contracts were alive or dead, it was in the judge's discretion to say that it was not a proper question to be submitted to arbn.—*GREY & Co. v. TOLME & RUNGE* (1914), 31 T. L. R. 137; 59 Sol. Jo. 218, C. A.

*Annotations*:—*Reid. Smith, Coney & Barrett v. Becker, Gray*, [1916] 2 Ch. 86, C. A. *Mentd. Jager v. Tolme & Runge & London Produce Clearing House*, [1916] 1 K. B. 939, C. A.

**344. Act of 1889, s. 4, permissive only.]**—A contractor brought an action to recover the price of certain works constructed for a local authority under a contract, which provided for the reference of disputes thereunder to the engineer of the local authority, &, in answer to a summons to stay proceedings under the above sect., challenged the conduct of the engineer in relation to the works, the question in dispute being whether the engineer had not precluded himself by his own admissions from asserting that the works had not been completed to his satisfaction & that the period of maintenance had not expired:—*Held*: the ct., in the exercise of the jurisdiction conferred upon it by the above Act, would refuse to order the action to be stayed, because the above sect. was permissive only, & though the evidence failed to show that the engineer had unfitted himself to act as arbitrator, yet the fact that one judge of the Ct. of Appeal was not "satisfied that there was no sufficient reason why the matter should not be referred" was a ground upon which another judge of co-ordinate jurisdiction could concur in the view that an absence of a sufficient reason was not shown.—*FREEMAN & SONS v. CHESTER RURAL DISTRICT COUNCIL*, [1911] 1 K. B. 783; 80 L. J. K. B. 695; 104 L. T. 368; 75 J. P. 132, C. A.

*Annotation*:—*Reid. Aird (J.) v. Bristol Corpn.* (1913), 77 J. P. 209, H. L.

**345. Court will not overrule discretion.]**—When a judge under s. 4 of the Act of 1889 has refused to stay proceedings in an action & has exercised his discretion judicially, his decision will not be overruled.

On an application to stay an action on a policy of insurance the judge refused an order on the grounds (1) the clause as to costs was unfair & oppressive, as pltf. had to pay half the costs in any event; (2) the case raised difficult questions of law:—*Held*: the first ground was not good, as pltf. had agreed to the terms of the policy & was not asking for a rectification, but the second ground was good & the ct. would not overrule the discretion of the county ct. judge.—*CLOUGH v. COUNTY LIVE STOCK INSURANCE ASSOCN., LTD.* (1916), 85 L. J. K. B. 1185; 32 T. L. R. 526; 60 Sol. Jo. 642; W. C. & Ins. Rep. 373.

**346. Power of court on application—Appointment of receiver—Liberty to apply.]**—An agreement, having reference to a ship, which S. & Co. had undertaken to build for a co., contained a clause providing that all matters in dispute should be settled by arbn. The co. alleged that the ship was not properly constructed in accordance with the agreement, it having been, in fact, refused any classification at Lloyd's. They commenced an

action against S. & Co. & W. & Co., who were assignees of S. & Co., claiming a lien upon the ship for sums which they had paid, repayment of such sums, the appointment of a receiver, & an injunction. A motion was made on behalf of S. & Co. & W. & Co. that all proceedings in the action might be stayed, & the matters in dispute referred to arbn. There was a counter-motion of the co. for a receiver, & they contended that, as it was necessary to appoint a receiver, no order could be made on the other motion:—*Held*: the ct. had power to appoint a receiver & to send all the rest of the action to be determined by arbn., & to stay all further proceedings, except for the purpose of carrying out the order for a receiver, with general liberty to apply, so as to enable the parties to make any necessary application pending the arbn.—*COMPAGNIE DU SENEGAL ET DE LA CÔTE OCCIDENTALE D'AFRIQUE v. SMITH & Co. & WOODS & Co.* (1883), 53 L. J. Ch. 166; 49 L. T. 527; 32 W. R. 111.

*Annotation*:—*Folld. Pini v. Roncoroni*, [1892] 1 Ch. 633.

**347. Form of order—Liberty to apply.]**—A stay of proceedings in order to send the matter to arbn. should, in a suitable case, reserve liberty to apply, & then if the arbitrator consider that something is being done which ought not to be done, an injunction can be granted.—*BRIGHTON MARINE PALACE & PIER, LTD. v. WOODHOUSE*, [1893] 2 Ch. 486; 62 L. J. Ch. 697; 68 L. T. 669; 41 W. R. 488; 37 Sol. Jo. 424; 3 R. 565.

*Annotations*:—*Mentd. Ives & Barker v. Willans*, [1894] 1 Ch. 68; *Bartlett v. Ford's Hotel Co.*, [1895] 1 Q. B. 850, C. A.; *Zalinfoff v. Hammond*, [1898] 2 Ch. 92.

**348. — Costs — Receiver.]**—By articles of partnership between pltf. & defts. it was provided that "all matters in difference in relation to the partnership affairs" should be referred to arbn. Disputes arose between the partners of such a character as to render the continuance of the partnership difficult, & an action was brought for the dissolution of the partnership. Defts. moved for a stay of proceedings & reference to arbn., & pltf. moved for the appointment of a receiver:—*Held*: (1) an order should be made for a stay of proceedings till further order, the costs of the application to be costs in the action, & the costs of the action to be in the discretion of, & dealt with by, the arbitrators, in the form in *Vawdrey v. Simpson*, No. 386, *post*; (2) the order would be expressed to be without prejudice to the motion for a receiver.—*MACHIN v. BENNETT*, [1900] W. N. 146.

**349. Power to appoint receiver & stay.]**—Articles of partnership provided that all difficulties that might arise between the partners or their representatives during the partnership or at its dissolution should be settled by arbn. Pltf. brought an action for dissolution, & moved for the appointment of a receiver & manager. Deft. moved for an order under s. 4 of the Act of 1889, staying all proceedings in the action, on the ground that the parties had agreed to refer all matters in dispute to arbn.:—*Held*: the ct. had jurisdiction to appoint a receiver, & could by the same order, with a view to a reference to arbn., stay all proceedings in the action except for the purpose of carrying out the order for a receiver.—*PINI v.*

**345 i. Court will not overrule discretion.]**—The ct. will not interfere with the discretion of the ct. of first instance in refusing to grant an order under C. L. P. (Ir.) Act, 1856, s. 14, staying proceedings in an action against an insurance co., on the ground that the matter should by an arbn. clause in the policy be referred & an award obtained as a condition precedent to liability,

when the co. would not undertake not to raise the question of fraud, & there was a question as to whether the award was, in law, a condition precedent.—*WILSON v. NATIONAL LIVE STOCK INSURANCE Co., LTD.* (1914), 48 L. L. T. 77.—*IR.*

**347 i. Form of order—Liberty to apply.]**—In an action by the personal repre-

sentatives of a deceased partner to have the survivor's account an application was made for a stay, on the ground that the partnership articles provided for arbn.:—*Held*: a stay should be granted subject to pltf.'s right at any time to apply for the appointment of a receiver or for an injunction.—*ROYAL TRUST Co. v. MILLIGAN* (1905), 6 O. W. R. 476; 10 O. L. R. 456.—*CAN.*



**Sect. 10.—Stay of proceedings: Sub-sects. 5 & 6, A., B. & C.]**

RONCORONI, [1892] 1 Ch. 633; 61 L. J. Ch. 218; 66 L. T. 255; 40 W. R. 297; 36 Sol. Jo. 254.

*Annotation*:—*Distd.* Jack v. Bell (1892), 36 Sol. Jo. 760.

**350. —.**—A partnership deed provided that if, during the partnership or at any time afterwards, any difference should arise between the partners or their exors. or administrators in regard to the construction of any of the articles or to anything to be made or done in pursuance thereof, or to any other matter relating to the partnership affairs, such difference should be referred to arbitrators & an umpire, & such reference should be deemed an arbn. within C.L.P. Act, 1854, & be subject to the provisions as to arbn. contained in the Act. In an action for a declaration that the partnership should be dissolved, for accounts, for a receiver & manager, for damages & for an injunction, pltf. moved for the appointment of a receiver & an injunction, & deft. moved for a stay of proceedings under the arbn. clause:—*Held*: (1) by consent, there would be judgment for a dissolution, with the usual reference to chambers for the appointment of a receiver & manager pending the winding-up; (2) an injunction should be granted & a stay ordered, so far as was necessary, of all proceedings in the action, so that all matters might be referred to arbn., with liberty to apply upon the completion of the arbn., the costs of the motions to be costs in the action & all to be reserved.—*HALSEY v. WINDHAM*, [1882] W. N. 108.

*Annotation*:—*Folld.* Compagnie du Senegal v. Wood (1883), 53 L. J. Ch. 166.

**351. —.**—An action was brought for the winding-up of a partnership carried on under articles, which contained the usual arbn. clause. Pltf. moved for the appointment of a receiver & manager & for an injunction. Deft. had a cross-motion for a stay of the action pending a reference to arbn. The case alleged against deft. was that he had absented himself from the business & had generally misconducted himself as partner:—*Held*: (1) a receiver should be appointed; (2) a stay of proceedings should be refused, as it was not a convenient course in the present case that a receiver should be appointed & a reference to arbn. ordered at the same time.—*JACK v. BELL* (1892), 36 Sol. Jo. 760.

**352. Provision for costs—Power to add.**—An order was made at chambers under C. L. P. Act, 1854, s. 11, staying proceedings in an action brought on a contract containing an agreement to refer disputes arising thereunder. The order made no provision as to the costs of the action. The matter in dispute being afterwards referred to arbn., an award was made in favour of pltf.:—*Held*: there was jurisdiction under the above sect., after the award had been made, to make an order varying the terms of the original order by directing that deft. should pay the costs of the action.—*BUSTROS v. LENDERS* (1871), L. R. 6 C. P. 259; 40 L. J. C. P. 193; 24 L. T. 472; 19 W. R. 757.

#### SUB-SECT. 6.—GROUNDS FOR REFUSING OR GRANTING STAY.

##### A. No Defence to Action.

**353. Where party applying admits he has no defence to action.**—By a charterparty, it was agreed that the charterers should insure the vessel, & that the policies should be delivered to & be the

property of the owners; & the charterparty contained a stipulation that "any question or difficulty which might thereafter arise out of that charterparty should be decided by arbn.," in a manner pointed out. An action having been brought by the owners against the charterers for refusing to deliver them the policies, against which action it was admitted that there was no defence:—*Held*: not a case for the application of the C. L. P. Act, 1854, s. 11.—*LURY v. PEARSON* (1857), 1 C. B. N. S. 639; 140 E. R. 263.

##### B. Allegations of Fraud.

**354. Discretion—Sale of goods—Bonâ fide allegation.**—By a contract for the sale of a cargo of linseed cake (paid for on receipt of the shipping documents), it was provided that any dispute as to quality, or as regards any question arising out of the contract, should be settled by arbn. in the usual manner, & that the contract should not be void on that account. An action having been brought by the buyers to recover back the money paid, on the ground that the cargo was not of the description represented, but a mere spurious imitation of linseed cake, it was doubted whether the case was one in which the ct. had power to stay the proceedings under C. L. P. Act, 1854, s. 11, with a view to compel a reference:—*Held*: there being a *bonâ fide* suggestion of fraud, the case was not one in which the ct. would in the exercise of their discretion enforce the reference.—*WALLIS v. HIRSCH* (1856), 1 C. B. N. S. 316; 26 L. J. C. P. 72; 28 L. T. O. S. 159; 140 E. R. 131.

*Annotations*:—*Distd.* Hirsch v. Im Thurn (1858), 4 C. B. N. S. 569. *Consd.* Alexander v. Mendl (1870), 22 L. T. 609. *Distd.* West London Dairy Soc. v. Abbott (1881), 44 L. T. 376. *Consd.* Minifie v. Railway Passengers Assoc. (1881), 44 L. T. 552. *Distd.* Fox v. Railway Passengers Assoc. (1885), 52 L. T. 549. *Refd.* Lury v. Pearson (1857), 1 C. B. N. S. 639.

**355. — Charge made by applicant for stay.**—Partnership articles between A. & B. provided that, if the business should not be conducted to the satisfaction of B., he should have power to give notice to A. to determine the partnership; the articles also contained an arbn. clause providing that any differences in relation to the partnership should be referred to arbn. B. having given notice to A. for the partnership to be determined, A. brought an action against B. alleging various charges of fraud, & claiming that the notice should be declared void, & that B. should be restrained from announcing the dissolution of the partnership, whereupon B. moved that the matters in question should be referred to arbn.:—*Held*: A. having failed to establish a *primâ facie* case of fraud, the matters in question should be referred to arbn. according to the articles.

In a case where fraud is charged, the ct. will in general refuse to send the dispute to arbn. if the party charged with the fraud desires a public inquiry. But where the objection to arbn. is by the party charging the fraud, the ct. will not necessarily accede to it, & will never do so unless a *primâ facie* case of fraud is proved.—*RUSSELL v. RUSSELL* (1880), 14 Ch. D. 471; 49 L. J. Ch. 268; 42 L. T. 112.

*Annotations*:—*Apprvd.* Walmsley v. White (1892), 67 L. T. 433, C. A. *Refd.* Minifie v. Railway Passengers Assoc. (1881), 44 L. T. 552; Belfield v. Bourne, [1894] 1 Ch. 521. *Mentd.* Vawdrey v. Simpson, [1896] 1 Ch. 166; Lapointe v. L'Assocn. de Bienfaisance, [1906] A. C. 535, P. O.; Green v. Howell, [1910] 1 Ch. 495, C. A.; Kelly v. National Soc. of Printers (1915), 113 L. T. 1055, C. A.; Cassel v. Inglis, [1916] 2 Ch. 211.

**356. — Partnership—Power of expulsion.**—Articles of partnership provided that a partner

#### PART I. SECT. 10, SUB-SECT. 6.—B.

**356 i. Discretion Partnership.]**—Where parties had agreed to refer any future difference that might arise under

a partnership between them to arbn., & one filed a bill for an account, injunction, & receiver, proceedings were stayed under C. L. P. Act, though an answer had been filed in the suit, & the bill

contained allegations of fraud.—*WHITE v. KIRBY* (1869), 2 Ch. Ch. 414.—*CAN.*

##### 356 ii.

##### Misappropriation.]

—Partnership articles provided that any

might be expelled for breach of certain acts therein specified, & that, if any question should arise whether a case had happened to authorise the exercise of this power, such question should be referred to arbn. Defts. served a notice on pltf. to determine the partnership on the ground that he had committed a breach within the expulsion clause, but gave no details of the particular act complained of. Pltf. thereupon brought an action to restrain defts. from acting on this notice, & defts. moved to stay proceedings & refer all matters in dispute to arbn.:—*Held*: (1) the preliminary question, whether or not the notice of expulsion was valid, was one more suitable for decision by the ct. than by an arbitrator; (2) as there was a suggestion of a fraudulent exercise of the power of expulsion, the ct., in the exercise of its discretion, ought not to stay proceedings & enforce a reference.—*BARNES v. YOUNGS*, [1898] 1 Ch. 414; 67 L. J. Ch. 263; 46 W. R. 332; 42 Sol. Jo. 269.

*Annotation*:—*Dbtd. Green v. Howell*, [1910] 1 Ch. 495, C. A.

**357. — Allegations must be relevant & material.**—Where the parties to a deed or instrument in writing agree to refer differences to arbn., & one of them brings an action against the other, the ct. will stay proceedings in the action & will not allow the action to proceed upon a mere suggestion of fraud against deft., but will require it to appear that pltf. means to rely upon some matter of fraud relevant & material to the issue.—*HIRSCH v. IM THURN (THURN)* (1858), 4 C. B. N. S. 569; 27 L. J. C. P. 254; 31 L. T. O. S. 201; 4 Jur. N. S. 587; 6 W. R. 605; 140 E. R. 1214.

*Annotation*.—*Refd. Minifie v. Railway Passengers Assce.* (1881), 44 L. T. 552.

**358. —**—Pltf. entered into a written contract with defts. for the purchase of a cargo of wheat. The contract contained a clause, "should any dispute arise, the contract not to be void, it being agreed by buyers & sellers to leave same to be settled by two London corn factors, respectively chosen with power to call an umpire, whose decision is to be final." Pltf. brought an action to recover his deposit on the ground of misdescription of the subject-matter of the contract, & applied to set aside the nomination of an arbitrator by defts. Some imputations of fraud in pltf.'s conduct were made by defts., but were denied by pltf.:—*Held*: the words of the contract were large enough to make these matters of difference, the settlement of which should be enforced by arbn. under C. L. P. Act, 1854, s. 11.

The existence of a claim for relief in equity is a strong reason for sending a case to arbitrators, since they form a ct. of equity for the determination of all matters in difference, as well as a ct. of law for the interpretation & settlement of the contract.—*ALEXANDER v. MENDEL* (1870), 22 L. T. 609.

**359. —**—A policy of life insurance contained a condition to the effect that all disputes should, if the co., or the assured, or his legal representatives required it, be referred to arbn. in the manner specified in Railway Passengers Assurance Co.'s

difference between the partners should be forthwith referred. Pltf. brought an action for dissolution of the partnership, alleging that deft. had misappropriated partnership moneys, & otherwise acted contrary to the partnership articles:—*Held*: a stay must be refused.—*LATIMER v. DUMICAN* (1910), 1 L. T. 150.—IR.

**c. — Fire loss — Wilfully generated claim.**—A policy was conditioned that the assured should furnish an account of the loss, & should, if required, prove the account, that, if any difference should arise, same should be submitted to arbn., & that, if a fraudulent claim were made, the policy

should be void. Goods having been burned, the assured informed the assurers of the fire, & furnished his estimate of loss, but was not required to prove same. The premises were examined on behalf of the assurers twenty-three days after the fire. An action was threatened & further correspondence took place. After writ issued defts. offered a sum less than that claimed, & for the first time suggested arbn. Defts. having applied that the proceedings be stayed under C. L. P. Amendment Act (Ireland), 1856, s. 14:—*Held*: the motion should not be granted. If it were intended by appots. to raise a question of fraud by reason of a wilfully exaggerated claim, the action

Act, 1864. By s. 33 the ct. or a judge was empowered to order a stay of any proceedings contrary to the Act. In an action on the policy, in which it appeared that the only issue to be tried was whether the death of M. was caused by accident or by natural causes:—*Held*: defts., in the absence of any suggestion of fraud, were entitled to a stay of proceedings under s. 33, notwithstanding the fact that the issue & the evidence in support of it might bear upon the conduct of M. & of those who attended him, & so might involve a question similar to that of fraud or no fraud.—*MINIFIE v. RAILWAY PASSENGERS ASSURANCE CO.* (1881), 44 L. T. 552.

*Annotation*:—*Distd. Trainor v. Phoenix Fire Insee.* (1891), 8 T. L. R. 37.

### C. Arbitrator disqualified.

**Who may be appointed arbitrator.**—See Part II., Sect. 1, Sub-sect. 1, *post*.

**Bias of arbitrator**—As ground for restraint of arbitration.]—See Nos. 424, 425, *post*.

—As ground for leave to revoke submission.]—See Nos. 515—517, *post*.

—As ground for removal of arbitrator.]—See Part II., Sect. 2, Sub-sect. 3, *post*.

—As ground for setting aside award.]—See Part. IV., Sect. 16, Sub-sect. 2, B., *post*.

—As defence to proceedings to enforce award.]—See Part IV., Sect. 19, Sub-sects. 2, B. (b), 3, B., 5, E., *post*.

**360. Clerk of one party.**—A contractor brought an action on an agreement between a local board & himself which contained a clause that any dispute between them should be referred to the decision of the clerk of the board. The board applied for a stay of proceedings. The judge at chambers declined to stay proceedings, on the ground that the fact that the reference was to the clerk of one of the parties was a "sufficient cause" against a reference:—*Held*: a reference ought to take place, though not to the clerk, & the case must stand over until the parties could agree as to a referee or again applied to the ct.—*PICKTHALL v. MERTHYR TYDVIL LOCAL BOARD* (1886), 2 T. L. R. 805.

**361. Surveyor of one party.**—Contracts with the Manchester Corp'n. contained clauses referring disputes to the city surveyor, who had general charge of the work. The contractor brought an action for sums alleged to be due under the contracts & for extras, & the determination of the claims raised questions as to the correctness of the surveyor's directions. On an application by the corp'n. for a stay of the action:—*Held*: (1) inasmuch as the surveyor's professional capacity was to some extent at stake, & the temptation to decide in support of his own view would be great, he must be treated as an unsuitable person to decide the matter; (2) this was a sufficient reason why the matter should not be referred; (3) a stay should be refused.—*NUTTALL v. MANCHESTER CORPN.* (1892), 8 T. L. R. 513.

*Annotations*:—*Expld. Jackson v. Barry Ry. Co.* [1893] 1 Ch. 238, C. A. *Consd. Re Donkin & Leeds & Liverpool*

should not be stayed.—*DOOLEY v. LONDON ASSURANCE* (1872), 6 L. L. T. 31.—IR.

**p. — Dispute within submission.**—*Semle*: although a dispute may be within the terms of a submission, yet if it involves the charge of fraud against one of the parties the ct. may refuse to stay proceedings.—*CARMICHAEL v. JOHNSTON* (1899), 17 N. Z. L. R. 565.—N.Z.

**q. — Action based upon fraud.**—On a motion to stay an action the ct. will refuse to grant same, when it is of opinion that a cause of action based upon fraud actual or constructive is *bona fide* sued upon.—*WORKMAN v. BELFAST HARBOUR COMRS.*, [1899] 2 I. R. 234.—IR.



**Sect. 10.—Stay of proceedings: Sub-sect. 6, C., D. & E.]**

Canal Proprietors (1893), Hudson, Bldg. Contracts, 4th ed., Vol. II., p. 239; *Eckersley v. Mersey Docks & Harbour Board*, [1894] 2 Q. B. 667, C. A.

**362. Servant of one party.]**—The rule which applies to a judge or other person holding judicial office, namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties, does not apply to an arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it. In order to justify the ct. in saying that such an arbitrator is disqualified from acting, circumstances must be shown to exist which establish at least a probability that he will in fact be biassed in favour of one of the parties in giving his decision.

Where, however, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill & competence in advising his employers in respect of the carrying out of the contract.—*ECKERSLEY v. MERSEY DOCKS & HARBOUR BOARD*, [1894] 2 Q. B. 667; 71 L. T. 308; 9 R. 827, C. A.

**Annotations:—***Appld.* *Bright v. River Plate Construction Co.*, [1900] 2 Ch. 835. *Refd.* *Ives & Barker v. Willans*, [1894] 2 Ch. 478, C. A.; *Aird (John) v. Bristol Corpn.*, *Bristol Corpn. v. Aird (John)* (1913), 77 J. P. 209, H. L.

**363. Engineer of one party.]**—An arbn. clause referring disputes to the engineer of one party cannot be disregarded on the ground that the engineer is in substance a judge in his own case, unless there is sufficient reason to suspect that he will act unfairly.—*IVES & BARKER v. WILLANS*, [1894] 2 Ch. 478; 63 L. J. Ch. 521; 70 L. T. 674; 42 W. R. 483; 10 T. L. R. 439; 38 Sol. Jo. 417; 7 R. 243, C. A.

**Annotations:—***Distd.* *Bartlett v. Ford's Hotel Co.*, [1895] 1 Q. B. 850, C. A. *Expld.* *Blackwell v. Derby Corpn.* (1909), 75 J. P. 129, C. A. *Distd.* *Bristol Corpn. v. Aird (J.)*, [1913] A. C. 241, H. L.; *Parker, Gaines v. Turpin*, [1918] 1 K. B. 358. *Refd.* *Zalinoff v. Hammond*, [1898] 2 Ch. 92; *Freeman v. Chester R. D. Co.*, [1911] 1 K. B. 783, C. A.

**364. —.]**—The parties to a building contract agreed to refer disputes to H., the engineer of defts. The engineer wrote to plffs. saying their claims were outrageous, & plffs. alleged that he had incapacitated himself from acting as arbitrator by reason of bias, & brought an action:—*Held*: (1) there was no reason why the agreed arbitrator should not adjudicate in a fair manner between the parties merely because he had given the opinion above stated; (2) the action must be stayed.—*CROSS v. LEEDS CORPN.* (1902), Hudson, Bldg. Contracts, 4th ed., Vol. II., p. 339, C. A.

**Annotation:—***Expld.* *Blackwell v. Derby Corpn.* (1909), 75 J. P. 129, C. A.

**365. —.]**—Where, subsequent to the signing of a contract for works between a local authority & a contractor, under which the engineer of the local authority is to be arbitrator, there are allegations of unreasonable conduct on the part of the arbitrator, & that is the real dispute between the parties, there is sufficient reason within the Act of

1889, s. 4, why the matter should not be referred to him; but it is not sufficient that the arbitrator is the engineer of one party, since the contractor has made it a part of his contract that he shall not have an impartial arbitrator.—*BLACKWELL (R. W.) & Co., LTD. v. DERBY CORPN.* (1909), 75 J. P. 129, C. A.

**Annotations:—***Expld.* *Freeman v. Chester R. D. Co.*, [1911] 1 K. B. 783, C. A.; *Aird (John) v. Bristol Corpn.*, *Bristol Corpn. v. Aird (John)* (1913), 77 J. P. 209, H. L.

**366. —.]**—Plffs., contractors, sued defts. for large sums alleged to be due to them under a contract for the construction of sewers. The contract contained an arbn. clause in the widest possible terms, referring all disputes under the contract to the engineer. Defts. alleged that the works had not been completed to the satisfaction of the engineer, & he had not given a certificate to that effect as provided by the contract, & that they had called on plffs. to make good certain work which was defective. Plffs. alleged that the works were constructed under the supervision of the engineer, & had been passed by him as satisfactory, that in certain correspondence he had admitted that the period of maintenance had expired, & that he had expressed a concluded opinion that the work as to which the dispute arose was defective. The engineer denied these allegations. On a summons by defts. to stay the proceedings:—*Held*: the action ought to be allowed to proceed because, since the conduct of the engineer was challenged in the action, his cross-examination was essential to the determination of the question between the parties.—*FREEMAN & SONS v. CHESTER RURAL DISTRICT COUNCIL*, [1911] 1 K. B. 783; 80 L. J. K. B. 695; 104 L. T. 368; 75 J. P. 132, C. A.

**Annotation:—***Expld.* *Aird v. Bristol Corpn.* (1912), 28 T. L. R. 278, C. A.

**367. —.]**—Where a contractor executes works under a contract containing a provision for the reference of disputes to the engineer of the other party to the contract, & upon the settlement of the final account there arises a *bonâ fide* dispute of a substantial character between the contractor & the engineer involving a probable conflict of evidence between them, the fact that the engineer, without any fault of his own, must necessarily be placed in the position of judge & witness is a sufficient reason why the matter should not be referred in accordance with the contract, & the ct. will refuse to stay an action by the contractor for payment of the account.—*BRISTOL CORPN. v. AIRD (JOHN) & Co.*, [1913] A. C. 241; 82 L. J. K. B. 684; 108 L. T. 434; 77 J. P. 209; 29 T. L. R. 360, H. L.

**368. Lloyd's committee acting in dual capacity.]**—The masters of two steamships entered into an agreement for salvage services to be performed to a third steamship for a fixed sum, & in the event of any dispute arising as to the adequacy or otherwise of such sum the remuneration was to be fixed by the Committee of Lloyd's; & it was also provided that the Committee might itself object to the sum named in the agreement. The owners of the salving steamers instituted salvage actions in the Admlty. Ct., whereupon defts. applied to have the actions stayed:—*Held*: the fact that the Committee of Lloyd's were to be the arbitrators,

**PART I. SECT. 10, SUB-SECT. 6.—C.**

**362 i. Servant of one party.—Arbitrator becoming.]**—T. entered into a contract to act as agent for D. The contract contained an agreement to refer to arbitrators "any question or dispute arising as to the meaning or carrying out of these presents." T. having determined his agency, D. appointed T.'s arbitrator to the vacancy with T.'s knowledge & assent. T. instituted pro-

ceedings to recover certain sums due on commission & for money paid. On motion by D. to stay proceedings & to compel T. to have resort to the arbitrators:—*Held*: in the altered relations of T.'s arbitrator to D., it would be inequitable to suspend T.'s right of action or to compel him to have resort to the referees named.—*THOMPSON v. DAWSON & Co.* (1893), 27 L. T. 94.—*IR.*

**363 i. Engineer of one party.]**—A

clause in a contract provided that any dispute as to the meaning of the agreement, etc., should be referred to the engineer. A dispute arising, the contractor brought action:—*Held*: although the engineer had expressed his views, yet, as he swore that he would give plff.'s contention fair consideration should the matter come before him as arbitrator, the action must be stayed.—*SHERWOOD v. BALCH* (1898), 30 O. R. 1.—*CAN.*



& also had the right to send the matter to arbn., was a good ground for refusing to stay the action.—*THE CITY OF CALCUTTA* (1898), 79 L. T. 517; 15 T. L. R. 108; 8 Asp. M. L. C. 442, C. A.

*D. Question of Law submitted.*

**369. Only question one of law.]**—To an application for a stay of proceedings under C. L. P. Act, 1854, s. 11, on the ground that the instrument upon which the action was brought contained a stipulation that “if any difference should arise between the parties, either in principle or detail,” the same should be referred to arbn.:—*Held*: it was no answer that the difference was one of law as to the construction of the instrument.—*RANDEGGER v. HOLMES* (1866), L. R. 1 C. P. 679.

*Annotations*:—*Folld. Minifie v. Railway Passengers Assoc.* (1881), 44 L. T. 552, D. C. *Mentd. Willesford v. Watson* (1872), 42 L. J. Ch. 90; *Selby v. Whitbread Co.*, [1917] 1 K. B. 736.

**370. —.]**—The rules of a marine insurance assocn. provided that disputes should be referred to arbn.:—*Held*: the assured was not bound to submit a legal point to the decision of arbn. before suing in equity.—*ALEXANDER v. CAMPBELL* (1872), 41 L. J. Ch. 478; 27 L. T. 25; 1 Asp. M. L. C. N. S. 373; *reversd.* on another point, 27 L. T. 462, C. A.

**371. —.]**—The exors. of A., a deceased partner, sued the surviving partners & the exors. of B., a partner who had survived A. but died afterwards, to recover payment of A.’s share in the partnership assets, according to the partnership deed. The deed contained an agreement to refer all disputes to arbn. A statement of claim had been delivered, but before delivering their defence defts., the exors. of B., took out a summons to stay proceedings in the action, pursuant to C. L. P. Act, 1854, s. 11, on the ground of the agreement to refer to arbn. The only question was one of law as to the construction of the partnership deed:—*Held*: (1) under the Act of 1889, s. 4, the ct. had a discretion whether to stay proceedings or not, & it would not exercise that discretion by staying proceedings in a case where the only question was one of law which, if sent to the arbitrator, ought to be referred back by him to the ct. under s. 19 of the Act; (2) the summons should stand over until appets. had put in their statement of defence, in order that any party might then apply to have the question of law decided.—*Re CARLISLE, CLEGG v. CLEGG* (1890), 44 Ch. D. 200; 59 L. J. Ch. 520; 62 L. T. 821; 38 W. R. 638.

*Annotation*:—*Reid. Rowe v. Crossley* (1912), 108 L. T. 11, C. A.

**372. Questions of law depending on numerous facts.]**—Pltf. ordered certain machinery from defts. under a contract which contained an arbn. clause, neither side to appear before the arbitrator by solr. or counsel. Pltf. brought an action (*inter alia*) for damages for negligence & breach of contract & for trespass in setting up & testing the machinery. Defts. moved to stay the proceedings:—*Held*: (1) since the decision of the points of law

involved depended on numerous facts, the matter should go to the arbitrator, who, if necessary, could state the facts in a special case; (2) the action should be stayed as to the contract, but should go on as to the claim in trespass.—*ROWE BROTHERS & CO., LTD. v. CROSSLEY BROTHERS, LTD.* (1912), 108 L. T. 11; 57 Sol. Jo. 144, C. A.

**373. Questions of law inter alia.]**—A life insurance policy provided that it should not cover death by war, & the policy contained an arbn. clause. The assured lost his life by an explosion which caused the loss of a battleship, & his extrix. brought an action on the policy against the insurance co. Defts. applied to have the action stayed. Pltf. contended that as serious questions of law were involved, the case ought not to be sent to arbn.:—*Held*: the ct. was not justified in refusing the application merely because there were important questions of law to be considered, & as no sufficient reason had been shown why the contract to submit to arbn. should not be observed, the action must be stayed.—*LOCK v. ARMY, NAVY & GENERAL ASSURANCE ASSOCN., LTD.* (1915), 31 T. L. R. 297.

**374. Difficult questions of law.]**—*CLOUGH v. COUNTY LIVE STOCK INSURANCE ASSOCN., LTD.*, No. 345, *ante*.

*E. Subject-matter of Dispute.*

**375. Existing differences.]**—By a memorandum it was agreed that all matters in difference in relation to the W. Railway between A. & B. & between A. & the W. Ry. Co., & also between C. & B. & between C. & the W. Ry. Co., whether retrospective or prospective, present or future, should be referred to an arbitrator. This memorandum was signed by B. for himself, & also as agent for the co. A formal deed of reference was afterwards prepared & executed by B., but by none of the other parties:—*Held*: assuming the agreement to be within C. L. P. Act, 1854, s. 11, at all events it was not one which the ct. ought in its discretion to enforce by staying the proceedings in an action brought by B. against A., in respect of a matter in difference included within it.—*MASON v. HADDAN* (1859), 6 C. B. N. S. 526; 33 L. T. O. S. 163; 141 E. R. 562.

*Annotation*:—*Folld. Randell v. Thompson* (1876), 1 Q. B. D. 748, C. A.

**376. Matters in dispute not within submission.]**—Articles of partnership between pltf. & other persons for performing a contract contained an agreement that any dispute between the partners should be settled by arbn., but there was no agreement that the submission to arbn. might be made a rule of ct. One of the partners became a liquidating debtor & deft. was appointed his trustee, & he elected to carry on the contract. Deft. claimed to have purchased the shares of pltf. & other partners in the undertaking. Pltf. brought an action against deft. asking for an account of the partnership dealings. The main questions at issue were whether the shares of the other partners were purchased on behalf of pltf. & deft. or of deft. alone, & whether deft. had purchased the share of pltf.

**PART I. SECT. 10, SUB-SECT. 6.—D.**

**374 i. Difficult questions of law.]**—On a motion to stay an action the ct. will not stay same, where there are serious & difficult questions of law involved not proper to be submitted to the determination of an arbitrator.—*WORKMAN v. BELFAST HARBOUR COMRS.*, [1899] 2 I. R. 234.—*IR.*

**374 ii. —.]**—An agreement to refer disputes arising out of a contract does not entitle one of the parties to insist on an academic question of interpretation of the contract, which could not be brought before a ct. of law, being referred

to arbn.—*TRANSVAAL MINES LABOUR CO., LTD. v. ROBINSON GROUP OF MINES* (1911), W. L. D. 191.—*S. AF.*

**PART I. SECT. 10, SUB-SECT. 6.—E.**

**376 i. Matters in dispute not within submission.]**—A deed of partnership provided that all matters in dispute should be referred to arbn. The partnership became dissolved by the marriage of A. A. filed a bill in Ch. against B., who had persisted in carrying on the business, to wind up & take account under the ct., whereupon B. moved that the proceedings in the cause should

be stayed pursuant to C. L. P. Amendment Act (Ireland), 1856, s. 14:—*Held*: the matters in dispute were not within the arbn. clause, & the proceedings should not be stayed.—*DENNEHY v. JOLLY* (1875), 9 I. L. T. 3.—*IR.*

**376 ii. —.]**—In an action on a policy, defts. moved to stay the proceedings, on the ground that the policy was subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbn., & that the insured should not be entitled to



## PART I.—THE SUBMISSION.

**382. Matter not within powers of arbitrator.]—**Pltf. entered into a contract, which contained an arbn. clause, to do certain sewerage & other works for defts. After the work had been commenced he sought a rescission of the contract & brought an action claiming (*inter alia*) a declaration that the contract was void. Defts. took out a summons to stay the action on the ground that "any question, dispute, or difference" was to be settled by arbn.:—*Held*: the issue raised by the action being with reference to a matter wholly outside the powers of the arbitrator to deal with was not within the submission to arbn. in the contract, & pltf. was entitled to proceed to trial to have that issue decided by the ct.—*MONRO (MUNRO) v. BOGNOR URBAN DISTRICT COUNCIL*, [1915] 3 K. B. 167; 84 L. J. K. B. 1091; 112 L. T. 969; 79 J. P. 286; 59 Sol. Jo. 348; 13 L. G. R. 431, C. A.

**383. Matter within scope of arbitration.]—**A mining lease contained a clause providing that if any dispute, question or difference should arise between the parties, "touching these presents, or any clause, matter or thing herein contained, or the construction hereof, or the working of the mines, or any compensation or satisfaction to be paid or made, or any other thing to be done under the covenants by the lessees herein contained, or touching the rights, duties & liabilities of either party in connection with the premises," the matter in difference should be referred to two arbitrators, or their umpire, pursuant to, & so as in all respects to conform to the provisions in that behalf contained in C. L. P. Act, 1854. The lessors having filed a bill to restrain the lessees from working adjoining mines by means of a shaft sunk on the lessors' land, some of defts. applied to stay proceedings in the suit, & to refer the matter in difference to arbn. under the above-mentioned clause:—*Held*: (1) the subject-matter of the suit was within the arbn. clause; (2) it was not necessary for all defts. to join in the application to stay proceedings in the suit.—*WILLESFORD v. WATSON* (1873), 8 Ch. App. 473; 42 L. J. Ch. 447; 28 L. T. 428; 37 J. P. 548; 21 W. R. 350, L.C. & L.JJ.

*Annotations*:—*Folld. Law v. Garrett* (1878), 8 Ch. D. 26, C. A. *Expld. Percy v. Young* (1879), 14 Ch. D. 200, C. A. *Consd. Compagnie Du Seneegal v. Woods* (1883), 53 L. J. Ch. 166; *Lyon v. Johnson* (1889), 40 Ch. D. 579. *Refd. Plews v. Baker* (1873), L. R. 16 Eq. 564; *Gillett v. Thornton* (1875), L. R. 19 Eq. 599; *Wade-Gery v. Morrison* (1877), 37 L. T. 270; *Russell v. Russell* (1880), 14 Ch. D. 471; *Minifie v. Railway Passengers Assoc.* (1881), 44 L. T. 552; *De Ricci v. De Ricci*, [1891] P. 378; *Rowe v. Crossley* (1912), 108 L. T. 11, C. A.; *Hickman v. Kent or Romney Marsh Sheep-Breeders' Assoc.*, [1915] 1 Ch. 881. *Mentd. Brighton Marine Palace & Pier Co. v. Woodhouse* (1893), 62 L. J. Ch. 697.

**384. Claim for extras.]—**A sewerage contract provided that no claim for extras should be allowed unless submitted to the engineers within a given time; that the engineers should be sole judges as to the method of carrying out the works & the

materials to be used in the construction thereof, & that in case of any dispute arising at any time, whether during the progress of the works or after completion, as to certain specified matters not including extras, & as to all other matters therein left to the decision of the engineers, their decision should be final & binding on all parties to the contract:—*Held*: a claim for extras was not within the scope of the arbn. clause, & an action by the contractor for the amount of the claim ought to be allowed to proceed.—*TAYLOR v. WESTERN VALLEYS (MONMOUTHSHIRE) SEWERAGE BOARD* (1911), 75 J. P. 409, C. A.

**385. Claim for rectification.]—**By a deed dated in 1901, pltf. co. leased its undertaking, business & goodwill to M. Co. for a term of twenty-one years, subject to certain powers of determination & renewal therein mentioned. The deed contained a proviso giving an option to M. Co. & L. Co., or either of them, of purchasing the undertaking of pltf. co. The deed also contained an arbn. clause. In 1903 deft. co. was formed to take over the undertakings & assets of M. Co. & L. Co. Questions having arisen with reference to the option to purchase given by the deed of 1901, pltf. co. brought an action claiming the decision of questions as to the construction of the option to purchase & also rectification of the lease. On a motion by deft. co., under the Act of 1889, that the proceedings in the action might be stayed:—*Held*: (1) the question as to rectification of the lease of 1901 was not one which fell within the arbn. clause; (2) the question as to the construction of the option to purchase & rectification were so intimately connected that it was convenient that they should be dealt with together by the ct.; (3) the application to stay the proceedings in the action must be refused.—*PRINTING MACHINERY CO., LTD. v. LINOTYPE & MACHINERY, LTD.*, [1912] 1 Ch. 566; 81 L. J. Ch. 422; 106 L. T. 743; 28 T. L. R. 224; 56 Sol. Jo. 271.

**Claim for wrongful dismissal.]—***See* Nos. 148—152, 307, *ante*.

**386. Partnership dispute—Power to award dissolution.]—**Where articles of partnership contain a clause referring all matters in difference between the partners to arbn., an arbitrator has power to decide whether or not the partnership shall be dissolved, & to award a dissolution, though the judge has full discretion to determine, on a motion to stay proceedings under the Act of 1889, s. 4, whether the matters in dispute shall be tried in the action or referred to arbn.—*VAWDREY (VAUDREY) v. SIMPSON*, [1896] 1 Ch. 166; 65 L. J. Ch. 369; 44 W. R. 123; 40 Sol. Jo. 98.

*Annotation*:—*Mentd. Machin v. Bennett*, [1900] W. N. 146.

*See, further, PARTNERSHIP.*

**Disputes between companies & their members.]—***See* COMPANIES.

**383 i. Matter within scope of arbitration.]—**A contract provided (*inter alia*): "Disputes (if any) to be settled by arbn." Pltf. brought an action alleging that deft. had failed to deliver. Dft. applied to stay proceedings in the action & to refer the matters in dispute to arbn.:—*Held*: the dispute was within the arbn. condition, & deft. was entitled to have the action stayed & the matters in dispute referred to arbn.—*WADDELL & SONS, LTD. v. GOLLIN & CO. PROPRIETARY, LTD.* (1912), 31 N. Z. L. R. 1180.—N.Z.

**383 ii. —But inseparably linked with other matters.]—**If a claim falls within the terms of an agreement to submit to arbn., but it is joined with a number of other claims not so falling in such a

manner that the claims are not divisible, the ct. will refuse to refer the claim to arbn.—*TRANSVAAL MINES LABOUR CO., LTD. v. ROBINSON-GROUP OF MINES* (1911), W. L. D. 191.—S. AF.

**383 iii. —Dispute arising out of architect's certificate.]—**A contract provided for payment on architect's certificates & that the architect's decision should be final subject to arbn. as hereinafter provided, & made provision for the appointment of arbitrators. On the completion of the contract, defts. admitted their obligations except as to \$512, & in an action brought by pltf. to recover the balance, successfully contended before the referee in chambers that the action should be stayed under Arbn. Act, s. 6. On appeal:—

*Held*: the parties had by the contract provided a tribunal to decide disputes arising from the decisions or rulings of the architect, & the order of the referee staying the action was right.—*GUNN v. HUDSON'S BAY CO.* (1915), 28 W. L. R. 575.—CAN.

**a. Claim for trespass.]—**A corpn entered upon pltf.'s lands & took timber therefrom for road repairs. They did not obtain or apply for permission or give notice before entering, & pltf. brought an action for the trespass & conversion of the timber:—*Held*: it was not a case for arbn., & the action should not be stayed pending an arbn., under Municipal Clauses Act.—*COOK v. NORTH VANCOUVER* (1911), 18 W. L. R. 349; 16 B. C. R. 129.—CAN.



*Sect. 10.—Stay of proceedings: Sub-sect. 6, F. & G.; Sub-sect. 7.]*

*F. When Arbitration Clause only applies to Part of Dispute.*

**387. Matters in dispute only partly within clause.]**

—A mining lease contained a clause for referring to arbn. all questions to arise between lessors & lessees "relative to or concerning the indenture, or any covenant, clause, matter or thing therein contained." After bill filed by the lessors, to compel the lessees to work the mine in a particular manner, notices to refer were served by the lessees. Upon motion to stay proceedings:—*Held*: (1) the case came within C. L. P. Act, 1854, s. 11, but the sect. gave the ct. a discretion; (2) the ct. in its discretion refused to stay proceedings, on the ground that the notices to refer related to other matters besides those the subject of the suit, & that questions arose in the suit which did not come within the clause in the lease.—*WHEATLEY v. WESTMINSTER BRYMBO COAL & COKE CO., LTD.* (1865), 2 Drew. & Sm. 347; 11 L. T. 728; 11 Jur. N. S. 232; 13 W. R. 400; 62 E. R. 653.

*Annotation*:—*Consd. Willesford v. Watson* (1871), L. R. 14 Eq. 572.

**388. Isolated point—Main dispute incapable of reference.]**—A partnership deed between P. & B. contained a clause providing for reference of all disputes & questions arising during or after the determination of the partnership, so that every such dispute or question should be so referred within forty days next after the same should arise. After the death of P. various questions arose between B. & the representatives of P. One only of these questions arose within forty days before the first demand for reference was made. An action for account having been brought by the representatives of P. against B., they moved for the appointment of an *interim* receiver & manager, on the ground that B. had set up another shop on his own account, & induced the customers of the old shop to go to the new one, & had otherwise acted contrary to the interests of the partnership business. B. made a cross-motion for stay of proceedings & reference of all questions to arbn.:—*Held*: the ct. would not, in the exercise of its discretion, order the reference to arbn. of an isolated question when the main points in dispute were incapable of arbn.—*YOUNG v. BUCKETT* (1882), 51 L. J. Ch. 504; 46 L. T. 266; 30 W. R. 511.

**389. Disputes under lease & agreement—Former only containing arbitration clause.]**—By a lease the lessor covenanted to supply the lessee with a certain quantity of water per day. The lease contained a clause providing that if any difference should arise between the parties touching the lease or anything therein contained, or the construction thereof, or in any way connected with the lease or the operation thereof, it should be referred to arbn. Some years afterwards, disputes having arisen between the parties as to the water supply,

a written agreement was entered into binding the lessor to take certain steps with a view to securing a better supply, & in some points varying the rights of the lessee as to the supply. Afterwards the lessee commenced an action alleging that the steps mentioned in the agreement had not been taken, & also alleging that the lessor had not supplied the stipulated quantity of water, & claiming an inquiry as to the damages sustained by pltf. "by reason of the matters aforesaid." Deft. moved to stay proceedings in the action & refer the dispute to arbn.:—*Held*: (1) pltf. could in the action claim damages for breaches of the agreement as well as for breaches of the covenant in the lease, & as the arbn. clause only applied to matters arising under the lease, it did not cover the whole subject-matter of the action; (2) it would not be right to split up the action by referring to arbn. the matters arising under the lease, leaving the action to proceed as to the other matters; (3) the application must be refused.—*TURNOCK v. SARTORIS* (1889), 43 Ch. D. 150; 62 L. T. 209; 38 W. R. 340, C. A.

*Annotations*:—*Distd. Ives & Barker v. Willans*, [1894] 2 Ch. 478, C. A. *Consd. Rowe v. Crossley* (1912), 108 L. T. 11, C. A.

**390. Small portion of relief claimed not within arbitration clause.]**—The fact that a small portion of the relief claimed is not within the scope of the arbn. clause is not in itself a sufficient reason for refusing to stay proceedings, where the main subject of the action is within the arbn. clause.

& *BARKER v. WILLANS*, [1894] 2 Ch. 478; 63 L. J. Ch. 521; 70 L. T. 674; 42 W. R. 483; 10 T. L. R. 439; 38 Sol. Jo. 417; 7 R. 243, C. A.

*Annotations*:—*Distd. Bartlett v. Ford's Hotel Co.*, [1895] 1 Q. B. 850, C. A. *Expld. Blackwell (R. W.) v. Derby Corpn.* (1909), 75 J. P. 129, C. A. *Distd. Bristol Corpn. v. Aird (J.)*, [1913] A. C. 241, H. L.; *Parker, Gaines v. Turpin*, [1918] 1 K. B. 358. *Refd. Zalinoff v. Hammond*, [1898] 2 Ch. 92; *Freeman v. Chester R. D. Co.*, [1911] 1 K. B. 783, C. A.

**391. Chancery practice in allowing partial stay.]**

—*Qu.*: whether, where an action embraces several items, all within the reference clause, as to some of which the arbitrator is disqualified from acting, the ct. should allow the action to proceed as to these items & allow the remaining items to be referred.

It is the practice of the Ch. Div. to stay an action as to one matter in dispute & at the same time to allow it to proceed as to another, notwithstanding that both matters are within the reference, & in many cases that is a desirable course (*LORD PARKER OF WADDINGTON*). — *BRISTOL CORPN. v. AIRD (JOHN) & CO.*, [1913] A. C. 241; 82 L. J. K. B. 684; 108 L. T. 434; 77 J. P. 209; 29 T. L. R. 360, H. L.

*G. When Relief asked outside Arbitrator's Powers.*

**392. Arbitrator unable to award ejectment.]**—A farming lease contained an agreement to refer to arbn. all matters in dispute "touching these presents, or any clause, matter, or thing herein

**PART I. SECT. 10. SUB-SECT. 6.—F.**

**387 i. Matters in dispute only partly within clause.]**—A contract between pltf. & defts. contained a clause providing for the reference of disputes to an arbitrator. While the works were in progress, defts. directed certain work to be suspended & additional work to be executed. Pltf. commenced an action to recover damages for the work suspended & for payment for the additional work. Defts. applied for a stay under Judicature Act, s. 27, & for a compulsory order of reference:—*Held*: the claim for damages was clearly outside the submission, & the remaining

items not being satisfactorily shown to be within it & all the items being so far connected as to make it doubtful whether complete justice would be done to the parties, unless all were disposed of by the same tribunal, the application must be refused.—*MOYERS v. SOADY* (1886), 18 L. R. Ir. 499.—*IR.*

**b. Substantial portion of action founded on negligence.]**—P. was insured with a co. against liability for injuries caused to third parties through the negligence of his servants, it being a condition precedent to his right to sue that he should accept arbn. If required. A sum having been awarded against him in respect of a cause of action con-

templated by the policy, P. charged that the co. had been guilty of negligence in the conduct of the defence, & refusing arbn., sought in an action to recover from the co. the full sum, together with costs. The co. was willing to pay the amount of the policy with the costs, if accepted in final settlement, otherwise they reserved the right to defend as to the entire amount. Upon a motion by the co. under C. L. P. Amendment Act (Ireland), 1856, s. 14:—*Held*: as the substantial portion of the action was founded upon negligence, the ct. should not stay the proceedings.—*PATTERSON v. NORTHERN ACCIDENT INSURANCE CO., LTD.*, [1901] 2 L. R. 262.—*IR.*

contained, or the construction hereof, or anything to be done under the covenants or agreements herein contained, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties, or liabilities of either party in connection with the premises." By a supplemental deed of even date, which contained no arbn. clause, the lessor released the lessee from the observance of certain of the restrictive covenants in the lease. The assignees of the lessor having brought ejectment for alleged breaches of covenant, deft. moved for a stay of proceedings & that the matter might be referred:—*Held*: it was no objection to the application that an arbitrator could not award ejectment, for the ct. could give effect, if necessary, to the finding of the arbitrator in that respect.—*WADE-GERY v. MORRISON* (1877), 37 L. T. 270.

*Annotation*:—*Distd.* Turnock v. Sartoris (1889), 43 Ch. D. 150, C. A.

**393. Arbitrator unable to determine construction & effect of agreement.]**—By a lease the lessor covenanted to supply the lessee with a certain quantity of water per day. The lease contained a clause providing that if any difference should arise between the parties touching the lease or anything therein contained, or the construction thereof, or in any way connected with the lease or the operation thereof, it should be referred to arbn. Some years afterwards, disputes having arisen between the parties as to the water supply, a written agreement was entered into binding the lessor to take certain steps with a view to securing a better supply, & in some points varying the rights of the lessee as to the supply. Afterwards the lessee commenced an action alleging that the steps mentioned in the agreement had not been taken, & also alleging that the lessor had not supplied the stipulated quantity of water, & claiming an inquiry as to the damages sustained by pltf. "by reason of the matters aforesaid." Deft. moved to stay proceedings in the action, & refer the disputes to arbn.:—*Held*: even if the arbn. clause could be construed so widely as to cover all the matters in respect of which damages were claimed, it would not be proper to refer them to an arbitrator, as he would have no power to determine the construction of the agreement & its effect upon the provision of the lease, & the application must be refused.—*TURNOCK v. SARTORIS* (1889), 43 Ch. D. 150; 62 L. T. 209; 38 W. R. 340, C. A.

*Annotations*:—*Distd.* Ives & Barker v. Willans, [1894] 2 Ch. 478, C. A. *Refd.* Rowe v. Crossley (1912), 108 L. T. 11, C. A.

**394. Arbitrator unable to grant injunction.]**—A mining lease contained a clause that whenever any dispute should arise touching (*inter alia*) the working of the mine, or compensation to be paid, or anything to be done under the covenant, or touching the rights or duties of either party, the matter in difference should be referred to two arbitrators or their umpire in conformity with C. L. P. Act, 1854. The ct., under s. 11, on defts.' motion,

stayed proceedings on a bill filed by the lessors praying for an injunction to restrain workings alleged to be improper, & an account, & directed a reference.—*WILLESFORD v. WATSON* (1873), 8 Ch. App. 473; 42 L. J. Ch. 447; 28 L. T. 428; 37 J. P. 548; 21 W. R. 350, L.C. & L.JJ.

*Annotations*:—*Consd.* & *Folld.* Law v. Garrett (1878), 8 Ch. D. 26, C. A. *Distd.* Piercy v. Young (1879), 14 Ch. D. 200, C. A. *Consd.* Russell v. Russell (1880), 14 Ch. D. 471; *Compagnie Du Senegal v. Woods* (1883), 53 L. J. Ch. 166. *Refd.* Plews v. Baker (1873), L. R. 16 Eq. 564; *Gillett v. Thornton* (1875), L. R. 19 Eq. 599; *Wade-Gery v. Morrison* (1877), 37 L. T. 270; *Minifie v. Railway Passengers Assoc.* (1881), 44 L. T. 552; *Lyon v. Johnson* (1889), 40 Ch. D. 579; *Rowe v. Crossley* (1912), 108 L. T. 11, C. A.; *Hickman v. Kent or Romney Marsh Sheep-Breeders' Assocn.* [1915] 1 Ch. 881. *Mentd.* De Ricci v. De Ricci, [1891] P. 378; *Brighton Marine Palace & Pier Co. v. Woodhouse* (1893), 62 L. J. Ch. 697.

### S-SECT. 7.—AT WHAT STAGE APPLICATION MAY BE MADE—"STEP IN PROCEEDINGS."

**395. Summons for particulars—Order for interrogatories.]**—Pltf. brought an action for balance of an account for work done under a contract, which contained a proviso that all disputes should be referred to arbn. Defence & counterclaim were delivered. Pltf. took out a summons for particulars of the counterclaim, which was afterwards amended by deft. Pltf. then obtained leave to deliver interrogatories, & afterwards gave notice that he discontinued the action. Subsequently he took out a summons under the Act of 1889, s. 4, for a stay of the proceedings under the counterclaim:—*Held*: (1) the summons for particulars of the counterclaim was a "step in the proceedings"; (2) the obtaining an order for leave to administer interrogatories was a step in the new proceedings commenced by delivery of the amended counterclaim.—*CHAPPELL v. NORTH*, [1891] 2 Q. B. 252; 60 L. J. Q. B. 554; 65 L. T. 23; 40 W. R. 16; 7 T. L. R. 563, D. C.

*Annotations*:—*Apld.* Brighton Marine Palace & Pier v. Woodhouse, [1893] 2 Ch. 486. *Consd.* Ives & Barker v. Willans, [1894] 1 Ch. 68. *Folld.* County Theatres & Hotels v. Knowles, [1902] 1 K. B. 480, C. A. *Refd.* Bartlett v. Ford's Hotel Co., [1895] 1 Q. B. 850, C. A.

**396. Security for costs.]**—Deft. to an action, who was a party with pltf. to a submission to refer the subject-matter to arbn., at the time of entering an appearance to the action applied for a statement of claim, & also took out a summons for security for costs. An order was made directing the security to be given or the action dismissed, & deft. shortly after took out a summons to stay proceedings under the Act of 1889, s. 4:—*Held*: deft., having applied for security for costs, had taken a "step in the proceedings" & was not entitled to a stay of the proceedings under that sect.—*ADAMS v. CATLEY* (1892), 66 L. T. 687; 40 W. R. 570; 36 Sol. Jo. 525.

*Annotations*:—*Refd.* Ives & Barker v. Willans, [1894] 1 Ch. 68. *Mentd.* Brighton Marine Palace & Pier Co. v. Woodhouse (1893), 62 L. J. Ch. 697.

### PART I. SECT. 10, SUB-SECT. 7.

**c. Before statement of defence delivered.]**—An application under C. L. P. Act, 1854, s. 11, to stay proceedings in an action for the purpose of compelling pltf. to carry out an agreement to submit the matters in dispute to arbn. must be made before filing the statement of defence.—*NORTHERN ELEVATOR CO. v. MCLENNAN* (1902), 14 Man. R. 147; 22 C. L. T. 302.—*CAN.*

**d. —.]**—W. brought an action against an insurance co. for the amount of a loss. The policy contained the usual arbn. clause. The co. entered an appearance, pleadings were delivered & issue was joined. After delivery of the

statement of defence, the co. served upon W. notice of the appointment of an arbitrator:—*Held*: the co., by delivering a defence in the action, had placed itself in such a position that the action could not be stayed.—*RE HUDSON'S BAY FIRE INSURANCE CO. & WALKER* (1914), 27 W. L. R. 218.—*CAN.*

**e. —.]**—Applications to stay proceedings under Arbn. Act, R. S. O., 1914 (c. 65), s. 8, must be made after appearance & before delivery of any pleadings.—*BULL v. STEWART* (1916), 27 O. W. R. 170.—*CAN.*

**f. Proceedings to stay action.]**—Any proceedings taken by a party to a suit

to stay legal proceedings under Arbn. Act, s. 19, are not "steps in the proceedings."—*RALLI v. NOOR MAHOMED* (1906), 1 L. L. R. 31 Bom. 236.—*IND.*

**g. Application for time to file statement.]**—Defts. in an action applied for further time to file their written statement & obtained it. Subsequently they applied for a reference to arbn. & stay of proceedings:—*Held*: an application for further time was a "step in the proceedings" within Arbn. Act, s. 19, & the application for reference to arbn. could not be maintained.—*SARAT KUMAR ROY v. CALCUTTA CORPN.* (1907), 1 L. R. 34 Calc. 443.—*IND.*



*Sect. 10.—Stay of proceedings: Sub-sects. 7 & 8.*  
*Sect. 11.]*

**397. Notice requiring statement of claim.]—**A notice by deft. requiring a statement of claim is not a "step in the proceedings" which debars deft. from applying for a stay under the Act of 1889, s. 4.—*IVES & BARKER v. WILLANS*, [1894] 2 Ch. 478; 63 L. J. Ch. 521; 70 L. T. 674; 42 W. R. 483; 10 T. L. R. 439; 38 Sol. Jo. 417; 7 R. 243, C. A.

*Annotations:—***Consd.** *Bartlett v. Ford's Hotel Co.*, [1895] 1 Q. B. 850, C. A. **Distd.** *Parker, Gaines v. Turpin*, [1918] 1 K. B. 358. **Refd.** *Zalinoff v. Hammond*, [1898] 2 Ch. 92; *Blackwell (R. W.) v. Derby Corpn* (1909), 75 J. P. 129, C. A.; *Bristol Corpn. v. Aird (John)*, [1913] A. C. 241, H. L. **Mentd.** *Freeman v. Chester R. D. C.*, [1911] 1 K. B. 783, C. A.

**398. Summons for directions.]—**On a summons for directions taken out in an action the usual order for delivery of pleadings was made upon the joint request of the solrs. for both parties, no suggestion being made that the matter ought to be settled by arbn.:—*Held*: deft. had taken a step in the proceedings which disentitled him to an order for a stay of the proceedings.—*STEVEN v. BUNCLE*, [1902] W. N. 44.

**399. —.]—**Where upon the hearing of a summons for directions taken out under R. S. C., Ord. 30, deft. appears & an order is made in his favour, as, for example, for discovery, this constitutes a "step in the proceedings" by deft. so as to preclude him from subsequently applying under the Act of 1889, s. 4, to stay the action.—*COUNTY THEATRES & HOTELS, LTD. v. KNOWLES*, [1902] 1 K. B. 480; 71 L. J. K. B. 351; 86 L. T. 132, C. A.

*Annotations:—***Folld.** *Steven v. Buncle*, [1902] W. N. 44. **Ext'd.** *Richardson v. Le Maître*, [1903] 2 Ch. 222. **Folld.** *Ochs v. Ochs*, [1909] 2 Ch. 121; *Cohen v. Arthur*, *Cohen v. Cohen* (1912), 56 Sol. Jo. 344. **Mentd.** *Welby v. Parker*, [1916] 2 Ch. 1, C. A.

**400. Acquiescence in order.]—**Attendance by deft. before the master on a summons for directions taken out by pltf., & acquiescence, without protest, in a common form order for delivery of pleadings, is taking a step in the proceedings within the Act of 1889, s. 4, & deft. is thereby precluded from moving to stay proceedings under that sect.—*RICHARDSON v. LE MAITRE*, [1903] 2 Ch. 222; 72 L. J. Ch. 779; 88 L. T. 626.

*Annotations:—***Consd.** *Ochs v. Ochs*, [1909] 2 Ch. 121. **Mentd.** *Welby v. Parker*, [1916] 2 Ch. 1, C. A.

**401. —.]—**Attendance by defts., before a master on the usual summons for directions taken out by pltf., which the master proposed to treat as a summons for an account under R. S. C., Ord. 15, & giving an undertaking to furnish an account as a term of the summons standing over, is taking a step in the proceedings within the Act of 1889, s. 4, & defts. are thereby precluded from obtaining a stay of proceedings under that sect. It is not necessary in such a case that an order shall actually have been made.—*OCHS v. OCHS BROTHERS*, [1909] 2 Ch. 121; 78 L. J. Ch. 555; 100 L. T. 880; 53 Sol. Jo. 542.

**402. —.]—**Attendance before the master & acquiescence without protest in an order, which is made subject to the production of a certain document to the master which is ultimately produced, is taking a step in the proceedings within the Act of 1889, s. 4, & deft. is thereby precluded from moving to stay proceedings under that sect.—*COHEN v. ARTHUR*, *COHEN v. COHEN* (1912), 56 Sol. Jo. 344.

**403. Notice to defend.]—**A sum of money being alleged to be due to pltf. for goods supplied to defts., proceedings were taken in the ct. for its recovery, & a default summons was served

upon defts., who filled up the slip attached to the summons giving notice of their intention to defend the action. Defts. subsequently applied for a stay of the action under the Act of 1889, s. 4:—*Held*: the giving notice of an intention to defend by filling up the slip attached to the default summons was merely the equivalent of entering appearance in the High Ct., & defts. had not taken any step in the proceedings after appearance which disentitled them to apply for a stay.—*AUSTIN & WHITELEY, LTD. v. BOWLEY & SONS* (1913), 108 L. T. 921.

**404. Extension of time—Short notice of trial.]—**An action will not be stayed upon the ground that there is an agreement to refer, if the party applying has obtained time to plead & is under terms to take short notice of trial.—*SMITH & CO. v. BRITISH MARINE MUTUAL INSURANCE ASSOCN.* (1883), Bitt. Rep. in Ch. 215.

*Annotation:—***Consd.** *Brighton Marine Palace & Pier v. Woodhouse*, [1893] 2 Ch. 486.

**405. — Arranged out of court.]—**In an action by pltf. against a contractor under an agreement, which provided that all disputes should be referred to arbn., deft. had delivered no pleadings, but when the original time for putting in a defence was about to expire, he wrote to pltf. asking for fourteen days further time to put in his defence, which was granted, & subsequently wrote asking for ten days' further time, which was also granted. On motion by deft. to stay proceedings under the Act of 1889, s. 4:—*Held*: obtaining by consent an enlargement of time wherein to plead was not taking a step in the proceedings within the above sect., & there must be an order to stay proceedings.—*BRIGHTON MARINE PALACE & PIER LTD. v. WOODHOUSE*, [1893] 2 Ch. 486; 62 L. J. Ch. 697; 68 L. T. 669; 41 W. R. 488; 37 Sol. Jo. 424; 3 R. 565.

*Annotations:—***Apld.** *Ives & Barker v. Willans*, [1894] 1 Ch. 68. **Refd.** *Bartlett v. Ford's Hotel Co.*, [1895] 1 Q. B. 850, C. A.; *Zalinoff v. Hammond*, [1898] 2 Ch. 92.

**406. —.]—**Where deft. takes out a summons & obtains an order for further time for delivering his defence, he takes a step in the proceedings within the Act of 1889, s. 4, & is not afterwards entitled to apply under that sect. for a stay on the ground that the proceedings were brought in respect of a matter agreed to be referred.—*FORD'S HOTEL CO., LTD. v. BARTLETT*, [1896] A. C. 1; 65 L. J. Q. B. 166; 73 L. T. 665; 44 W. R. 241, H. L.

*Annotation:—***Refd.** *Zalinoff v. Hammond*, [1898] 2 Ch. 92.

**407. Filing affidavit in opposition.]—**The mere filing of affidavits in answer to affidavits filed in support of a motion for the appointment of a receiver, in an action for dissolution of partnership, is not taking a step in the proceedings within the Act of 1889, s. 4, so as to preclude the ct. from referring all matters in dispute to arbn.—*ZALINOFF v. HAMMOND*, [1898] 2 Ch. 92; 67 L. J. Ch. 370; 78 L. T. 456.

**408. Defence—Plea & answer.]—**Where, after statement of defence delivered, deft. applied to the ct. under C. L. P. Act, 1854, c. 11, to stay proceedings:—*Held*: (1) the above sect. was imperative in requiring an application to the ct., to send to arbn. matters which the parties had agreed should be decided by arbn., to be "after appearance & before plea or answer" in the action in which it was sought to stay proceedings; (2) it being clear that since Jud. Acts the statement of defence had taken the place of "plea & answer," the application was made too late.—*WEST LONDON DAIRY SOCIETY, LTD. v. ABBOTT* (1881), 44 L. T. 376; 29 W. R. 584.



## SUB-SECT. 8.—APPLICANT MUST BE READY AND WILLING TO REFER.

**409. Not ready when action brought.]**—Deft. agreed to employ pltf. as his agent for carrying on his business in a specified district for fifteen years, the agreement containing a clause for referring to arbn. any disputes as to the construction of the agreement, or any payment, act, or thing relating to or arising out of the agreement. Before the term expired deft. dismissed pltf. from his employment for alleged misconduct, & gave notice to refer the matters in dispute between them to arbn., but among the matters in dispute he did not specify his dismissal of the agent. Both parties appointed arbitrators, but before anything more was done pltf. brought an action against deft. to restrain him from dismissing him & from appointing another agent. Deft. moved to stay proceedings in the action on the ground of the agreement to refer all matters to arbn.:—*Held*: (1) since deft. was not ready at the time when the action was brought to refer to arbn. all matters in dispute, including the question whether pltf. ought to be reinstated in his employment, the ct. ought not to exercise their power of staying proceedings in the action.—*DAVIS v. STARR* (1889), 41 Ch. D. 242; 58 L. J. Ch. 808; 60 L. T. 797; 37 W. R. 481, C. A.

*Annotations*:—*Distd.* Renshaw v. Queen Anne Residential Mansions Co., [1897] 1 Q. B. 662, C. A. *Expld. & Distd.* Parry v. Liverpool Malt Co., [1900] 1 Q. B. 339, C. A.

**410. Two out of three parties ready & willing.]**—The lease of a mine contained an agreement to refer disputes between the lessors & three lessees to arbitrators or their umpire, pursuant to C. L. P. Act, 1854. The lessees sank a shaft, & through the shaft drew minerals from an adjoining mine. The lessors filed a bill to restrain the lessees from so doing. Two of the three lessees applied for an order to stay proceedings in the suit, & that the matter might be referred to arbn.:—*Held*: it was no objection to the application that two only of three defts. were, at the commencement of the suit & at the date of the application, ready & willing to concur, & the dissent of deft., if persisted in, would not necessarily be a ground for refusing the order.—*WILKESFORD v. WATSON* (1873), 8 Ch. App. 473; 42 L. J. Ch. 447; 28 L. T. 428; 37 J. P. 548; 21 W. R. 350, L.C. & L.JJ.

*Annotations*:—*Folld.* Law v. Garrett (1878), 8 Ch. D. 26, C. A. *Distd.* Piercy v. Young (1879), 14 Ch. D. 200, C. A. *Consd.* Russell v. Russell (1880), 14 Ch. D. 471; *Compagnie Du Senegal v. Woods* (1883), 53 L. J. Ch. 166. *Refd.* Plevs v. Baker (1873), L. R. 16 Eq. 564; *Gillett v. Thornton* (1875), L. R. 19 Eq. 599; *Wade-Gery v. Morrison* (1877), 37 L. T. 270; *Minifie v. Railway Passengers Assco.* (1881), 44 L. T. 552; *Lyon v. Johnson* (1889), 40 Ch. D. 579; *Rowe v. Crossley* (1912), 108 L. T. 11, C. A.; *Hickman v. Kent or Romney Marsh Sheep-Breeders' Asscn.*, [1915] 1 Ch. 881. *Mentd.* De Ricci v. De Ricci, [1891] P. 378; *Brighton Marine Palace & Pier Co. v. Woodhouse* (1893), 62 L. J. Ch. 697.

## PART I. SECT. 10, SUB-SECT. 8.

**h. Date at which willingness should be shown.]**—Persons who are desirous of taking advantage of an arbn. clause in a contract should so intimate at the earliest possible moment in the ordinary course of business. The party applying for a stay is bound to show that at the time the writ was issued he was willing to refer the matter in dispute.—*DOOLEY v. LONDON ASSURANCE* (1872), 6 L. L. T. 31.—*IR.*

**k. —.]**—The period at which appets. willingness to arbitrate should be shown to have existed was when they first became aware of the action being brought.—*DOOLEY v. LONDON ASSURANCE*, *supra*.—*IR.*

**l. Evidence of lack of willingness—Rescission of principal contract.]**—Deft. & pltf. agreed to submit to arbn. any

dispute which should arise between them & to rescind the agreement in certain circumstances. Deft. rescinded the agreement & pltf. brought an action to establish his rights. Deft. moved to stay proceedings in the action upon the ground that the arbn. clause was paramount:—*Held*: deft. was not at the commencement of the proceedings ready & willing to submit the difference to arbn.—*FERNAN v. MONITOR* (1906), 3 W. L. R. 426.—*CAN.*

**m. Onus of proof.]**—Pltf. sued defts. as liquidators of an enemy co., under the Alien Enemies (Winding-up) Ordinance, 1914, for damages for breach of contract. Defts. took out a summons under s. 541 of the Code for a stay of proceedings, on the ground that the matter in dispute should be submitted to arbn., under a clause in the contract

**411. Necessity for affidavit.]**—Deft., who applies for a stay of the action on the ground that there is an agreement to refer to arbn., ought to file an affidavit that he is ready & willing to go to arbn.—*PIERCY v. YOUNG* (1879), 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 845, C. A.

*Annotations*:—*Mentd.* Fraser v. Ehrensperger (1883), 12 Q. B. D. 310, C. A.; *De Ricci v. De Ricci*, [1891] P. 378; *Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 106 L. T. 451, C. A.

## SECT. 11.—RESTRAINT OF ARBITRATION BY INJUNCTION.

**412. Restraining parties—Dispute not within submission—Proceedings futile—Lands Clauses Consolidation Act, 1845 (c. 18).]**—The High Ct. has no jurisdiction to issue an injunction to restrain a party from proceeding with an arbn. in a matter beyond the agreement to refer, although such arbn. proceeding may be futile & vexatious.—*NORTH LONDON RY. CO. v. GREAT NORTHERN RY. CO.* (1883), 11 Q. B. D. 30; 52 L. J. Q. B. 380; 48 L. T. 695; 31 W. R. 490, C. A.

*Annotations*:—*Expld.* Hayward v. East London Waterworks Co. (1884), 28 Ch. D. 138; *London & Blackwall Ry. Co. v. Cross* (1886), 31 Ch. D. 354, C. A. The case must not be understood as going further than deciding that there is no right or jurisdiction in the Ch. Div. of the High Ct. to restrain a person from proceeding for compensation under Lands Clauses Consolidation Act, 1845 (c. 18), on the ground that he is not entitled to compensation. The case does not decide that in no case is it right to restrain persons from proceeding to arbn.; there are cases in which it is quite right so to do (*LINDLEY, L.J.*). *Appld.* Hanly & Fisher v. Mallet (1886), 3 T. L. R. 71. *Distd.* Birmingham & District Land Co. v. L. & N. W. Ry. Co. (1887), 36 Ch. D. 650. *Folld.* Wood v. Lillies (1892), 61 L. J. Ch. 158. *Consd.* Richardson v. Methley School Board, [1893] 3 Ch. 510. *Distd.* Kitts v. Moore, [1895] 1 Q. B. 253, C. A. *Mentd.* Farrar v. Cooper (1890), 44 Ch. D. 323; *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. Same*, [1892] 2 Q. B. 358, C. A.; *Holmes v. Millage*, [1893] 1 Q. B. 551, C. A.; *A.-G. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101; *Devonport Corp'n. v. Tozer* (1903), 67 J. P. 269, C. A.; *Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 106 L. T. 451, C. A.; *Morgan v. Hart*, [1914] 2 K. B. 183, C. A.

**413.**—Notwithstanding the enlarged powers of granting injunctions conferred by Jud. Act, 1873 (c. 66), s. 25 (8), the High Ct. has not since that Act, any more than the Ct. of Ch. had before it, jurisdiction to restrain by injunction a person from proceeding before an arbitrator on a claim for compensation under Lands Clauses Consolidation Act, 1845, notwithstanding that his claim may be futile or vexatious.

Nor does the fact that claimant is, in the proceedings before the arbitrator, using the name of a third party without authority make any difference.—*LONDON & BLACKWALL RY. CO. v. CROSS* (1886), 31 Ch. D. 354; 55 L. J. Ch. 313;

as follows: "This contract should be construed & the rights of the parties thereunder determined in Bremen according to the laws of Germany." Arbn. was impossible owing to war:—*Held*: appets. were not able to satisfy the ct. that they were then ready & willing to do all things necessary to the proper conduct of the arbn., & application refused.—*BESWICK v. LOWE, BINGHAM & MATTHEWS* (1916), 11 Hong Kong L. R. 97.—*HONG KONG.*

## PART I. SECT. 11.

**n. Restraining parties—Arbitration inequitable.]**—The Ct. of Equity will restrain deft. from proceeding with an arbn., where his conduct has been such as to make it inequitable for him to proceed to arbn.—*SNEDDON v. KYLE* (1902), 2 S. R. N. S. W. Eq. 112.—*AUS.*

*Sect. 11.—Restraint of arbitration by injunction.]*

54 L. T. 309; 34 W. R. 201; 2 T. L. R. 231, C. A.

*Annotations:—***Apld.** Hanly & Fisher v. Mallet (1886), 3 T. L. R. 71. **Distd.** Birmingham & District Land Co. v. L. & N. W. Ry. Co. (1888), 40 Ch. D. 268, C. A. **Consd.** Farrar v. Cooper (1890), 44 Ch. D. 323. **Folld.** Wood v. Lillies (1892), 61 L. J. Ch. 158. **Expld.** Kitts v. Moore, [1895] 1 Q. B. 253, C. A. **Mentd.** L. & N. W. Ry. Co. v. Walker (1900), 82 L. T. 93, H. L.

**414.** — — — — —.]—The ct. has no jurisdiction to grant an injunction to restrain a person from proceeding with an arbn. in a matter beyond or outside an arbn. agreement, although such arbn. proceedings may be futile & vexatious; & the mere circumstance that the arbn. will be futile & vexatious affords no sufficient ground, under Jud. Act, 1873 (c. 66), s. 25 (8), for granting an injunction. Therefore, where W. & L. entered into a partnership for carrying on a theatre under an agreement containing a usual arbn. clause, & L. served W. with a notice referring to arbn. the question whether the theatre should be sold or not, the ct. declined to grant an injunction restraining L. from taking any further step in the arbn., although it was of opinion that the question was not one which fell within the arbn. clause.—**WOOD v. LILLIES** (1892), 61 L. J. Ch. 158; 8 T. L. R. 281.

*Annotation:—***Refd.** Kitts v. Moore, [1895] 1 Q. B. 253, C. A.

**415.** **Pending action to set aside submission.]**—Injunction granted upon bill filed & affidavit to restrain proceeding in an arbn., where a bill was brought to have the agreement containing the arbn. clause rescinded.—**MYLNE v. DICKINSON** (1815), Coop. G. 195; 35 E. R. 528, D. C.

*Annotation:—***Folld.** Kitts v. Moore, [1895] 1 Q. B. 253, C. A.

**416.** — — — — —.]—The ct. has jurisdiction to interfere by injunction on equitable grounds to restrain deft. from proceeding to arbn., where an action has been brought impeaching the instrument containing the agreement for reference. Jud. Act, 1873 (c. 66), s. 25 (8), has not enlarged the jurisdiction of the ct. so as to enable it to grant an injunction where, before the Act, it could not have done so.—**KITTS v. MOORE**, [1895] 1 Q. B. 253; 64 L. J. Ch. 152; 71 L. T. 676; 43 W. R. 84; 39 Sol. Jo. 96; 12 R. 43, C. A.

*Annotations:—***Distd.** Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills (1911), 105 L. T. 823. **Refd.** Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills (1912), 106 L. T. 451, C. A.; Smith, Coney & Barrett v. Becker, Gray, [1916] 2 Ch. 86, C. A. **Mentd.** Devonport Corpn. v. Tozer, [1902] 2 Ch. 182; Smith, Coney & Barrett v. Becker, Gray (1914), 31 T. L. R. 59.

**417.** — — — **Where injury to one party will result—But not where proceedings merely futile.]**—The ct. has jurisdiction to restrain a party from proceeding to arbn., & will exercise that jurisdiction at the instance of one of the parties to the agreement for reference in a proper case, such as where it is satisfied that injury will result to the party complaining if the arbn. is allowed to proceed; but the ct. will not exercise its jurisdiction where it sees the result of the arbn. will be merely futile & productive of no injury to the party complaining.

Articles of partnership between three partners A., B. & C., provided that, as to any question in

**417 i.** — — — *Not when arbitration merely futile.]*—In an action by three partners against the fourth partner, & against the arbiter named under a clause of arbn. in the contract of copartnery, pursuers sought to prevent defenders proceeding with a reference under the clause, on the ground that many of the questions submitted to the arbiter were not such as he would have power to decide. The objection had been taken

before the arbiter, who repelled it:—**Held:** at that stage of the arbn. it must be assumed that the arbiter would keep within his powers, & it was inexpedient to say what would look like instructing the arbiter in his duties & to separate the questions into two categories & direct that he might entertain some & not entertain others.—**BENNET v. BENNET** (1903), 10 S. L. T. 609.—**SCOT.**

relation to the partnership, the decision of the majority should prevail, & further that, in case of any dispute between the partners, they should appoint three arbitrators, one to be appointed by each partner, & that the partners should abide by the award. Subsequently A. & B. gave C. notice of their appointment of two arbitrators, & requested him to appoint a third to decide disputes which they alleged had arisen between themselves & C. C. denied the existence of any dispute requiring arbn. & requested A. & B. to furnish him with particulars of the alleged disputes, which, however they declined to do until C. had appointed his arbitrator, & they threatened that if he did not appoint his arbitrator, they would proceed to arbn. before their own arbitrators. On a motion by C. to restrain A. & B. from proceeding to arbn.:—**Held:** as in C.'s absence any arbn. proceedings would be futile & in no way binding upon him, the ct. ought not to grant an injunction.—**FARRAR v. COOPER** (1890), 44 Ch. D. 323; 59 L. J. Ch. 506; 62 L. T. 528; 38 W. R. 410; 6 T. L. R. 241.

*Annotations:—***Distd.** Kitts v. Moore, [1895] 1 Q. B. 253, C. A. **Mentd.** May v. Mills (1914), 30 T. L. R. 287.

**418.** — — — **Submission ultra vires.]**—Where an agreement made between two railway cos. under their common seals contains clauses which are beyond the powers of the directors of one of the cos., & clauses for referring to arbn. all disputes arising under the agreement, the ct. will, at the suit of a shareholder of that co., restrain both cos. from proceeding to arbn. in respect of alleged breaches of those clauses. But no such injunction will be granted at the suit of a shareholder of the other co., on the ground that the stipulations of any such clause are beyond the powers of the directors of the co. in which pltf. is not a shareholder.—**MAUNSELL v. MIDLAND GREAT WESTERN (IRELAND) RY. CO.** (1863), 1 Hem. & M. 130; 2 New Rep. 268; 32 L. J. Ch. 513; 8 L. T. 347, 826; 9 Jur. N. S. 660; 11 W. R. 768; 71 E. R. 58.

*Annotations:—***Expld.** Wood v. Lillies (1892), 61 L. J. Ch. 158. **Refd.** Taylor v. Chichester & Midhurst Ry. Co. (1867), L. R. 2 Exch. 356, Ex. Ch. **Mentd.** London & Blackwall Ry. Co. v. Cross (1886), 31 Ch. D. 354, C. A.; Kitts v. Moore, [1895] 1 Q. B. 253, C. A.

**419.** — — — **Plaintiff refusing to appoint—Appointment of sole arbitrator by defendants.]**—Pltf's., the owners of the steamship *D.*, chartered her by charterparty dated Apr. 26, 1911, to defts., M. & Co., to load a cargo of beans at Vladivostock & to proceed to a port in the United Kingdom & there deliver the cargo "agreeably to bills of lading." On June 10 a cargo of about 6,000 tons was loaded, & bills of lading made out to the order of M. & Co. or their assigns were signed by the master & handed to M. & Co.'s representative. M. & Co. had, by a contract dated Apr. 27, 1911, sold the cargo to defts., the B. Co., on the terms of a "basis delivered" contract, by clause 10 of which the contract was to be void as regarded any portion shipped which might not arrive. On June 12 defts. M. & Co., under the contract of Apr. 27, declared to the B. Co. that the beans had been shipped by steamship *D.* On arrival of the vessel at Liverpool, the port of discharge, M. & Co. handed to the B. Co. the bills of lading indorsed against a payment. When the discharge had been completed it

**417 ii.** — — —.]—Injunction will not be granted to restrain a party from proceeding with an arbn., where the result will be merely futile. An arbn. to determine value of land of pltf. taken by defts. will not be restrained because a condition precedent to taking of the land may not have been complied with.—**DUNCAN v. CAMPBELLTON** (1906), 26 C. L. T. 466; 3 N. B. Eq. 224.—**CAN.**



was alleged that there was a shortage of 171 bags, & the B. Co. having paid only in respect of the quantity actually delivered, M. & Co. instructed them to make a corresponding deduction from the freight, but plffs. refused to acknowledge the claim for short delivery. A dispute having thus arisen, M. & Co. gave notice that they demanded an arbn. under a clause in the charterparty, which provided for arbn. "by arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third," & formally required plffs. within seven clear days to appoint their arbitrator. Plffs. did not appoint an arbitrator, & defts., after the expiry of the seven days, gave notice of the appointment of a gentleman to act as sole arbitrator. Plffs. thereupon took out a summons for further directions asking (*inter alia*) for an injunction to restrain first defts. from proceeding with the arbn.:—*Held*: there was no jurisdiction in the ct. to grant the injunction asked for.—*DEN OF AIRLIE S.S. Co., LTD. v. MITSUI & Co., LTD. & BRITISH OIL & CAKE MILLS, LTD.* (1912), 106 L. T. 451; 12 Asp. M. L. C. 169; 17 Com. Cas. 116, C. A.

**420. — Submission illegal — Trading with enemy.**—At some time before July 31, 1914, plffs., who carried on business in Liverpool, agreed to purchase from defts. a quantity of beetroot sugar, f.o.b. Hamburg, in Aug. On July 31 the German Govt. placed an embargo on the export of beetroot sugar. On Aug. 1 plffs. gave orders to defts. to sell the sugar, & on the same day defts. contracted in London to buy the sugar from plffs. All the contracts contained an arbn. clause. War broke out between Great Britain & Germany on Aug. 4, & proclamations dealing with trading with the enemy were then issued. Disputes having arisen between plffs. & defts. with regard to the contracts, defts. desired to submit the disputes to arbn.:—*Held*: though the performance of the contracts in specie was illegal after Aug. 4, yet as they were valid & binding at the time when they were made, plffs. were not entitled to an injunction restraining defts. from proceeding with the arbn.—*SMITH, CONEY & BARNETT v. BECKER, GRAY & Co.*, [1916] 2 Ch. 86; 84 L. J. Ch. 865; 112 L. T. 914; 31 T. L. R. 151, C. A.

*Annotation*:—*Mentd.* Jager v. Tolme & Runge & London Produce Clearing House, [1916] 1 K. B. 939, C. A.

**421. — Waiver of right to arbitrate.**—A suit was instituted by a contractor praying for a declaration of his rights upon the construction of certain contracts between him & defts., & for inquiries & accounts on the footing of such declara-

tion. Defts. claimed the right to proceed by arbitration "on most if not all" of the matters in dispute. On a motion to restrain the arbitrator from making an award:—*Held*: (1) whether defts.' seizure of the works was a waiver of their right to proceed by arbitration could not be determined until the cause was heard; (2) as some matters seemed to be excluded from the arbn., but some remained, the order would be for the reference to go on, defts. undertaking not to take any proceedings upon any award without the leave of the ct.—*PICKERING v. CAPE TOWN RY. Co.* (1865), L. R. 1 Eq. 84; 13 L. T. 357, 570, L.C.

**422. Restraining arbitrators — Corruption.**—*Semble*: the ct. has jurisdiction, by analogy to a writ of prohibition, to restrain by injunction an arbitrator from proceeding with a reference on the ground of corruption.—*MAIMESBURY RY. Co. v. BUDD* (1876), 2 Ch. D. 113; 45 L. J. Ch. 271.

*Annotation*:—*Refd.* North London Ry. Co. v. G. N. Ry. Co. (1883), 11 Q. B. D. 30, C. A.

**423. — Unfitness or incompetence.**—The ct. will restrain an arbitrator by injunction from acting in any case in which he is, in the opinion of the ct., unfit or incompetent to act.—*BEDDOW v. BEDDOW* (1878), 9 Ch. D. 89; 47 L. J. Ch. 588; 26 W. R. 570.

*Annotations*:—*Distd.* North London Ry. Co. v. G. N. Ry. Co. (1883), 11 Q. B. D. 30, C. A. *Mentd.* Thomas v. Williams (1880), 14 Ch. D. 864; Quartz Hill Consolidated Gold Mining Co. v. Beall (1882), 20 Ch. D. 501, C. A.; Bonnard v. Perryman, [1891] 2 Ch. 269, C. A.; Jackson v. Barry Ry. Co., [1893] 1 Ch. 238, C. A.

**424. — Bias—Expressions of opinion previous to acting.**—A contract, by which plff. undertook to construct a dock for deft. co., provided that any dispute between the co. & the contractor as to the meaning of any part of the contract, or as to the quality or description of the materials to be used in the works, should be referred to the co.'s engineer as arbitrator. A dispute arose whether the contract required the interior of a certain embankment to be made of stone, or whether rocky marl was allowable, so that, if the contractor by the direction of the engineer used stone, he would be entitled to be paid for it as an extra. A correspondence took place between the contractor & the engineer, in which the engineer stated his view to be that the contract bound the contractor to use stone, & that it was not an extra. The co. then referred the dispute to the arbn. of the engineer. After this reference, & on the day for which the first appointment had been made, the engineer wrote to the contractor a letter in which he repeated his former view. Plff. brought his action

**424 i. Restraining arbitrators — Bias.**—Contractors with a co. referred all disputes to the co.'s engineer as arbiter, & sought to have him interdicted from acting as such, or issuing any decree-arbitral, on the ground that he had been to blame for delay in the execution of the work, that it was incompetent for him to adjudicate on the questions thence arising, & that previous to the contract he had made an estimate of the probable expense of the works:—*Held*: the allegations were not relevant or sufficient, & action dismissed.—*TROWSDALE & SON v. JOFF & NORTH BRITISH RY. Co.* (1865), 38 Sc. Jur. 25.—*SCOT*.

**424 ii. — — —**—The High Ct. has power to prevent a non-indifferent arbitrator from acting without waiting until the award is made, though perhaps the better course is to apply for leave to revoke the submission if another arbitrator be not substituted.—*BURFORD TOWNSHIP v. CHAMBERS* (1894), 25 O. R. 663.—*CAN*.

**424 iii. — — —**—By Act of Parliament questions arising between plffs.

& defts. were "referred to the arbn. of C." Later defts. obtained an Act of Parliament authorising certain works. Thereafter, but before any of the latter works had been commenced, plffs. brought an action to have C. interdicted from acting as arbiter under the first Act, averring that the works under the two Acts were so related that questions in which the interests of defts. & plffs. would mutually conflict "must arise from time to time in the ordinary course of execution of the respective undertakings":—*Held*: C. had disqualified himself from determining any question between defts. & plffs. under the first Act arising out of the execution of works by defts. under the second Act, & if such a question actually occurred for decision C. would be disqualified not merely from determining that question, but also from acting as arbiter between the parties under the first Act *quoad omnia*, but as no such question had actually occurred, or might ever occur, it was premature to interdict C. from acting as arbiter under the first Act, & therefore, interdict must be refused.—*CALEDONIAN RY. Co. v. GLASGOW CORPN.* (1897), 25 R. (Ct. of Sess.) 74.—*SCOT*.

**424 iv. — — —**—*PLAUNT v. GILLIES BROTHERS* (1912), 21 O. W. R. 509; 3 O. W. N. 921.—*CAN*.

**424 v. — Lack of authority to refer.**—An insurance co. brought a note of suspension & interdict to stop proceedings in an arbn. under a policy issued by them. The grounds of suspension were (1) that law agents who had made the claim & nominated an arbiter, & who professed to act on behalf of the insured, had in fact acted on behalf of his creditors (who had no right to claim under the policy), & (2) that the agents had no authority from the insured:—*Held*: the objections did not disclose sufficient grounds for stopping proceedings in the arbn., & the note must be refused.—*LICENCES INSURANCE CORPN. & GUARANTEE FUND, LTD. v. SHEARER*, [1907] S. C. 10.—*SCOT*.

**424 vi. — Misconduct.**—A party in a submission regarding a complicated accounting having raised a declarator to have arbiters discerned incapable of pronouncing decree, in respect of their having required the parties to sign an obligation for their remuneration, at



**Sect. 11.—Restraint of arbitration by injunction.****Sect. 12: Sub-sect. 1.]**

to restrain the co. from proceeding further with the arbn.:—*Held*: (1) considering the position of the engineer, who, as engineer of the co., must necessarily have already expressed an opinion on the point in dispute, his writing after the commencement of the arbn. a letter repeating the same opinion would not disqualify him from acting as arbitrator unless, on the fair construction of the letter, it appeared that he had made up his mind so as not to be open to change it upon argument; (2) the letter did not, upon its fair construction, show that the engineer had precluded himself from keeping his mind open, & the injunction granted by the ct. below ought to be dissolved. *Qu.*: whether there was jurisdiction to grant it.—**JACKSON v. BARRY RY. CO.**, [1893] 1 Ch. 238; 68 L. T. 472; 9 T. L. R. 90; 2 R. 207, C. A.

**Annotations**:—**Appld.** *Eckersley v. Mersey Docks & Harbour Board*, [1894] 2 Q. B. 667, C. A. **Foll.** *Bright v. River Plate Construction Co.*, [1900] 2 Ch. 835. **Dist.** *Freeman v. Chester R. D. Co.*, [1911] 1 K. B. 783, H. L.; *Aird (John) v. Bristol Corp.*, *Bristol Corp. v. Aird (John)* (1913), 77 J. P. 209, H. L. **Refd.** *Re Nott & Cardiff Corp.*, [1918] 2 K. B. 146, C. A. **Mentd.** *Re Donkin & Leeds & Liverpool Canal Proprietors* (1893), *Hudson, Bldg. Contracts*, 4th ed., Vol. II., p. 239, D. C.; *Ives & Barker v. Willans*, [1894] 2 Ch. 478, C. A.; *Re Nuttall & Lynton & Barnstaple Ry. Co.* (1899), 82 L. T. 17, C. A.; *Hickman v. Roberts*, [1913] A. C. 229, H. L.

**425.** — — — — —.]—Under a contract independent engineers gave their opinion that the original scheme was unworkable, & pltf. estimated the cost of putting the matters right at £21,000, but the borough engineer who was one of defts. thought £7,000 enough. The corp. having given notice to refer the matter to the arbn. of the borough engineer:—*Held*: (1) the borough engineer had not precluded himself from being arbitrator by unfair statements or by prejudging the dispute, & he was the real arbitrator within

same time presented a bill of suspension & interdict to have the arbiters prohibited from in the meanwhile taking any further steps in the submission. The ct. refused the bill, reserving all competent pleas in the declarator as in a reduction.—**FRASER v. GORDON** (1834), 12 Sh. (Ct. of Sess.) 887.—**SCOT.**

**424 vii.** — *Unfitness of arbitrator subject of action of declarator.*—A party to a submission brought a declarator to have it found that the arbiter had disqualified himself from acting in that capacity; thereafter he presented a note of suspension for the purpose of having the arbiter interdicted from proceeding with the submission, on the ground that he ought not to do so while the question whether he was not disqualified was pending. The ct. refused the note.—**DREW v. LEBURN** (1850), 12 D. (Ct. of Sess.) 983.—**SCOT.**

**424 viii.** — *Illegality of subject-matter.*—*Held*: It was not a good ground for interdicting an arbiter from proceeding with a submission that he was about to consider & dispose of a claim alleged to be illegal, as founded on a *pactum de quota litis*. *Semble*: it was not to be assumed that the arbiter would not rightly dispose of such a claim.—**BELLOR YOUNG OR FARRELL v. ARNOTT** (1857), 19 D. (Ct. of Sess.) 1000.—**SCOT.**

**424 ix.** — *Matters outside submission.*—A contract contained a clause providing that disputes should be referred to an engineer named. The contractor abandoned the work, & raised a reduction of the contract, on the ground of misrepresentation. Thereafter, the co. having called on the party named as the arbiter to act, the contractor maintained that the clause of reference in the contract did not apply to such a case as had arisen & brought a note of suspension, but the ct. refused to interdict the arbiter from proceeding

the terms of the contract; (2) pltf.'s application to restrain the arbn. must be refused.—**McKEE v. DUBLIN CORPN. & O'SULLIVAN** (1912), *Hudson, Bldg. Contracts*, 4th ed., Vol. II., p. 466.

**Bias generally.**—See Nos. 515—517, Part II., Sect. 2, Sub-sect. 3, Part IV., Sects. 16, Sub-sect. 2, B., 19, Sub-sects. 2, B. (b), 3, B., 5, E., *post*.

**426.** — *Matter unsuited for arbitration.*—O. offered pltf. a sample of barley. Pltf. wrote offering 33s. 6d. a quarter for 56 quarters. O. on Jan. 22 telegraphed, "Brokers will not divide under 34s."—i.e., will not divide the quantity offered at a less price than 34s. Pltf. telegraphed back, "Will take 56 quarters at 34s." Next day O. sent a "sold note," by which the contract was made subject to the rules of the Liverpool Corn Trade Assocn. On Jan. 23 the contract note was received. Pltf. was advised of the arrival of the barley, inspected it & found it not according to sample, & at once advised O. of it. It was admitted that this was the fact, & endeavours were made to induce pltf. to take the barley at a reduction, which he refused. O. wrote demanding payment, which was refused, & then claimed to go to arbn. under the Liverpool rules, which provided that all disputes should be referred to arbn. Pltf. refused to appoint an arbitrator, & O. claimed to do so under the rules. Pltf. having issued a writ in an action for an injunction to restrain O. from proceeding to arbn.:—*Held*: such a case ought not to be sent to arbn. under the rules, & the order made by the judge in chambers for an injunction to restrain the seller from proceeding to arbn. was right.—**SISSONS v. OATES** (1894), 10 T. L. R. 392, D. C. **Annotation**:—**Mentd.** *Munro v. Bognor U. D. C.* (1915), 13 L. G. R. 431.

**427. Agreement impugned—Not representing real contract—Injunction refused.**—A contract contained the terms of business in accordance with which defts. were to deal in stocks & shares on

under the reference in the contract, the contractor having the ordinary remedies against an arbiter acting *ultra vires*.—**WILSON v. CALEDONIAN RY. CO. & GRAHAM** (1860), 22 D. (Ct. of Sess.) 697.—**SCOT.**

**424 x.** — — — — —.]—A claim having been lodged in an arbn., resp., before the arbiter had considered the claim or pronounced any decision thereon, presented a note for interdict against the arbiter proceeding with the reference, on the ground that the form of the claim was such that the arbiter was asked to pronounce an order which would be *ultra vires*:—*Held*: (1) although it might be the claim as stated could not be competently sustained, yet, as the matters in question fell *prima facie* under the clause of reference, & the claim might be amended so as to be competent, the objections resolved into a question of pleading which fell primarily to be dealt with by the arbiter; (2) it could not be assumed that the arbiter would pronounce incompetent orders; (3) complainant was not entitled to have the arbn. interdicted.—**MOORE v. M'COSH** (1903), 5 F. 946; 40 Sc. L. R. 691.—**SCOT.**

**424 xi.** — *Most expedient course in interests of both parties.*—A contract contained a clause referring any dispute or difference as to the intent of the contract to the decision of the architect as sole arbiter. The contractors for a considerable time, without objection on the part of the employers, made use of "shivers" sand. On the employers subsequently objecting to its use the contractors maintained their right to continue to use it on various grounds, & the employers referred the matter to the arbiter, who issued what the employers contended was an award, but what the contractors averred was only an *ex p.* opinion. The latter thereafter called on the arbiter to reconsider his

award, & hear the parties:—*Held*: the employers had mistaken their remedy in applying to the arbiter, but to prevent further proceedings before him interdict was granted as the most expedient course in the interest of both parties.—**GREENOCK P. B. v. COGHILL & SON** (1878), 5 R. (Ct. of Sess.) 732.—**SCOT.**

**424 xii.** — *Jurisdiction of Court of Chancery.*—Before a submission has been made a rule of ct., a ct. of equity has jurisdiction to restrain an arbitrator improperly appointed from entering upon the duties of such arbn.—**DIRECTOR-CABLE CO. v. DOMINION TELEGRAPH CO.** (1883), 28 Gr. 648; 8 A. R. 416.—**CAN.**

**424 xiii.** — *Unwillingness or inability of one party to attend.*—The arbiter under a reference having taken part of the evidence adjourned the proof, & at an adjourned diet counsel for A., one of the parties, stated that he appeared merely to protest against the arbn. going on, & the arbiter declared the proof for A. closed. After hearing the remaining proof for the other party the arbiter issued a note of his proposed findings. Before any further proceedings had taken place, A. brought an action for reduction of the interim orders & of the note of proposed findings, & for interdict against the arbiter going on with the reference. Pursuer averred that he had been obliged to go abroad owing to ill-health, that in his absence his agent was unable to proceed with the reference, & that the arbiter had pronounced the orders under reduction notwithstanding that the agent had intimated his desire to have proceedings delayed until his client's return:—*Held*: the action was irrelevant, on the ground that it was still open to pursuer to appeal to the arbiter.—**WEMYSS v. ARDROSSAN HARBOUR CO.** (1893), 20 R. (Ct. of Sess.) 500.—**SCOT.**

pltf.'s account. Defts., having a claim against pltf. for differences, instituted arbn. proceedings under an arbn. clause in the contract, which provided that any dispute between the parties should be referred to arbn. Pltf. brought an action for an injunction to restrain defts. from proceeding with the arbn. proceedings, on the ground that the written agreement did not rightly represent the real contract entered into between the parties. Pltf. contended that the real intention was not to deal in transactions for the actual purchase & sale of stocks, but to deal in differences only, & the transactions were gambling transactions & should be submitted to a jury. The ct. refused to grant an injunction. — *McHARG v. UNIVERSAL STOCK EXCHANGE, LTD.*, [1895] 2 Q. B. 81; 64 L. J. Q. B. 498; 72 L. T. 602; 43 W. R. 464; 11 T. L. R. 409; 15 R. 459, C. A.

## SECT. 12.—ENFORCEMENT OF A SUBMISSION OR AGREEMENT TO SUBMIT.

*See, also, Sects. 9, 10, ante, Part II., Sect. 7, post.*

### SUB-SECT. 1.—IN GENERAL.

**428. By assumpsit on promise.]—**An *assumpsit* may be maintained upon a promise, in consideration of "a submission," without adding "to stand to the award, etc.," for it shall be intended an absolute submission. — *NEVE v. LYNE* (1596), [Cro. Eliz. 460; 78 E. R. 713.

**429. By action for refusal to nominate arbitrator.]—***Seemle*: no action can be maintained for refusing to nominate an arbitrator in pursuance of a covenant to refer matters to arbn. — *TATTERSALL v. GROOTE* (1800), 2 Bos. & P. 131; 126 E. R. 1197.

*Annotations*: — *Apld.* *Dowbiggin v. Harrison* (1829), 4 Man. & Ry. K. B. 622. *Distd.* *Scott v. Avery* (1856), 5 H. L. Cas. 811, H. L. *Expld. & Distd.* *Belfield v. Bourne*, [1894] 1 Ch. 521. *Mentd.* *Freeland v. Stansfeld* (1854), 2 Sm. & G. 479; *Livingston v. Ralli* (1855), 5 E. & B. 132.

**430. —.]—**Declaration on a written agreement, not under seal, by pltf. to let land to deft., with right of sporting, deft. to make satisfaction to pltf.'s tenants for damage done by game on their farms, the amount to be ascertained by a valuer to be chosen by each party, & an umpire. Averment that deft. entered & preserved the game,

which did damage to the tenants, & that deft. was requested by pltf. to appoint a valuer. Breach, that, although within a reasonable time a valuer was appointed by pltf. & notice thereof given to deft., & pltf. requested him to give the name of a referee on his part & fix a time, etc., of meeting to ascertain the damage, etc., in default of which pltf.'s valuer would alone ascertain the damage done, yet deft. did not give notice to pltf. of any valuer chosen by him, nor had ever made satisfaction, etc.:—*Held*: (1) after verdict, it must be taken that the declaration alleged a refusal by deft. to appoint a valuer; (2) the jury having found that pltf. did not give notice in a reasonable time of his appointment of a valuer, this was an immaterial allegation, inasmuch as deft. had refused to appoint altogether.

The rule ought to be made absolute for judgment for pltf., notwithstanding the verdict for deft., finding that pltf. did not notify to deft. his choice of an arbitrator within a reasonable time. It appears by the record that deft. was requested to appoint an arbitrator on his part, & refused to do so within a reasonable time. In effect he refused to proceed by arbn. It is immaterial whether pltf. chose an arbitrator, or notified his choice at any time; & the verdict on this issue is consequently on an immaterial fact, & does not prevent pltf. from having judgment (LORD DENMAN, C.J.). — *THOMAS v. FREDRICKS* (1847), 10 Q. B. 775; 16 L. J. Q. B. 393; 11 Jur. 942; 116 E. R. 294.

*Annotation*: — *Mentd.* *Knowlman v. Bluett* (1874), L. R. 9 Exch. 307, Ex. Ch.

**431. By action for damages—Damages may be substantial.]—**A contract for the sale of a cargo of wheat contained a provision that, if any difference arose, it should be referred to arbn.:—*Held*: an action lay for breach of the agreement to refer, & the damages might be substantial & not merely nominal. — *LIVINGSTONE (LIVINGSTON) v. RALLI* (1855), 5 E. & B. 132; 24 L. J. Q. B. 269; 25 L. T. O. S. 143; 1 Jur. N. S. 594; 3 W. R. 488; 3 C. L. R. 1096; 119 E. R. 430.

*Annotations*: — *Apld.* *Scott v. Liverpool Corpn.* (1858), 1 Giff. 216. *Refd.* *Postonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112, P. C. *Mentd.* *Hodgkinson v. Fernie* (1857), 27 L. J. C. P. 66; *Handlyn v. Talisker Distillery* (1894), 6 R. 188, H. L.

**432. —.]—**Damages may be nominal.]—A building agreement contained a provision that any dispute which should arise under it should be referred to arbn. In an action for breach of the agreement to refer:—*Held*: pltf. could not

## PART I. SECT. 12, SUB-SECT. 1.

**a. By suit.]—***Seemle*: A suit will not lie to enforce an agreement to refer to arbn. — *CORINGA OIL CO. v. KOEGLER* (1875), 1 L. R. 1 Calc. 466.—**IND.**

**428 i. By action on promise.]—**A clause in a contract, which provides for the appointment of arbitrators in the event of a dispute, is merely a promise to that effect, which, however, may be enforced at the diligence of either of the contracting parties. — *LAFEBRE v. MACKINNON* (1914), Q. R. 23 K. B. 555.—**CAN.**

**429 i. By action for refusal to nominate arbitrator.]—**A contract contained a clause providing, in case of any dispute, for a reference to two arbitrators in England, one to be appointed by each of the contracting parties. Matter of disputes arising, defts. refused to appoint an arbitrator. Previous to the making of the award pltf., under the provisions of C. L. P. Act, 1854, had the submission to arbn. made a rule of the Ct. of Common Pleas. In a suit in which pltf.'s claim was for damages incurred by pltf. in respect of

the breach of the contract:—*Held*: the making the submission a rule of ct. had not the effect of depriving a party of his right to appoint an arbitrator. — *CORINGA OIL CO. v. KOEGLER* (1875), 1 L. R. 1 Calc. 466.—**IND.**

**429 ii. —.]—***Action on covenant.]—*By a lease it was agreed that, in case any difference should arise, the rent should be fixed by arbn., & the lessee covenanted that he would appoint an arbitrator; differences as to the amount of the rent having arisen which had not terminated at the death of the lessee, & deft. having become his personal representative, & entered into possession, & having failed, though requested, to appoint an arbitrator:—*Held*: an action for breach of the covenant was sustainable against deft. sued as assignee. — *DONEGAL v. VERNER* (1872), 6 I. C. L. R. 504.—**IR.**

**b. By action of declarator.]—**A lease provided that, in the event of coal becoming exhausted or not workable to profit, & upon the fact being ascertained by persons of skill, the lease should be at an end. The tenant having

averred that the coal was exhausted, a reference was entered into, which the landlord afterwards declined to proceed with. The tenant raised an action to have it declared that the reference subsisted & the landlord was bound to abide by it:—*Held*: the tenant was entitled to have that question of fact determined, in terms of the stipulations of the lease, "by persons of skill mutually chosen." — *COCHRANE v. GUTHRIE* (1859), 31 Sc. Jur. 205.—**SCOT.**

**c. Action on contract equivalent to action against party for refusal to refer.]—**In an action on a contract, which contained an agreement that if any difference arose, it should be referred, pltf. alleged that he was wrongfully discharged from completing the contract, & made various claims & requested a reference, which was refused, that the arbitrator resigned, & no other person was appointed as arbitrator under the contract & that the disputes had never been decided:—*Held*: pltf.'s action was really an action for a refusal to refer his claims to arbn., & such an action might be maintained. — *MULVENA v. COMR. FOR RAILWAYS* (1888), 3 Q. L. J. 108.—**AUS.**



**Sect. 12.—Enforcement of a submission or agreement to submit: Sub-sects. 1 & 2.]**

recover more than nominal damages if he would have been entitled to recover nothing under an arbn.—**BRUNSDON v. STAINES LOCAL BOARD** (1884), *Cab. & El.* 272.

**433. — Refusal to arbitrate.]**—On a case stated by arbitrators having reference to a question of price under a contract, by the terms of which disputes were to be submitted to arbn., it was contended that the refusal of one of the parties to the contract to submit the question of price to arbn. had prevented fulfilment of the contract:—*Held*: by the refusal to arbitrate there had arisen an actionable breach of contract, & there would be judgment for plffs.—*Re SAMUEL (M.) & Co., LONDON, & SOCIÉTÉ COMMERCIALE ET INDUSTRIELLE DE NAPTHE CASPIENNE ET DE LA MER NOIR* (1895), 12 T. L. R. 41.

**434. — Arbitrator refusing to act.]**—An agreement to settle disputes between two parties as to the amount to be paid by one of them in respect of the value of goods belonging to, or work done by, the other of them, by a reference to two valuers, one to be appointed by each party, does not import any undertaking by the former that the valuer whom he may appoint shall act in the valuation, nor any liability for his not acting. The party is only bound to appoint a valuer on his part, & if the person appointed does not act, the other party is remitted to his original cause of action & may revoke his submission, or may possibly, if the valuer has undertaken to act & failed in his duty, have a right of action against him, but has no right of action against the party who appointed him.—*COOPER v. SHUTTLEWORTH* (1856), 25 L. J. Ex. 114.

*Annotation*:—**Distd.** *Clarke v. Westrope* (1856), 18 C. B. 765.

**435. — Relief against penalty on bond.]**—Parties to a suit entered into a bond with £200 penalty to stand to an award. Afterwards one of them countermanded the reference:—*Held*: equity could relieve against the penalty, & a trial was directed as to damages.—*WILSON v. BARTON* (1671), *Nels.* 148; 21 E. R. 812.

**436. By mandamus—To appoint arbitrator.]**—The rules of a building society provided that disputes between the society & the members should be settled by arbitrators, that five arbitrators should be elected by the board of directors, & that in each case of dispute the matters in difference should be decided by three of such arbitrators, to be selected by lot:—*Held*: if the society neglected to appoint arbitrators in accordance with their rules, the proper course for the member was to apply for a mandamus to compel them so to do.—*NORTON v. COUNTIES CONSERVATIVE PERMANENT BENEFIT SOCIETY*, [1895] 1 Q. B. 246; 64 L. J. Q. B. 214; 71 L. T. 790; 59 J. P. 149; 43 W. R. 178; 11 T. L. R. 92; 39 Sol. Jo. 95; 14 R. 59, C. A.

*Annotation*:—**Mentd.** *Botten v. City & Suburban Permanent Benefit Bldg. Soc.* (1895), 72 L. T. 375, C. A.

*See, generally*, BUILDING SOCIETIES.

**437. Specific performance.]**—A bill to enforce the specific performance of an agreement to refer to arbn. has never been entertained (*GRANT, M.R.*)—

**437 i. Specific performance.]**—(u. : whether it was intended by the exception in Act IX. of 1872, s. 28, to authorise the ct. to entertain a suit for specific performance of an agreement to refer to arbn.—*CORINGA OIL Co. v. KOEGLER* (1875), 1 L. R. 1 Cal. 466.—**IND.**

**PART I. SECT. 12, SUB-SECT. 2.**

**d. Rights of party acting on submission—Submission subsequently found to be void.]**—Where a party had entered into an informal agreement with another, settling certain disputed claims, & containing a submission

*GOURLAY v. SOMERSET (DUKE)* (1815), 19 Ves. 429; 34 E. R. 576.

*Annotations*:—**Appld.** *Morgan v. Milman* (1853), 3 De G. M. & G. 24; *Hare v. Burges* (1857), 5 W. R. 585, C. A.; *Finch v. Underwood* (1875), 33 L. T. 634. **Distd. & Expld.** *Hart v. Hart* (1881), 18 Ch. D. 670. **Appld.** *Evershed v. Evershed* (1882), 46 L. T. 690. **Refd.** *South Wales Ry. Co. v. Wythes* (1854), 3 Eq. Rep. 153. **Mentd.** *Darnley v. L. C. & D. Ry. Co.* (1865), 3 De G. J. & Sm. 24.

**438. —.]**—There is considerable weight, as evidence of what the law is, in the circumstance that no instance is to be found of a decree for specific performance of an agreement to name arbitrators, or that any discussion upon it has taken place in experience for the last twenty-five years (*LORD ELDON, C.*)—*STREET v. RIGBY* (1802), 6 Ves. 815; 31 E. R. 1323.

*Annotations*:—**Follid.** *La Purisima Concepcion* (1849), 13 Jur. 545. **Distd.** *British Empire Shipping Co. v. Somes* (1857), 3 K. & J. 433. **Consd.** *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112, P. C. **Distd.** *Penrice v. Williams* (1883), 23 Ch. D. 353. **Refd.** *South Wales Ry. Co. v. Wythes* (1854), 3 Eq. Rep. 153. **Mentd.** *Livingston v. Ralli* (1855), 3 C. L. R. 1096; *Blythe v. Lafone* (1859), 28 L. J. Q. B. 164.

**439. —.]**—The ct. will not entertain a bill for the specific performance of an agreement to refer to arbn.—*AGAR v. MACKLEW* (1825), 2 Sim. & St. 418; 4 L. T. O. S. Ch. 16; 57 E. R. 405.

*Annotation*:—**Refd.** *Richardson v. Smith* (1870), 5 Ch. App. 649, n.

**440. —.]**—An agreement between a railway co. & railway contractors (who were also land-owners) for the construction of a branch railway provided that the co. should find the land within a reasonable time & build the stations, that the contractors should give a bond to the amount of £50,000 to secure the performance of the contract & undertake to execute the works for a double line of railway, & the ballasting & permanent way for a single line, according to the terms of a specification, to be prepared by the engineer for the time being of the co., that the co. should work the branch in a reasonable & proper manner as compared to the remainder of the main railways, & that in case of difference as to working, the same should be settled by arbn., & that any of the details of the arrangement, in case of difference, should be determined by a referee to be appointed by the S.-G. for the time being:—*Held*: this agreement was too vague, obscure & uncertain to be enforced in a specific performance suit.—*SOUTH WALES RY. Co. v. WYTHES* (1854), 5 De G. M. & G. 880; 3 Eq. Rep. 153; 24 L. J. Ch. 87; 24 L. T. O. S. 165; 3 W. R. 133, C. A.

*Annotations*:—**Follid.** *Kernot v. Potter* (1862), 3 De G. F. & J. 447; *Greenhill v. Isle of Wight Ry. Co.* (1871), 23 L. T. 885. **Distd.** *Greene v. West Cheshire Ry. Co.* (1871), L. R. 13 Eq. 44. **Refd.** *Onions v. Cohen* (1865), 5 New Rep. 400; *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112, P. C.

*See, also*, Sect. 13, Sub-sect. 4, *post*.

**SUB-SECT. 2.—ABORTIVE REFERENCES.**

*See, now*, Arbitration Act, 1889, ss. 5 & 6.

*See, also*, Part II., Sect. 7, *post*.

**441. Powers & duty of court.]**—In an action upon a contract whereby the parties have provided for arbn. as a means of ascertaining the amount due

relative to others, & made payments in terms of the agreement & acted on the submission:—*Held*: although the submission failed from ambiguity, he was not entitled to insist in an action of repetition of the payments & otherwise, on the assumption that the agreement was not binding, action being reserved



under the contract, if arbn. proceedings have proved abortive it is the duty of the ct. to supply the defect by itself ascertaining the amount due.

When an arbn. for any reason becomes abortive it is the duty of a ct. of law, in working out a contract of which such an arbn. is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a ct. in such circumstances, & it is its duty, to come to the assistance of parties by the removal of the impasse & the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, & it furnishes by an appeal to a ct. of justice the means of working out & of preventing the defeat of bargains between parties (LORD SHAW OF DUNFERMLINE).—CAMERON v. CUDDY, [1914] A. C. 651; 83 L. J. P. C. 70; 110 L. T. 89, P. C.

**442.** —.—.]—A railway co. agreed to make such accommodation works as A. should notify within one month after possession should have been given to the co. A. & the co.'s engineer met & discussed the necessary works, & a memorandum was made specifying certain works. Certain discussions as to these works were protracted beyond the month, A. supposing that the condition as to time was waived. Two months after the one month had expired, A. made his award. The award provided for a cattle arch which had not been previously mentioned. The solrs. of the co., not being fully informed as to the exact date of the award, took it up & paid the arbitrator's charges:—*Held*: as the parties had agreed to leave matters to the discretion of A., the ct. had no power to substitute its own discretion for that of A. so as to order the construction of works, though such might appear to be necessary & proper.—DARNLEY (EARL) v. LONDON, CHATHAM & DOVER RY. CO. (1867), L. R. 2 H. L. 43; 36 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817, H. L.

*Annotations*:—*Mentd.* Gossip v. Wright (1863), 32 L. J. Ch. 648; A.-G. v. Cambridge Consumers' Gas Co. (1868), L. R. 6 Eq. 282; Breckon v. Russell (1868), 19 L. T. 468; Budding v. Murdoch (1875), 1 Ch. D. 42.

**443. No agreement signed—No reference taking place.**—Where a cause was ready to be tried, but was withdrawn at the time of trial upon an agreement of reference, which was never signed, & no reference ever took place, the ct. refused to give judgment as in case of a nonsuit, on the ground that pltf., having taken the cause down for trial once, was not in default, & that deft.'s course was to take down the record by proviso.—HANSBY v. EVANS (1839), 7 Dowl. 198; 4 M. & W. 565; 1 Horn & H. 420; 8 L. J. Ex. 105; 3 Jur. 44; 150 E. R. 1545.

**444. Failure of party to take up order of reference.**—A verdict was taken for pltf. at the assizes

Mar. 31, subject to a reference, the award to be made on or before the first day of Easter term, Apr. 16. The attorney for pltf. left the assize town for his own residence, having first directed his agent at the assize town to obtain the order of reference & send it him. On Apr. 4, having again written to his agent respecting the order, he left home on business & returned on the 14th, when he found that the order of reference had not been sent, & in consequence, he was not able to obtain it till the time for making the award had expired. Deft. having declined submitting to a new order of reference on the former terms, the ct. refused to grant a rule enabling pltf. to proceed upon his verdict in default of such submission.

It was pltf.'s fault that the arbn. did not proceed; the attorney went away & deserted the cause. The rule must be discharged, & pltf. may take the cause down again for trial (*per Cur.*).—DOE d. FISHER v. SAUNDERS (1832), 3 B. & Ad. 783; 1 L. J. K. B. 273; 110 E. R. 236.

**445. Reference by order—Default of third party.**—By order of *Nisi Prius* a verdict was taken for pltf., subject to an arbn. which was not entered upon through the default of a third party:—*Held*: pltf. might apply for leave to enter & try the cause *de novo*.—BACON v. CRESSWELL (1835), 1 Hodg. 189.

*Annotation*:—*Refd.* Hall v. Rouse (1838), 4 M. & W. 24.

**446.** —.— **Default of party.**—By an order of *Nisi Prius*, to which F. consented to become a party, a decree was to be obtained in Ch., by consent, to refer a cause & a Ch. suit between the same parties to a master in Ch. Pltfs., trustees for F., having, in violation of their consent, frustrated the endeavour to obtain such a decree from the Ct. of Ch., & having applied for a new trial in the cause, the ct. granted the application for a new trial, but only on condition of pltfs. paying the costs of the day & of the motion for a new trial, & of a motion for an attachment for not obeying the order of *Nisi Prius*.—MORGAN v. MILLER (1839), 6 Bing. N. C. 168; 8 Scott, 266; 133 E. R. 66.

**447. Verdict subject to reference—Arbitrator refusing to proceed.**—Where a verdict was found for pltf. at *Nisi Prius*, for the damages in the declaration, subject to the award of a barrister, & the arbitrator declined proceeding in the reference:—*Held*: pltf. was entitled to judgment & execution forthwith, unless deft. consented to refer the damages to another arbitrator.—WOOLLEY v. KELLY (CLARK) (1822), 1 B. & C. 68; 2 Dowl. & Ry. K. B. 158; 1 L. J. O. S. K. B. 38; 107 E. R. 26.

*Annotations*:—*Consd.* Hall v. Phillips (1832), 9 Bing. 89; Bacon v. Cresswell (1835), 1 Hodg. 189; Cheslyn v. Dalby,

in regard to the matter submitted.—STIRLING v. KER (1830), 8 Sh. (Ct. of Sess.) 911.—SCOT.

**e. No arbitrators appointed—Amount settled by jury.**—Upon a covenant in a lease that in case of fire a fair deduction should be made in the rent, to be ascertained by arbn., where neither had appointed an arbitrator:—*Held*: the tenant was not precluded from making a jury the medium by which a deduction was to be made. *Qu.*: whether if the landlord had offered to arbitrate, & the tenant had refused, the deduction could then be referred to a jury.—MCGILL v. PROUDFOOT (1847), 4 U. C. R. 33.—CAN.

**f. Arbitrators refusing to act.**—Where parties had agreed to refer all matters in dispute to the arbn. of three persons, & one of the arbitrators refused to continue to act, & the other two consequently refused to proceed with the reference, the ct. refused to order the

agreement to be filed in ct.—BROOKE v. SURDIAL (1874), 12 B. L. R. A. C. 13.—IND.

**445 i. Reference by order—Failure to enlarge.**—A cause was referred, the award to be made by July 1, with leave to the arbitrator to enlarge, but no verdict was taken. He enlarged the time, & after hearing evidence, adjourned to enable defts. to procure their witnesses. Neither party attended again, nor took any steps to procure a further enlargement, & pltf. gave notice of trial. Defts. notified him that they would move against the proceedings, as the order of reference was yet in force, but pltf. took a verdict, defts. not appearing:—*Held*: defts., if they desired the reference to continue, should have applied for an enlargement before the verdict, & by omitting so to do they had waived their right.—MILLER v. HOGG (1858), 2 P. R. 299.—CAN.

**445 ii.** *Arbitration not proceeded*

*with—Motion for liberty to proceed with action.*—A case was referred by consent to arbn. The arbn. was not proceeded with for upwards of five years, & then deft. denied the authority of the arbitrators. Pltf. moved the ct. for liberty to proceed with the action, notwithstanding the lapse of time & notwithstanding the consent whereby the cause was referred to arbn. He accounted for the delay by his anxiety not to press deft.:—*Held*: if the motion was granted the case would still stand referred to arbn. as before, & the motion should be refused.—O'CALLAGHAN v. O'CALLAGHAN (1861), 12 L. C. L. R. App. xlvii.—IR.

**g. Time for award elapsing through illness of arbitrator.**—Where one of the arbitrators had been ill & the time for sending it in elapsed before they could make their award, the ct. superseded the arbn. & recalled the suit.—JOSEPH v. (1865), Bourke, 359.—IND.

**Sect. 12.—Enforcement of a submission or agreement to submit: Sub-sect. 2.]**

*Dalby v. Cheslyn* (1836), 2 Y. & C. Ex. 170. **Distd.** *Burley v. Stephens* (1836), Tyr. & Gr. 413. **Refd.** *Cottam v. Partridge* (1841), 3 Scott, N. R. 174.

**448. — Reference not proceeded with.]—**Where, on the trial of a cause under a writ of trial, a verdict was taken by consent for pltf., subject to a reference to an arbitrator, & in consequence of the arbn. not being proceeded with, pltf., without getting rid of the first verdict, gave a fresh notice of trial, & obtained a verdict in the absence of deft., who did not appear at the trial, the second verdict, & all proceedings since the first trial, were set aside for irregularity.—*HARRISON v. GREENWOOD* (1845), 15 L. J. Q. B. 92; 6 L. T. O. S. 86, 157; 9 Jur. 1098.

**449. — Time limit expired—Enlargement.]—**Where a verdict was taken by consent, subject to a reference, & the arbitrator had omitted to enlarge the time for making his award, so that the time passed by, the ct. made a rule that pltf. should be at liberty to enter up judgment & sue out execution for the whole sum, unless deft. would consent to enlarge the time.—*TAYLOR v. GREGORY* (1831), 2 B. & Ad. 774; 9 L. J. O. S. K. B. 329; 109 E. R. 1333.

**Annotations:—****Refd.** *Evans v. Davies* (1835), 3 Dowl. 786; *Burley v. Stephens* (1836), 1 M. & W. 156. **Mentd.** *Bacon v. Cresswell* (1835), 1 Hodg. 189; *Cottam v. Partridge* (1841), 2 Man. & G. 843.

**450. — New trial.]—**When a verdict is taken with damages, subject to the award of an arbitrator, if the arbitrator omit to make his award within the specified time, the ct. will send the cause down for a new trial.—*HALL (HALE) v. PHILLIPS* (1832), 9 Bing. 89; 2 Moo. & S. 167; 1 L. J. C. P. 169; 131 E. R. 548.

**Annotations:—****Expld.** *Hall v. Rouse* (1838), 4 M. & W. 24. **Refd.** *Evans v. Davies* (1835), 3 Dowl. 786; *Burley v. Stephens* (1836), 1 M. & W. 156.

**451. —.]—**A cause was referred at the assizes, & by consent, a verdict was entered for pltf., damages £50, costs 40s., subject to the award of an arbitrator. The time for making the award expired without an award being made; the time was further enlarged by consent, & the enlarged time having also expired without an award being made, pltf. gave notice of trial, & proceeded to the trial of the cause, & obtained a verdict. A judge's order having been previously obtained for altering the record in the *disringas*, the clerk of assize at the trial erased the indorsement of the previous verdict, & entered the new verdict in the usual way. The ct. set aside the latter verdict for irregularity.

The distinction is where a verdict is given absolutely for the pltf. & the amount only is referred, in which case the death of the arbitrator or other intervening accident does not entirely open the cause, but where the verdict itself is referred to an arbitrator, such event opens the cause & the ct. has no power over deft. (*PARKE, B.*).—*EVANS v. DAVIES (DAVIS)* (1835), 3 Dowl. 786; 1 Gale, 150.

**Annotations:—****Refd.** *Hall v. Rouse* (1838), 4 M. & W. 24; *Minchiner v. Martin* (1852), 12 C. B. 455.

**452. — Judgment.]—**Where the time for making an award pursuant to an order of *Nisi Prius* expires before the award is made, & the arbitrator has not enlarged the time, as empowered by the order, the ct. will in certain circumstances direct judgment to be signed & execution issued for the sum for which the jury find, subject to the reference, unless the enlargement is consented to.—*WILKINSON v. TIME* (1835), 4 Dowl. 37; 1 Har. & W. 351.

**Annotations:—****Distd. & Expld.** *Porch v. Hopkins* (1844), 13

L. J. Q. B. 137. **Refd.** *Cottam v. Partridge* (1841), 2 Man. & G. 843.

**453. Waiver.]—**Where, by an order of *Nisi Prius*, a verdict was taken, subject to the award of an arbitrator, & the time for making the award expired before the order of reference was delivered to the arbitrator:—**Held:** (1) it was irregular to take the cause down again for trial without setting aside the previous verdict; (2) such irregularity was not waived by deft.'s attorney attending & cross-examining a witness, under an order for the examination of the witness on interrogatories.—*HALL v. ROUSE* (1838), 4 M. & W. 24; 1 Horn & H. 245; 7 L. J. Ex. 214.

**454. — Award set aside—Discretion as to execution.]—**Where a verdict was taken for pltf. in an action of debt, for the amount in the declaration & nominal damages, subject to the award of an arbitrator, to whom the cause & all matters in difference between the parties were referred, the costs of the cause to abide the event, & the arbitrator having made an award in favour of pltf. as to the action, but against them as to the other matters in difference, which was afterwards set aside by deft. for defects in it, the ct. refused to allow pltf. to issue execution for a nominal amount of debt & the costs, unless deft. would consent to refer the matter back to the same arbitrator.—*PORCH v. HOPKINS* (1844), 1 Dow. & L. 881; 13 L. J. Q. B. 137; 2 L. T. O. S. 334.

**455. Power to sue for quantum meruit.]—**By agreement in writing deft., as incoming tenant, agreed with pltf., as outgoing tenant, to purchase straw upon the farm at a valuation to be made by two persons, or their umpire. Valuers were appointed by the parties, who did not agree upon the valuation or appoint an umpire, & in the meanwhile deft. consumed the straw:—**Held:** pltf. entitled to recover for the straw as upon a *quantum meruit*, the arbn. agreed to by the parties having become impracticable.—*CLARKE v. WESTROPE* (1856), 18 C. B. 765; 25 L. J. C. P. 287; 20 J. P. 728; 139 E. R. 1572.

**Annotations:—****Refd.** *Re Constable & Cranswick* (1899), 80 L. T. 164; *Kellett v. New Mills U. D. C.* (1900), Hudson, Bldg. Contracts, 4th ed., Vol. II., p. 298.

**456. Failure of stewards to agree.]—**Deft. was stakeholder of a race, which was to be decided by the award of four stewards. After the race was over the stewards met, but were unable to agree, two being in favour of pltf.'s horse, & two in favour of another horse. In an action by pltf. to recover the stakes:—**Held:** (1) it was a condition precedent that there should be a decision of the stewards, if practicable; (2) pltf. could not submit the question to the jury. **Semble:** if he could not get a decision from the stewards, & it became impossible finally to determine to whom the stakes belonged, each party might recover back his contribution.—*BROWN v. OVERBURY* (1856), 11 Exch. 715; 25 L. J. Ex. 169; 20 J. P. 454; 4 W. R. 252.

**Annotations:—****Expld. & Apld.** *Scott v. Avery* (1856), 5 H. L. Cas. 811. **Distd.** *Parr v. Winteringham* (1859), 1 E. & R. 394. **Expld. & Distd.** *Mills v. Bayley* (1863), 2 H. & C. 36; *Sadler v. Smith* (1869), L. R. 4 Q. B. 214. **Refd.** *Spackman v. Plumstead Board of Works* (1885), 10 App. Cas. 229. **Mentd.** *Dinos v. Wolfe* (1869), L. R. 2 P. C. 280, C. A.

**457. Essential particular left to decision of arbitrators—No decision given.]—**The ct. refused to decree specific performance of an agreement for the sale of lands where an essential particular—namely, the mode of erection of houses—was left, in case the parties differed, to the absolute decision of two persons named in the agreement, or their nominee, & where no such decision had been given.—*TILLET v. CHARING CROSS BRIDGE CO.* (1859), 26 Beav. 419; 28 L. J. Ch. 863; 34 L. T.



O. S. 42 ; 5 Jur. N. S. 994 ; 7 W. R. 391 ; 53 E. R. 959.

*Annotations* :—**Distd.** *Baker v. Met. Ry. Co.* (1862), 31 Beav. 504. **Consd.** *Hart v. Hart* (1881), 18 Ch. D. 670. **Mentd.** *Re Whistler* (1887), 35 Ch. D. 561.

**458. Reference of estimate to A. for approval—Death of A.]**—An agreement was made between a landowner & a railway co., whereby it was agreed that an estimate should be made by the co.'s engineer of the cost of completing a road, & submitted to A., the landowner's agent, "for approval, in case of difference the amount to be determined by B.," the amount, "when agreed or determined," to be paid to the landowner, "in discharge of all obligations" as to the road, & "the purchase to be completed forthwith." In Dec., 1871, A. died, & in May, 1872, the co., for the first time, sent in an estimate for the cost of completing the road. The purchase had not been completed, & neither the purchase-money nor any interest had been paid. B. was living :—**Held** : (1) the submission of the estimate to A. for approval was of the essence of the agreement, & inasmuch as by his death the agreement was incapable of being performed in the manner & form therein specified, the ct. could not enforce performance of it ; (2) the co. should pay interest on the purchase-money from the date of their taking possession, but no inquiry should be directed as to damages.—**FIRTH v. MIDLAND Ry. Co.** (1875), L. R. 20 Eq. 100 ; 44 L. J. Ch. 313 ; 32 L. T. 219 ; 23 W. R. 509.

*Annotation* :—**Mentd.** *County Hotel & Wine Co. v. L. & N. W. Ry. Co.*, [1918] 2 K. B. 251.

**459. Valuation—Failure to agree as to umpire.]**—An indenture provided for the valuation of certain hereditaments by two persons, one chosen by each party, or in case of their disagreement by an umpire appointed by those two. Persons who were appointed as valuers differed greatly in their estimates & were unable to agree upon any third person. Pltf. accordingly filed a bill to have the agreement carried into execution, & that the ct. would appoint persons to make the valuation :—**Held** : as the agreement made was to purchase at a price to be ascertained in a specified mode, & no price had been fixed in that mode, there was no complete & concluded contract which the ct. could execute.—**MILNES v. GERY** (1807), 14 Ves. 100 ; 33 E. R. 574.

*Annotations* :—**Distd.** *Pritchard v. Ovey* (1820), 1 Jac. & W. 396. **Expld.** *Morgan v. Milman* (1853), 3 De G. M. & G. 24 ; *Clarke v. Westrope* (1856), 18 C. B. 765. **Consd.** *Tillett v. Charing Cross Bridge Co.* (1859), 26 Beav. 419. **Foll.** *Vickers v. Vickers* (1867), L. R. 4 Eq. 529. **Distd.** *Richardson v. Smith* (1870), 5 Ch. App. 648, L. C. **Consd.** *Hart v. Hart* (1881), 18 Ch. D. 670. **Refd.** *Blundell v. Bret-targh* (1810), 17 Ves. 232 ; *Scott v. Avery* (1856), 5 H. L. Cas. 811, H. L. ; *Collins v. Collins* (1858), 53 E. R. 916 ; *Loftus v. Roberts* (1902), 18 T. L. R. 532, C. A. ; *County Hotel & Wine Co. v. L. & N. W. Ry. Co.*, [1918] 2 K. B. 251.

**460. — No umpire appointed—Specific performance.]**—A. agreed to purchase a factory at a certain price & to take the plant & fixtures at a valuation, the amount to be ascertained by valuers appointed on each side, or by an umpire, to be appointed by the valuers before proceeding with the business. The valuers could not agree, & had neglected to appoint an umpire. At the instance of the vendor the ct. decreed specific performance & directed the value of the plant & fixtures to be ascertained by the chief clerk.—**JACKSON v. JACKSON** (1853), 1 Sm. & G. 184 ; 22 L. J. Ch. 873 ; 21 L. T. O. S. 98 ; 1 W. R. 264 ; 65 E. R. 80.

*Annotation* :—**Refd.** *Richardson v. Smith* (1870), 5 Ch. App. 648, L. C.

**461. — No appointment of umpire provided for.]**—Where two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the

share of the other at a valuation to be made by two persons, one appointed by each partner, & the partnership was carried on for some time under that agreement :—**Held** : though the valuation could not be so made, because no umpire was provided, the ct. would carry the partnership agreement into effect by ascertaining the value of the share.

Where the fixing a value by arbitrators is not of the essence of an agreement, the ct. will carry the agreement into effect, & will itself, if necessary, ascertain the value.—**DINHAM v. BRADFORD** (1869), 5 Ch. App. 519, L. C.

*Annotation* :—**Apprvd.** *Hordern v. Hordern*, [1910] A. C. 465, P. C.

**462. — Refusal to appoint arbitrator.]**—By a contract for the sale of an estate it was agreed that the price should be £24,000, & it was further agreed that certain furniture & other articles on the estate, the value of which was about £2,000, should be valued by valuers mutually agreed upon, & that the purchaser would take a part of the furniture & articles at that valuation. The vendor refused to appoint a valuer, & refused to complete. A decree was made at the suit of the purchaser for specific performance of the contract, except so far as it related to the furniture & articles.—**RICHARDSON v. SMITH** (1870), 5 Ch. App. 648 ; 39 L. J. Ch. 877 ; 19 W. R. 81, L. C. & L. J.

**463. — Refusal of arbitrator to act.]**—A declaration stated that deft. agreed to purchase of pltf. certain goods, at a valuation to be made by N. & M. or their umpire, & that M. refused to attend to value, whereupon N. valued the goods to deft. Breach, that deft. refused to take the goods so valued & to pay the price :—**Held** : bad, there being no agreement that deft. would take the goods at the valuation of N. only.—**THURNELL v. BALBIRNIE** (1837), 2 M. & W. 786 ; *Murp. & H.* 235 ; 6 L. J. Ex. 255 ; 1 Jur. 847 ; 150 E. R. 975.

*Annotations* :—**Distd.** *Lowndes v. Stamford* (1852), 18 Q. B. 425 ; *Scott v. Avery* (1856), 5 H. L. Cas. 811, H. L.

**464. — Refusal to sign bond.]**—Disputes having arisen between landlord & tenant as to repairs & dilapidations, these were referred to arbn., & arbitrators were appointed, but no award was made. It was afterwards agreed by correspondence that the tenant should purchase the premises at a price to be fixed by the same arbitrators. An arbn. bond was prepared by the tenant's solr., & sent to the landlord, who refused to execute it :—**Held** : it being uncertain that any award would ever be made, specific performance of the agreement for sale could not be decreed.—**WILKS v. DAVIS** (1817), 3 Mer. 507 ; 36 E. R. 195.

*Annotations* :—**Consd.** *Agar v. Macklew* (1825), 4 L. J. O. S. Ch. 16 ; *Vickers v. Vickers* (1867), L. R. 4 Eq. 529.

**465. — Failure of mode agreed upon.]**—Where there are circumstances in which a mode of valuation agreed upon by the parties fails, the ct. will ascertain the value by a reference to the master.—**ARKWRIGHT v. STOVELD** (1824), Coop. Pr. Cas. 499 ; 3 L. J. O. S. Ch. 49 ; 47 E. R. 618.

**466. — To be ascertained by arbitration—No submission made.]**—Where a contract for sale of land stipulates that the price shall be ascertained by arbn., the Ct. of Equity cannot interfere where the price is not so ascertained.—**MORGAN v. MILMAN** (1853), 3 De G. M. & G. 24 ; 22 L. J. Ch. 897 ; 20 L. T. O. S. 285 ; 17 Jur. 193 ; 1 W. R. 134 ; 43 E. R. 10, L. J.

*Annotations* :—**Mentd.** *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426 ; *Re Dyke's Estate* (1869), 17 W. R. 658 ; *Johnson v. Bragge*, [1901] 1 Ch. 28.

**467. No price fixed.]**—Under an agreement for sale of leasehold premises & the goodwill of a trade, certain fixtures were to be taken at a valua-



**Sect. 12.—Enforcement of a submission or agreement to submit: Sub-sect. 2. Sect. 13: Sub-sect. 1, A.]**

tion, to be made by two gaugers, to be named, or their umpire:—*Held*: the ct. could not decree specific performance of an agreement for sale at a price to be determined by arbn., unless the arbitrators had actually fixed the price.—**DARBEY v. WHITAKER** (1857), 4 Drew. 134; 5 W. R. 772; 62 E. R. 52.

**Annotations:—****Consd.** Collins v. Collins (1858), 26 Beav. 306. **Folld.** Tillett v. Charing Cross Bridge Co. (1859), 26 Beav. 419. **Expld.** Richardson v. Smith (1870), 5 Ch. App. 648, 1. C. **Refd.** Baker v. Met. Ry. Co. (1862), 31 Beav. 504; Hart v. Hart (1881), 18 Ch. D. 670. **Mentd.** Muller & Co.'s Margarine v. I. R. Comrs. (1899), 69 L. J. Q. B. 291, C. A.

**468. ——— Refusal to allow valuers to proceed.]—****VICKERS v. VICKERS**, No. 55, *ante*.

**469. ———.]—**Deft. agreed to sell to pltf. the lease & goodwill of a public-house, with a proviso that deft. should sell the fixtures & furniture at a fair valuation, to be made by a person named in the contract. Deft. afterwards refusing to perform the contract, & preventing the valuer from proceeding, he was ordered, on motion, to permit the valuer & clerks at all reasonable times, & on proper notice, to enter on the premises for the purposes of the valuation.—**SMITH v. PETERS** (1875), L. R. 20 Eq. 511; 44 L. J. Ch. 613; 23 W. R. 783.

**Annotation:—****Mentd.** County Hotel & Wine Co. v. L. & N. W. Ry. Co., [1918] 2 K. B. 251.

**470. ———.]—**Where there is a contract to sell at a valuation by A., B. & C., the ct. will compel the vendor to permit the valuation. The time of valuation is of the essence of the contract, but deft. cannot take advantage of it, if he improperly occasion the delay.—**MORSE v. MEREST** (1821), 6 Madd. 26; 56 E. R. 999.

**Annotations:—****Mentd.** Pope v. Duncannon (1838), 9 Sim. 177; Richardson v. Smith (1870), 5 Ch. App. 649, n.

**471. Death of arbitrator—Return of deposit.]—**Money deposited with a third party to abide the result of an arbn., which subsequently became impossible, by the death of one of the arbitrators before the arbn. was commenced, & no proceeding afterwards taken, was ordered to be returned to the party who made the deposit.—**ROYLE v. WILLIAMS** (1835), 4 L. J. Ch. 113.

**Generally.]—**See Nos. 524—553, *post*.

### SECT. 13.—REVOCATION OF AN AGREEMENT TO SUBMIT.

*Arbitration Act, 1889, s. 1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the ct. or a judge, & shall have the same effect in all respects as if it had been made an order of ct.*

**SUB-SECT. 1.—IN WHAT CASES PARTY MAY REVOKE AGREEMENT TO SUBMIT.**

**A. At Common Law and in Cases not within Statutory Restrictions.**

**472. Distinction between general agreement to refer & submission to particular arbitrator.]—**There may be an agreement to refer generally without naming the arbitrators; such an agreement was always irrevocable, & an action would always lie for its breach, although the ct. could not compel either of the parties to proceed under it. There may be an agreement to clothe a particular arbitrator with authority, & if one of the parties revoked that particular arbitrator's authority & refused to submit to him, he could not be

compelled to proceed. In such a case, though not with exactitude, one might probably talk of revocation of the submission & of the submission as revocable although it was in truth a revocation of the authority of that arbitrator. In fact an agreement to refer was never revocable, for an action might have been brought upon it in respect of a breach (**BOWEN, L.J.**).—*Re SMITH & SERVICE & NELSON & SONS* (1890), 25 Q. B. D. 545; 59 L. J. Q. B. 533; 63 L. T. 475; 39 W. R. 117; 6 T. L. R. 434; 6 Asp. M. L. C. 555, C. A.

**Annotations:—****Consd.** Manchester Ship Canal Co. v. Pearson, [1900] 2 Q. B. 606, C. A.; Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills (1912), 106 L. T. 451, C. A. **Refd.** Doleman v. Ossett Corp., [1912] 3 K. B. 257, C. A. **Mentd.** United Kingdom Mutual S.S. Assce. Assocn. v. Houston, [1896] 1 Q. B. 567.

**473. General agreement to refer not revocable.]—**Where a contract contains an agreement to refer, one party cannot revoke such agreement & bring an action. If he does so the ct. will stay the proceedings under C. L. P. Act, 1854, s. 11.—**MOFFAT v. CORNELIUS** (1878), 39 L. T. 102; 26 W. R. 914, C. A.

**Annotation:—****Mentd.** Piercy v. Young (1879), 42 L. T. 710, C. A.

**474. ———.]—**Matters in difference were referred by an agreement, whereby pltf. was to execute a conveyance of estates to deft. with a power to sell within two months after the award & apply the net proceeds in payment of the balance that might be found due. Before the award pltf. executed a deed revoking the arbitrator's authority & moved for an injunction to restrain a sale under the power:—*Held*: the injunction must be refused.—**HARCOURT v. RAMSBOTTOM** (1820), 1 Jac. & W. 505; 37 E. R. 460.

**Annotation:—****Refd.** Pope v. Duncannon (1838), 9 Sim. 177.

**475. ———.]—**Articles of partnership between pltf. & other persons for performing a contract contained an agreement that any dispute between the partners should be settled by arbn., but there was no agreement that the submission to arbn. might be made a rule of ct. One of the partners became a liquidating debtor, & deft. was appointed his trustee, & he elected to carry on the contract. Deft. claimed to have purchased the shares of pltf. & the other partners in the undertaking. Pltf. brought an action against deft. asking for account of the partnership dealings. The main questions at issue were whether the shares of the other partners were purchased on behalf of pltf. & deft. or of deft. alone, & whether deft. had purchased the share of pltf. as well as of the other partners. Deft. moved for an order under C. L. P. Act, 1854, s. 11, staying all proceedings in the action, & referring the matters in question to arbn., but before the motion was heard pltf. revoked the agreement for arbn.:—*Held*: although a particular submission to arbn. might be revoked, a general agreement to refer to arbn. could not be revoked by one of the parties.—**PIERCY v. YOUNG** (1879), 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 845, C. A.

**Annotations:—****Consd.** Fraser v. Ehrensperger (1883), 12 Q. B. D. 310, C. A. The meaning of what the late Master of the Rolls said was, that one of the parties could not revoke the agreement to refer, but that he could revoke the submission to a particular arbitrator (**BRETT, M.R.**); *De Ricci v. De Ricci*, [1891] P. 378; *Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 106 L. T. 451, C. A. **Mentd.** Smith v. Hargrove (1885), 16 Q. B. D. 183.

**476. ———.]—**Although a particular submission to arbn. may be revoked, a partner can no more revoke a general agreement to refer than he can revoke any other contract in the partnership articles.—**CHRISTIE v. NOBLE** (1880), cited 14 Ch. D. at p. 203, n.

**477. Submission to particular arbitrator revocable.]—Held:** although deft. was bound in a bond to stand to, abide, observe, etc., the rule, etc., arbitrament, etc., yet he might countermand it, for a man cannot by his act make such authority, power or warrant not countermandable which is by the law & of its own nature countermandable; as if I submit myself to an arbitrament, although this be made by express words irrevocable, or that I grant or am bound that this shall stand irrevocably, yet it may be revoked.—**VYNIOR'S CASE** (1609), 8 Co. Rep. 80a; 77 E. R. 595 *sub nom.* **VIVION v. WILDE**, 2 Brownl. 290.

**Annotations:—****Consd.** *Marsh v. Bulteel* (1822), 5 B. & Ald. 507. **Refd.** *Re Rouse & Meier* (1871), L. R. 6 C. P. 212; *Randell v. Thompson* (1876), 1 Q. B. D. 748, C. A. **Mentd.** *Lyn v. Wyn* (1665), O'Brigg. 122; *Thomas v. Sarrell* (1672), 3 Keb. 143; *Charneley v. Winstanley* (1804), 1 Smith, K. B. 435; *Brown v. Tanner* (1825), 1 C. & P. 651; *Warburton v. Starr* (1825), 4 B. & C. 103; *Smart v. Sanders* (1848), 5 C. B. 895; *Livingston v. Ralli* (1855), 5 E. & B. 132; *Toppin v. Healey* (1863), 11 W. R. 466; *Fraser v. Ehrensperger* (1883), 12 Q. B. D. 310, C. A.

**478. —.]—**It has been properly admitted that deft. could not destroy his agreement to submit to the arbn., & therefore, a remedy lies upon the bond given to secure such agreement. But it is equally clear that before the Act of 1698 a submission to arbn. might be revoked before it was executed, & there is nothing in that stat. to make it irrevocable while it continues executory. The stat. says that it shall & may be lawful for the parties to agree that their submission should be made a rule of ct., which agreement (that is, so long as it subsists as an agreement unrescinded) shall or may be entered of record, etc. After it is made a rule of ct. the party cannot indeed rescind it without incurring a breach of that rule; but till then it has its binding force as an agreement only, to submit to the award of the arbitrator, whose authority is in its nature revocable; & for the breach of which agreement the party has a remedy of another sort (**LORD ELLENBOROUGH, C.J.**).—**MILNE v. GRATRIX** (1806), 7 East, 608; 103 E. R. 236.

**Annotations:—****Refd.** *King v. Joseph* (1814), 5 Taunt. 452. **Mentd.** *Clapham v. Higham* (1822), 1 Bing. 87; *Lord v. Lord* (1855), 5 E. & B. 404.

**479. —.]—**Submission to arbn. by deed may be revoked by deed & notice of revocation before award made; & after the revocation, the submission ought not to be made a rule of ct.—**KING v. JOSEPH** (1814), 5 Taunt. 452; 128 E. R. 765.

**Annotations:—****Mentd.** *Murphy v. Keller* (1851), 17 L. T. O. S. 297; *Lord v. Lord* (1855), 5 E. & B. 404.

**480. —.]—**A declaration stated that deft. covenanted to obey, abide by, & perform an award, & that he would not prevent the arbitrators from making their award. It then stated that the arbitrators made their award, & thereby directed deft. to pay a certain sum therein mentioned, & alleged as a breach of the covenant that deft. did not pay the sum awarded. Plea, that before the award deft., by deed, revoked the authority of the arbitrators, of which revocation they had notice:—**Held:** deft. was entitled to judgment, although it appeared by the plea that he had been guilty of a breach of the covenant to abide by the award by revoking the authority of the arbitrators, pltf. being entitled to recover damages only in respect of the cause of action stated in his declaration, & not in respect of a cause of action disclosed in the plea.

The second count of the declaration stated the deed of reference, & then averred that deft. did, before the making of the award, hinder & prevent the arbitrators from making their award in this, that deft., by a certain deed in writing, signed &

sealed by him, after reciting as was therein recited, did revoke the authority:—**Held:** this was an allegation, not of the mere legal effect of the deed, but of the fact of revocation, & it was unnecessary to state that the arbitrators had notice of the revocation, that being necessarily implied in the averment that deft. had revoked the authority.—**MARSH v. BULTEEL** (1822), 5 B. & Ald. 507; 1 Dow. & Ry. K. B. 106; 106 E. R. 1276.

**Annotation:—****Mentd.** *Lang v. Purves* (1862), 15 Moo. P. C. C. 389, P. C.

**481. —.]—**An agreement in a deed provided that arbitrators should appoint an umpire:—**Held:** (1) until such appointment the reference could not go on; (2) after such appointment there would be no power to revoke, as the case would fall within the Act of 1698, s. 39.—**BRIGHT v. DURNELL** (1836), 4 Dowl. 756; Tyr. & Gr. 576.

**Annotation:—****Consd.** *Shepherd v. Norwich Corpn.* (1885), 30 Ch. D. 553.

**482. —.]—**Pltf. by deed agreed with deft. to empty a mill-pool at a certain price per yard of the mud removed, the measurement of the mud to be ascertained by N., to whom it was also agreed that any dispute which should arise should be referred. Disputes having arisen, the matter was referred to N., who made an award both as to the measurement of the mud & as to the other matters in dispute. In an action upon the award:—**Held:** though the agreement that the mud should be measured by N. was irrevocable, yet the agreement for reference was revocable, & a plea that before the award was made deft. revoked the reference to arbn. was good, as the agreement, containing no express stipulation that the reference should be made a rule of ct., was not made irrevocable by C. L. P. Act, 1854, s. 17.—**MILLS v. BAYLEY** (1863), 2 H. & C. 36; 2 New Rep. 38; 32 L. J. Ex. 179; 8 L. T. 392; 9 Jur. N. S. 499; 11 W. R. 598; 159 E. R. 17.

**Annotations:—****Appld.** *Re Rouse & Meier* (1871), L. R. 6 C. P. 212. **Consd.** *Randell v. Thompson* (1876), 1 Q. B. D. 748, C. A.; *Re Mitchell & Izard & Governor of Ceylon* (1888), 21 Q. B. D. 408, C. A. **Refd.** *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112, P. C.; *Thomson v. Anderson* (1870), 39 L. J. Ch. 468; *Fraser v. Ehrensperger* (1883), 12 Q. B. D. 310, C. A.

**483. —.]—**The power to revoke without the leave of a ct. a submission to arbn., which does not contain a consent clause for making the submission a rule of ct., is not affected by C. L. P. Act, 1854.

A. & B. having dissolved partnership, signed an agreement by which, after stating that B. had offered A. £18,000 for the purchase of his interest in the partnership business & assets, & that A. had declined the offer but was willing to accept £20,000, they agreed to leave it to a referee to say what sum should be paid by B. to A.:—**Held:** the agreement was revocable by either party at any time before the award was made.—**THOMSON v. ANDERSON** (1870), L. R. 9 Eq. 523; 39 L. J. Ch. 468; 22 L. T. 570; 34 J. P. 500; 18 W. R. 445.

**Annotations:—****Mentd.** *Fraser v. Ehrensperger* (1883), 12 Q. B. D. 310, C. A.; *Re Mitchell & Izard & Governor of Ceylon* (1888), 21 Q. B. D. 408, C. A.

**484. —.]—**A dispute having arisen between pltf. & deft. as to the balance due to pltf. for work done for deft., they referred the matter, by an instrument in writing, to a specific arbitrator, W. No time was fixed for making an award, & there was no clause as to making the submission a rule of ct. W. proceeded in the matter at once, & held his last sitting within three months. Several months having afterwards elapsed, & no award having been made, pltf. having given notice to W. & deft. that they revoked the submission, brought an action against deft. for the alleged balance. Deft. having applied for a stay of pro-







**490. — Arbitrator appointed under Common Law Procedure Act, 1854, s. 13.]**—Where there is an agreement to refer a dispute to two arbitrators, one to be appointed by each party, but no agreement to make the submission a rule of ct., & one of the parties having failed to appoint an arbitrator, the other party, by virtue of the above sect., appoints his arbitrator to act as sole arbitrator, the authority of such arbitrator may be revoked by either party before an award is made.—*FRASER v. EHRENSPERGER* (1883), 12 Q. B. D. 310; 53 L. J. Q. B. 73; 49 L. T. 646; 32 W. R. 240, C. A.

*Annotation:—Refd. Re Mitchell & Izard & Governor of Ceylon* (1888), 21 Q. B. D. 408, C. A.

**491. — Unless authority coupled with interest.]**—Where, in a submission to arbn. by an order of *Nisi Prius* in an action between A. & B., it is stipulated that a certain sum of money shall be placed by B. in the hands of C., the arbitrator, to abide the event of the award, & B., after placing the sum in the hands of C., becomes bkpt., the submission is not revoked, nor are the assignees of B. entitled to demand back the money, as, in such circumstances, C. has not a mere authority, but an authority coupled with an interest.—*TAYLER v. MARLING* (1840), 2 Man. & G. 55; 2 Scott. N. R. 374; Drinkwater, 121; 10 L. J. C. P. 26; 133 E. R. 661.

**492. — Not after award made but before notice of award.]**—On a motion to set aside an award it appeared that after the award was made, but before he had notice of it, one of the parties revoked the arbitrator's authority on the ground of the other's insolvency. The ct. declined to grant a rule *nisi* on this ground.—*Re MACLARTY & GRAY* (1857), 28 L. T. O. S. 288.

**493. — Arbitrator acting improperly.]**—If a party has reasonable ground to believe that the arbitrators are acting improperly, he may revoke the authority at any time before the award is made.

Pltf. & deft. mutually entered into bonds to submit to arbn. a certain claim of pltf. on a charter-

party, for the hire of a ship. The umpire chosen by the arbitrators evincing partiality towards deft., pltf., before the award was made, revoked his authority, & afterwards brought an action on the charterparty & recovered a verdict for £1,500 & sued out execution thereon. The umpire, notwithstanding the revocation, made an award in favour of deft.:—*Held*: the conduct of the umpire was highly improper, & in the circumstances pltf. was not guilty of a contempt of the order of the ct. in revoking the power he had previously delegated when he found that it was about to be made an improper use of.—*STEWART (STEWART) v. WILLIAMSON* (1829), 5 Bing. 415; 2 Moo. & P. 765; 7 L. J. O. S. C. P. 156; 130 E. R. 1121.

*B. Where statutory restrictions apply—By leave of the Court.*

*See, now, Arbitration Act, 1889, s. 1.*

**494. When necessary—No complete reference.]**—Two arbitrators were chosen in pursuance of a clause in a deed, which directed that they should appoint an umpire before they commenced proceedings. They met, but could not agree upon an umpire, whereupon pltf. revoked his arbitrator's authority:—*Held*: the case was not within the C. P. Act, 1833, s. 39, which applied only when there was a complete reference, & pltf. was entitled to revoke without leave.—*BRIGHT v. DURNELL* (1836), 4 Dowl. 756; Tyr. & Gr. 576.

*Annotation:—Mentd. Shepherd v. Norwich Corpn.* (1885), 30 Ch. D. 553.

**495. — Reference by order on trial of indictment.]**—The provisions of C. P. Act, 1833, s. 39, which take away the power of revoking a submission to arbn. made in an action, do not extend to a reference, agreed to on the trial of an indictment, but where such reference has been made at *Nisi Prius*, with a proviso for making the order a rule of ct., either party may, by himself or attorney, still revoke his submission.—*R. v. BARDELL* (1836), 5 Ad. & El. 619; 2 Har. & W. 401;

*v. MOHIMA CHUNDER DUTT* (1872), 17 W. R. 516.—IND.

**489 ii. — — —.]**—After the parties to a suit have agreed to refer it to arbn. & the order of reference has been made by the ct., neither of them can arbitrarily & on no sufficient ground withdraw from the agreement.—*NAIN-SUKH RAI v. UMADAI* (1884), 1 L. L. R. 7 All. 273.—IND.

**489 iii. — — —.]**—Where a party states in writing the matter to be referred & the ct. refers to an arbitrator agreed upon the matter in difference, the party is not entitled at his own option to withdraw from such a reference.—*AITKEN SPENCE & Co. v. FERNANDO*, [1903] A. C. 200; 72 L. J. P. C. 63; 38 L. T. 178; 19 T. L. R. 295, P. C. CEYLON.

**489 iv. — Reference by order of *Nisi Prius*.]**—When a cause was referred at *Nisi Prius*, & one of the parties revoked his submission before the award was made, the ct. set aside the award.—*EDWARDS v. KELLY* (1830), 2 Hud. & Br. 605; 3 L. R. L. Rec. O. S. 328.—IR.

**489 v. — — —.]**—An order made at *Nisi Prius* to refer a case to arbn. may be revoked by one of the parties.—*WALKER v. MINCHIN* (1834), 2 Ir. L. Rec. N. S.—IR.

**489 vi. — — —.]**—*Held*: a reference by order of *Nisi Prius* might be revoked by either party before award made.—*BURRELL v. MILLS* (1831), 2 O. S. 243.—CAN.

**492 i. — Not after result of reference apparent.]**—Where a co. took possession of lands without consent of the owner, & held them for some time, & an arbn. was agreed on, by which it seemed probable that the price would be fixed

at a sum very much larger than the co. would be willing to pay:—*Held*: the co. could not, on this ground, revoke the submission.—*GREAT WESTERN RY. Co. v. MILLER* (1855), 12 U. C. R. 651.—CAN.

**492 ii. Before award.]**—It is almost a universal rule that a submission to arbn. is revocable before award made.—*SURUBJEET NARAIN SINGH v. GOURIE PERSHAD NARAIN SINGH* (1867), 7 W. R. 269.—IND.

**492 iii. — — —.]**—Where a cause was referred to arbn., & the arbitrator arrived at a conclusion, & reduced such decision to writing, & communicated same to parties:—*Held*: the award was complete, & it was too late afterwards to revoke his authority.—*MILNER v. LUTTRELL, MILNER v. BRYDGES* (1878), 2 P. & B. 87.—CAN.

**492 iv. — — —.]**—*Qu.*: whether after an award has been made a party can revoke his submission, even if he establishes fraud or mistake.—*Re ZUBER & HOLLINGER* (1911), 190 W. R. 724; 25 O. L. R. 252; 3 O. W. N. 416.—CAN.

**s. What constitutes revocation — Revocation by one of two parties on same side.]**—In an action on an award, the two defts. having, on one side, submitted to arbn.:—*Held*: one of them without the other could not revoke the authority of the arbitrator.—*HENERY v. HENERY* (1826), Batt. 125.—IR.

**t. — — —.]**—One of two persons on the same side may revoke a joint submission to arbn., & such revocation will be a forfeiture of a joint & several bond by both, conditioned to stand to, obey & perform the award.—

*HATHEWAY v. CLIFF* (1851), 2 All. 267.—CAN.

**u. — Revocation by deed & parol—*Nisi Prius*.]**—A revocation by deed can set aside a deed, by which a person binds himself to abide by the decision of arbitrators. Revocation by parol may set aside a parol agreement. Notice is not necessary.—*ALLA AYAPPA v. NUNDULA PERAIYA alias PERAMBOTLU* (1865), 3 Mad. 82.—IND.

**v. — Revocation presumed from failure to proceed.]**—Where some months had elapsed without either party taking action to carry out an agreement to refer a dispute to arbn.:—*Held*: pltf. not debarred from considering the agreement revoked & prosecuting his suit.—*JEORAKHUM LOH v. MUTTRA PERSHAD* (1873), 1 N. W. 252.—IND.

**w. — Revocation by telegram.]**—In the course of arbn. proceedings one of the arbitrators received two telegrams purporting to be sent by pltf. & deft. to the arbitrators, the terms of which were: "Stay further proceedings: arrange matters here":—*Held*: the telegrams sent to the arbitrators did not amount to a revocation of their authority.—*KELLIE v. FRASER* (1877), 1 L. R. 2 Calc. 445.—IND.

**PART I. SECT. 13, SUB-SECT. 1.—B.**

**494 i. When necessary—Effect of Common Law Procedure Act, 1856, s. 97.]**—*Semble*: the restraint upon revocation without leave of the ct. or a judge, provided by 7 Will. 4, c. 3, s. 29, is extended by C. L. P. Act, 1856, s. 97, to all submissions without words purporting that they are not to be made a rule of ct.—*WOOD v. CLOSTER* (1858), 16 U. C. R. 490.—CAN.

**Sect. 13.—Revocation of an agreement to submit:**  
**Sub-sect. 1, B.]**

1 Nev. & P. K. B. 74 ; 6 L. J. K. B. 30 ; 111 E. R. 1299 ; *sub nom.* R. v. SHILLIBEER, 5 Dowl. 238.

**496. — Reference by order not made in action.]**  
 —On the trial of two indictments, one for perjury & the other for conspiracy between the same parties, it was arranged by the counsel on each side that verdicts of not guilty should be taken, & an order of *Nisi Prius* was drawn up by consent, whereby the indictments & all matters in difference between the prosecutor & deft. (including suits in Ch.) were referred to arbn., the costs of the indictments to be in the discretion of the arbitrator, but no power was given to him to alter the verdict. After various attendances before the arbitrator deft. revoked the submission & proceeded with the suits in Ch. On a rule for an attachment for contempt:—*Held*: (1) the instrument of reference could not be treated as a submission under the Act of 1838 so as to make it irrevocable under C. P. Act, 1833 ; (2) assuming it to be valid as an order of *Nisi Prius*, deft. was entitled at common law to revoke the submission, & not being made in an action, that power was not taken away by C. P. Act, 1833.—R. v. HARDEY (HARDY) (1850), 14 Q. B. 529 ; 19 L. J. Q. B. 196 ; 15 L. T. O. S. 130 ; 14 J. P. 432 ; 14 Jur. 649 ; 117 E. R. 205.

**Annotations:—Mentd.** R. v. Blakemore (1850), 14 Q. B. 544 ; Williams v. Lewis (1857), 3 Jur. N. S. 1324 ; Harding v. Wickham (1861), 2 John. & H. 676.

**497. — Agreement for making submission rule of court—Incorporation of Common Law Procedure Act, 1854, sufficient.]**—By a contract in writing it was provided that disputes between the contracting parties should be referred to arbn. The contract did not contain an express stipulation that the submission should be made a rule of ct., but by one of its clauses it was agreed that the provisions of C. L. P. Act, 1854, with regard to arbn. as far as they were applicable, should apply to the arbn. therein agreed to. A dispute arising out of the contract having been referred, one of the parties revoked the submission. The arbitrator proceeded *ex p.* & made his award:—*Held*: (1) the incorporation in the submission of the above Act was equivalent to an agreement that the submission should be made a rule of ct. ; (2) the case was within C. P. Act, 1833, s. 39, & the submission was not revocable without leave of the ct.—*Re MITCHELL & IZARD & GOVERNOR OF CEYLON* (1888), 21 Q. B. D. 408 ; 57 L. J. Q. B. 524 ; 59 L. T. 812 ; 36 W. R. 873 ; 4 T. L. R. 731, C. A.

**498. — Effect of Act of 1889.]**—Let us consider whether s. 1 [of the Act of 1889] has made any alteration [in the state of the law at the passing of the Act]. “A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the ct. or a judge.” The phrase is used which had always been used, “a submission shall be irrevocable” ; that is to say, the power of the arbitrator cannot be revoked when he has

once been appointed. It does not mean that the agreement to refer is irrevocable, because that always was in the true sense of the word irrevocable. The sect. proceeds: “& shall have the same effect in all respects as if it had been made an order of the ct.,” which can only mean, “as if it had been made an order of ct. before this Act was passed.” That is the obvious meaning of the phrase, & therefore, the only effect of the sect. is that a submission is to be irrevocable in the sense in which that phrase was used before the Act, & that it is to have the same effect in all respects as if before the Act it had been made a rule of ct. What was that effect? It enabled the ct. to assist the parties to carry on their dispute before the arbitrators, when arbitrators were appointed, & to enforce the award after it had been made in the same way as if it had been a judgment of the ct. (LORD ESHER, M.R.).—*Re SMITH & SERVICE & NELSON & SONS* (1890), 25 Q. B. D. 545 ; 59 L. J. Q. B. 533 ; 63 L. T. 475 ; 39 W. R. 117 ; 6 T. L. R. 434 ; 6 Asp. M. L. C. 555, C. A.

**Annotations:—Mentd.** United Kingdom Mutual S.S. Assce. Assocn. v. Houston, [1896] 1 Q. B. 567 ; Manchester Ship Canal Co. v. Pearson, [1900] 2 Q. B. 606 ; Den of Airline S.S. Co. v. Mitsui & British Oil & Cake Mills (1912), 106 L. T. 451, C. A. ; Doleman v. Ossett Corpn., [1912] 3 K. B. 257.

**499. When to be obtained—Not after award.]**—Leave to revoke a submission cannot be given by the ct. under C. P. Act, 1833, after the arbitrator has made his award.—*PHIPPS v. INGRAM* (1835), 3 Dowl. 669.

**500. How obtained—Not ex parte.]**—A judge at chambers having, under C. P. Act, 1833, s. 39, revoked a submission to arbn. on an *ex p.* statement, the ct. rescinded the order of revocation.—*CLARKE v. STOCKEN* (1836), 2 Bing. N. C. 651 ; 5 Dowl. 32 ; 2 Hodg. 1 ; 3 Scott, 90 ; 5 L. J. C. P. 190 ; 132 E. R. 251.

**501. On what grounds granted—Generally.]**—To induce the ct. to permit a party to rescind his submission under C. P. Act, 1833, s. 39, strong grounds must be laid before them.

It was sought to rescind a submission on the grounds (1) that the choice of the umpire was decided by lot ; (2) that the umpire had for a pupil the son or the nephew of one of the parties concerned in the reference:—*Held*: the grounds were insufficient.—*JAMES v. ATTWOOD* (1839), 7 Scott, 841.

**502. — — —.]**—Where in a submission the arbitrator had been properly appointed, & neither he nor the parties had misconducted themselves:—*Held*: the ct. would not allow the revocation of the arbitrator's authority.—*Re WOODCROFT & JONES* (1841), 9 Dowl. 538 ; Woll. 146 ; 5 Jur. 771.

**503. — — —.]**—During the progress of an arbn. it may be seen that the arbitrator has mistaken the law & is about to act upon his error, & the power of putting him right used to consist in the right of either party to revoke the submission to arbn. That power has been greatly controlled by

**500 i. How obtained—Application to judge.]**—On a reference under a rule of ct., notice given by one party to the arbitrators not to proceed cannot, since 7 Will. 4, c. 14, s. 27, affect the validity of the award. Either party desirous of revoking the submission should apply to a judge.—*LLOYD v. HOSKINS* (1840), 1 Kerr, 132.—CAN.

**500 ii. — All parties should join in petition.]**—*Held*: the fact that a petition by nineteen different cos. was not signed by all the nineteen cos., & that the appeal from the order of the judge dismissing the petition was by but one of the nineteen cos. & the other cos. were not parties to it, would have required serious consideration if the ct. had to revoke

the submission to arbn.—*ATLAS ASSURANCE CO., LTD. v. AHMEDBOY HABIBBOY* (1908), 1 L. R. 34 Bom. 1.—IND.

**501 i. On what grounds granted—Discretion of court.]**—On an application to be allowed to revoke a submission, the discretion of the ct. ought to be exercised in the most sparing & cautious manner.—*Re WRIGHT & GREY COUNTY* (1862), 8 L. C. L. J. 104.—CAN.

**501 ii. — Improper allowance for expenses.]**—Upon a reference to determine the damage sustained by pltf. the arbitrators awarded \$2,200.65, & among other items, \$40 for travelling & law expenses. Upon motion to set aside the award, the ct. refused to inter-

fere, it being the duty of the party objecting to apply to the judge upon affidavit to revoke the submission, & not to content himself with merely objecting to the allowance of the item by the arbitrator.—*CARVETH v. FORTUNE* (1862), 12 C. P. 504.—CAN.

**501 iii. — Claim admitted bad in other proceedings.]**—*Held*: under the declaration in the case, pltf. clearly could not recover for damages of any kind, & pltf.'s counsel having admitted this on the application for leave to revoke, the ct. would not revoke the submission on the ground, amongst others, that such a claim was being entertained by the arbitrators.—*ROSS v. BRUCE COUNTY* (1870), 21 C. P. 141.—CAN.



legislation, & now it may be extremely difficult for a party to make such a case to a ct. as will induce them to make an order giving leave to revoke unless a case is stated (LORD HALSBURY, C.).—**TABERNACLE PERMANENT BUILDING SOCIETY v. KNIGHT**, [1892] A. C. 298; 62 L. J. Q. B. 50; 67 L. T. 483; 56 J. P. 709; 41 W. R. 207; 8 T. L. R. 616; 36 Sol. Jo. 538, H. L.

**Annotations**:—**Mentd.** *Re Gough & Liverpool Corpn.* (1892), 36 Sol. Jo. 270, C. A.; *Re Kirkleatham L. B. & Stockton & Middlesborough Water Board*, [1893] 1 Q. B. 375, C. A.; *Re Kent County Council & Sandgate L. B.* (1895), 72 L. T. 725; *Re Spillers & Baker & Leatham*, [1897] 1 Q. B. 312, C. A.; *Strohmenger v. Finsbury Permanent Investment Bldg. Soc.*, [1897] 2 Ch. 469, C. A.; *Re Palmer & Hosken*, [1898] 1 Q. B. 131, C. A.; *Re Montgomery, Jones & Liebenthal* (1898), 78 L. T. 406, C. A.; *Re Holland S.S. Co., National S.S. Co. & Bristol Steam Navigation Co.* (1906), 23 T. L. R. 59, C. A.; *Shrewsbury v. Shrewsbury* (1907), 23 T. L. R. 224, C. A.; *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. Co. of London*, [1912] A. C. 673, H. L.; *May v. Mills* (1914), 30 T. L. R. 287; *Sidney v. N. E. Ry. Co.*, [1916] 2 K. B. 760; *Lobitos Oilfields v. Admiralty Comrs.*, Crown S.S. Co. v. Admiralty Comrs. (1917), 86 L. J. K. B. 1444, D. C.

#### 504. Intention to admit doubtful evidence.]

—By order of *Nisi Prius*, all matters in difference in a cause were submitted to arbn., with liberty to the arbitrator to reserve questions for the opinion of the ct. on certain points of law which had been raised at the trial. Evidence was offered before him to which deft. objected. The arbitrator thought the objections weighty, but refused to decide upon them, & declared his intention to receive the evidence, stating that he should raise in his award such objections to it as appeared to him on consideration to be important, but he declined pledging himself to raise any objection in particular. Deft. thereupon moved the ct. for leave to revoke his submission, stating that the admission of the evidence would make many additional meetings necessary & cause great expense:—**Held**: no sufficient ground for giving leave under C. P. Act, 1833, s. 39, to revoke the submission, though the objections to evidence might be well founded.

The discretion of the ct. to which this appeal is made ought to be exercised in the most sparing & cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of strife, should only open the floodgates for multiplied expenses & interminable delays (LORD DENMAN, C.J.).—**SCOTT v. VAN SANDAU** (1841), 1 Q. B. 102; 4 Per. & Dav. 725; 113 E. R. 1068.

**Annotations**:—**Apprvd. & Apld.** *Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 106 L. T. 451, C. A. **Mentd.** *Re Hawley & North Staffordshire Ry. Co.* (1847), 5 Ry. & Can. Cas. 383.

**505. — Wrongful rejection of evidence.—Mistake in law.**—If an arbitrator refuse to allow a party to a reference to put in evidence certain documents which by law he is entitled to have read on his behalf, the party aggrieved may, pending the reference, apply for leave to revoke the submission. If, however, it be shown that the arbitrator has acted wrongly in law, the ct. will not necessarily make the rule absolute: but, on the contrary, will discharge it, provided it be satisfied that the arbitrator, on hearing the decision of the

ct., will comply with its directions & receive the evidence.—**Re HART v. DUKE** (1862), 32 L. J. Q. B. 55; 9 Jur. N. S. 119; 11 W. R. 75.

**Annotations**:—**N.F.** *Kirk & Randall v. East & West India Dock Co.* (1886), 55 L. T. 245, C. A.; *James v. James & Bendall* (1889), 22 Q. B. D. 669.

**506. — — —**—Under a commission to take evidence abroad in an action copies of certain documents, & answers of witnesses with regard to the contents of such documents, were received by the comrs. in evidence on behalf of pltf. without objection on the part of deft., who joined in the commission. The copy documents were appended to the depositions & returned by the comrs. On an application to be allowed to revoke the submission of the action to an arbitrator:—**Held**: the secondary evidence of the documents having been taken under the commission, without objection on the part of deft., was receivable before an arbitrator to whom the action was referred, & who had rejected the evidence, & it was too late then to take objection on the ground that the original documents were not produced.—**ROBINSON & Co. v. DAVIES & Co.** (1879), 5 Q. B. D. 26; 49 L. J. Q. B. 218; 28 W. R. 255.

**507. — Intention to introduce new cause of action.**—Where a cause has been referred by consent under an order which does not reserve power to the arbitrator to amend, the ct. will not allow pltf. to revoke the submission unless deft. will consent to an amendment so as to introduce a new cause of action, there being no suggestion of any breach of faith on the part of deft.—**SMURTHWAITE v. RICHARDSON** (1863), 15 C. B. N. S. 463; 143 E. R. 866.

**Annotation**:—**Consd. & Folld.** *Vanderbyl v. McKenna* (1868), L. R. 3 C. P. 252.

**508. — Wrongful admission of evidence.**—Matters in difference which arose in the execution of a contract were referred to an arbitrator in accordance with a clause in the contract. The arbitrator received certain evidence, which was objected to as tending to vary a contract in writing, & other evidence which was inadmissible in one view of the contract & admissible in another. The party who objected to the evidence applied for leave to revoke the submission:—**Held**: (1) the ct. had power to give leave to revoke the submission where it appeared that the arbitrator was going wrong in point of law even in a matter within his jurisdiction; (2) this power would be exercised unless the parties agreed to the arbitrator raising the questions in a special case for opinion of the ct.—**EAST & WEST INDIA DOCK CO. v. KIRK & RANDALL** (1887), 12 App. Cas. 738; 57 L. J. Q. B. 295; 58 L. T. 158; *sub nom.* *KIRK v. EAST & WEST INDIA DOCK CO.*, 3 T. L. R. 821, H. L.

**Annotations**:—**Expld. & Distd.** *James v. James* (1889), 22 Q. B. D. 669. I do not understand the case as laying down any general rule opposed to what had been the ordinary practice previously. The case being one of a very exceptional character, the House of Lords took the view that it was expedient & right under the circumstances to compel the arbitrator to state a special case (LINDLEY, L.J.). **Consd.** *Re Palmer & Hosken*, [1898] 1 Q. B. 131, C. A. This jurisdiction [to give leave to revoke the submission] is discretionary & to be exercised according to the circumstances of the case. (Granting leave to revoke the

**505 i. — Wrongful rejection of evidence.**—It is not sufficient ground for the revocation of a submission that the arbitrators declined to receive certain evidence.—**Re SMALL & LAWRENCE FOUNDRY CO.** (1896), 23 A. R. 543.—**CAN.**

**x. — Bankruptcy of other party.**—A contract provided (*inter alia*) that an arbn. should take place in Melbourne, & be subject to the laws of Victoria. After one of the parties to the contract had been adjudicated bkpt., he appointed an arbitrator, whereupon the

other party applied to the ct. for leave to revoke the appointment, power & authority of such arbitrator:—**Held**: (1) the provision that the arbn. should be subject to the laws of Victoria amounted to an agreement that the submission should be made a rule of ct., & under Supreme Ct. Act, 1890, s. 141, the arbitrator's authority was not revocable without leave of ct.; (2) in view of the bkpcy. of the party appointing such leave should be given.—**Re FREEMAN & KEMPSTER** (1909), V. L. R. 394.—**AUS.**

**z. Nature & effect of judge's order.**—An order of a judge dismissing a petition to revoke a submission to arbn. decides a question of right, namely, whether or not appt. is, by the terms of reference to arbn., deprived of his right at common law to have the dispute settled in the ordinary way in a ct. of law. It goes to jurisdiction & is not passed as an exercise of discretion.—**ATLAS ASSURANCE CO., LTD. v. AHMEDBHROY HABI-BHOY** (1908), 1 L. R. 34 Bom. 1.—**IND.**



**Sect. 13.—Revocation of an agreement to submit:**  
**Sub-sect. 1, B.; sub-sect. 2, A. (a).]**

was considered the right mode of controlling the arbitrator in matters of law; & the case shows the importance attached by the House of Lords to keeping the arbitrator right in point of law (*CHITTY, L.J.*); *Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 17 Com. Cas. 116, C. A. **Mentd.** *Re Sim & Lenders* (1887), 3 T. L. R. 428; *Bush v. Whitehaven Town & Harbour Trustees* (1888), 52 J. P. 392; *Tabernacle Permanent Bldg. Soc. v. Knight* (1892), 62 L. J. Q. B. 50, H. L.

**509. — — —.]**—Upon an arbitration as to compensation for mines taken under Railways Clauses Consolidation Act, 1845 (c. 20), the arbitrator received certain evidence which was admissible only if certain disputed heads of claim were proper:—**Held:** (1) an application to revoke the submission was the simplest & most convenient form for determining the question of law raised; (2) it being decided that the claims were inadmissible, the submission ought to be revoked.—**Re GERARD (LORD) & LONDON & NORTH WESTERN RY. CO.**, [1895] 1 Q. B. 459; 64 L. J. Q. B. 260; 72 L. T. 142; 43 W. R. 374; 11 T. L. R. 170; 14 R. 201, C. A.

**Annotations:—Folld.** *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53, C. A. **Mentd.** *Manchester Corpn. v. New Moss Colliery*, [1906] 1 Ch. 278; *Re Carlisle & Northumberland County Council* (1911), 10 L. G. R. 50; *L. & N. W. Ry. Co. v. Howley Park Coal & Canal Co.*, [1911] 2 Ch. 97, C. A.

**510. — — — Intention to exceed jurisdiction.]**—Leave to revoke the submission will be granted if the arbitrator is proposing to exceed his jurisdiction, & if the extent of his jurisdiction is doubtful on the construction of the agreement, the question can be raised for the determination of the ct. on the application for leave to revoke (**ALDERSON, B.**).—**FAVIELL v. EASTERN COUNTIES RY. CO.** (1848), 2 Exch. 344; 6 Dow. & L. 54; 17 L. J. Ex. 297; 154 E. R. 525.

**Annotations:—Mentd.** *Smith v. Troup* (1849), 7 C. B. 757; *Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189; *Chambers v. Mason* (1858), 5 C. B. N. S. 59; *Kirk & Randall v. East & West India Dock Co.* (1886), 55 L. T. 245, C. A.; *Neale v. Gordon-Lennox* (1902), 71 L. J. K. B. 536, C. A.; *May v. Mills* (1914), 30 T. L. R. 287.

**511. — — — Refusal of third party to join reference.]**—A cause & a Ch. suit to which A. & B. were parties were, by an order made at *Nisi Prius*, referred to an arbitrator. C., who was a party to the Ch. suit, but not a party to the action (which arose out of it), refused to become a party to the reference:—**Held:** his refusal was no ground for allowing A. to rescind the order of reference.—**WILSON v. MORRELL** (1855), 15 C. B. 720; 24 L. T. O. S. 215; 1 Jur. N. S. 310; 3 W. R. 175; 3 C. L. R. 333; 139 E. R. 609.

**512. — — — Appointment of umpire by lot.]**—Two arbitrators met for the appointment of an umpire. Each proposed one, but, though both were assumed to be fit persons to be appointed, neither of the arbitrators would consent to withdraw his nominee. It was then agreed between them that the names should be written upon two slips of paper & placed in a hat, & that the one first drawn should be the umpire. This having been done, the two arbitrators went together to the person chosen & requested him to act:—**Held:** one of the parties to the reference was entitled, upon these facts coming to his knowledge, to revoke his submission.—**EUROPEAN & AMERICAN S.S. CO., LTD. v. CROSSKEY** (1860), 8 C. B. N. S. 397; 29 L. J. C. P. 155; 6 Jur. N. S. 896; 141 E. R. 1219; *sub nom. Re WOLF & CROSSLEY & EUROPEAN & AMERICAN S.S. CO., LTD.*, 1 L. T. 373; 8 W. R. 236.

**Annotations:—Refd.** *Morgan v. Boulton* (1863), 11 W. R. 265; *Re Hopper* (1867), L. R. 2 Q. B. 367. **Mentd.** *Willesford v. Watson* (1871), L. R. 14 Eq. 572.

**513. — — — Winding up of other party.]**—An indictment by one omnibus co. against another rival

co. for conspiracy was removed into the Ct. of Q. B. & referred to an arbitrator, who was to award what was to be done by the parties. During the pendency of the reference one co. was ordered to be wound up:—**Held:** the other co. was entitled to a rule to revoke the submission, unless security was given for future costs by the other co.—**Re METROPOLITAN SALOON OMNIBUS CO.** (1860), 1 L. T. 294.

**514. — — — Mistake in law within jurisdiction.]**—Where parties have agreed to refer questions in dispute between them to arbn., the mere fact that the arbitrator in the course of the proceedings is making a mistake of law in a matter within his jurisdiction does not entitle the party dissatisfied with the arbitrator's view to come to the ct. & claim as of right leave to revoke the submission. There is power to give leave to revoke the submission in such a case which may be exercised under exceptional circumstances, but it is a matter of discretion depending on the circumstances of the particular case.

An arbitrator had power by the terms of the reference to decide the question of liability before dealing with the question of damages, & the parties agreed that he should exercise such power. He accordingly did decide the question of liability before dealing with the damages:—**Held:** the ct. would not afterwards give the party, against whom he had decided, leave to revoke the submission on the ground that he had decided wrongly in point of law.—**JAMES v. JAMES & BENDALL** (1889), 23 Q. B. D. 12; 58 L. J. Q. B. 424; 61 L. T. 310; 37 W. R. 600, C. A.

**Annotation:—Refd.** *Re Palmer & Hosken*, [1898] 1 Q. B. 131, C. A.

**515. — — — Bias in arbitrator.]**—Where an arbitrator, to whom certain disputed debts between A. & B. had been referred, was one of several trustees who had lent part of the trust-moneys to A. unknown to B., who, on discovering the fact & that A. was insolvent, applied to the ct. to rescind the submission:—**Held:** the interest in the arbitrator was too remote to warrant the ct. in rescinding.—**DREW v. DREW** (1855), 25 L. T. O. S. 282, H. L.

**516. — — — Litigation with party to arbitration.]**—Active litigation between one of the parties to a submission to arbn. & the arbitrator agreed on is a ground upon which the ct. will, & has jurisdiction to, interfere & revoke the submission, although the litigation arose at a period long subsequent to the date of the submission & in respect of matters wholly unconnected with it.—**Re BARING BROTHERS & CO. & DOWLTON & CO.** (1892), 61 L. J. Q. B. 704; 8 T. L. R. 701; 36 Sol. Jo. 666, D. C.

**Annotation:—Distd.** *Belcher v. Roedean School Site & Buildings* (1901), 85 L. T. 468, C. A.

**517. — — — — —.]**—Where, by the terms of a building contract, all questions are submitted to the arbn. of an architect appointed by the building owners, the mere fact that the builders, or those claiming through them, bring an action against the architect charging him with fraud in relation to the contract does not entitle them to revoke the submission.

An application to revoke a submission is one to be granted with great caution, & not by any means so readily as suggested by [counsel], who argued that any litigation between the arbitrator & one of the parties is a reason for removing the arbitrator (**MATHEW, L.J.**).—**BELCHER v. ROEDEAN SCHOOL SITE & BUILDINGS, LTD.** (1901), 85 L. T. 468, C. A.

— — — **Generally.]**—See Part II., Sect. 2, Sub-sect. 3; Part IV., Sects. 16, Sub-sect. 2 B., 19, Sub-sects. 2 B. (b), 3 B., 5 E., *post*.

**518. — — — Arbitrator interested—Party's engineer.]**—A contract for the construction of work for a co. provided that the parties should refer any

question or dispute to the engineer of the co., whose decision was to be final & binding. The contractor moved to revoke the submission on the ground that the engineer would have to decide matters relating to his own conduct, the allegations being that he had ordered a large number of unnecessary extras & been guilty of delays:—*Held*: the application should be dismissed, as the question of the engineer's alleged misconduct formed no substantial part of the claim to be tried in the arbn.—*Re DONKIN & LEEDS, ETC., CANAL CO. OF PROPRIETORS* (1893), 9 T. L. R. 192.

**519. — Party's manager.**—A co. issued policies of insurance against losses by burglaries, & stipulated that claims should be settled by arbn. Pltf. had one of these policies & made a claim, & the co. claimed to appoint their manager as the arbitrator:—*Held*: the co. must appoint another arbitrator within a week, or the submission to arbn. must be rescinded.—*Re FRANKENBERG & SECURITY Co.* (1894), 10 T. L. R. 393.

**520. — Evidence—Refusal of party to allow commission.**—One of the parties to an arbn. applied for a rule to compel the other parties to consent to a commission to take evidence abroad, otherwise the submission to arbn. to be revoked. The application was refused.—*Re DREYFUS & SONS & PAUL* (1893), 9 T. L. R. 358; 37 Sol. Jo. 357.

**521. — Arbitrator's jurisdiction questioned—Construction of agreement.**—Pltfs., the owners of s.s. *D.*, chartered her by charterparty, dated Apr. 26, 1911, to defts., M. & Co., to load a cargo of beans at Vladivostock, & to proceed to a port in the United Kingdom, & there deliver the cargo "agreeably to bills of lading." On June 10 a cargo of about 6,000 tons was loaded, & bills of lading made out to the order of M. & Co., or their assigns, were signed by the master & handed to M. & Co.'s representative. M. & Co. had, by a contract dated Apr. 27, 1911, sold the cargo to defts., B. Co., on the terms of a "basis delivered" contract, by clause 10 of which the contract was to be void as regarded any portion shipped which might not arrive. On June 12 defts., M. & Co., under the contract of Apr. 27, declared to B. Co. that the beans had been shipped by s.s. *D.* On arrival of the vessel at Liverpool, the port of discharge, M. & Co. handed to B. Co. the bills of lading indorsed against a payment. When the discharge had been completed it was alleged that there was a shortage of one hundred & seventy-one bags, & B. Co. having paid only in respect of the quantity actually delivered, M. & Co. instructed them to make a corresponding deduction from the freight, but pltfs. refused to acknowledge the claim for short delivery. A dispute having thus arisen, M. & Co. gave notice that they demanded an arbn. under a clause in the charterparty, which provided for arbn. "by arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third," & formally required pltfs. within seven days to appoint their arbitrator. Pltfs. did not appoint an arbitrator, & defts., after the expiry of the seven days, gave notice of the appointment of a gentleman to act as sole arbi-

trator. Pltfs. thereupon took out a summons for further directions, asking (*inter alia*) that leave be given to pltfs. to revoke the submission to arbn.:—*Held*: in exercise of its discretion the ct. ought not to give leave to revoke the submission to arbn.—*DEN OF AIRLIE S.S. Co., LTD. v. MITSUI & Co., LTD., & BRITISH OIL & CAKE MILLS, LTD.* (1912), 106 L. T. 451; 12 Asp. M. L. C. 169; 17 Com. Cas. 116, C. A.

**522. Grounds for refusing to grant—Submission not by consent.**—An arbitrator was appointed under Wakefield Corp'n. Waterworks Act, 1880, s. 51, by the Local Govt. Board. It was contended, on behalf of the corp'n., that the ct. had no jurisdiction to give leave to revoke the submission, for the reason that there had been no submission or consent to arbn.:—*Held*: leave should be refused.—*Re WAKEFIELD CORPN. & WAKEFIELD UNION GUARDIANS* (1888), 4 T. L. R. 561.

**523. Appeal from order granting leave.**—An appeal from a judge at chambers granting leave to revoke a submission to arbn. lies to the Ct. of Appeal & not to a Divisional Ct.—*Re PORTLAND URBAN DISTRICT COUNCIL & TILLEY & Co.*, [1896] 2 Q. B. 98; 65 L. J. Q. B. 527; 74 L. T. 703; " T. L. R. 427; 40 Sol. Jo. 516.

*Annotation*:—*Dhdt. Miller, Gibb v. Smith & Tyrer*, [1916] 1 K. B. 419. In view of the later authorities I think that *Re Portland Urban Council & Tilley* must be taken to be overruled; I do not see how it can be reconciled with *Re Frere & Staveley Taylor & Co. & North Shore Mill Co.*, [1905] 1 K. B. 366 (LUSH, J.).

## SUB-SECT. 2.—BY OPERATION OF LAW.

### A. By Death.

#### (a) Where no proviso for event of death.

**524. Party dying before appointment of arbitrator.**—By the terms of an agreement, if any dispute thereon should arise between the parties, it was to be referred to arbn., & each party was to appoint an arbitrator if called on by the other so to do. Disputes arose, & one of the parties died before the arbitrators were appointed:—*Held*: his exors. were not bound by the agreement to appoint an arbitrator.—*Re PERCIVAL* (1885), 2 T. L. R. 150.

**525. Party dying before order of reference drawn up.**—Where a reference is directed at *Nisi Prius*, but deft. dies before the order is drawn up, the proper course is to move for leave to enter nominal damages.—*WYATT v. HOSTE* (1823), 1 L. J. O. S. C. P. 98.

**526. Party dying before award—Award to be delivered during life of parties—Personal representatives of deceased not bound.**—An agreement was entered into for sale of land at a price to be fixed by arbitration within a limited time, & if they should not agree within that time, by an umpire, also within a limited time. The arbitrators made their award within the time limited for them, but one of the parties had previously died:—*Held*: (1) the award was to be delivered to the parties during their life; (2) the condition of the agreement not having been performed in this respect, specific performance

**523 i. Appeal from order dismissing petition to revoke.**—An order of a judge dismissing a petition to revoke a submission to arbn., on the ground that the arbitrators are going beyond scope of the reference, is a "judgment" within clause 15 of Letters Patent & as such is appealable.—*ATLAS ASSCE. Co., LTD. v. AHMEDBHAY HABIBHOY* (1908), 1 L. R. 34 Bom. 1.—IND.

*interest in submission.*—*Held*: a mutual submission fell by the death of one of the parties, notwithstanding that he had assigned his interest to a third party, who was a consenter to the submission, & who was willing to go on with it as if he were the principal, having in himself the substantial interest.—*ROBERTSON v. CHEYNES* (1847), 9 D. (Ct. of Sess.) 599.—SCOT.

contract provided that, in the event of dispute in reference to the quantities or prices of additions, variations, or omissions, the items should be referred to arbn. A submission under the clause was made a rule of ct., & an award was made which was sent back in consequence of the inclusion of matters not submitted. Before any further award one party died:—*Held*: the proceedings should be continued in the name of the personal representative of deceased.—*Re DONOVAN & BURKE*, [1908] 2 I. R. 143; 42 I. L. T. 68.—IR.

## PART I. SECT. 13, SUB-SECT. 2.—A. (a).

### b. Party dying after assignment of c. Death after award remitted back but before second award.]—A clause in a



**Sect. 13.—Revocation of an agreement to submit:**  
**Sub-sect. 2, A. (a) & (b).]**

against the successors of the deceased party was refused.—**BLUNDELL v. BRETTARGH** (1810), 17 Ves. 232; 34 E. R. 90.

**Annotations:—**Consd. **Brooke v. Mitchell** (1840), 6 M. & W. 473. **Refd.** **McDougal v. Robertson** (1827), 4 Bing. 435, Ex. Ch. **Mentd.** **Pritchard v. Overy** (1820), 1 Jac. & W. 396; **Morgan v. Milman** (1853), 3 De G. M. & G. 24.

**527. Proviso binding personal representatives.]—**By an agreement for the sale of land the vendor & purchaser covenanted for themselves & their representatives to fulfil the contract & to refer the question of value. One of the parties died:—**Held:** the agreement was to be executed by the parties or their representatives, & was not an authority to be determined by their deaths.—**BELCHIER v. REYNOLDS** (1754), 3 Keny. 87; 96 E. R. 1318.

**528. — Reference by order—How far revocation.]—**Where a cause is referred to arbn., the death of one of the parties, at any time before the award made, is a revocation of the arbitrator's authority, & the ct. will set aside an award made subsequent to such death.—**POTTS v. WARD** (1814), 1 Marsh. 366.

**Annotations:—**Consd. **Toussaint v. Hartop** (1817), 7 Taunt. 571; **Cooper v. Johnson** (1819), 2 B. & Ald. 394. **Refd.** **Rhodes v. Haigh** (1823), 3 Dow. & Ry. K. B. 608. **Mentd.** **Bradbury v. Morgan** (1862), 7 L. T. 104.

**529. — — — — —.]—**One of the parties to an order of reference had died before the award was actually made:—**Held:** this did not prevent the arbitrator from proceeding to make his award.—**HARDING v. WICKHAM** (1861), 2 John. & H. 676; 4 L. T. 738; 9 W. R. 652; 70 E. R. 1230.

**Annotation:—****Mentd.** **Grafham v. Turnbull** (1875), 44 L. J. Ch. 538.

**530. — — — Judgment nunc pro tunc.]—**An action was referred by order of *Nisi Prius*, & an award was made on Nov. 28, two days previous to which deft. died. On a rule to show cause why judgment should not be signed for deft. according to the award, as of Michaelmas Term last:—**Held:** the party applying was entitled to have the judgment entered *nunc pro tunc*.—**LEWIS v. WINTER** (1837), Will. Woll. & Dav. 47; 1 Jur. 40.

**531. — — — After verdict—How far revocation.]—**If on a reference by order of *Nisi Prius* the submission is confined to what the verdict & judgment embrace, the death of either of the parties before award will not revoke the submission; but it is a revocation if the verdict & judgment do not embrace all matters in difference which are submitted, for if the arbitrator cannot proceed upon all matters submitted, he cannot proceed upon any.—**BOWER v. TAYLOR** (1816), 7 Taunt. 574, n., cited 3 Dow. & Ry. K. B. 610, n.; 129 E. R. 229.

**Annotations:—**Consd. **Toussaint v. Hartop** (1817), 1 Moore, C. P. 287; **Rhodes v. Haigh** (1823), 2 B. & C. 345. **Refd.** **Bowker v. Evans** (1885), 15 Q. B. D. 565, C. A.

**532. — — — — —.]—**Where a verdict was taken for pltf., by consent, subject to the award

of an arbitrator, such reference being authorised by an order of *Nisi Prius*, & deft. died after the verdict, but before the award, & the arbitrator, after such death, made his award, ordering a verdict to be entered for deft.:—**Held:** such award was bad, as the death of deft. was a revocation of the arbitrator's authority.

In entering into a rule of reference at *Nisi Prius*, with a verdict for pltf., it is prudent to provide by a special stipulation that the reference shall not be defeated by the death of one of the parties before award made.—**TOUSSAINT v. HARTOP** (1817), 1 Moore, C. P. 287; 7 Taunt. 571; 129 E. R. 227.

**Annotations:—****Refd.** **McDougal v. Robertson** (1827), 1 Moo. & P. 147, Ex. Ch.; **Miller v. Spurrs** (1833), 2 Moo. & S. 730.

**533. — — — — —.]—**Where a cause was referred after verdict entered:—**Held:** the authority of the arbitrator was determined by the death of either party before the award.—**COOPER v. JOHNSON** (1819), 2 B. & Ald. 394; 1 Chit. 187; 106 E. R. 410.

**Annotations:—****Refd.** **Rhodes v. Haigh** (1823), 2 B. & C. 345; **McDougal v. Robertson** (1827), 4 Bing. 435, Ex. Ch.; **Smith v. Fielder** (1835), 3 L. J. C. P. 62; **Prior v. Hem-brow** (1841), 8 M. & W. 873; **Bradbury v. Morgan** (1862), 7 L. T. 104.

**534. — — — — —.]—**Upon the trial of an action relating to the right of using a stream of water a verdict was taken for pltf., subject to the award of an arbitrator, to whom all matters in difference were referred, with liberty to the arbitrator to regulate future enjoyment of the stream. One of the parties to the cause having died before any award was made:—**Held:** his death determined the arbitrator's authority, & an award made subsequently was set aside.—**RHODES v. HAIGH** (1823), 2 B. & C. 345; 3 Dow. & Ry. K. B. 608; 2 L. J. O. S. K. B. 40; 107 E. R. 413.

**535. — — — — —.]—**A verdict was taken for pltf. in Hilary Term, 1832, by consent, subject to a reference. The arbitrator made an award in favour of pltf. after the expiration of Trinity Term, deft. having died in the meantime. On motion made in the following Michaelmas Term, the ct. allowed judgment to be entered *nunc pro tunc* as of Trinity Term, notwithstanding more than two terms had elapsed since the verdict was taken.—**MILLER v. SPURRS** (1833), 2 Moo. & S. 730.

**536. — — — Party one of several joint claimants—Effect on survivors.]—**Where several parties jointly claim a sum of money, & the cause of action is referred, & one of the parties so jointly claiming dies, the arbitrator cannot award the sum to be paid to the survivors & the exors. of the deceased.—**EDMUNDS v. COX** (1784), 2 Chit. 432; 3 Doug. K. B. 406; 99 E. R. 720.

**537. — — — Infant party—Submission by guardians.]—**Where guardians had submitted matters to arbn., & the infant died before award made, the ct. relieved the guardians from the consequences of the award, & set it aside.—**BURSLEM v. BURNS** (1823), 1 L. J. O. S. K. B. 155.

**527 i. Party dying before award — Proviso binding personal representatives—Implied.]—**Partners in a minute providing for the dissolution of the firm, with the view of dividing the assets, nominated an accountant as referee. After certain proceedings before the arbiter, one of the partners died, & his trustee & exor. appeared in the reference, in which all parties continued to plead until the accountant pronounced his award:—**Held:** the reference did not expire by the death of one of the parties, on the grounds that such a reference was binding on heirs, & that it had been so interpreted by the parties themselves in their actings before the arbiter.—**ORRELL v. ORRELL** (1859), 31 Sc. Jur. 295.—**SCOT.**

**536 i. — — — Party one of several joint claimants—Effect on survivors—Trustees.]—**Trustees entered into a reference with the representatives of a firm with whom the truster had had cash transactions. The reference contained a provision, by which the parties bound themselves & their respective heirs, exors. & successors to implement & fulfil whatever award should be issued. Before an award was issued the trustees who had entered into the reference died. Thereafter the new trustees maintained that the reference had fallen by the death of one of the contracting parties:

—**Held:** the contracting party being the trust, which as represented by the new trustees continued to exist notwithstanding the death of the original trustees, the submission had not fallen.—**ALEXANDER'S TRUSTEES v. DYMCK'S TRUSTEES** (1883), 20 Sc. L. R. 806.—**SCOT.**

**d. Reference by wife with husband's consent — Death of husband.] — Qu.:** whether a submission, relative to moveable claims, by a married woman, to which her husband consents as her administrator in law, & for all interest he has in the matter, falls by the death of the husband before decree-arbitral is pronounced.—**ROBERTSON v. CHENEY** (1847), 9 D. (Ct. of Sess.) 599.—**SCOT.**



**538. Party being infant tenant for life—Effect on trustees.]**—On showing cause against a rule for setting aside an award made concerning the repair of a weir upon a mill stream, it appeared that two of plffs. were trustees & guardians under a will for an infant, who was tenant for life of the property on which the weir was erected. Before the award was made, the infant died, & the award was made against two of plffs. in their character of trustees:—*Held*: the award was not binding, & should be set aside as far as related to the trustees.—*BRISTOW v. BINNS* (1823), 3 Dow. & Ry. K. B. 184.

**539. — Arbitrator in position of valuer.]**—Even at common law, the death of a party does not operate as a revocation of a submission where the arbitrator is in the situation of a person appointed by the vendor & purchaser to fix the value & price of an estate sold. In such a case the surviving party & the representative of deceased would be compellable respectively to fulfil the contract.—*CALEDONIAN RY. CO. v. LOCKHART* (1860), 3 Macq. 808; 3 L. T. 65; 6 Jur. N. S. 1311; 8 W. R. 373, H. L.

*Annotations*:—*Mentd.* *Bagnall v. L. & N. W. Ry. Co.* (1862), 1 H. & C. 544, Ex. Ch.; *Palmer v. Met. Ry. Co.* (1862), 31 L. J. Q. B. 259; *Ringland v. Lowndes* (1864), 17 C. B. N. S. 514; *Stone v. Yeovil Corp.* (1876), 1 C. P. D. 691; *Bottomley v. Ambler* (1877), 38 L. T. 545, C. A.; *R. v. Poulter* (1887), 20 Q. B. D. 132; *Holliday v. Wakefield Corp.*, [1891] A. C. 81, H. L.; *R. v. Manley-Smith* (1893), 63 L. J. Q. B. 171.

**540. Party dying before statement of special case.]**—Where a cause was referred to a barrister to state a special case, & the case was stated after the death of deft., the ct. refused to set it aside.—*JAMES v. CRANE* (1846), 15 M. & W. 379; 3 Dow. & L. 661; 15 L. J. Ex. 232; 153 E. R. 897.

**541. Party dying after award—Made in pursuance of rule of court—No verdict or judgment entered up.]**—The death of deft. after the making of an award in pursuance of a rule of ct., where no verdict or judgment has been entered up, abates the suit, & the ct. will not enforce the performance of the award by attachment.—*MAFFEY v. GODWYN* (1832), 1 Nev. & M. 101.

**542. — Death after execution but before notice.]**—Where an order of reference required that the arbitrator should make & publish his award in writing, ready to be delivered to the parties, or such of them as should require same, on or before a certain day:—*Held*: the award was “published” & “ready to be delivered,” within the order, when it was executed by the arbitrator in the presence of & attested by witnesses, & it could not be set aside, although plff. died on the following day & before he had notice that the award was ready.—*BROOKE v. MITCHELL* (1840), 6 M. & W. 473; 8 Dowl. 392; 9 L. J. Ex. 269; 4 Jur. 656; 151 E. R. 498.

(b) *Where proviso for event of death.*

**543. General rule.]**—The death of either of the submitting parties will not determine the authority of the arbitrator, or vacate the subsequent proceedings upon the reference, where the deed or instrument of submission contains a proviso that the submission shall not vacate or expire through the death of either of the parties.—*MCDUGAL v. ROBERTSON* (1827), 4 Bing. 435; 2 Y. & J. 11; 1 Moo. & P. 147; 130 E. R. 835, Ex. Ch.

**544. —.]**—By an order of reference, the award was to be delivered to the parties, or if they or either of them were dead before the making of the award to their respective personal representatives, on or before a given day, with liberty to the arbitrator to enlarge the time for making his award. Plff. died before the award was made, & after his

death the arbitrator enlarged the time for making the award:—*Held*: the award made within the enlarged time was good.—*TYLER v. JONES* (1824), 3 B. & C. 144; 4 Dow. & Ry. K. B. 740; 107 E. R. 688.

*Annotations*:—*Folld.* *Clarke v. Crofts* (1827), 4 Bing. 143; *McDougal v. Robertson* (1827), 4 Bing. 435. *Consd.* *Bowker v. Evans* (1885), 33 W. R. 695, C. A.

**545. —.]**—The matters in question in a suit in Ch. brought by beneficiaries against exors. were by covenant referred to arbn., & in case of death of any of the parties before the award, the reference was not to abate, but the personal representatives of the parties so dying were to be taken to be parties to the order of reference. One of defts., B., died before the award, & the award directed payment by his exor.:—*Held*: the authority to the arbitrator was not revoked by the death of B. The provision against abatement prevented revocation, & was not a mere covenant not to revoke, for breach of which an action would lie.—*DOWSE v. COXE* (1825), 3 Bing. 20; 10 Moore, C. P. 272; 3 L. J. O. S. C. P. 127; 130 E. R. 420; *reversd.* on another point, *sub nom.* *BIDDELL v. DOWSE* (1827), 6 B. & C. 255.

*Annotations*:—*Appld.* *Clarke v. Crofts* (1827), 4 Bing. 143. *Folld.* *McDougal v. Robertson* (1827), 4 Bing. 435. *Consd.* *Farhall v. Farhall* (1871), 7 Ch. App. 123, L.J.J.

**546. —.]**—By an order of *Nisi Prius* (made a rule of ct.) a verdict was taken for plff., by consent, subject to a reference of all matters in difference between the parties, & if either of the parties should be dead before the making of the award, then the award was to be delivered to his personal representatives. Plff. died before the award was made, notwithstanding which the arbitrator proceeded with the reference:—*Held*: the authority of the arbitrator was not revoked by the death of plff.—*CLARKE v. CROFTS* (1827), 4 Bing. 143; 12 Moore, C. P. 349; 5 L. J. O. S. C. P. 127; 130 E. R. 722.

*Annotation*:—*Folld.* *McDougal v. Robertson* (1827), 4 Bing. 435.

**547. —.]**—If men who submit to arbn. in the instrument of submission bind their representatives in a case where the action would survive to or against their representatives, although one or both of the parties should die before the award be made, the arbitrators may proceed with the reference. They have provided for the event of death, & agreed that those who take their property should take it subject to the decision of the arbitrators appointed. But if the representatives are not included in the reference, & one of the parties dies, that reference is determined (*LORD WYNFORD*).—*ORPHAN BOARD v. VAN REENEN* (1829), 1 Knapp. 83; 12 E. R. 252, P. C.

**548. —.]**—By an order of reference, a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law & in equity, etc., so that he should publish his award by a certain day (with power to enlarge the time), ready to be delivered to the parties, or if either of them should be dead, to their personal representatives, & the arbitrator was to be at liberty to make one or more awards at his discretion. At the time of the submission two suits in equity were pending, in which the parties to the action were interested, & in which certain infants were also concerned. Before an award was made, L., one of the parties to the equity suits, died. The arbitrator made his award, whereby he ordered that a verdict should be entered for plff., damages £500, & that defts. should pay the further sum of £350, for grievances not included in the declaration:—*Held*: the arbitrator's authority was not revoked by the death of L.—*WRIGHTSON v. BYWATER* (1838), 3 M. & W. 199; 6 Dowl. 359;

**Sect. 13.—Revocation of an agreement to submit:**  
**Sub-sect. 2, A. (b), B. C. & D.; Sub-sect. 3.]**

1 Horn & H. 50; 7 L. J. Ex. 83; 150 E. R. 1114.

**Annotations:—Mentd.** Doe d. Madkins v. Horner (1838), 8 Ad. & El. 235; Harrison v. Creswick (1852), 16 Jur. 315, Ex. Ch.; Re Wyld, Ex p. Wyld (1860), 2 De G. F. & J. 642, L.JJ.

**549. —.**—A. & B., partners, referred to arbn. all matters in difference between them & C., & if either of the parties should die before the award was made it was to be delivered to his personal representatives, or such of them as should desire same. Pending the arbn. B. died; several meetings were held after his death, & C. then protested against the arbitrator's proceeding, unless the exor. of B. were made a party. An award having been made in favour of A. without B.'s exor. having been made a party, the ct. refused on that ground to set the award aside.—*Re HARE* (1839), 6 Bing. N. C. 158; 8 Dowl. 71; 8 Scott, 367; 133 E. R. 62.

**550. —.**—Differences & disputes having arisen between the trustees & managers of a chapel as to the conduct of B., one of the trustees, & an information & bill having been filed in the Ct. of Ch. at the relation of all the trustees (except B.) against B. & another person, praying an account against B. in respect of such part of the trust funds as had come into his hands, & B. having, by his answer, charged the relators with breach of trust in their management of the trust fund, an order was made, with the consent of all parties, that the cause & all matters in difference should be referred to arbn., the arbitrator to have full authority over the costs of the suit & reference. The order expressly provided that the death of any of the parties should not operate as a revocation of the arbitrator's authority, but that his award should be delivered to the personal representatives of the deceased party or parties. During the reference one of the relators, being a party thereto, died, & afterwards the arbitrator made his award, & thereby directed that the costs of the reference should be borne & paid by the parties by whom they were incurred. Pltf., one of the relators, paid the solr., who had been retained for them in the conduct of the reference, his bill of costs & brought an action for money paid against the exors. of the deceased relator, for his proportion of the costs incurred after his death, including the costs of the award:—*Held*: the exors. were liable in such action for their testator's proportion of the costs of the reference incurred after his death, & also of the costs of the award.—*PRIOR v. HEMBROW* (1841), 8 M. & W. 873; 10 L. J. Ex. 371; 151 E. R. 1294.

**Annotations:—Refd.** Bradbury v. Morgan (1862), 10 W. R. 776. **Mentd.** Bevan v. Whitmore (1863), 15 C. B. N. S. 433.

**551. Refusal of arbitrator to proceed or executor to attend—Jurisdiction of court.]—**A cause & all matters in difference were referred by an order of reference to the decision of an arbitrator, the arbitrator to make & publish his award, ready to be delivered to the parties, or either of them, "or if they or either of them should be dead before the making of the award, to their respective personal representatives who should require same," on or before a certain day. Several meetings were from time to time held, but one of the parties died before the reference was concluded. After his death the arbitrator was requested to proceed with the reference, but he declined doing so, the extrix.

of the deceased party having refused to attend & protested against his proceeding:—*Held*: the ct. had no power to direct the arbitrator to proceed or to compel the extrix. to attend before him.—*LEWIN v. HOLBROOK* (1843), 11 M. & W. 110; 12 L. J. Ex. 267; 152 E. R. 736.

**Annotation:—Mentd.** Edward v. Davies (1854), 23 L. J. Q. B. 278.

**552. — Unless cause of action in tort.]—**The parties to an action for a tort agreed before trial to refer the matter in dispute to an arbitrator. The order of reference contained a clause that the arbitrator should publish his award "ready to be delivered to the parties in difference, or such of them as require same (or their respective personal representatives, if either of the parties die before the making of the award)." After the hearing of the reference had been concluded, but before the award was made, pltf. died. The arbitrator afterwards published the award, & the exors. of pltf. having proved his will, took up the award:—*Held*: the cause of action being in tort died with pltf. & did not pass to his personal representatives by force of the clause above mentioned, which in an action of tort was inoperative, & the exors. were not entitled to be substituted as pltf. in place of their testator.

It was an agreement as to procedure & as to the mode of procedure. If the subject-matter of dispute is gone the agreement as to the mode of deciding it becomes invalid. The cause of action being gone, it is futile to consider what might have been the rights of the parties (*BRETT, M.R.*).—*BOWKER v. EVANS* (1885), 15 Q. B. D. 565; 54 L. J. Q. B. 421; 53 L. T. 801; 33 W. R. 695; 1 T. L. R. 371, C. A.

**Annotation:—Consd.** Harvey v. North-Eastern Marine Engineering Co. (1902), 5 W. C. C. 30.

**553. — Other party wrongly revoking—Liability for costs.]—**By order of *Nisi Prius*, a cause was referred to arbn., with liberty for the arbitrator to examine the parties, but the death of either was not to operate as a revocation of the reference. Pltf. died before he was examined & before the arbitrator had made his award, whereupon deft. revoked his submission on the ground, as he alleged, of his having lost the opportunity of examining pltf., but it appeared, on the evidence, that this was not the true cause:—*Held*: since there was no reasonable ground for the revocation, deft. must pay the costs of a trial occasioned by the termination of the reference.—*SMITH v. FIELDER* (1833), 10 Bing. 306; 2 Dowl. 764; 3 Moo. & S. 853; 3 L. J. C. P. 62; 131 E. R. 922.

#### *B. By Marriage.*

**554. Old rule—Marriage before award—Revocation of arbitrator's authority.]—**In debt on obligation conditional to submit to an award, pltf. on *oyer* pleaded intermarriage of the *femme* with pltf. before award, to which deft. demurred:—*Semble*: this intermarriage was a revocation of the power given to arbitrators.—*SACCUM v. NORTON* (1671), 2 Keb. 865; 84 E. R. 547.

**555. — — — —.]—**A. declared in covenant against B. & her husband for that B., before her intermarriage, covenanted with A. by deed to leave certain accounts in difference between them to arbn. & to abide & perform the award provided it were made during their lives. A., protesting that B. had not, before her intermarriage, performed her part of the covenant, averred that after

#### **PART I. SECT. 13, SUB-SECT. 2.—B.**

**554 i. Old rule—Marriage before award—Revocation of arbitrator's authority—Waiver.]—**After execution of a deed of submission to arbn., E., a party whose

rights were principally affected, married. Her husband took no part in the proceedings. The arbitrator's award recited the marriage, & the entering of a rule to proceed against E. & her husband, & awarded that they should pay

certain sums:—*Held*: (1) the marriage of E. revoked the jurisdiction of the arbitrator; (2) the husband did no act to waive the revocation.—*ROCHE v. R.* (1845), 8 L. Eq. R. 638.—*IR.*



making the indenture & the intermarriage of defts., the arbitrator awarded B. to pay A. a certain sum, & then alleged a breach for non-payment of such sum. After verdict for pltf. on *non est factum* pleaded:—*Held*: upon this declaration it must be taken that B. intermarried after the submission & before the award made, in which case pltf. could not recover upon the breach assigned for non-payment of the sum awarded, because the marriage was a countermand to the authority of the arbitrator.—*CHARNLEY v. WINSTANLEY* (1804), 5 East, 266; 1 Smith, K. B. 433; 102 E. R. 1072.

*Annotations*:—*Distd.* *Marsh v. Bulteel* (1822), 5 B. & Ald. 507. *Refd.* *Perreau v. Bevan* (1826), 5 B. & C. 284. *Mentd.* *Castledine v. Mundy* (1832), 4 B. & Ald. 90; *Head v. Baldroy* (1837), 6 Ad. & El. 459; *Lang v. Purves* (1862), 15 Moo. P. C. C. 389, P. C.; *Stirling v. Maitland* (1864), 5 B. & S. 840; *Hamlyn v. Wood* (1891), 60 L. J. Q. B. 734, C. A.

556. —.]—In the case of a *feme sole* marriage after submission is a revocation, for it is in law a civil death of all her rights.—*ANDREWS v. PALMER* (1821), 4 B. & Ald. 250; 106 E. R. 929.

*Annotations*:—*Mentd.* *Marsh v. Wood* (1829), 7 L. J. O. S. K. B. 327; *Taylor v. Marling* (1840), 2 Man. & G. 55.

557. —.]—A submission by a woman to arbn. is revoked by her marriage before the award is made.—*M'CAN v. O'FERRALL* (1841), 8 Cl. & Fin. 30; West 593; 8 E. R. 12, H. L.

*Present rule.*—See Married Women's Property Act, 1882 (c. 75), s. 13.

#### C. By Bankruptcy.

558. Bankruptcy before award—No ground for setting aside award.]—The ct. will not set aside an award on the ground that one of the parties had become bkpt. before the making of the award.—*SNOOK v. HELLYER* (1818), 2 Chit. 43.

*Annotation*:—*Mentd.* *Wood v. Adcock* (1852), 7 Exch. 468.

559. —.]—At the trial a verdict was found for pltf., damages £10,000, subject to the award of an arbitrator, to whom the cause & all matters in difference were referred. Deft. committed an act of bkpcy. on Dec. 14, upon which a *fiat* issued on the 19th; the arbitrator (with notice of the act of bkpcy. & of the fact of a docquet having been struck) made his award on the 18th:—*Held*: no ground for setting aside the award.—*TAYLOR v. SHUTTLEWORTH* (1840), 6 Bing. N. C. 277; 8 Dowl. 281; 8 Scott, 565; 9 L. J. C. P. 138; 113 E. R. 109.

560. — Reference by order—Not revoked.]—A case was referred by order of *Nisi Prius*, & after the reference, but before the making of the award, pltf. became bkpt.:—*Held*: this was no revocation of the submission, & the arbitrator having awarded a verdict for deft. had done right.—*ANDREWS v. PALMER* (1821), 4 B. & Ald. 250; 106 E. R. 929.

*Annotations*:—*Distd.* *Marsh v. Wood* (1829), 7 L. J. O. S. K. B. 327. *Consd.* *Taylor v. Marling* (1840), 2 Man. & G. 55.

561. — Position of trustee in bankruptcy.]—In July, 1884, an order was made by consent by which all matters in dispute in an action were referred to arbn., the costs to be in the discretion of the arbitrator. In Nov., before an award had been made, deft. became bkpt., & in

Jan., 1885, the trustee in bkpcy. wrote to the arbitrator as follows: "I give you notice that I as trustee deny any agreement of reference or that any award therein is or will be binding on me, & so far as I have the power I revoke your authority." In the following Feb. the arbitrator made his award, & awarded to pltf. in the action a certain sum & ordered that all costs should be paid by deft. A proof for the costs having been rejected by the trustee in bkpcy. & also by the county ct. judge:—*Held*: (1) the bkpcy. did not operate as a revocation of the submission, & the trustee had no power to revoke the authority; (2) the creditor was entitled to prove for the costs in question.—*Re SMITH, Ex p. EDWARDS* (1886), 3 Morr. 179.

*Annotation*:—*Mentd.* *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A.

562. — Arbitrator's authority coupled with interest.]—In a submission to arbn. by an order of *Nisi Prius*, in an action between A. & B., it was stipulated that a sum of money should be placed by B. in the hands of C., the arbitrator, to abide the event of the award. B., after placing the sum in the hands of C., became bkpt.:—*Held*: the submission was not revoked, nor were the assignees of B. entitled to demand back the money.—*TAYLER v. MARLING* (1840), 2 Man. & G. 55; 2 Scott, N. R. 374; *Drinkwater*, 121; 10 L. J. C. P. 26; 4 Jur. 1161; 133 E. R. 661.

563. — Submission in extent in aid—Revoked.]—On an extent in aid a submission of all matters in difference between the Crown debtor & debtor *paravaile*, without the authority of the Crown, is revoked by a discharge of the latter, under Insolvent Debtors Act, & an award subsequently made is bad.—*R. v. BINGHAM* (1831), 2 Cr. & J. 130; 2 Tyr. 46; 1 L. J. Ex. 62; 149 E. R. 55.

564. — Submission—Not revoked.]—*Semble*: the insolvency of pltf. does not operate as a revocation of the submission.—*HOBBS v. FERRARS* (1840), 8 Dowl. 779; 4 Jur. 825.

565. —.]—I see no reason why the bkpcy. of either party should be held to operate a revocation of the submission; & the decisions are numerous to show that it does not so operate. Two persons think fit to refer their differences to the determination of an arbitrator; one of them afterwards becomes bkpt. I do not see why a revocation of the submission should, therefore, be imposed upon them, when possibly neither party wishes to revoke (*MAULE, J.*).—*HEMSWORTH v. BRIAN* (1845), 1 C. B. 131; 2 Dow. & L. 844; 14 L. J. C. P. 134; 4 L. T. O. S. 315; 135 E. R. 486.

*Annotation*:—*Mentd.* *Rule v. Bryde* (1847), 1 Exch. 151.

#### D. By Lunacy.

*See case infra.*

#### SUB-SECT. 3.—EFFECT OF REVOCATION.

566. Order containing directions as to costs—Made rule of court after revocation.]—A judge's order directed that a cause should be referred, & that either party wilfully preventing the arbitrator from making an award by affected delay or otherwise, should pay such costs as the ct. thought

#### PART I. SECT. 13, SUB-SECT. 2.—D.

e. *Insanity supervening after proceedings but before award.*]—If a person was in fit condition to manage his affairs down to the time when the proceedings before an arbitrator were substantially concluded, the award will not be invalidated by reason of the person having become insane before the final publication of the award.—*GOUREE-NATH v. MONGHYR COLLECTOR, COURT*

*OF WARDS v. RUGHOOBUR DYAL, SHEO PERSHAD NARAIN v. MONGHYR COLLECTOR* (1867), 7 W. R. 5.—IND.

#### PART I. SECT. 13, SUB-SECT. 3.

f. *Matters withdrawn from arbitrators—Suit still pending.*]—A suit was referred to arbitrators, who were to make an award within six months. The arbitrators had only one meeting, at which an agreement was come to by the parties to settle all matters among

themselves & withdraw the matters from arbn., which was done. No award was made by the arbitrators within six months from the reference. On application by pltf. to have the suit restored:—*Held*: the suit was still pending, the arbitrators not having determined it while they had jurisdiction to do so, & the suit should be brought again before the ct.—*GAPI NATH NANDI v. SHIB CHANDRA NANDI* (1871), 6 B. L. R. A. C. 74.—IND.



**Sect. 13.—Revocation of an agreement to submit:**  
*Sub-sects. 3 & 4. Sect. 14. Part II. Sect. 1:*  
*Sub-sect. 1.]*

Reasonable & just:—*Held*: (1) such order might be made a rule of ct. after one of the parties had revoked the authority of the arbitrator; (2) where the authority was revoked because the party could not procure the attendance of material witnesses before the arbitrator, the ct. refused to allow any costs.—*ASTON v. GEORGE* (1819), 2 B. & Ald. 395; 1 Chit. 200; 106 E. R. 411.

*Annotations*:—*Consd.* *Clapham v. Higham* (1822), 1 B. & C. 87; *Greenwood v. Misdale* (1825), M'Cle. & Yo. 276. *Distd.* *Morgan v. Williams* (1833), 2 Dowl. 123. *Refd.* *Smith v. Fielder* (1833), 10 Bing. 306.

**567. Award made after revocation—Whether set aside.]**—A cause was referred to arbn. under a judge's order, & one of the parties, before the award was published, & before the judge's order was made a rule of ct., revoked his submission, but the arbitrator made an award notwithstanding this revocation. The ct. set aside the award, although the judge's order had been made a rule of ct. before any application to set aside the award.—*CLAPHAM v. HIGHAM* (HYAM) (1822), 1 Bing. 87; 7 Moore, C. P. 403; 1 L. J. O. S. C. P. 5; 130 E. R. 36.

**568. — Injunction to restrain party from acting on.]**—Where an award is made after the submission has been revoked by pltf., equity will not restrain deft. from acting on the award, unless pltf. had good grounds for revoking the submission.—*POPE v. DUNCANNON* (LORD) (1838), 9 Sim. 177; 2 Jur. 178; 59 E. R. 326.

#### SUB-SECT. 4.—REMEDIES AGAINST PARTY REVOKING.

**569. Forfeiture of bond.]**—Debt upon bond conditioned to stand to, abide by & perform an award, etc. Deft. after demanding oyer of the bond & condition pleaded no award made, & pltf. replied that deft. before the time, etc., revoked & recalled his authority:—*Held*: (1) by the countermand the bond was forfeited; (2) judgment should be given for pltf.—*VYNIOR'S CASE* (1610), 8 Co. Rep. 80 a; 77 E. R. 595; *sub nom.* *VIVION v. WILDE*, 2 Brownl. 290.

*Annotations*:—*Appld.* *Marsh v. Bulteel* (1822), 5 B. & Ald. 507; *Brown v. Tanner* (1825), 1 C. & P. 651; *Warburton v. Storr* (1825), 4 B. & C. 103. *Consd.* *Pestonjee Nussurwanjee v. Manockjee* (1868), 12 Moo. Ind. App. 112, P. C. *Refd.* *Charneley v. Winstanley* (1804), 1 Smith. K. B. 435; *Smart v. Sandars* (1848), 5 C. B. 895; *Livingston v. Ralli* (1855), 5 E. & B. 132; *Toppin v. Healey* (1863), 11 W. R. 466; *Re Rouse & Meier* (1871), L. R. 6 C. P. 212; *Randell v. Thompson* (1876), 1 Q. B. D. 748, C. A.; *Fraser v. Ehrensperger* (1883), 12 Q. B. D. 310, C. A. *Mentd.* *Lyn v. Wyn* (1665), O'Bridg. 122; *Londre v. Mohun* (1672), Freem. K. B. 42; *Thomas v. Sorrel* (1672), 3 Keb. 143.

**570. Action on case—Breach of contract.]**—An action on the case for breach of promise to perform the award will lie against a party who revokes his authority to an arbitrator.—*NEWGATE* (NUGATE) *v. DEGELDER* (1666), 2 Keb. 10, 20, 24; 1 Sid. 281; 84 E. R. 7, 13, 16.

*Annotation*:—*Mentd.* *Livingston v. Ralli* (1855), 1 Jur. N. S. 594.

**571. Action on agreement.]**—A revocation of a submission to arbn. not under seal, before award made, is, in effect, a breach of an agreement to stand to, obey, abide, perform, etc., an award, for which *assumpsit* will lie; & pltf. may declare that

deft. undertook to perform the agreement & not to revoke the submission, & lay the revocation as a breach.—*BROWN v. TANNER* (1825), M'Cle. & Yo. 464; 1 C. & P. 651; 148 E. R. 495.

**572. —.]**—Where matters in difference are referred to arbn., by bond or agreement, & one of the parties revokes the authority of the arbitrator, he may be liable to an action; but the submission cannot afterwards be made a rule of ct. in order to bring him into contempt.—*HOWARD v. KAYE* (1826), 5 L. J. O. S. K. B. 62.

**573. —.]**—A submission to arbn. may be revoked, but the party revoking will be liable to an action (*WILLIAMS, J.*)—*TAPPIN v. HEALEY* (1863), 11 W. R. 466; 1 New Rep. 326.

*Annotation*:—*Mentd.* *Re Hannans Empress Gold Mining & Development Co.* (1896), 74 L. T. 550.

**574. — Stipulated penalty.]**—Where two parties entered into an agreement (not under seal) to refer a dispute to the arbn. of S., & bound themselves mutually in a penalty "for the true & faithful observance & performance" of the award to be made by S.:—*Held*: the penalty was incurred by a revocation of the submission.—*WARBURTON v. STORR* (1825), 4 B. & C. 103; 6 Dow. & Ry. K. B. 213; 3 L. J. O. S. K. B. 156; 107 E. R. 997.

*Annotations*:—*Consd.* *Brown v. Tanner* (1825), 1 C. & P. 651. *Mentd.* *Newton v. Wilmot* (1841), 8 M. & W. 711.

**575. — By assignees of bankrupt—Revocation after bankruptcy.]**—Covenant by the assignees of A., a bkpt., on articles of agreement, entered into by A., before his bkpcy, & debts., whereby, after reciting that differences existed between pltf. & debts. respecting certain ships of war purchased by the former, they bound themselves to abide by the award of S. Breach, that debts. had revoked their submission. Plea, that before any award was made, A. became bkpt., & all his interest in the subject-matter of the reference was assigned to the provisional assignee. Replication, that the provisional assignee assigned to pltf.s.:—*Held*: as the subject-matter of the reference was taken out of bkpt. & assigned to pltf.s., who would not have been bound by the award, the submission was no longer mutual & was not binding, & debts. by giving notice to the arbitrator not to proceed did not make themselves liable to an action.—*MARSH v. WOOD* (1829), 9 B. & C. 659; 4 Man. & Ry. K. B. 504; 7 L. J. O. S. K. B. 327; 109 E. R. 245.

*Annotations*:—*Expld. & Distd.* *Taylor v. Marling* (1840), 2 Man. & G. 5. *Consd.* *Taylor v. Shuttleworth* (1840), 6 N. C. 277. *Expld.* *Gibson v. Carruthers* (1841), 8 M. & W. 321; *Hemsworth v. Brian* (1845), 14 L. J. C. P. 134. *Expld. & Distd.* *Re Milnes & Robertson* (1854), 15 C. B. 451. *Expld.* *Re Kitchin, Ex p. Young* (1881), 45 L. T. 90, C. A.

**576. Attachment for contempt.]**—Where a cause is referred by a judge's order, such order may be made a rule of ct., even after revocation, in order to bring the party revoking into contempt.—*HOWARD v. KAYE* (1826), 5 L. J. O. S. K. B. 62.

**577. —.]**—*STEWART* (*STEWART*) *v. WILLIAMSON*, No. 493, *ante*.

*See, also*, Nos. 485, 487, 488, 572, *ante*.

#### SECT. 11.—MAKING A SUBMISSION A RULE OF COURT.

Cases on this subject have been omitted as obsolete.

## Part II.—The Arbitrators and Umpire.

See, now, Arbitration Act, 1889, ss. 5 &amp; 6.

## SECT. 1.—APPOINTMENT OF ARBITRATORS AND UMPIRE.

## SUB-SECT. 1.—WHO MAY BE APPOINTED ARBITRATORS.

**578. One of parties.]**—If deft. agree to refer the matter to pltf. he cannot object to the award that pltf. was a judge in his own cause.—MATTHEW

*v. OLLERTON* (1693), 4 Mod. Rep. 226 ; Comb. 218 ; 87 E. R. 362.

*Annotations* :—**Mentd.** *Boulter v. Clark* (1747), Bull. N. P. 5th ed. 16 ; *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720, Ex. Ch. ; *R. v. Coney* (1882), 8 Q. B. D. 534.

**579. Interested party.]**—The appointment of any interested party as arbitrator is so contrary to the first principles of justice that no consent whatever

## PART II. SECT. 1, SUB-SECT. 1.

**a. Qualifications of arbitrator—Arbitration Act, 1890.]**—A person to be appointed an umpire under Arbn. Act, 1890, should be a man who, from training & actual experience gained in the class of business in reference to which the dispute has arisen, is competent to examine & review the transactions & accounts in question between the parties.—*CLOUSTON & Co. v. CORRY* (1901), 23 N. Z. L. R. 597.—N.Z.

**578 i. One of parties.]**—Under a co.'s charter the Govt. were required to find a right of way through private property. The charter provided for arbn. An owner of land through which the line passed acted as his own arbitrator. The Govt. arbitrators made an award to which the owner refused to subscribe. The co. entered on the land. In an action for trespass the co. pleaded as title the award. Reply, that, the owner having acted as arbitrator & being interested, the award was void :—*Held* : the objection of interest was one which the other side had waived, & might waive, & the owner could not take advantage of his own wrong & repudiate his own deliberate act. The objection to interest only applies to a concealed interest : here it was open & known before the submission was made.—*BYRNE v. NEFD. RY. Co.* (1885), 7 NEFD. L. R. 50.—NEFD.

**578 ii.** —.—Where, in a contract entered into between M. & B., M. was the employer & B. the employee, & all disputes were to be referred to M. as sole arbitrator :—*Held* : while such reference might be extremely inconvenient, there was not sufficient ground for refusing to allow the arbn. to proceed according to the terms of the arbn. clause.—*BRYCHAN v. MELVILLE* (1902), 9 S. L. T. 459.—SCOT.

**579 i. Interested party.]**—If an arbitrator unknown to one of the parties has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator.—*CO-OPERATIVE HINDURTHAN BANK, LTD. v. BHOLA NATH BOROOAH* (1914), 19 C. W. N. 165.—IND.

**579 ii. — Engineer.]**—A party to a contract alleged that the engineer of the other party was disqualified from acting as arbitrator on the ground that he was the engineer :—*Held* : the parties were bound by the contract.—*LOW & THOMAS v. WESTERN DISTRICT COMMITTEE OF COUNTY COUNCIL OF DUMBARTON* (1905), 13 S. L. T. 620.—SCOT.

**579 iii. — Interest known.]**—If an arbiter has an interest in the subject of reference & this is well known to the parties before they sign the submission, the award is good notwithstanding the interest.—*JOHNSTON v. CHEAPE* (1817), 5 Dow. 247 ; 3 E. R. 1318.—SCOT.

**579 iv. — — — — —.]**—*NORTHERN ELECTRIC & MANUFACTURING CO. v. WINNIPEG CITY* (1913), 24 W. L. R. 547.—CAN.

**579 v. — Personal interest.]**—The engineer of a co. having been appointed arbiter in a contract between the co. & the contractor :—*Held* : not

disqualified from acting as arbiter by reason of his being (as alleged by the contractor) personally interested in the questions in dispute.—*TROWSDALE v. N. B. RY. Co.* (1864), 2 Macph. (Ct. of Sess.) 1334.—SCOT.

**579 vi. — — — — — Expression of opinion.]** Under a contract the engineer was appointed arbiter. In the course of the operations he reported to his employers that the works were in a "disgraceful state" :—*Held* : he was not thereby disqualified from acting as arbiter.—*SCOTT v. CARLUKE LOCAL AUTHORITY* (1879), 16 Sc. L. R. 435.—SCOT.

**579 vii. — — — — —.]**—*MACKAY v. PAROCHIAL BOARD OF BARRY* (1883), 10 R. (Ct. of Sess.) 1046.—SCOT.

**579 viii. — — — — —.]**—A contract contained an arbn. clause whereby the contractor & his employers agreed to refer any question to the employers' engineer as arbiter. A question arose under the contract, with regard to which the employers' engineer expressed a definite opinion in reply to his employers, who had consulted him :—*Held* : the arbiter was not disqualified.—*HALLIDAY v. DUKE OF HAMILTON'S TRUSTEES* (1903), 40 Sc. L. R. 628.—SCOT.

**579 ix. — — — — — Absence of fraud or bad faith.]**—Under a contract with a provision that "the decision of the city engineer on all points shall be final & conclusive," etc., the city engineer is not disqualified, in the absence of fraud or of bad faith. The possible bias of the engineer in favour of the plans drawn by him is not sufficient to disqualify him.—*FARQUHAR v. HAMILTON CITY* (1893), 20 A. R. 86.—CAN.

**579 x. — Preliminary estimate of cost.]**—Pltfs. sought from defts. payment of money under a contract for the erection of a dam across a river. Some extensions were decided upon, & a further agreement was entered into. Provision was made for payments according to progress estimates of defts. engineers. Completion to the satisfaction of the engineers was a condition precedent to the right to final payments. Payments according to some progress estimates were made, but further payment was withheld, on the ground that the work had not been completed according to contract. Pltfs. contended that the engineers were disqualified from acting as quasi-arbitrators between pltfs. & defts., & that pltfs. were, therefore, relieved from the necessity of satisfying the engineers as to the completion of the contract :—*Held* : they were not disqualified by having made a preliminary estimate of what the work should cost, the estimate not having been the basis of any action of defts.—*MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE* (1911), 18 W. L. R. 151 ; *aff.* (1912), 20 W. L. R. 603 ; 1 W. W. R. 1082 ; 2 D. L. R. 702.—CAN.

**579 xi. — Architect.]**—The mere fact that the arbiter on disputes arising out of a building contract is the architect employed in the building does not infer disqualification of the architect on the

ground of bias.—*SCOTT v. GERRARD* (1916), 2 S. L. T. 42.—SCOT.

**579 xii. — — — — — Examination as witness.]**—A contract contained a clause referring any disputes to the decision of the architect as arbiter. In the course of an action raised by the contractor, concluding for reduction of the clause of reference, & for payment, the architect was examined as a witness for defenders in regard to certain of the matters in dispute :—*Held* : the architect was thereby disqualified from acting as arbiter.—*DICKSON v. GRANT* (1870), 8 Macph. (Ct. of Sess.) 566.—SCOT.

**579 xiii. — Attorney of party.]**—The arbitrator appointed by one of the parties having refused to act, he appointed a new arbitrator, who formerly acted as his attorney, but not in this suit :—*Held* : bad.—*TULLY v. CHAMBERLAIN* (1873), 9 C. L. J. O. S. 237.—CAN.

**579 xiv. — Person acting professionally for party on occasions.]**—An award was made by a majority of arbitrators. The principal defence to an action on the award was that C., being agent of resps., was disqualified to act as their arbitrator :—*Held* : the evidence showed that C. was not in the continuous employ of resps., but acted for them from time to time only, in his professional capacity as a notary public, & not in any other capacity, & he was not disqualified.—*NORTH SHORE RY. Co. v. URSULINE LADIES OF QUEBEC* (1885), Cass. Dig. 2nd ed. 36.—CAN.

**579 xv. — Ratepayer & consumer.]**—In an arbn. concerning the price of gas to be supplied by a gas co. to a municipal council, a ratepayer & consumer of gas supplied by such co. is disqualified from acting as arbitrator.—*Re SANDHURST CORPN. & BENDIGO GAS Co.* (1886), 12 V. L. R. 682.—AUS

**579 xvi. — Ratepayer.]**—By certain Acts a town was empowered to enter upon any lands in the county, & it was provided that the damages should be determined by arbn. :—*Held* : by reason of R. S. N. S., 1900 (c. 39), that an objection to an award on the ground that C. F., one of the arbitrators appointed under the Act, was not a disinterested party, he having been assessed as a ratepayer in the town, was not sustainable.—*R. v. GLACE BAY (TOWN)* (1904), 36 N. S. L. R. 456.—CAN.

**579 xvii. — R. S. O., 1887 (c. 184), s. 396 (2).]**—By the above Act no member, officer, or person in the employment of a corpn. interested in any arbn., nor any person so interested, shall act as an arbitrator under the Act :—*Semble* : a ratepayer was disqualified.—*Re MUSKOKA TOWNSHIP & GRAVENHURST VILLAGE* (1884), 6 O. R. 352.—CAN.

**579 xviii. — Person previously employed by one party.]**—A matter of compensation was referred to arbn., & each party appointed an arbitrator, & these selected C. as a third arbitrator. C. had been a short time previously employed by one of the parties to value lands similar & adjacent to those in question, but employment had ceased before his appointment as third arbitrator :—*Held* : C.'s connection, having ceased before his appointment as arbitrator,



**Sect. 1.—Appointment of arbitrators & umpire: s. 1 & 2, A.]**

can make it valid.—*Re* SAMUEL (1848), 10 L. T. O. S. 464.

**580. — Shareholder of company.]—**A contract between a railway co. & a building contractor stipulated that payments during the progress of the works should be made on the certificates of the co.'s principal engineer or his assistant. In case of dispute between the contractor & the assistant engineer, the decision of the principal engineer was to be final, but at the completion of the works, if the contractor & the principal engineer differed, the differences were to be settled by arbn. On a bill objecting (*inter alia*) that the principal engineer was a shareholder in the co.:—*Held*: no fraudulent concealment of the fact being alleged, it formed no ground for relief, since by the contract the contractor had bound himself to submit to the judgment of a particular individual, whose position as principal engineer made him interested in the co.—*RANGER v. GREAT WESTERN RY. CO.* (1854), 5 H. L. Cas. 72; 24 L. T. O. S. 22; 18 Jur. 795; 10 E. R. 824, H. L.

**Annotations:—***Consd.* New Brunswick & Canada Ry. Co. v. Conybeare (1862), 9 H. L. Cas. 711, H. L. *Expld.* Hill v. South Staffordshire Ry. Co. (1865), 11 Jur. N. S. 192, C. A. *Consd.* Wildes v. Russell (1866), Har. & Ruth. 689. *Expld.* Western Bank of Scotland v. Addie v. Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145, H. L. *Refd.* *Re* London, Birmingham & Buckinghamshire Ry. Co., *Ex p.* Curzon (1857), 6 W. R. 141; Scott v. Liverpool Corp'n. (1858), 3 De G. & J. 334, L. C.; Phillips v. Eyre (1870), L. R. 6 Q. B. 1. *Mentd.* *Re* Royal British Bank (1859), 3 De G. & J. 387, L.J.J.; Thornhill v. Leats (1860), 8 C. B. N. S. 831; Thames Iron Works & Shipbuilding Co. v. Royal Mail Steam Packet Co. (1862), 13 C. B. N. S. 358; Mackay v. Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394, P. C.; Stegmann v.

could not be treated as a disqualification.—*ROWAND v. MARTIN* (1890), 7 Man. L. R. 160.—**CAN.**

**579 xix. — Shareholder in unincorporated company.]—***Held*: two arbitrators, who had power to appoint an oversman, were not entitled to appoint a person, who was a shareholder in an unincorporated co., one of the parties to the reference.—*SMITH v. LIVERPOOL & LONDON & GLOBE INSURANCE CO.* (1887), 14 R. (Ct. of Sess.) 931.—**SCOT.**

**579 xx. — Superintendent.]—**By a contract it was provided that all differences, etc., should be referred to the award of H., the superintendent in charge of the work:—*Held*: the fact of H. being such superintendent did not disqualify him from acting as arbitrator.—*MCMANEE v. TORONTO CITY* (1893), 21 O. R. 313.—**CAN.**

**579 xxi. — Alderman.]—**An alderman is disqualified to act on behalf of the city as one of a board of arbitrators to determine the value of land expropriated by the city.—*Re* ABELL (1901), 21 C. L. T. 511; 2 N. B. Eq. Rep. 271.—**CAN.**

**579 xxii. — Selling brokers.]—***LEARY & CO. v. BRIGGS & CO.* (1904), 12 S. L. T. 210.—**SCOT.**

**579 xxiii. — Party retained to report on matter submitted.]—**A clause in a policy provided that any alleged loss by fire should be referred to arbn. of some indifferent person to be agreed on by both parties. The person nominated by one party, though not a general officer of that party, had before the reference been specially retained to examine & report & advise, & had so examined & reported & advised upon the very matter in dispute:—*Held*: he could not be said to be an indifferent person within the meaning of the clause.—*Re* COLEMAN & ROYAL INSURANCE CO. (1905), 24 N. Z. L. R. 817.—**N.Z.**

**579 xxiv. — Mortgagee of one party.]—**An arbitrator is not disqualified by reason of being a mtgee. of property

purchased by one of the parties.—*CAMPBELL v. IRWIN* (1913), 25 O. W. R. 853; 5 O. W. N. 957.—**CAN.**

**579 xxv. — Husband of one shareholder—Executor of another.]—**If the husband of one of the shareholders in a co. concerned in an arbn. is also her agent & the testamentary exor. of her father, who also holds shares in the co., he should not be appointed arbitrator.—*CEDAR RAPIDS, ETC. CO. v. LACOSTE* (1915), Q. R. 24 K. B. 207.—**CAN.**

**579 xxvi. — Brother of party.]—**The fact that one of the arbitrators is a brother of one of the parties constitutes a real likelihood of an operative prejudice on his part, & the ct. will set aside such an appointment.—*Re* TURNBULL & PIPESTONE (1915), 31 W. L. R. 595; 8 W. W. R. 982.—**CAN.**

**581 i. — Counsel habitually employed by solicitors of party.]—**Where it appeared that, for some years prior to the arbn., an arbitrator had from time to time acted as chamber counsel for the standing solr. of one of the parties to the arbn. but not for that party himself:—*Held*: there was no such relation between him & the party as might give rise to bias or show an interest which would invalidate the award.—*Re* CHRISTIE & TOWN OF TORONTO JUNCTION (1895), 24 O. R. 443; 22 A. R. 21; 25 S. C. R. 551.—**CAN.**

**581 ii. — Counsel retained by one party.]—**Where the arbitrator was the retained pleader of pltf., & no disclosure of this fact was made, before the arbitrator was appointed, & deft. was consequently unaware of it:—*Held*: the award was bad.—*KALI PRASANNO GHOSE v. RAJANI KANT CHATTERJI* (1897), I. L. R. 25 Calc. 141.—**IND.**

**b. — Waiver of objection to arbitrator.]—**A party objecting to an arbitrator on the ground of interest does not, in a case where the arbitrator continues to sit, waive the objection by entering into his case & endeavouring to

O'Connor (1899), 81 L. T. 627, C. A.; Taff Vale Ry. Co. v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426, H. L.; Lodder v. Slowey, [1904] A. C. 442, P. C.

**581. — Counsel habitually employed by solicitors of party.]—**Counsel habitually employed by the solrs. of one of the parties to an arbn. is not disqualified from acting as arbitrator merely on that account.—*BRIGHT v. RIVER PLATE CONSTRUCTION CO., LTD.*, [1900] 2 Ch. 835; 70 L. J. Ch. 59; 82 L. T. 793; 64 J. P. 695; 49 W. R. 132; 44 Sol. Jo. 610.

**582. Merchants—Appointment left to Tribunal de Commerce — Non-merchants appointed.]—**In an action of debt by two out of three syndics of a French bkpt., upon an arbitral sentence & ordinance adjudging that deft. should pay a sum of money to the bkpt.:—*Held*: although, by the express agreement of the parties, merchants were to be appointed as arbitrators, the Tribunal de Commerce, which it was agreed might name the arbitrators in case of disagreement, might appoint persons not merchants, & the proceedings of foreign tribunals must be assumed to be according to the law, unless the contrary were shown.—*ALIVON v. FURNIVAL* (1834), 1 Cr. M. & R. 277; 3 L. J. Ex. 241; 149 E. R. 1084.

**Annotations:—***Mentd.* *R. v. Douglas* (1845), 1 Car. & Kir. 670; Boyle v. Wiseman (1855), 10 Exch. 617; Ingate v. Austrian Lloyds' Co. (1858), 6 W. R. 659; *In the goods of* Holl (1858), 1 Sw. & Tr. 136 n.; *Re* Henderson, Nouvion v. Freeman (1887), 57 L. J. Ch. 367, C. A.; Didisheim v. London & Westminster Bank, [1900] 2 Ch. 15, C. A.

**583. Fluctuating body.]—**The "Society of Inspectors of Poor for Scotland," an unincorporated & fluctuating body:—*Held*: proper arbitrators of a question referred to them by two parishes as to the maintenance of a pauper.

obtain an award in his favour.—*Re* SANDHURST CORN. & BENDIP GAS CO. (1886), 12 V. L. R. 682.—**AUS.**

**c. —**Where the municipality, by its secretary-treasurer, objects to one of the arbitrators on the ground of interest, but continues represented at the arbn. by the reeve & secretary-treasurer, it does not waive its objection.—*Re* TURNBULL & PIPESTONE (1915), 31 W. L. R. 595; 8 W. W. R. 982.—**CAN.**

**d. Judge of Probate Court.]—**Judge of Probate Ct. acting as quasi-arbitrator to settle matters in difference. Award upheld.—*Re* SCOTT ESTATE (1896), 29 N. S. L. R. 92.—**CAN.**

**e. Absent person — Act VIII. of 1859, s. 319.]—**When a person goes away from the country & remains away, & there is no evidence to show an intention to return, that person becomes incapable of acting as umpire within the meaning of the above sect.—*GADADHAR MOITRY v. GANGA PRASAD MOITRY* (1870), 4 B. L. R. 89.—**IND.**

**f. Resident outside municipality — Municipal Act (Man.), s. 699.]—**The provisions of the above Act, which require that the person nominated by the Lieut.-Gov. in Council as arbitrator shall be resident without the limits of any municipality interested, are imperative, & not directory only, & the appointment of a resident of such municipality is wholly void.—*Re* TURNBULL & PIPESTONE (1915), 31 W. L. R. 595; 8 W. W. R. 982.—**CAN.**

**g. Umpire — Need not be expert — Reference to expert arbitrators.]—**Where, under a submission within the meaning of Arbn. Act, 1908, two arbitrators are appointed who are both skilled valuers & are unable to agree upon an umpire, & the intervention of the ct. under the above Act becomes necessary, the umpire appointed by the ct. need not himself be a valuer.—*Re* BRYANT & THOMSON (1914), 33 N. Z. L. R. 983.—**N.Z.**



There is nothing in law that I have discovered to prevent a valid reference to the arbn. of such a body (LORD CAIRNS, C.).

The benchers of the Inns of Ct. decide matters of the gravest importance; & yet they are not a corpn., but a fluctuating body (LORD HATHERLEY). —*RATHVEN PARISH v. ELGIN PARISH* (1875), L. R. 2 Sc. & Div. 535.

*Annotation*:—*Distd. Tancred Arrol Co. v. Steel Co. of Scotland* (1890), 15 App. Cas. 125, H. L.

**584. Members of named associations—Non-members appointed—Attendance of parties no waiver.]—**A contract, headed "London Corn Trade Assocn.," for the sale by deft. to pltf. of a quantity of wheat contained a clause that all disputes from time to time arising out of the contract should be referred to two arbitrators, one to be appointed by each party, the two arbitrators having power to appoint a third, & "the arbitrators appointed shall be in all cases principals engaged in the corn trade as merchants, millers, factors, or brokers, & shall also be members of the London Corn Exchange, the Baltic, or the London Corn Trade Assocn., & residing in the United Kingdom." The clause also provided that either party, if dissatisfied with the award, might appeal to the committee of appeal elected for the purpose, who were to confirm the award unless four members of the committee decided otherwise. The committee of appeal consisted of five members. A dispute under the contract was referred to arbn. in accordance with the above clause, the parties attended the arbn. proceedings, the three arbitrators made an award in favour of deft., & the award was confirmed by the committee of appeal. Neither of the arbitrators appointed by the parties was a member of one or other of the three bodies above mentioned, but this fact was not known to pltf. until after the award had been confirmed on appeal. The two arbitrators had, however, on many occasions acted as arbitrators under similar contracts containing a similar arbn. clause. Pltf. having brought an action for a declaration that the award was null & void:—*Held*: (1) as the arbitrators were not qualified to act as arbitrators under the contract, they had no jurisdiction to determine the dispute, & the award was null & void; (2) pltf. were not estopped from relying upon the defect in the qualifications of the arbitrators appointed by deft.

## PART II. SECT. 1, SUB-SECT. 2.—A.

*h. By whom appointment made—Mortgagor & mortgage must concur.]*—The words "opposite party" in Dominion Railway Act (51 Vict. c. 29), s. 150, must be read so as to include both mtgor. & mtgee., & both must concur in the appointment of an arbitrator to determine the compensation to be paid for mtgd. land required for the railway. —*Re TORONTO, HAMILTON, & BUFFALO RY. CO. & BURKE* (1895), 27 O. R. 690.—CAN.

*k. How made—Appointment not under seal.]*—The appointment of an arbitrator by a corpn. was not under seal, but the ct. declined to set aside the award on that ground, as the objection, if valid, could be taken in any proceeding to enforce the award.—*Re HARVEY & PARKDALE* (1888), 16 O. R. 372.—CAN.

*l. — Under Public Health (Ireland) Act, 1878 (c. 52), s. 217.]—Re DOUGLAS & BELFAST CORPN., [1909] 2 I. R. 30.—IR.*

*m. — R. S. O., 1897, c. 285—Bye-law.]* By s. 4 (1) of the above Act it was provided that every municipal council shall name & appoint by bye-law one person to be the engineer & arbitrator, etc., & such engineer shall continue an officer of such corpn. until his appointment is revoked by bye-laws (of which he shall have notice) & another

engineer is appointed in his stead. Defts.' council duly appointed R. such engineer, & he accepted the office. Subsequently they without any notice to him, & without any bye-laws expressly revoking his appointment, passed a bye-law purporting to appoint S., as such engineer, the latter bye-law in no way referring to the former or to R.:—*Held*: S. did not become "the engineer." —*TURTLE v. TOWNSHIP EUPHEMIA* (1899), 31 O. R. 101.—CAN.

*n. — Appointment by letter.]* By Acts of 1902, c. 104, the recompense to the owner of land taken for railway purposes, etc., was to be fixed by three arbitrators, one chosen by the co., another by the owner or proprietor, & where these were unable to agree, a third to be appointed by the two arbitrators first nominated. The co.'s engineer wrote to M., who had previously acted for the co., requesting him to ascertain whether the arbitrators could get to work, & if so to let them know that he (M.) was prepared to agree to act, "& ask them to appoint their man, so that you two, if you cannot agree to the valuation, may select a third." Acting on the letter received, M., in company with pltf.'s nominee, met & investigated the damages, & with C., who was appointed third arbitrator, signed an award, for the amount of which action was brought:—*Held*: the letter in the

—*JUNGHEIM, HOPKINS & CO. v. FOUKELMANN, [1909] 2 K. B. 948; 78 L. J. K. B. 1132; 101 L. T. 398; 25 T. L. R. 819; 53 Sol. Jo. 790.*

**585. Defendant company's engineer—Effect of amalgamation.]—**A railway co. entered into a contract, one of the terms of which was that T., "if & so long as he shall continue to be the co.'s principal engineer," should be the arbitrator as to matters in difference. Afterwards the co. was amalgamated by Act of Parliament with another railway co. Disputes having arisen between the parties to the contract, T. made two awards as to the subject-matter of it:—*Held*: T. was still the proper person to make the awards.—*Re WANSBECK RY. CO. & TROWSDALE* (1866), L. R. 1 C. P. 269; 12 Jur. N. S. 740.

**586. Defendant company's manager.]—**Unless the agreement so provides, a co. cannot appoint its own manager as arbitrator.—*Re FRANKENBERG & SECURITY CO.* (1894), 10 T. L. R. 393.

**Appointment of servant, engineer or surveyor of one party.]—**See Nos. 360—367, *ante*.

**Arbitrator acquiring interest in subject-matter or otherwise becoming biased—As ground for refusing stay.]—**See Nos. 360—368, *ante*.

—**As ground for restraining arbitration.]—**See Nos. 424, 425, *ante*.

—**As ground for granting leave to revoke submission.]—**See Nos. 515, 517, *ante*.

—**As ground for removal of arbitrator.]—**See Part II., Sect. 2, Sub-sect. 3, *post*.

—**As ground for setting aside award.]—**See Part IV., Sect. 16, Sub-sect. 2, B., *post*.

—**As defence to proceedings to enforce award.]—**See Part IV., Sect. 19, Sub-sects. 2, B. (b), 3, B., 5, E., *post*.

## SUB-SECT. 2.—HOW ARBITRATORS MAY BE APPOINTED.

### A. Generally.

**587. Appointment by lot.]—**Action to set aside award, one of the grounds being that the arbitrator was appointed by lot:—*Held*: if both parties agreed to that mode of choosing, they must take their chance; it was not like the case of two arbitrators choosing an umpire.—*Re SHAW & SIMS* (1851), 17 L. T. O. S. 160.

absence of anything in the stat., as to how the arbn. was to be conducted, or the steps to be taken, previous to inquiry, was as effective as any agreement, even if such were necessary, & the co. were bound by it.—*McISAAC v. INVERNESS RY. & COAL CO.* (1905), 38 N. S. L. R. 80.—CAN.

*o. Form of notice of appointment.]—*It was objected that defts.' notice appointing their arbitrator was not accompanied by a surveyor's certificate, & it was denied that pltf. was entitled to any compensation:—*Held*: (1) as no land was taken, & defts. denied pltf.'s right to anything, the certificate was unnecessary; (2) such notice need not be under defts.' corporate seal.—*WIDDER v. BUFFALO & LAKE HURON RY. CO.* (1865), 24 U. C. R. 520.—CAN.

*p. Swearing of arbitrators on appointment.]—*Arbitrators sworn before a judge, commissioner or prothonotary, instead of by a justice of the peace, are validly sworn.—*GIRARD v. HA HA BAY RY. CO.* (1915), Q. R. 47 S. O. 325.—CAN.

*q. When made—Not after expiry of submission.]—*Arbitrators to be appointed under a contract are creatures of that contract & cannot be called into existence after the contract has been determined.—*Re HIGGINS, FIELDING & WIGHT & VICTORIAN RYS. CO.* (1885), 11 V. L. R. 140.—AUS.

**Sect. 1.—Appointment of arbitrators & umpire:**  
2. B.

**B. When one Party makes Default.**

See, now, Arbitration Act, 1889, ss. 5 & 6.

**588. At common law—What amounts to refusal to nominate—Notice of nomination required.]—**Declaration on a written agreement (not under seal) by pltf. to let land to deft. for two years, & by deft. to make satisfaction for damages done to tenants by game on their farms, over which he was to be at liberty to preserve the game, the amount of damage to be settled by two referees, one chosen by each party, or by their umpire in case of disagreement. Averment, that deft. entered & enjoyed the exclusive right of shooting during the whole term agreed upon. Breach, that although within a reasonable time M. was chosen & nominated on behalf of pltf. & notice thereof given to deft., who was requested by pltf. to give the name & address of a referee on his behalf to act with M. within ten days, or that in default M. would assess the damage alone, yet deft. did not nor would give notice to pltf. of any person chosen or nominated on his behalf, nor ever made any satisfaction for the damage done, that, accordingly, M. assessed the damage, & that deft. had not paid any compensation to pltf. :—*Held*: the declaration sufficiently alleged a refusal by deft. to nominate a referee.

**PART II. SECT. 1, SUB-SECT. 2.—B.**

**588 i. At common law—What amounts to refusal to nominate.]—**A lease contained an agreement for renewal upon terms to be fixed by arbitrators, provided that if either party refused to appoint an arbitrator within seven days after being required, the other might appoint a sole arbitrator, whose award should be final. The lessors served upon the lessees a notice requiring them to appoint an arbitrator. The lessees protested against any arbn., but at the same time named an arbitrator. The lessors did not accept this as an appointment & assumed to appoint a sole arbitrator as upon default :—*Held*: the lessees had made a valid appointment of an arbitrator.—*FARLEY v. SANSON* (1902), 24 C. L. T. 303; 7 O. L. R. 639; 1 O. W. R. 738; 3 O. W. R. 460.—**CAN.**

**s. ——— What amounts to refusal to act.]—**Each of the parties agreed to name an arbitrator, provided that the two, within ten days after the appointment of the one last named, should appoint an umpire, & that if either party should neglect to appoint an arbitrator for the space of ten days, after being requested so to do, or should appoint an arbitrator who should refuse or neglect to act as such, then the arbitrator of the party making such request should appoint an arbitrator on behalf of the other party. Arbitrators were duly appointed. S., the arbitrator of deft., required D., the arbitrator of pltf., to join in the naming an umpire, but D. could not at that time intelligently take action. Next day D., expressing his readiness to act, confirmed a nomination by his partner of an umpire :—*Held*: the facts did not establish any refusal or neglect on the part of D. to act as arbitrator, such as would justify S. in naming an arbitrator in his stead.—*DIRECT U. S. CABLE CO. v. DOMINION TELEGRAPH CO. OF CANADA* (1883), 8 A. R. 416; 28 Gr. 648.—**CAN.**

**t. Under statute—19 & 20 Vict. c. 113, s. 16.]—**After the service of notice given by the above Act requiring the opposite party to appoint a new arbitrator as a condition precedent to the appointment of a sole arbitrator, seven clear days must elapse upon any of which the opposite party may

Nomination implies notice to the other party; neither party chooses & nominates a referee until he informs the other party, who the referee is (LORD DENMAN, C.J.).

The jury found for deft. on an issue that pltf. did not notify to deft. his choice of an arbitrator within a reasonable time :—*Held*: an immaterial finding.—*THOMAS v. FREDRICKS* (1847), 10 Q. B. 275; 16 L. J. Q. B. 393; 11 Jur. 942; 116 E. R. 794.

*Annotation*:—*Mentd. Knowlman v. Bluett* (1874), L. R. 9 Exch. 307.

**589. When nomination complete.]—**By the terms of an agreement, dated May 25, deft. agreed to purchase certain growing crops of pltf., the price to be paid on June 5, the valuation to be made by June 3, by two persons, one named by each party by May 31, & in case either party neglected or refused to nominate a referee within the time appointed, the referee of the other party alone to make a final decision :—*Held*: (1) the word "nominate" meant not only the choice of a referee, but the communication of the appointment to the other party; (2) an appointment by pltf. of a referee on May 31, & communication of that appointment to deft. by letter, which reached him on June 1, did not entitle pltf. to proceed *ex p.* within the meaning of the agreement.

appoint an arbitrator. — *HEALY v. HEALY* (1866), 17 I. C. L. R. 649.—**IR.**

**v. ——— Arbitration (Scotland) Act, 1894 — Dispute within reference.]—**A feu-charter contained a clause "reserving the mines, etc., & liberty to work same upon payment of surface damages as the same should be ascertained by two arbiters, one to be chosen by each party, or by an oversman to be appointed by such arbiters in case of their differing in opinion." The superior having refused to nominate an arbirer to ascertain the surface damages sustained by the vassal's feu through subsidence caused by the underground mineral workings of the superior :—*Held*: such damages fell within the clause, & an arbirer accordingly appointed on the vassal's prayer in terms of the above Act.—*HALLPENNY v. DEWAR* (1898), 35 Sc. L. R. 696.—**SCOT.**

**w. ——— Arbitration Act, s. 5 (b).]—**Disputes having arisen between pltf. & deft. under a contract, which provided for the arbn. of any difference between them, pltf. obtained the consent of B. to act as his arbitrator if appointed, & without having made any formal appointment of B. notified deft. that he had appointed B. his arbitrator. Dft. failed to appoint an arbitrator. Thereupon pltf. purporting to act under s. 8 (b) of the above Act, appointed B. sole arbitrator. There was no notification to B. of the specific disputes which he was to decide nor any formal acceptance of the office by him, but he sat & made an award :—*Held*: B. was properly appointed.—*COX v. JOHNSON* (1914), 14 S. R. N. S. W. 240.—**AUS.**

**x. ——— Service of notice.]—**A submission provided for a reference to arbitrators, & defts. failed to appoint an arbitrator. Pltfs. proceeded to arbn. before their own arbitrator after serving defts. a general agent in Melbourne with a notice to appoint an arbitrator under the above Act. Defts. moved to set aside the appointment of the arbitrator :—*Held*: the appointment must be set aside, on the ground that the notice required by the above Act must be served upon some person in New South Wales.—*NEW PINNACLE GROUP S. M. CO. v. LUHRIG COAL & ORE DRESSING APPLIANCES CO.* (1900), 21 N. S. W. L. R. 297.—**AUS.**

**y. ——— British Columbia Arbitration Act, 1911 (c. 11).]—**CITY OF NORTH VANCOUVER v. JACKSON (1914), 27 W. L. R. 456.—**CAN.**

**z. ——— Arbitration Act, R. S. O., 1897 (c. 62), s. 8.—Submission not within.]—**A submission contained in a policy provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbn. of two disinterested persons, one to be chosen by each party, & if the arbitrators are unable to agree, they shall choose a third, & the award of the majority shall be sufficient" :—*Held*: the submission was not one providing for a reference "to two arbitrators, one to be appointed by each party," within the above sect., & therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator.—*Re FAULKNER, EXCELSIOR LIFE INSURANCE CO. v. EMPLOYER'S LIABILITY ASSURANCE CORPN.* (1904), 23 C. L. T. 215; 5 O. L. R. 609; 2 O. W. R. 348; 3 O. W. R. 391.—**CAN.**

**a. ——— Reference to three arbitrators.]—**An agreement provided for a reference to three arbitrators, appointed by each party choosing an arbitrator & they two a third in case of dispute, or a majority of them :—*Held*: the agreement imported that the three arbitrators should act from the outset, & therefore, the above Act providing that a party who has appointed an arbitrator may, if the other party makes default, appoint that arbitrator as sole arbitrator did not apply.—*Re STURGEON FALLS ELECTRIC LIGHT & POWER CO. & STURGEON FALLS* (1901), 21 C. L. T. 595; 2 O. L. R. 585.—**CAN.**

**b. ——— Necessity for notice.]—**Where a submission provides that the reference shall be to two arbitrators the above Act gives power to the party who has appointed an arbitrator, if the other makes default, to appoint that arbitrator as sole arbitrator :—*Held*: notice of the appointment of such sole arbitrator should be given to the party in default who, if not notified, is not called upon to move against the appointment.—*Re STURGEON FALLS ELECTRIC LIGHT & POWER CO. & STURGEON FALLS* (1901), 21 C. L. T. 595; 2 O. L. R. 585.—**CAN.**



The nomination is not complete until the name is communicated (LORD DENMAN, C.J.).—TEW (DEW) v. HARRIS (1847), 11 Q. B. 7; 17 L. J. Q. B. 1; 10 L. T. O. S. 87; 11 Jur. 947; 116 E. R. 376.

**590. — Validity of request to nominate—Necessity for particularising matters to be arbitrated on.]—**An agreement between A. & B. contained the following clauses: "In every case of any difference between the parties hereto or their representatives, whether touching the true intent or construction of this agreement or of anything therein expressed, or touching anything to be done or omitted in pursuance of this agreement, or as to any of the incidents or consequences thereof or otherwise relating to the premises, the matter in question shall be referred to arbn." "Every such reference shall be made to two persons, one to be named by each party." "If either party for fourteen days after being requested by the other party to name an arbitrator fail so to do, then both arbitrators may be named by the party making such request." Differences having arisen, A. appointed an arbitrator, but B. declined to do so on request, whereupon A. appointed a second arbitrator, & the two proceeded to hear & dispose of the matter. The appointment of the arbitrators purported to be made by A. & C. (who was said to be an incumbrancer on A.'s presumed interest under the agreement) severally, & the notice was also given by A. & C.:—*Held*: (1) the appointments by A., since they were several, were not vitiated by the simultaneous appointments by C.; (2) it was not necessary in the appointment of the arbitrators to particularise the matters to be arbitrated upon; (3) the request to B. to appoint an arbitrator was not rendered invalid by its requiring him to notify the appointment to the solrs. who had been acting for A. throughout the matter, instead of to A. himself.—*Re HADDAN & ROUPELL* (1861), 9 C. B. N. S. 683; 142 E. R. 269.

**Under statute—Common Law Procedure Act, 1854, s. 11—Valuation not arbitration.]—See Nos. 51—71, ante.**

**591. — Common Law Procedure Act, 1854, s. 13—Reference to three arbitrators.]—**The provisions of the above sect. that where the reference is to two arbitrators, & one party fails to appoint, the other party may appoint his arbitrator to act alone, & an award made by such arbitrator shall be binding on both parties, do not apply where the reference is to three arbitrators, one to be appointed by each

of the parties thereto & the third to be chosen by the two so appointed.—*GUMM v. HALLETT* (1872), L. R. 14 Eq. 555; 41 L. J. Ch. 514; 26 L. T. 468.

*Annotation*:—*Reid. Fraser v. Ehrensperger* (1883), 12 Q. B. D. 310, C. A.

**592. — Act of 1889, s. 6 (b)—Appointment of sole arbitrator—Industrial & Provident Societies Act, 1893 (c. 39).]**—J., a member of an industrial society, nominated his daughter to receive his interest in the society, & died on May 19, 1898, without having revoked the nomination. Both his widow & the daughter claimed the amount standing to his credit in the books of the society. On Sept. 20 the daughter wrote a letter to the society nominating an arbitrator & asking the society to name an arbitrator to act on their behalf in accordance with one of their rules. The society took no notice of this application, & on Oct. 19 the daughter gave notice that the arbitrator named in her former letter had been appointed by her as sole arbitrator under the above sub-sect. The society replied that they would refuse to be bound by the decision of an arbitrator so appointed. On Nov. 1 the sole arbitrator gave an *ex p.* award in favour of the daughter. On Nov. 17 a plaint was taken out by the daughter in the ct. ct. under the above Act of 1893, s. 49, & the judge enforced the award in favour of the daughter:—*Held*: it was not necessary to decide whether the Act of 1889 was or was not applicable, since the plaint in the ct. ct., as the forty days mentioned in the Act of 1893, s. 49 (5), had elapsed, might be regarded as an application under that sub-sect.—*JESSOP v. HUD- DERSFIELD INDUSTRIAL SOCIETY* (1899), 80 L. T. 598.

*See, generally, INDUSTRIAL, PROVIDENT & SIMILAR SOCIETIES.*

**SUB-SECT. 3.—HOW UMPIRE MAY BE APPOINTED.**

*See, now, Arbitration Act, 1889, ss. 5 & 6.*

#### A. Generally.

**593. All arbitrators must be present & concur.]—**Where an umpire is to be appointed by two or more arbitrators, they must be all present & concur in the appointment.—*EADS v. WILLIAMS* (1854), 4 De G. M. & G. 674; 3 Eq. Rep. 244; 24 L. J. Ch.

#### PART II. SECT. 1, SUB-SECT. 3.—A.

**c. By whom appointed—By parties or arbitrators.]—**Under a submission by four persons to two arbitrators, " & should they not agree, to choose an umpire ":—*Held*: the umpire should have been appointed by the parties, not by the arbitrators.—*O'DOUGHERTY v. FRETWELL* (1853), 11 U. C. R. 65.—**CAN.**

**f. — Arbitrators must have authority.]—**An agreement was entered into for the sale of sheep, bearing that the stock was to be taken over on valuation by two men mutually chosen, who were named; the two referees differed, & without the consent of the parties, made a devolution on an oversman:—*Held*: the devolution by the referees on the oversman was invalid.—*MATHE- SON v. M'KENZIE* (1842), 4 Dunl. (Ct. of Sess.) 1472.—**SCOT.**

**g. — — — What constitutes authority.]—**A reference in terms of a lease to "two persons of skill to be chosen mutually by the parties" means the nomination of one man of skill on each side, & does not imply in them the nomination of an umpire.—*COCHRANE v. GUTHRIE* (1861), 23 Dunl. (Ct. of Sess.) 865.—**SCOT.**

**h. — — — Where arbitrators have no express power.]—**Where a reference does not fairly prohibit the appointment of an umpire, arbitrators may appoint one, though the reference provides that the award of the named arbitrators should be final.—*Re BAILEY & HART* (1883), 9 V. L. R. 311.—**AUS.**

**k. How appointment made — Judicial act—Free judgment necessary.]—**A reference was to two arbitrators with power to appoint an umpire, who was to make an award if the two disagreed:—*Held*: the parties were entitled to the free judgment of the two arbitrators in the appointment of the umpire.—*Re LAWSON v. HUTCHINSON* (1872), 19 84.—**CAN.**

**l. — — — Cannot be delegated.]—**The naming by arbitrators of an umpire is a judicial act which cannot legally be performed by the partners of one of the arbitrators, & his subsequent confirmation thereof is ineffectual.—*DIRECT CABLE CO. v. DOMINION TELEGRAPH CO. OF CANADA* (1883), 8 A. R. 41; 28 Gr. 648.—**CAN.**

**m. — — — — —.]—**A contract provided that disputes were to be referred to the arbn. of two merchants, & that, should they be unable to agree,

they should appoint an umpire. The arbitrators disagreed, & referred the case to the Bombay Chamber of Commerce, who appointed an umpire:—*Held*: the appointment was invalid, as the arbitrators could not delegate the power of appointment conferred on them.—*SMITH v. LUDHA GHELLA DAMO- DAR* (1892), L. L. R. 17 Bom. 129.—**IND.**

**n. — — — Whether writing necessary.]—**The appointment of an umpire need not be in writing, if the reference does not in terms require it.—*RAY v. DURAND* (1850), 1 P. R. 27.—**CAN.**

**o. — — —.]—**A devolution on an oversman in a reference between incoming & outgoing tenants can only be made in writing signed by the arbiters.—*FREDERICK v. CUNNINGHAM & MITLAND* (1865), 37 Sc. Jur. 563.—**SCOT.**

**p. — — —.]—**Where an oversman was appointed by arbiters under a written agreement:—*Held*: a written minute of devolution was not necessary for validity of the award.—*DICK v. INGLIS* (1907), 15 S. L. T. 615.—**SCOT.**

**q. When appointment made — After invalid award filed by arbitrators.]—**An



**Sect. 1.—Appointment of arbitrators & umpire:**  
**Sub-sect. 3, A. & B.]**

531 ; 24 L. T. O. S. 162 ; 1 Jur. N. S. 193 ; 3 W. R. 98 ; 43 E. R. 671, L. C.

**Annotations :—Mentd.** Whitmore v. Smith (1860), 5 H. & N. 824 ; Barclay v. Messenger (1874), 43 L. J. Ch. 449 ; Bottomley v. Ambler (1877), 38 L. T. 545, C. A. ; Levy v. Stogdon, [1898] 1 Ch. 478.

**594. — Arbitrators signing at different times not in each other's presence.]—**By deed all matters in difference were submitted to the award of A. & B., or such third person as they should appoint as umpire, by writing under their hands, to be indorsed on the submission. The submission, with a memorandum signed by A. & B. on it, appointing C. umpire, was made a rule of ct., & a rule nisi for an attachment for not fulfilling an award of C., which was regular on the face of it, was obtained. By affidavits it was made to appear that A. & B. did not sign the memorandum appointing C. at the same time, or in each other's presence. On these affidavits the ct. discharged the rule.—**LORD v. LORD** (1855), 5 E. & B. 404 ; 26 L. J. Q. B. 34 ; 1 Jur. N. S. 893 ; 3 W. R. 553 ; 119 F. R. 531.

**Annotations :—Distd.** Re Hopper (1867), L. R. 2 Q. B. 367. **Mentd.** Anning v. Hartley (1858), 27 L. J. Ex. 145.

**595. — One arbitrator acquiescing with reluctance in appointment by other arbitrator.]—**The ct. refused to set aside an award, on the ground that the umpire, by whom it was made, had been nominated by one of two arbitrators, under a claim of right to appoint him, where it appeared that the other had, though with some reluctance & for the sake of peace, acquiesced in such nomination.—**Re VINICOMBE & MORGAN** (1841), 10 L. J. Q. B. 128.

**596. — Judicial act — Meeting necessary — Separate signatures permissible.]—**The appointment of an umpire by the arbitrators is a judicial act, & they must meet for this purpose ; but the signing of the appointment is not a judicial act & can be done separately. It is merely the record of that which they have already done in the judicial exercise of their functions.—**Re HOPPER** (1867), L. R. 2 Q. B. 367 ; 8 B. & S. 100 ; 36 L. J. Q. B. 97 ; 15 W. R. 443 ; *sub nom.* **WRIGHTSON v. HOPPER**, 15 L. T. 566 ; 31 J. P. 182.

**Annotations :—Mentd.** Moseley v. Simpson (1873), L. R. 16 Eq. 226 ; Turner v. Goulden (1873), L. R. 9 C. P. 57 ; *Re Dawdy* (1885), 15 Q. B. D. 426, C. A. ; *Re Hammond & Waterton* (1890), 62 L. T. 808.

**597. Objection of party after appointment of umpire.]—**After the time was out for moving to set aside an award made a rule of ct., the ct. granted an attachment for non-performance of it & would not drive pltf. to his action on the submission-bond on an affidavit disclosing that the arbitrators, after having appointed one umpire who refused to act, appointed another who accepted the authority, but that deft. afterwards, & before the umpire had proceeded, having objected to his appointment, because of partiality, the arbitrators

acceded to the objection, & each proposed another, but could not agree on the person to be substituted, & did not in fact substitute any other, though the respective attornies agreed on a third person, in consequence of which the umpire objected to was called on by pltf.'s attorney to proceed, & made his award within time.

Here the arbitrators had executed their authority by an effectual appointment of an umpire, who accepted & acted upon the authority so conferred on him : the consent or dissent of the parties themselves afterwards to such appointment signifies nothing (**LORD ELLENBOROUGH, C.J.**).—**OLIVER v. COLLINGS** (1809), 11 East, 367 ; 103 E. R. 1045.

**598. No stamp required.]—**The appointment of an umpire made in writing by two arbitrators requires no stamp.—**ROUTLEDGE v. THORNTON** (1812), 4 Taunt. 704 ; 128 E. R. 507.

**B. Appointment by Lot.**

**599. Appointment by lot.]—**On an arbn. the arbitrators chose the umpire by lot, & he made his award. The award was set aside, as it was a distrusting of God's Providence to leave matters to chance.—**HARRIS v. MITCHELL** (1704), 2 Vern. 485 ; 23 E. R. 911.

**Annotations :—Apld.** Hewitt v. Penny (1753), Say. 99. **Distd.** Neale v. Ledger (1812), 16 East, 51. **Refd.** *Re Cassell* (1829), 9 B. & C. 624.

**600. Deciding by lot which of two arbitrators should appoint umpire.]—**An award was set aside because the arbitrators, instead of choosing an umpire as they were empowered to do, had tossed up who should name one, the award being made by the umpire so chosen.—**HEWITT v. PENNY** (1753), Say. 99 ; 96 E. R. 816.

**Annotation :—Distd.** Neale v. Ledger (1812), 16 East, 51.

**601. —.]—**Two arbitrators were to choose an umpire, & each arbitrator named a person to whom the other objected, & they afterwards agreed to decide by lot which should name the umpire, & thereupon the party who won named the person to whom the other had previously objected :—**Held** : the award made by such umpire was bad.—**WELLS v. COOKE** (1818), 2 B. & Ald. 218 ; 106 E. R. 347.

**Annotations :—Folld.** *Re Cassell* (1829), 9 B. & C. 624. **Refd.** Young v. Miller (1824), 3 B. & C. 407.

**602. —.]—**A cause was referred to two arbitrators specially named, together with a third, to be chosen by them, & the award of any two was to be binding. They agreed that each should name one person, & that the right of selecting one of those so named should be determined by lot :—**Held** : this mode of appointing the third arbitrator was bad, & a sufficient ground for setting aside the award.—**YOUNG v. MILLER** (1824), 3 B. & C. 407 ; 5 Dow. & Ry. K. B. 263 ; 3 L. J. O. S. K. B. 54 ; 107 E. R. 784.

**603. Each arbitrator nominating person—Selection by lot—Nominees known to both parties.]—**

agreement was entered into for the appointment of two arbitrators with power to select a third, who should act with them in matters of difference only. The arbitrators first appointed made an award which failed to comply with the submission :—**Held** : a difference between the arbitrators arising after the filing of the award was not a difference within the meaning of the submission which justified the calling in of the third arbitrator.—**HALL v. QUEEN INSURANCE Co.** (1906), 39 N. S. L. R. 295.—**CAN.**

**r. Proof of appointment — Question of fact.]** The question as to whether one of the arbitrators has agreed to the appointment of a particular umpire is a question of fact, & the trial judge's

decision on the same is final.—**KIDD v. DAVISON** (1901), 34 N. S. L. R. 233.—**CAN.**

**s. — Where appointment verbal.]—**A submission was to K. & M., & such person as they should appoint. The affidavits were contradictory as to the fact of a verbal appointment of C., & there was no appointment in writing proved, but it was sworn that he was chosen by deft., as one of two proposed by pltf., & that he sat with the others & voted in deft.'s presence without objection. The ct. refused to interfere against an award by C. & K.—**OSBORNE v. WRIGHT** (1854), 12 U. C. R. 65.—**CAN.**

**t. Parol proof inadmissible.]**

Parol proof of the appointment of an oversman in a reference is incompetent.—**FREDERICK v. MAITLAND & CUNNINGHAM** (1865), 3 Macph. (Ct. of Sess.) 1069.—**SCOT.**

**PART II. SECT. 1, SUB-SECT. 3.—B.**

**603 i. Each arbitrator nominating person—Selection by lot—Nominees known to both parties.]—**Two arbiters, who had power to appoint an oversman, differed as to which of two persons equally eligible should be nominated ; eventually they selected one by lot :—**Held** : the appointment was valid.—**SMITH v. LIVERPOOL & LONDON & GLOBE INSURANCE Co.** (1887), 14 R. (Ct. of Sess.) 931.—**SCOT.**

Two arbitrators were to choose a third, & the award was to be made by the three or any two of them, & each of the arbitrators proposed to the other a third, who was admitted to be a fit person. Not being able to agree which of the two proposed should be selected, they agreed to decide the choice by lot:—*Held*: this was within their authority, & an award made by such third arbitrator in conjunction with the one by whom he had been originally proposed could not be impeached on that account.—*NEALE v. LEDGER* (1812), 16 East, 51; 104 E. R. 1008.

*Annotations*:—*Distd.* *Young v. Miller* (1824), 3 B. & C. 407. *N.F.* *Re Cassell* (1829), 9 B. & C. 621. *Consd.* *European & American Steam Shipping Co. v. Crosskey* (1860), 8 C. B. N. S. 397. *Folld.* *Re Hopper* (1867), L. R. 2 Q. B. 367. *Distd.* *Pescod v. Pescod* (1887), 58 L. T. 76.

**604.** ————.]—A submission was made to two arbitrators, & to such third person as they should appoint, the award to be made by any two of the three. The two arbitrators met for the purpose of appointing a third, & not being able to concur in such appointment, it was agreed between them that each of them should name two, & that the names of the four should be put into a hat, & that the name drawn should be the third arbitrator; & the arbitrator was so appointed. The award was made by one of the arbitrators originally named, & the person so appointed by the two:—*Held*: the appointment of the third arbitrator was bad, inasmuch as the choice of the third ought to have been the act of the will & judgment of the two, & matter of choice, not of chance.

It is a general rule that the appointment of the third person must be the act of the will & judgment of the other two: it must be matter of choice & not of chance, unless the parties consent to or acquiesce in some other mode (*LORD TENTERDEN, C.J.*).—*Re CASSELL* (1829), 9 B. & C. 624; 4 Man. & Ry. K. B. 555; 7 L. J. O. S. K. B. 329; 109 E. R. 232.

*Annotations*:—*Expld.* *Ford v. Jones* (1832), 3 B. & Ad. 248. *Consd.* *Re Tunno & Bird* (1833), 5 B. & Ad. 488; *Re Hodson & Drewry* (1839), 7 Dowl. 569. *Appld.* *European & American Steam Shipping Co. v. Crosskey* (1860), 8 C. B. N. S. 397. *Distd.* *Re Hopper* (1867), L. R. 2 Q. B. 367.

**605.** ————.]—Where a cause is referred to two arbitrators, & their umpire in case of dispute, & it is afterwards agreed to appoint an umpire, such appointment must in no case be decided by chance.

Where each of two arbitrators had named a person to be umpire, & neither was disapproved of, & it was thereupon proposed that the final choice should be determined by lot, which was accordingly done in the presence & with the concurrence of the arbitrators & parties:—*Held*: an award made by the umpire so chosen must be set aside.—*FORD v. JONES* (1832), 3 B. & Ad. 248; 1 L. J. K. B. 104; 110 E. R. 93.

*Annotations*:—*Consd.* *Re Tunno & Bird* (1833), 5 B. & Ad. 488; *Re Hodson & Drewry* (1839), 7 Dowl. 569. *Refd.* *Re Jamieson & Binns & Dean* (1836), 4 Ad. & El. 945; *Re Hopper, Barningham & Wrightson* (1867), 36 L. J. Q. B. 97.

**606.** ————.]—An award was made by an umpire, who had been selected by each arbitrator naming one person, & then tossing up, which should be the umpire:—*Seemle*: if both were properly qualified, this was not a ground for setting aside the award.—*Re LANCASTER & TOPPING* (1846), 7 L. T. O. S. 139.

**607.** ————.]—Each of two arbitrators selected a person to act as umpire, & while both agreeing that either person so selected would be fit & proper person to act as umpire, were yet unable to agree upon the choice of either, & thereupon appointed one of such persons by lot to be umpire:—*Held*: a good appointment.—*MORGAN*

*v. BOLT (BOULT)* (1863), 1 New Rep. 271; 11 W. R. 265.

*Annotation*:—*Refd.* *Re Hopper* (1867), L. R. 2 Q. B. 367.

**608.** ————.]—Valuers had power to appoint an umpire. Each valuer nominated a person to act as umpire, but neither would agree to the one so nominated by the other. They both agreed that the persons nominated were fit & proper persons to act as umpire. It was then agreed that the names should be put on pieces of paper with numbers to them, & one piece should be drawn & the person whose number was on that paper should act as umpire. This was done:—*Held*: this was not an illegal mode of choosing the umpire.—*Re HOPPER* (1867), L. R. 2 Q. B. 367; 8 B. & S. 100; 36 L. J. Q. B. 97; 15 W. R. 443; *sub nom.* *WRIGHTSON v. HOPPER*, 15 L. T. 566; 31 J. P. 182.

*Annotations*:—*Mentd.* *Moseley v. Simpson* (1873), L. R. 16 Eq. 226; *Turner v. Goulden* (1873), L. R. 9 C. P. 57; *Re Dawdy* (1885), 15 Q. B. D. 426, C. A.; *Re Hammond & Waterton* (1890), 62 L. T. 808.

**609.** ————.]—*Nominee of one not known to other.*—A submission was made to two arbitrators, who were (in the event of their not being able to agree) to appoint a third person as umpire; they could not agree, & they met for the purpose of appointing the umpire. Each proposed a person for the duty, but only one of the two proposed was known to both the arbitrators, the other being only known to his proposer, who said that he possessed the qualifications necessary for the duty. Upon this the two names were put into a hat, with the understanding that the one drawn out should be appointed, & the name of the one not known to both the arbitrators was drawn, & he proceeded with his duties:—*Held*: the appointment was bad, it having been made by lot, & the party so appointed not being known to both the arbitrators. —

& *AMERICAN S.S. CO., LTD. v. CROSSKEY* (1860), 8 C. B. N. S. 397; 29 L. J. C. P. 155; 6 Jur. N. S. 896; 141 E. R. 1219; *sub nom.* *Re WOLF & CROSSLEY & EUROPEAN & AMERICAN S.S. CO., LTD.*, 1 L. T. 373; 8 W. R. 236.

*Annotations*:—*Expld.* *Morgan v. Boulton* (1863), 11 W. R. 265. *Refd.* *Re Hopper* (1867), L. R. 2 Q. B. 367. *Mentd.* *Willesford v. Watson* (1871), L. R. 14 Eq. 572.

**610.** ————.]—*Nominee of neither party known to other.*—In an action for dissolution of partnership the matters in difference were referred to arbn., & two arbitrators were appointed. The two arbitrators met at a hotel to appoint an umpire, & each nominated a man unknown to the other. They put the two names into a hat, & directed the waiter to draw one out, & the lot fell upon the person nominated by plff.'s umpire. On motion on behalf of deft.:—*Held*: the arbitrators not knowing whether the persons respectively nominated by each other were fit to act as umpire, the appointment was bad.—*PESCOD v. PESCOD* (1887), 58 L. T. 76; 4 T. L. R. 193.

**611.** *Where appointment has been by lot—Effect of consent of parties.*—An umpire may be appointed by lot with the assent of the parties. Such assent sufficiently appears by each party presenting three names, from which that of the umpire is to be drawn, or by the parties signing the memorandum by which the person whose name is drawn is appointed umpire.—*Re TUNNO & BIRD* (1833), 5 B. & Ad. 488; 2 Nev. & M. K. B. 328; 3 L. J. K. B. 5; 110 E. R. 870.

*Annotations*:—*Expld.* *Re Jamieson & Binns* (1836), 4 Ad. & El. 945; *Re Greenwood & Titterton* (1839), 9 Ad. & El. 699. *Appld.* *James v. Attwood* (1839), 7 Scott, 841. *Refd.* *Re Hodson & Drewry* (1839), 7 Dowl. 569; *Re Hopper, Barningham & Wrightson* (1867), 36 L. J. Q. B. 97.

**612.** ————.]—*No consent without knowledge.*—Where arbitrators have decided the choice of

**Sect. 1.—Appointment of arbitrators & umpire:**  
**Sub-sect. 3, B.; sub-sects. 4, 5 & 6,**

an umpire by tossing up, acquiescence of the parties, subsequently to the choice & before the reference is proceeded in, does not render the appointment valid unless the parties acquiescing have knowledge of all the circumstances under which the choice was made.

Where one of two arbitrators objected to S. as umpire, & afterwards the two arbitrators tossed up, & the other arbitrator won & named S., & the attorney of one of the parties, knowing that the arbitrator had tossed up, but not knowing that one of them had objected to S., proceeded in the reference:—*Held*: the irregularity was not cured, though the ground of the arbitrator's objection to S. was negatived by affidavit.—*Re JAMIESON & BINNS & DEAN* (1836), 4 Ad. & El. 945; 2 Har. & W. 35; 5 L. J. K. B. 187; 111 E. R. 1039.

*Annotations*:—**Expld.** *Hodson v. Drewry* (1838), 1 Will. Woll. & H. 540; *European S.S. Co. v. Crosskey* (1860), 8 C. B. N. S. 397.

**613.** ———.—Where arbitrators are empowered to choose an umpire &, having differed in their nominations, make the appointment by lot, & then inform the litigating parties "that they have mutually chosen" A. to be umpire, & the parties thereupon assent to the choice, neither party is bound by such acquiescence if given in ignorance of the real state of facts. An award was set aside on motion, it appearing by the affidavits that a communication was made as above, & the choice assented to, but it not appearing whether the parties assenting (& one of whom now objected) knew, at the time of such assent, how the appointment had taken place.—*Re GREENWOOD & TITTERINGTON* (1839), 9 Ad. & El. 699; 1 Per. & Dav. 461; 2 Will. Woll. & H. 83; 8 L. J. Q. B. 182; 2 J. P. 727; 112 E. R. 1377.

**614.** ———.—**Waiver of objection by agent.** An agent appointed to represent a party on a reference to arbn., & to conduct the reference on his behalf, though not an attorney, has authority to bind his principal by waiving an objection to an improper appointment of an umpire by lot.—*Re BACKHOUSE & TAYLOR* (1851), 2 L. M. & P. 70; 20 L. J. Q. B. 233; 16 L. T. O. S. 373; *sub nom.* *TAYLOR v. BACKHOUSE*, 15 Jur. 86.

**615.** ———.—**Consent of attorneys' clerks—Attendance of parties without knowledge.**—Where the appointment of an umpire by lot was consented to by the attorneys' clerks, but not by the attorneys themselves or their clients:—*Held*: the appointment was bad, although the parties, in ignorance of the mode of appointment, had attended before the umpire.—*Re HODSON (HODGSON) & DREWRY* (1838), 7 Dowl. 569; 1 Will. Woll. & H. 540; 2 J. P. 742; 2 Jur. 1088.

*Annotation*:—**Refd.** *Re Greenwood* (1839), 2 Will. Woll. & H. 83.

**616.** ———.—**Failure of solicitor & son of party to object—After knowledge of mode of appointment.**—Where two arbitrators disagreed & chose an umpire by lot, & the solr., & also the son of one of the parties, were informed of the selection & made no objection:—*Held*: this was sufficient assent to bind the principal.—*WILSON v. BLYTH & TYNE*

*RY. Co.* (1863), 2 New Rep. 182; *sub nom.* *Re BLYTH & TYNE RY. Co. & WILSON*, 11 W. R. 705.

**617. Agreement to choose umpire by lot—Umpire must be chosen by lot.**—Where arbitrators have agreed to choose an umpire by lot, they are bound by such agreement & cannot afterwards adopt a different course. Hence an award made by an arbitrator not chosen by lot was set aside.—*OATES v. MOORE* (1847), 2 New Pract. Cas. 317; 9 L. T. O. S. 176.

**SUB-SECT. 4.—APPOINTMENT OF THIRD ARBITRATOR.**

*See, also*, No. 627, *post*.

**618. Time for appointment.**—An objection to an award, that a third arbitrator was not appointed until after the two arbitrators appointed by the parties had disagreed, can only prevail when the submission in terms required the third arbitrator to be appointed before the others proceeded with the intended arbn.; it cannot prevail where the dispute was referred to two arbitrators who alone could have made an award, & it was only in case of necessity arising, in consequence of their not being able to agree, that they were to appoint a third arbitrator.—*Re KITTS & MURRAY, WILES & SON, LTD. & CATER & Co., LTD.*, [1917] W. N. 4.

**SUB-SECT. 5.—APPOINTMENT OF ARBITRATOR IN SUCCESSION TO ORIGINAL NOMINEE.**

**619. Time for appointment—Failure of original nominee to make award promptly.**—A local stat. directed an arbitrator to make an award assessing to the rent-charge within six months of the passing of the Act. By the same Act certain inclosure comrs. were appointed to divide & allot certain commonable lands. No time was fixed for this to be done, but it was impossible for the arbitrator to make his award until they had completed their duties. In default of the award being made within six months, the Bishop of Oxford had power to appoint another arbitrator. The inclosure comrs. not having completed their duties within the six months, the arbitrator named did not make his award until after that time. Pltf. at first submitted & acquiesced therein, but subsequently applied to the Bishop, who appointed a second arbitrator, by whom an award was made. In debt upon this last award:—*Held*: the mere lapse of time was a neglect within the meaning of the Act, & the second arbitrator was rightly appointed.—*WILLOUGHBY v. WILLOUGHBY* (1847), 9 Q. B. 923; 16 L. J. Q. B. 251; 8 L. T. O. S. 470; 11 J. P. 581; 11 Jur. 902; 115 E. R. 1529.

**SUB-SECT. 6.—APPOINTMENT OF ARBITRATORS OR UMPIRE BY THE COURT.**

**A. Under Common Law Procedure Act, 1854**  
 (c. 125), s. 12.

**620. Arbitration begun before Act—Limits of application of special Act.**—*Held*: the above sect.

**PART II. SECT. 1, SUB-SECT. 4.**

**a. Manner of appointment—Stipulated manner must be followed.**—The provisions in reference to the appointment of a third arbitrator must be strictly followed. Where, therefore, a submission provided that the third arbitrator should be appointed by writing indorsed thereon under the hands of the arbitrators therein named, & the appointment was not so indorsed: *Held*: the award was invalid.

—*BRYCE v. LOUTIT* (1893), 21 A. R. 100.  
 —CAN.

**b. Writing unnecessary.**—Pltfs. appointed C. to be their arbitrator, & defts. appointed B. Pltfs. claimed a declaration that D., who was alleged to have been agreed upon by C. & B. as the third arbitrator, was not duly appointed, & an injunction to prevent him from acting, because (*inter alia*) the appointment was not made in writing:—*Held*: in the absence of anything to

require the appointment of the third arbitrator to be made in writing, the appointment might be made by parol.—*KEDY v. DAVISON* (1901), 34 N. S. L. R. 233.—CAN.

**c. By whom appointment made—Arbitrators properly appointed.**—The appointment of a third arbitrator appointed by two arbitrators, one of whom is not legally appointed, is also void.—*Re TURNBULL & PIPESTONE* (1915), 31 W. L. R. 595; 8 W. W. R. 982.—CAN.



authorised the ct. to appoint an umpire in an arbn. commenced before the passing of the Act.

Where, by a special Act, certain matters not connected with railways were referred to arbn. in the manner provided by Cos. Clauses Consolidation Act, 1845 (c. 16):—*Held*: that as the arbn. clauses of the Act of 1845 only applied to cases where a railway co. was one party to the arbn., an umpire might be appointed under C. L. P. Act, 1854.—*Re LORD & CO. OF COPPER MINERS IN ENGLAND* (1854), 1 K. & J. 90; 3 Eq. Rep. 197; 24 L. J. Ch. 145; 24 L. T. O. S. 129; 3 W. R. 86; 3 C. L. R. 37; 69 E. R. 382.

*Annotations*:—*Distd.* *Collins v. Collins* (1858), 26 Beav. 306. *Folld.* *Re Anglo-Italian Bank & de Rosaz* (1867), L. R. 2 Q. B. 452. *Consd.* *De Rosaz v. Anglo-Italian Bank* (1869), L. R. 4 Q. B. 462. *Folld.* *Re Metropolitan Building Act, Ex p. McBryde* (1876), 4 Ch. D. 200.

**621. No suit or arbitration pending.**—*Semble*: the ct. or a judge has no power to appoint an arbitrator under a clause in an agreement to refer all matters in dispute to arbn., where there is no suit or arbn. actually pending.—*Re COX & HORGOD* (1858), 31 L. T. O. S. 217; 6 W. R. 664.

**622. Effect of application of Companies Act, 1862 (c. 89), s. 131.**—A dispute as to the price to be paid for his shares having arisen between a shareholder & a co., not a railway co., & the arbitrators having neglected to appoint an umpire:—*Held*: the case was within C. L. P. Act, 1854, s. 12, & a judge would appoint an umpire under that sect.—*Re ANGLO-ITALIAN BANK, LTD. & DE ROSAZ* (1867), L. R. 2 Q. B. 452.

*Annotation*:—*Folld.* *De Rosaz v. Anglo-Italian Bank* (1869), L. R. 4 Q. B. 462.

**623. Joint effect of provisions in company's articles.**—In Companies Clauses Consolidation Act, 1845 (c. 16), & Common Law Procedure Act, 1854, s. 12.]—Declaration that defts. were a banking co. incorporated under Cos. Act, 1862 (c. 89); that a resolution was passed for the winding up of the co. & the transfer of the business to another co.; that pltf. was a shareholder in the first co. & expressed a dissent in writing as required by s. 161 of the Act of 1862, & required the liquidators either to abstain from carrying the resolution into effect or to purchase his interest; that by the articles of assocn., in the event of any difference arising between the co. & any of the shareholders, such difference was to be referred to two arbitrators, one of the arbitrators to be named by each party, & the arbitrators to appoint an umpire, & if they did not do so within fourteen days an umpire might be appointed by a judge under C. L. P. Act, 1854; that the dispute relating to the settling of the price of pltf.'s shares was referred to two arbitrators; that they did not appoint an umpire; that an umpire was appointed by a judge; that the arbitrators did not agree; that the umpire duly made his award adjudging the price to be paid for the purchase of pltf.'s interest at £2,100, which sum he directed to be paid to pltf., & further directed that defts. should pay to pltf. his costs of the reference & award, & that defts. did not pay the money:—*Held*: the judge had power to appoint an umpire under the articles of assocn., or under Cos. Clauses Consolidation Act, 1845, supplemented by C. L. P. Act, 1854.—*DE ROSAZ v. ANGLO-ITALIAN BANK LTD.* (1869), L. R. 4 Q. B. 462; 10 B. & S. 354; 38 L. J. Q. B. 161; 17 W. R. 724.

*Annotation*:—*Mentd.* *Baring-Gould v. Sharpington, Pick & Shovel Syndicate* (1898), 67 L. J. Ch. 622.

**624. Refusal of arbitrators under Metropolitan Building Act, 1855, to nominate umpire.**—Surveyors nominated under the above Act to settle differences in dispute between a building owner & an adjoining owner as to the erection of a party wall having refused to appoint an umpire, the ct.

appointed an umpire under C. L. P. Act, 1854, notwithstanding that an action was pending to settle the right of one of the parties to an ancient light in the party wall.—*Re METROPOLITAN BUILDING ACT, Ex p. McBryde* (1876), 4 Ch. D. 200; 46 L. J. Ch. 153; 35 L. T. 543.

**Valuations not arbitrations—No power to appoint umpire.**—*See* Nos. 51—71, *ante*.

**625. Valuation involving arbitration—Death of valuer—Neglect to appoint umpire.**—The validity of a notice to dissolve a partnership being disputed, it was agreed that, in order to avoid litigation, one of the partners should retire, & that the value of his interest in the business, & the question of notice (if raised), should be decided by two valuers named in the agreement, or their umpire. One of the valuers died before the valuation was made, & his successor neglected to join with the surviving valuer in appointing an umpire:—*Held*: since the validity of the notice to dissolve the partnership was in dispute, the ct. ought to appoint an umpire.—*Re EVANS, DAVIES & CADDICK* (1870), 22 L. T. 507; 18 W. R. 723.

*See, also*, PARTNERSHIP.

**626. Effect of Railway Companies Arbitration Act, 1859 (c. 59).**—By an agreement between two telegraph cos., whose submarine lines were not then constructed, for the exclusive working of their undertakings in unison for twenty years, & for payments each to the other of a proportion of their gross receipts in manner thereafter mentioned, it was arranged (*inter alia*) that either party might, after five years, claim to have the agreement or any of the provisions thereof modified in matters of detail by arbn. In case the parties should not agree upon a sole arbitrator the matter was to be referred to a sole arbitrator to be appointed in accordance with the above Act of 1859, & the provisions of that Act were to apply to every reference to arbn. under the agreement, & as if the parties to the reference were railway cos.:—*Held*: a master's order appointing an arbitrator under C. L. P. Act, 1854, s. 12, was within the jurisdiction of the ct. given by that sect.—*Re BRAZILIAN SUBMARINE TELEGRAPH CO., LTD. & WESTERN & BRAZILIAN TELEGRAPH CO., LTD.* (1880), 42 L. T. 234.

*B. Under Arbitration Act, 1889 (c. 49), s. 5.*

ARBITRATION ACT, 1889, s. 5. *In any of the following cases*:—

- (a) *Where a submission provides that the reference shall be to a single arbitrator, & all the parties do not after differences have arisen concur in the appointment of an arbitrator*;
- (b) *If an appointed arbitrator refuses to act, or is incapable of acting, or dies, & the submission does not show that it was intended that the vacancy should not be supplied, & the parties do not supply the vacancy*;
- (c) *Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator & do not appoint him*;
- (d) *Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, & the submission does not show that it was intended that the vacancy should not be supplied, & the parties or arbitrators do not supply the vacancy*;

*any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.*

*If the appointment is not made within seven clear days after the service of the notice, the court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in*

**Sect. 1.—Appointment of arbitrators & umpire:**  
*Sub-sect. 6. R. & C. Sect. 2: sub-sect. 1.]*  
*the reference & make an award as if he had been appointed by consent of all parties.*

**627. Reference to three arbitrators—Refusal to appoint—Court cannot appoint.]—**Where an agreement to refer disputes to arbn. provides for a reference to three arbitrators, one to be appointed by each party, & the third by the two so appointed, & one party refuses to appoint an arbitrator, the ct. has no power, either under or apart from the above Act, to order him so to do.—*Re SMITH & SERVICE & NELSON & SONS* (1890), 25 Q. B. D. 545; 59 L. J. Q. B. 533; 63 L. T. 475; 39 W. R. 117; 6 T. L. R. 434; 6 Asp. M. L. C. 555, C. A.

*Annotations:—Expld. Manchester Ship Canal Co. v. Pearson, [1900] 2 Q. B. 606. Consd. Den of Airie S.S. Co. v. Mitsui British Oil & Cake Mills* (1912), 106 L. T. 451, C. A. *Mentd. United Kingdom Mutual S.S. Assoc. Assocn. v. Houston, [1896] 1 Q. B. 267; Doleman v. Ossett Corpn., [1912] 3 K. B. 257, C. A.*

**628. Agreement providing for successive appointments by third party—Court will not appoint.]—**A contract between contractors & a co., made before the commencement of the above Act, provided for reference of all differences to M. as a standing referee, or failing him to a person to be named by the President of the Institute of Civil Engineers. It was afterwards agreed that the arbn. should be conducted according to the above Act. Differences arose, & the arbitrator made an award & in July, 1891, left the country. During his absence, further differences having arisen, the co. applied in Aug. to the President to appoint another arbitrator, & he appointed S. The contractors objected to S. acting, & he declined to act without a judge's order, which was granted, not to take effect if M. should return by a certain day. M. did not return till later:—*Held*: the proper course under the agreement was to apply to the President again to obtain the appointment of some other person, & the judge had no jurisdiction to make the appointment. *Semble*: the case was not one where an appointed arbitrator—i.e., S.—refused to act or was incapable of acting within s. 5 (b) of the Act.—*Re WILSON & SON & EASTERN COUNTIES NAVIGATION & TRANSPORT CO., [1892] 1 Q. B. 81; 61 L. J. Q. B. 237; 65 L. T. 853; 8 T. L. R. 78; 36 Sol. Jo. 79; affd. on another point, 8 T. L. R. 264, C. A.*

**629. Single arbitrator—Notice to concur—Duty of Court to appoint.]—**A contract with a municipal corpn. for the construction of sewerage works provided that matters relating to the works should be decided by G., "or other the surveyor & engineer for the time being" of the corpn., & that the award, order, or certificate made by him, or "by other the arbitrator or umpire" to be appointed in accordance with clause 39 of the specification in reference to any dispute, should be binding & conclusive. Clause 39 provided for arbn. in certain events pursuant to C. L. P. Act, 1854. A dispute having arisen, the contractor served the corpn. with a notice to concur in the appointment of a sole arbitrator, but they declined so to do:—*Held*: (1) the words arbitrator & umpire as thus used were synonymous & the reference was to a single arbitrator; (2) a notice to "concur in the appointment" of an arbitrator was a good notice to appoint an arbitrator under the Act of 1889, s. 5; (3) as a general rule, in a case falling within the sect., where the conditions required by the sect. were being fulfilled, the ct. had no discretion

to refuse to appoint an arbitrator, the word "may" in the sect. being equivalent to "must."—*Re F. & LEICESTER CORPN., [1892] 1 Q. B. 136; 61 L. J. Q. B. 438; 65 L. T. 733; 56 J. P. 228; 8 T. L. R. 136; 36 Sol. Jo. 107, C. A.*

**630. Refusal to appoint arbitrator—Submission to arbitration disputed—Appeal from order appointing arbitrator.]—**A dispute arose out of a contract for the sale of goods owing to non-delivery of the goods or some of them. The contract, which provided that the parties expressly agreed to submit all disputes arising thereout to arbn., was signed by the vendors' brokers "by the authority of our principals as agents." The purchasers called upon the brokers to appoint an arbitrator. The brokers refused so to do on the ground that they as mere agents were not parties to the submission to arbn. On the application of the purchasers an order was made by a district registrar for the appointment of an arbitrator. On appeal to a judge at chambers that order was discharged. The purchasers appealed to a Divisional Ct.:—*Held*: (1) as there was no cause or matter pending in the High Ct., the appeal was not in a matter of practice & procedure within R. S. C., Ord. 54, r. 23, & the appeal lay to a Divisional Ct. & not to the Ct. of Appeal; (2) there being a dispute as to whether the agents were liable at all on the contract, the registrar was wrong in making an order, the effect of which would be to force them to arbitrate on the footing that they were liable.—*MILLER, GIBB & CO. v. SMITH & TYRER, LTD., [1916] 1 K. B. 419; 85 L. J. K. B. 627; 114 L. T. 562; 60 Sol. Jo. 514.*

**631. Appointment of umpire—Parties to application—Power to require attendance of arbitrators.]—**Under the special jurisdiction conferred upon the ct. by the Act of 1889, s. 5, to appoint an umpire in references falling within the sect., it is competent to the ct., where two arbitrators having liberty to appoint an umpire fail to comply with a notice under that sect. requiring them to concur in an appointment, to bring the arbitrators before it in order to ascertain their views before making an appointment, due provision being made for their costs.

A dispute having arisen upon a contract for sale the respective parties, under a submission to arbn., appointed arbitrators with power to appoint an umpire. The arbitrators having failed to comply with a notice served upon them by the purchasers under the above sect., requiring them to appoint an umpire, the purchasers issued an originating summons, to which the arbitrators were made resps., asking the ct. to appoint an umpire. The vendors were not made resps. to the summons, as they were not within the jurisdiction. The arbitrator appointed by the vendors objected that he was not a proper party to the summons & that the vendors ought to be made parties thereto. The judge in chambers made an order appointing an umpire, with liberty to the vendors to discharge the order within a given time after receiving notice thereof, the costs to be costs in the arbn., & his order was affirmed on appeal:—*Held*: the objection as to the form of the summons failed, & the arbitrators were the proper parties to bring before the ct. rather than the other party to the contract.—*TAYLOR v. DENNY, MOTT & DICKSON, LTD., [1912] A. C. 666; 82 L. J. K. B. 203; 107 L. T. 69; 76 J. P. 417, H. L.*

*Annotations:—Mentd. Miller, Gibb v. Smith & Tyrer, [1916] 1 K. B. 419; Lendon v. Keen, [1916] 1 K. B. 994.*

#### C. Under Colonial Statutes.

*See cases infra.*

#### PART II. SECT. 1, SUB-SECT. 6.—C.

**d. Appointment of arbitrator—Arbitration (Scotland) Act, 1894—No number of arbitrators specified.]—**The above Act does not apply to an agreement to refer

to arbn., which leaves it undetermined whether the reference is to be to one or to two or more arbiters, & the ct. has no power to appoint an arbiter apart from that Act. —*M'MILLAN & SON,*

*LTD. v. ROWAN & Co. (1903), 5 F. (Ct. of Sess.) 317.—SCOT.*

**f. Appointment of sole arbitrator—How made—Not ex parte.]—Semble**: where no arbitrator has been named in



**SECT. 2.—COMMENCEMENT, DURATION, AND TERMINATION OF ARBITRATORS' AUTHORITY—TIME FOR MAKING AWARD.**

**SUB-SECT. 1.—WHEN IT BEGINS.**

**632. "Entering on reference"—Common Law Procedure Act, 1854—Award within three months.]**—An award was referred back by rule of the ct. on June 12, 1865; the arbitrators, on Oct. 5, having

an agreement, & the aid of the ct. in the appointment of an arbitrator is invoked, the parties ought to have an opportunity of being heard upon the selection to be made.—*COLEY v. DACOSTA* (1889), 1 L. R. 17 Calc. 200.—**IND.**

**g. ——— What must be averred.]**—In the absence of special reasons in support of a petition for the appointment of an arbitrator, the simple averment that it is in the interests of petitioner will not prevent its rejection as insufficient in law.—*CONSTANTINEAU v. PLOUFFE* (1913), 14 Q. P. R. 307.—**CAN.**

**h. ——— Where condition precedent to appointment.]**—By an agreement any dispute or difficulty was referred to an arbitrator mutually chosen, or, in the event of their failing to agree upon an arbitrator, then to such arbitrator as a judge of the High Ct. should upon notice appoint. On an application made to the ct. to appoint an arbitrator:—*Held*: the only question for the ct. to ascertain was whether the condition precedent to the making of the appointment, viz., the existence of a dispute or difference with regard to the matters mentioned in the clause, had arisen.—*RE WOOD, VALLANCE & CO.* (1915), 7 O. W. N. 814.—**CAN.**

**k. ——— When made — Not after death of party.]**—A policy of assurance contained a clause that difficulties should be referred to a "neutral person agreed upon by the corpn. & the assured." The assured died, & his exors. refused to appoint an arbitrator, & the corpn. applied to the ct. to do so under C. L. P. (Ireland) Act, 1856, s. 15:—*Held*: the words "agreed upon by the corpn. & the assured" implied exercise of a personal selection by the assured, & could not be extended to include his personal representatives.—*RE LOWRY (EXECUTORS) & OCEAN ACCIDENT & GUARANTEE CORPORATION* (1898), 32 I. L. T. 126.—

**l. ——— Under R. S. O., 1897 (c. 201) —When granted.]**—By reason of the above Act there is no jurisdiction to appoint an arbitrator to decide a dispute between a manufacturing assocn. & one of the members, until the assocn. makes rules in accordance with s. 6 of the above Act.—*RE CAMDEN CHEESE & BUTTER MANUFACTURING CO. & HART* (1904), 24 C. L. T. 291; 3 O. W. R. 837.—**CAN.**

**m. Where party refuses to appoint his arbitrator.]**—The ct. has jurisdiction to appoint an arbitrator on behalf of a party refusing to appoint such arbitrator, where the parties have covenanted that the matter in dispute should be determined by arbn.—*QUEBEC STREET R. R. CO. v. QUEBEC CORPORATION* (1887), 13 Q. L. R. 205.—**CAN.**

**n. ——— Arbitration Act, R. S. B. C., 1911 (c. 11), s. 8 (e)—Arbitration futile.]**—A party having refused to appoint an arbitrator the other party applied to a judge of the Supreme Ct. under the above sect. for an order appointing an arbitrator to act along with the arbitrator appointed by appet. Application was refused as the arbn. would have been abortive for reasons set forth.—*HUDSON'S BAY FIRE INSURANCE CO. v. WALKER* (1914), 27 W. L. R. 218.—**CAN.**

**o. ——— when submission irregular.]**—A submission must point out the

previously made an appointment, which deft. did not attend. appointed Oct. 19 to proceed peremptorily & *ex p.*, if either of the parties did not attend: deft. made an excuse for not attending, & the arbitrators, thinking the excuse valid, made a fresh peremptory appointment for Oct. 31. Deft. did not attend, & the arbitrators then took plff.'s evidence, & after further notice proceeded with the reference, deft. still refusing to attend; & they

*Held*: as it was stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the ct. to appoint an umpire was controlled by that stipulation.—*BARRACHIO v. DE SOUZA* (1872) 7 Mad. 72.—**IND.**

**v. ——— Under Civil Procedure Code ss. 509-523.]**—In an agreement to refer certain matters no provision was made for difference of opinion between the arbitrators, by appointing an umpire. The arbitrators being unable to agree upon the matters referred, the ct., on the application of one of them, appointed an umpire. An award was made by the umpire & one arbitrator, without the concurrence of the other arbitrator:—*Held*: inasmuch as the agreement to refer gave the ct. no power to appoint an umpire, & required that the award should be made by the arbitrators named by the parties, s. 509 & the other sects. preceding s. 523 of Civil Procedure Code were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement.—*MUHAMMAD ABID v. MUHAMMAD ASHGAR* (1885), 1 L. R. 8 All. 64.—**IND.**

**w. ——— Where umpire resigns after award set aside.]**—An award having been set aside on the ground of the umpire's misconduct during the arbn., the umpire sent a letter resigning his position. On a summons being taken out to have a new umpire appointed by the judge:—*Held*: the powers & duties of the arbitrators having ceased when they made their award they were *functi officio*, & consequently the resignation of the umpire was meaningless, as he had no position to resign.—*RE JOSEPH* (1884), 1 B. C. R. 11, 38.—**CAN.**

**x. ——— Under Arbitration Act, 1908 —Arbitrators unable to agree.]**—Where in an arbn. under the above Act arbitrators were unable to agree on an umpire:—*Held*: the ct. was entitled to appoint an umpire.—*RE BRYANT & THOMSON* (1914), 33 N. Z. L. R. 983.—**N.Z.**

**y. Arbitrator refusing to act — Civil Procedure Code, 1859, s. 319 — Permissive only.]**—Where some of the arbitrators named in an agreement refuse to act & the parties do not agree to appoint others, it is not incumbent upon the ct. to appoint other arbitrators, unless both parties agree, the provision of the above sect. being simply permissive.—*SADA SOOKH v. SHIVA DYAL* (1866), 1 Agra, 109.—**IND.**

**z. ——— Code of Civil Procedure (Act XIV. of 1882), s. 510.]**—The ct. has power under the above Act to appoint a new arbitrator in the place of another failing to act, only when the latter has consented to act as arbitrator.—*BEFIN BEHARI CHOWDHURY v. ANNODA PRASAD MULLICK* (1891), 1 L. R. 18 Calc. 324.—**IND.**

**a. ——— Common Law Procedure Act, 1856, ss. 15, 16.]**—The parties to an action consented to refer all matters in dispute to the arbn. of A. & B., with power to call in an umpire. B. declined to act:—*Held*: the ct. had no power to appoint an arbitrator in place of B.—*YEATES v. CARUTH* (1895), 2 I. R. 146.—**IR.**

**b. ——— Arbitration Act.]**—By submission between K. & T. & certain insurance cos. it was agreed that

names & capacities of the parties & arbitrators, the object in litigation & the time within which the award shall be given. Without these essential conditions it does not authorise the judge to proceed & name the arbitrator of the party who refuses.—*MCKAY v. MACKEDIE* (1897), Q. R. 11 S. C. 513.—**CAN.**

**p. Appointment of third arbitrator — Insufficient evidence of disagreement — Waiver.]**—It was objected that there was no sufficient evidence of disagreement between the two arbitrators to warrant the appointment of a third by the county judge:—*Held*: this objection had been waived by defts. attending before the three arbitrators.—*WIDDER v. BUFFALO & LAKE HURON RY. CO.* (1865), 24 U. C. R. 520.—**CAN.**

**q. ——— Under Common Law Procedure Act, 1856 — "In the usual manner."]**—Appointment of third arbitrator by judge under above Act, on a reference to be held "in the usual manner."—*ROWE v. COLTON* (1857), 3 L. C. L. J. 116.—**CAN.**

**r. ——— Manner of making application — Notice — Lack of authority.]**—Plff. & defts. each appointed an arbitrator. The two arbitrators not being able to agree upon a third, the judge of the county ct. upon their application appointed a third. No notice was given of the intention to make such application, but it appeared that the arbitrator appointed by them was their general agent, & that on three other occasions the judge had made similar appointments. The arbitrator, however, in this case, swore that he had no authority to apply, & that on the other occasions his proceedings were sanctioned by the co.:—*Held*: the third arbitrator was properly appointed.—*DALY v. BUFFALO & LAKE HURON RY. CO.* (1858), 16 U. C. R. 238.—**CAN.**

**s. ——— Not when manner of appointment provided for.]**—When individuals have chosen each an arbitrator & have determined the method of naming a third arbitrator, the choice of this arbitrator cannot be made by the ct.—*MACPIERSON v. DRUMM* (1881), 17 R. L. N. S. 672, S. C.—**CAN.**

**t. ——— Not where no submission but only mere promise to compromise.]**—A covenant by which it is provided that "in the event of any dispute arising out of the construction or meaning of this agreement, the subject of the dispute shall be referred to the award & determination of three arbitrators," is not an agreement to compromise but simply a promise to compromise. The ct. is without jurisdiction to appoint the third arbitrator, & the party aggrieved can only sue for damages.—*SHEDDEN FORWARDING CO. v. GRAND TRUNK RY. CO.* (1913), 15 Q. P. R. 229.—**CAN.**

**u. Appointment of umpire — Under Civil Procedure Code, s. 319 — Umpire to be selected from persons named.]**—B. submitted matters in dispute on terms that an umpire should be selected from seven persons named. Arbitrators were agreed upon, & R., one of the seven persons named, was appointed umpire. R. & some of the arbitrators declined to act. Fresh arbitrators were chosen, but no umpire, & the arbitrators being equally divided in their opinion on the case, the ct. of its own motion appointed as umpire L., who was not one of the seven persons named in the submission. B. objected to L.'s appointment:—



**Sect. 2.—Commencement, duration, & termination of arbitrators' authority—Time for making award: Sub-sects. 1, 2 & 3.]**

made their fresh award on Jan. 6, 1866:—*Held*: (1) an arbitrator entered on a reference, not when he accepted the office, or took upon himself the functions of arbitrator by giving notice of his intention to proceed, but when he entered into the matter of the reference, either with both parties before him, or under a peremptory appointment enabling him to proceed *ex p.*; (2) the award was made in time.—*BAKER v. STEPHENS* (1867), L. R. 2 Q. B. 523; 8 B. & S. 438; 36 L. J. Q. B. 236; 15 W. R. 902.

*Annotation*:—*Consd.* *Baring-Gould v. Sharpington Pick & Shovel Syndicate*, [1898] 2 Ch. 633.

**633. "Called on to act"—Act of 1889, Sched. I. (c).]**—When a notice is served upon arbitrators by one of the parties to the arbn. to appoint an umpire, they are "called on to act" in the matter of the arbn. within the above clause in the Act of 1889, Sched. I.—*BARING-GOULD v. SHARPINGTON COMBINED PICK & SHOVEL SYNDICATE*, [1899] 2 Ch. 80; 68 L. J. Ch. 429; 80 L. T. 739; 47 W. R. 546; 15 T. L. R. 366; 43 Sol. Jo. 494; 6 Mans. 430, C. A.

*Annotations*:—*Mentd.* *Payne v. Cork Co.*, [1900] 1 Ch. 308; *Manners v. St. David's Gold & Copper Mines*, [1904] 2 Ch. 593, C. A.; *Bisgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743, C. A.; *Llewellyn v. Kasintoe Rubber Estates*, [1914] 2 Ch. 670, C. A.

**SUB-SECT. 2.—HOW TIME IS CALCULATED.**

*See, generally, TIME.*

**634. Submission in March—"This instant month of April"—April rejected as repugnant.]**—A submission was dated Mar. 16. An award was to be made at or before the last of "this instant month of Apr." The award was made on the last day of Apr.:—*Held*: the award was not made at the proper time, the instant month was Mar., & Apr. must be rejected as repugnant.—*SHARLEY v. RICHARDSON* (1593), Cro. Eliz. 291; 78 E. R. 545; *sub nom.* *SHERRY v. RICHARDSON*, Poph. 15.

*Annotation*:—*Mentd.* *Johnson v. Dealtry* (1819), 3 B. & Ald. 72.

**635. Night of day before delivery.]**—An award made in the night of the day before it was conditioned to be delivered is good.—*WITHERS v. DREW* (1599), Cro. Eliz. 676; 78 E. R. 913.

*Annotation*:—*Refd.* *Startup v. Macdonald* (1843), 6 Maw. & G. 593.

& B. should be appointed appraisers, to ascertain loss by fire to property. The arbitrators accepted & selected an umpire & proceeded with their duties under the submission, when McC. announced that he was not able to act as arbitrator & that he withdrew as such arbitrator. On an application to the judge presiding at chambers to appoint an arbitrator to act with the other arbitrator & the umpire:—*Held*: under the terms of the above Act appmts. were entitled to have an arbitrator appointed in the place of McC., who refused to act.—*Re KIRK & TOREY & FIDELITY INSURANCE CO.* (1911), 10 E. L. R. 72; 45 N. L. R. 513.—**CAN.**

**c. — Arbitration Act, R. S. M., 1913 (c. 9).]**—Both parties agreed upon two arbitrators. Before the arbn. one of the arbitrators refused to act, & subsequently died. On a motion by one of the parties to appoint another arbitrator:—*Held*: the reference was

not to "two arbitrators, one to be appointed by each party," but to two persons agreed upon by the terms of the instrument, & ss. 7 & 8 of the above Act did not apply.—*Re WINDEBANK & C. P. R.* (1915), 33 W. L. R. 82; 9 W. W. R. 715; 25 D. L. R. 225.—**CAN.**

**d. Arbitrator guilty of misconduct.]**—There is no power in the ct. after the making of an award to appoint a fresh arbitrator in place of one guilty of misconduct.—*WOOD v. GOLD* (1894), 3 B. C. R. 281.—**CAN.**

**e. Arbitrator resigning—Trustee Act, 1898.]**—The ct. has no power to appoint a referee under the above Act.

Where a settlor created an office of referee for the decision of disputes between the trustees, & made no provision for the filling of the office except in the case of death:—*Held*: the ct. had no power under the above Act to fill a vacancy created by resignation.—

**636. Month—Calendar month.]**—Where, by deed of arbn., dated June 1, the arbitrators were to make their award on or before Oct. 1, with power, in case they should not agree in making their award within the time, to appoint an umpire, & his award to be binding, so as it be made within six months after the date of his appointment, & the arbitrators appointed an umpire within the time allowed to them, who made his umpirage within six calendar but not within six lunar months of his appointment:—*Held*: the umpirage was ill-made.—*Re SWINFORD* (1817), 6 M. & S. 226; 105 E. R. 1227.

**637. One calendar month—"Next after reference."]**—An award was to be made within one calendar month "next after the reference"; the reference was on Mar. 1 & the award on Apr. 1:—*Held*: in time.—*Re ANDREWES & ANDREWES* (1845), 5 L. T. O. S. 202.

**638. Not till after time limited for arbitrators.]**—Where time for award & umpirage was limited to same day, & the arbitrators could not agree, & after they had denied to make the award, the umpire made his award the same day:—*Held*: his authority was void, for the arbitrators' power was not determined by their declaring that they could not agree.—*BARNARD v. KING* (1651), Sty. 306; 82 E. R. 731.

*Annotation*:—*Refd.* *Coppin v. Hurnard* (1670), 1 Sid. 455.

**639. "Till" given date—Inclusive.]**—The submission to an award was that it should be made on or before the first day of Michaelmas Term. The time was enlarged till the first day of Hilary Term. The award was made on the first day of Hilary Term:—*Held*: good, as the word "till" was for this purpose inclusive.—*KNOX v. SIMMONDS* (SYMMONDS) (1791), 3 Bro. C. C. 358; 1 Ves. 369; 1 Hov. Suppl. 146; 29 E. R. 582.

*Annotation*:—*Mentd.* *Adams v. G. N. of Scotland Ry. Co.* [1891] A. C. 31, H. L.

**640. — — — — —.]**—Where an arbitrator enlarges the time for making an award till a given day, the time is to be computed as inclusive of that day.—*KERR v. JESTON* (1842), 6 Jur. 1110.

**641. "After" appointment—Date of appointment excluded.]**—By an agreement of reference to arbitrators, with power to appoint an umpire, it was covenanted that the umpire should make his award two calendar months after his appointment. He was appointed on June 29, & afterwards the time for making his award was enlarged by consent for three months further:—*Held*: that June 29 was to be excluded from the calculations of time, & the award, being made on Nov. 29, was made in due time.—*Re HIGHAM & JESSOP* (1841), 9 Dowl. 203; Woll. 28; 5 J. P. 193.

*Re JOHNSTON'S TRUSTS* (1900), 21 N. S. W. Eq. 6.—**AUS.**

**f. Arbitrator becoming incompetent—Arbitrators named in submission.]**—Where the instrument of submission names the arbitrators, the ct. has no power to appoint a new arbitrator in lieu of one who has become incompetent.—*Re CRAWFORD & ALLEN* (1903), 5 Terr. L. R. 398.—**CAN.**

**PART II. SECT. 2, SUB-SECT. 2.**

**g. "Within thirty days."]**—The time within which an award must be made depends upon the precise words used in the submission, & where an award is to be made within thirty days after the reference to arbitrators, the date of the reference is the date when the arbn. tribunal has been formed by the appointment of the agreed number of arbitrators & their acceptance of the position.—*ANDERSON v. BLUNDELL & WATKINS* (1905), 24 N. Z. L. R. 938.—**N.Z.**

## SUB-SECT. 3.—WHEN AND HOW TERMINATED.

*See, now, Arbitration Act, 1889, ss. 5 & 6.*

**642. Death of arbitrator.]**—A cause was referred to an arbitrator, who drew up a certificate, but died before he had declared the same:—*Held*: the certificate might be filed & taken to be authentic, although it had no date & deft. contended that the arbitrator never intended to deliver it.—*BOUGHTON v. BUTTER* (1680), 2 Rep. Ch. 172; 21 E. R. 649.

**643. —.**—Pltf. obtained a verdict, subject to a reference, but the arbitrator died before making his award, & the parties agreed that another should be substituted in his stead. One of them afterwards objecting to such substitution, the ct. refused to interfere, as the death of the arbitrator had the effect of opening the cause & as execution could not be sued out on the verdict on account of such death.—*HARPER v. ABRAHAM* (1819), 4 Moore, C. P. 3.

*Annotations:—Expld. & Follid. Hall v. Phillips* (1832), 9 Bing. 89. *Expld. Hall v. Raue* (1838), 4 M. & W. 24.

**644. —.**—Although a ct. of equity will not in general decree specific performance of an agreement to refer to arbn., or, on the death of an arbitrator, substitute the master for the arbitrator, yet, where matters of account have been referred to arbn., which fails by the death of the arbitrator, a party who refuses to supply the defect, by naming a new arbitrator, will receive no relief from a ct. of equity except upon the terms of his doing equity, & those terms may consist in his consenting to the accounts being taken by the master.—*CHESLYN v. DALBY*, *DALBY v. CHESLYN* (1836), 2 Y. & C.

## PART II. SECT. 2, SUB-SECT. 3.

**646 i. Removal by court.—Jurisdiction under 9 Edw. 7, c. 35, s. 5.]**—On a motion for an order setting aside a notice appointing an arbitrator, appets. denied that there had been any submission to arbn.:—*Held*: the judge had no jurisdiction to make order asked, the above Act only applying to admitted submissions.—*Re LITTLE STURGEON RIVER SLIDES CO. v. MACKIE* (1912), 23 O. W. R. 273; 4 O. W. N. 262; 6 D. L. R. 895.—CAN.

**646 ii. —.**—One party nominated arbitrator—*Action on different contracts arising between parties.]*—Where in a contract entered into between M. & B., M. was the employer & B. the employee, & all disputes were to be referred to M. as sole arbitrator:—*Held*: M. had not disqualified himself from acting as arbitrator by reason of having stated defences & supported these by evidence in an action on different matters to which he had been subjected by B. himself.—*BUCHAN v. MELVILLE* (1902), 9 S. L. T. 459.—SCOT.

**646 iii. —.**—Counsel as arbitrator—*Appointment as judge.]*—A judge of the Ct. of Session may legally continue to act as arbirer under a submission accepted by him when at the bar.—*FISHER v. COLQUHOUN* (SIR J.) (1844), 6 Dunl. (Ct. of Sess.) 1286.—SCOT.

**646 iv. —.**—Acquiring interest—*Becoming partner of one party.]*—An arbirer, named under a mutual tack, who subsequently becomes the partner in business of one of the contracting parties, who is also cautioner for a composition payable by the rest, is disqualified from acting, in respect of his actual or contingent interest, in the issue.—*TENNENT v. MACDONALD* (1836), 11 Fac. Coll. N. S. 818.—SCOT.

**646 v. —.**—Becoming employee of one party.]—In a contract it was stipulated that all disputes should be referred to the co.'s engineer. The co.'s engineer became manager of the co.:—*Held*: this circumstance *per se* was not suffi-

cient to disqualify him from acting as arbitrator.—*PHIPPS v. EDINBURGH & GLASGOW RY. CO.* (1843), 5 Dunl. (Ct. of Sess.) 1025.—SCOT.

**646 vi. —.**—*Advising in different action between same parties.]*—A. & H. entered into an agreement whereby (*inter alia*) H. was allowed to work minerals within a certain area, subject always to the opinion of G., a civil engineer, as arbirer. Subsequently G. (who acted as standing engineer to A.) advised him in an action against H. in regard to coal workings in a distinct but neighbouring area. H. objected to G. acting as arbirer under the agreement:—*Held*: G. was not disqualified.—*ADDIE & SONS v. HENDERSON & DIMMACK* (1879), 17 Sc. L. R. 15.—SCOT.

**646 vii. —.**—*Arbitrator's firm becoming involved in action with one party.]*—A purchaser at a sale lodged with the auctioneers £30, as security that he would fulfil his obligations. In an action by the purchaser against the auctioneers for repetition of the deposit, the auctioneers pleaded that the action was excluded by a clause in the conditions by which all disputes were referred to the determination of one of the partners of defenders' firm:—*Held*: as defenders' firm had taken upon themselves the defence of the action, the partner was disqualified by interest from acting as arbirer.—*McDOUGALL v. LAIRD & SONS* (1894), 22 R. (Ct. of Sess.) 71.—SCOT.

**646 viii. —.**—*Arbitrator accepting official position under one party.]*—By a clause of reference in a contract entered into by the town council of a burgh, the parties agreed to refer disputes which might arise under the contract to an arbirer named. The arbirer named was afterwards appointed Dean of Guild, & became *ex officio* a member of the town council:—*Held*: he was thereby disqualified from acting as arbirer.—*EDINBURGH MAGISTRATE v. LOWINE* (1903), 5 F. (Ct. of Sess.) 711; 40 Sc. L. R. 741.—SCOT.

Ex. 170; 160 E. R. 357; subsequent proceedings (1840), 4 Y. & C. Ex. 238.

*Annotations:—Mentd. Spong v. Wright* (1842), 9 M. & W. 629; *Williams v. Griffith* (1849), 3 Exch. 335; *Hales v. Stevenson* (1862), 1 New Rep. 23; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252.

**645. —.**—A contract for sale of land to a railway co. provided that certain specified roads should be provided by the co. This original contract was varied by an agreement which provided that an estimate of the cost of making one of the roads should be made by A., agent of one party, & submitted to B., agent of the other, for approval, & in case of difference the amount settled by C., & that the co. should pay the price to the landowner. B. died before A. submitted any estimate. Specific performance of the original contract was decreed at the suit of the landowner.—*FIRTH v. MIDLAND RY. CO.* (1875), L. R. 20 Eq. 100; 44 L. J. Ch. 313; 32 L. T. 219; 23 W. R. 509.

*Annotation:—Refd. County Hotel & Wine Co. v. L. & N. W. Ry. Co.*, [1918] 2 K. B. 251.

**646. Removal by court.]**—On an application for an order of the ct. to remove an arbitrator appointed under an agreement, on the ground that he had been guilty of misconduct in not taking the evidence of an important witness, who had since left England:—*Held*: upon the evidence, the arbitrator had done all he could to meet the convenience of the parties, & the charge of misconduct entirely failed. *Semble*: if the arbn. had commenced, & the arbitrator had then refused to arrange to take the evidence of an important witness unable after a certain time to attend, that

**646 ix. —.**—*Misconduct.]*—The submission contained in a contract was in case of dispute as to the manner in which work "is completed, R. C. McG. shall be referee to decide fairly what is just & right" between the parties, & they shall abide by & carry out his decision. The referee proceeded, but did not provide for a hearing or the calling of witnesses, but conferred with each party separately, & after interviewing some experts & viewing the work, made his award:—*Held*: the referee should be removed.—*WILKERSON v. MCGUGAN* (1912), 20 W. L. R. 651; 2 W. W. R. 121; 2 D. L. R. 11; Sask. L. R.—CAN.

**646 x. —.**—*Application—When & how made.]*—Where the person appointed is disqualified on the ground of interest to be an arbitrator, the party objecting may apply at once for his removal before the reference is entered upon, & such an application may be made either by motion to the ct. or by summons in chambers.—*Re COLEMAN & ROYAL INSURANCE CO.* (1905), 24 N. Z. L. R. 817.—N.Z.

**646 xi. —.**—*Procedure—Arbitrators made defendants.]*—In a suit to set aside on behalf of pltf. the nomination by defts. of an arbitrator for irregularity in such nomination:—*Held*: the arbitrators being necessary parties & defts. resident in this country, the arbitrators, though resident out of the jurisdiction, were properly made defts. to the bill.—*DIRECT CABLE CO. v. DOMINION TELEGRAPH CO.* (1883), 28 Gr. 648.—CAN.

**646 xii. —.**—*Security for costs of motion.]*—A submission provided for a reference to arbitrators, & defts. failed to appoint an arbitrator. Pltf. proceeded before their own arbitrator, after serving defts. with a notice to appoint an arbitrator under s. 5 (b) of Arbn. Act. Defts. moved to set aside the appointment of pltf.'s arbitrator:—*Held*: the parties moving to set aside the proceedings, being in the position of defts., need not give security for costs, although out of the jurisdic-



**2.—Commencement, duration, & termination of arbitrators' authority.—Time for making award: Sub-sect. 3. Sect. 3.]**

might amount to legal misconduct, but in this case the witness was going to Argentine for six months, & a commission could be sent to take his evidence there or the case put off until his return. —*Re WHITWILLAM TRUSTEES, ETC., & WREXHAM, MOLD & CONNAN'S QUAY RY. CO.* (1895), 39 Sol. Jo. 692.

**647. —.**]—During the course of an arbn. between a mtgor. & mtgee. the arbitrator made an order that each party to the arbn. should pay a moiety of the fees & expenses incurred in respect thereof as they should accrue from time to time; subsequently he made another order that the mtgee's solr. should personally pay the costs of the arbn., & declined to proceed until the same were paid. On a motion to remove the arbitrator under the Act of 1889, s. 11, on account of his alleged misconduct in making the above orders:—*Held*: although the arbitrator had plainly been guilty of serious mistakes of law, yet that was not sufficient ground for removing him from his office as a person not fit to act as arbitrator, he not having misconducted himself within the above sect.—*SCHOFIELD v. ALLEN* (1904), 48 Sol. Jo. 176; 116 L. T. Jo. 239, C. A.

**Death of party.]—See Nos. 524—553, ante.**

**Marriage of party.]—See Nos. 554—557, ante.**

**Bankruptcy of party.]—See Nos. 558—565, ante.**

**Revocation of authority.]—See Nos. 472—523, ante.**

**648. Appointment of umpire.]—**Submission to the award of A. & B., so that they make their award before a certain day, & if they do not agree, to the umpirage of an umpire to be selected by them, so that he make his award before the same day. The arbitrators chose an umpire before the day fixed & he made his award. Apparently the arbitrators also made an award. On an action being brought to enforce the umpire's award:—*Held*: since the same day was limited for the award of the arbitrators & the umpire, the power of the arbitrators was terminated on choosing an umpire, & hence the umpire's award was good.—*TWISLETON v. TRAVERS* (1666), 2 Keb. 15; 84 E. R. 10; *sub nom.* *TRAVERS v. TWISLETON*, 1 Lev. 174.

*Annotation*:—*Refd.* *Mitchell v. Harris* (1699), 1 Ld. Raym. 671.

*tion.*—*NEW PINNACLE GROUP S. M. CO. v. LUHRIG COAL & ORE DRESSING APPLIANCES CO.* (1900), 21 N. S. W. L. R. 297.—**AUS.**

**646 xiii. —.**—*Appeal from order.]*—Where one of the parties to an arbn. fails to appoint an arbitrator & the other party nominates an arbitrator who proceeds to act alone, & an application is made to set aside the appointment of such sole arbitrator & dismissed, the dismissal is a judicial order from which an appeal will lie.—*Re FAULKNER, EXCELSIOR LIFE INSURANCE CO. v. EMPLOYERS' LIABILITY ASSOCN. CORPN.* (1904), 5 O. L. R. 609; 2 O. W. R. 348; 3 O. W. R. 391.—**CAN.**

**1. By resignation.—Arbitrator cannot resign.]—**An arbirer accepted a submission, but did not subscribe the deed itself, as a party consenting to the registration clause. He subsequently pronounced a deliverance renouncing the submission, on the ground that it required more time than he could afford, but reserving to himself the power to act should he be compelled to do so. In a declarator at the instance of one of the parties:—*Held*: the renunciation was invalid, & the arbirer might be compelled to proceed.—*EDINBURGH &*

*GLASGOW RY. CO. v. MILLER* (1853), 25 Sc. Jur. 319.—**SCOT.**

**m. —.**—*Effect of withdrawal of same.]—*Where an arbitrator, before duly signing the award, tendered his resignation, but withdrew it, & afterwards signed the award:—*Held*: he did not formally divest himself of his character of arbitrator, & was, therefore, not *functus officio*.—*JOYMUNGAL SINGH BAHADOOR v. MOHUN RAM MARWARIE* (1875), 23 W. R. 429.—**IND.**

**n. —.**—*—.*]—The mere circumstance of an arbitrator having first tendered & then withdrawn his resignation does not formally divest him of his character as arbitrator.—*HAR NARAIN SINGH v. BHAGWANT KUAR* (1887), 1 L. R. 10; All. 137.—**IND.**

**p. Disagreement.]—**An agreement for submission referred matters in difference to the award, etc., of M. & B., & in case they disagreed, then to the award, etc., of such umpire as the arbitrators should nominate & appoint:—*Held*: the power of the arbitrators to make their award did not terminate until they disagreed upon the terms of the award.—*HOLMES v. TAYLOR* (1900), 33 N. S. L. R. 415.—**CAN.**

**649. —.**—*—.*]—If arbitrators choose an umpire their authority is executed, & they cannot revoke or choose again, though the person elected refuse to accept.—*REYNOLDS v. GRAY* (1697), 1 Ld. Raym. 222; 12 Mod. Rep. 120; 1 Salk. 70; 91 E. R. 1045.

*Annotation*:—*Consd.* *Doley v. Pitstow* (1755), Say. 221.

**650. —.**—*—.*]—Arbitrators cannot proceed on a reference after they have once named an umpire, for then their authority ceases, though the time for making their award is not expired.—*DANES v. MONSAY* (1735), Cooke, Pr. Cas. 116; 125 E. R. 993.

**Making of award.]—See Part IV., Sect. 13, Sub-sect. 3, post.**

**651. Expiry of reasonable time.]—**To debt on an award made by arbitrators upon a submission to them generally without any time, a plea that the arbitrators did not make any award within a reasonable time:—*Held*: ill.—*CURTIS v. POTTS* (1814), 3 M. & S. 145; 105 E. R. 565.

**652. —.**—*—.*]—Where a cause is referred without an order of *Nisi Prius* to an arbitrator to certify, it is not necessary that he should make his certificate within the time within which the jury process is returnable.—*SALTER v. YATES (YEATES)* (1836), 2 M. & W. 67; 5 Dowl. 291; 2 Gale, 224; 6 L. J. Ex. 67; 150 E. R. 671.

**653. —.**—*Which cannot be limited by arbitrators themselves.]—*By a deed of submission certain matters in difference were referred to the award of arbitrators, & the parties thereby covenanted to perform their award of & concerning the premises, or anything in anywise relating thereto, & also of & concerning all actions, etc., sums of money, demands, etc., at any time theretofore had, commenced, sued, prosecuted, or depending between the parties, so as the award was made in writing, under the hands of the arbitrators making the same, but no time within which the award was to be made was limited by the deed. By a memorandum, not under seal, indorsed on the deed after its execution, & signed by the arbitrators but not by the parties, the arbitrators agreed that the award should be delivered on or before Nov. 3:—*Held*: the arbitrators could not, in the absence of any power to that effect in the deed, limit the time for making their award so as to render an award made after Nov. 3 invalid.—*Re MORPHETT* (1845), 2 Dow. & L. 967; 14 L. J. Q. B. 259; 10 Jur. 546.

**651 i. Expiry of time.]—**After expiration of the time limited, arbitrators cannot, without (even if they can with) the concurrence of both parties to the submission, make a binding award.—*RUTHVEN v. RUTHVEN* (1851), 8 U. C. R. 12.—**CAN.**

**651 ii. —.**—*—.*]—An arbirer cannot, after the expiry of the submission, sign a decree-arbitral, although he may have come to his decision before the expiry, recorded it in an informal writing, & directed the clerk to extend it into a formal decree.—*LANG v. BROWN & FERGUSON* (1855), 2 Macq. 93.—**SCOT.**

**651 iii. —.**—*—.*]—An arbitrator is *functus officio* as soon as the time fixed, whether by consent or otherwise, within which he shall make his award has expired.—*BIENNETTO v. WINNIPEG* (1908), 18 Man. L. R. 100.—**CAN.**

**651 iv. —.**—*—.*]—An award by arbitrators, under Railway Act of Canada, after the date upon which the award was to have been given is without effect, as the board is *functus officio*.—*LACHINE, ETC., CO. v. THEBERGE* (1914), Q. R. 46 S. C. 504; 20 D. L. R. 703.—**CAN.**



## SECT. 3.—TIME FOR APPOINTMENT AND COMMENCEMENT OF UMPIRE'S AUTHORITY.

See, now, Arbitration Act, 1889, s. 2 & sched. I. (b) (d) & (e).

**654. Where umpire named in submission—Time limit for both arbitrators' & umpire's award.]—**Submission to two, &, if they cannot agree, to the umpirage of such as they choose, so an award be made by Jan. 22 next. The arbitrators not agreeing, the umpire before that time made an award. Deft. pleaded in bar that after that, & before Jan. 22, the arbitrators made an award, to which pltf. demurred:—*Held*: where the parties named the umpire & arbitrators & gave one day to both, the arbitrators' award at the time before the day was good.—*TWISLETON v. TRAVERS* (1666), 2 Keb. 15; 84 E. R. 10; *sub nom.* *TRAVERS v. TWISLETON*, 1 Lev. 174.

*Annotation*:—*Folld. Mitchell v. Harris* (1701), 1 Ld. Raym. 671.

**655. ——— Time limit for arbitrators' award.]—**Arbitrators who have power, if they make no award, to elect an umpire may elect him before the expiration of the time appointed for the making of their award. If the umpire be named in the submission, he cannot make his umpirage before the time limited for the arbitrators' award is expired.—*MITCHELL v. HARRIS* (1701), 1 Ld. Raym. 671; 1 Salk. 71; 12 Mod. Rep. 512; 91 E. R. 1347.

*Annotation*:—*Refd. Smailes v. Wright* (1815), 3 M. & S. 559.

**656. Where umpire to be appointed before entering reference—Appointment after enlargement of time—What constitutes "disagreement."]**—An appointment of an umpire by two arbitrators, under a power to appoint before "entering on the cause of the matters in difference," is good, though the arbitrators have, before such appointment, enlarged the time, because the enlargement of the time, being a mere arrangement for the common convenience of the arbitrators themselves, as well as of the parties concerned, cannot be said to be an entering upon the cause of the matters in difference. If one of the arbitrators insist upon producing further evidence, & the other refuse to allow it to be done, this is a sufficient "disagreement" between the arbitrators to authorise the interference of the umpire.—*CUDLIFF v. WALTERS* (1839), 2 Mood. & R. 232.

*Annotation*:—*Consd. Shepherd v. Norwich Corpn.* (1885), 30 Ch. D. 553.

**657. ——— Death of first nominee—Second umpire appointed.]—**A cause was referred to two arbitrators, who were empowered to appoint an

umpire before they entered upon the reference, who should be called in in case they disagreed. The two arbitrators accordingly appointed S. as umpire, & proceeded in the reference. S. having died, the two arbitrators appointed H., who ultimately made an award:—*Held*: the award must be set aside, as the arbitrators had no authority to appoint H., their power to appoint being restricted to their doing so before they had entered upon the arbn.—*MACNAMARA v. GINGER* (1844), 2 L. T. O. S. 128; 3 L. T. O. S. 208.

**658. Where umpire to decide in event of disagreement of arbitrators—Appointment made before entering on reference.]—**Arbitrators having power to choose an umpire may choose one the instant they begin to take the matter into consideration, & this is the fairest way of choosing an umpire.—*ROE d. WOOD v. DOE* (1788), 2 Term Rep. 644; 100 E. R. 347.

*Annotation*:—*Consd. Duckworth v. Harrison* (1838), M. & W. 432.

**659. ———.]—**Where a submission to arbn. to the award of two persons authorised the appointment of an umpire by them, if they should disagree:—*Held*: they might choose an umpire before they entered on the inquiry.—*BATES v. COOKE* (1829), 9 B. & C. 407; 109 E. R. 151.

**660. ———.]—**On a submission to the arbn. of two persons, with power to them, if they should not agree, to appoint a third person "to be umpire in or to concur & join with them in considering & determining all or any of the matters referred," there is a power to appoint such third person before any difference has arisen & before any proceedings have been taken on the reference; & that is, indeed, the proper course to pursue, & such third person when so appointed is not a third arbitrator, but an umpire. The effect of his appointment is that he is to sit with the arbitrators & hear & consider the matters referred, & if they do not agree in an award, to make an award upon all matters referred, & not merely those on which they do not agree; & it is sufficient to enable him so to act that at the conclusion of the evidence they arrive at different opinions on some of the matters referred; nor need he, if the time for making the award had expired, wait to see if they ever could agree; & on the other hand, their sitting with him till the time has expired & not then repudiating his authority is a tacit exercise of their power to enlarge the time for making the award, so as to enable him to make it.—*WINTERINGHAM v. ROBERTSON* (1858), 27 L. J. Ex. 301.

*Annotation*:—*Mentd. United Kingdom Mutual S.S. Assce. Assocn. v. Houston* (1896), 1 Com. Cas. 357.

## PART II. SECT. 3.

**656 i. Where umpire to be appointed before entering reference—Appointment after disagreement.]—**A stat. directed that each party should choose an arbitrator, & that the two arbitrators so chosen should select an umpire, & that the three so selected should determine the matter in controversy, the decision agreed on by two of them to be binding. The two arbitrators attempted, without appointing an umpire, to make the appraisement; but, disagreeing, finally appointed an umpire. An appraisement agreed upon by this umpire & one of the others was sustained.—*Re KENNY* (1856), 1 Thom. 14.—*CAN.*

**656 ii. ——— Reference cannot start till after appointment.]—**Where the terms of a reference provide for the appointment of an umpire before the arbitrators enter upon the reference, until the umpire is appointed, the reference cannot proceed.—*CHOONI LAL v. MADHORAM* (1908), 1 L. R. 36 Calc. 388.—*IND.*

**658 i. Where umpire to decide in event of disagreement of arbitrators—Appointment made before entering on reference.]—**

*Semble*: It is good practice for arbiters to commence their duties by nominating an oversman.—*CRAWFORD v. PATERSON* (1858), 20 Dunl. (Ct. of Sess.) 488.—*SCOT.*

**658 ii. ———.]—**Where a submission empowers the arbitrators, in case they shall disagree or fail to make an award, to appoint an umpire:—*Qu.*: whether they can appoint an umpire before entering on the reference.—*MANNION v. HARRISON* (1876), 1 L. R. 11 I. C. L. R. 102.—*IR.*

**658 iii. ———.]—**What constitutes "disagreement."—An outgoing & incoming tenant executed a reference to two persons as joint arbiters for fixing the price of certain subjects which the former had sold to the latter, with power to the arbiters, "in the case of their differing in opinion," to appoint an oversman. The arbiters selected an oversman, & came to an agreement as to all but one of the items, as to which one of the arbiters desired to have evidence from skilled persons:—*Held*: the arbiters had differed within the meaning of the reference, & were bound to execute a minute of devolution on

the oversman.—*SINCLAIR v. FRASER, ETC.* (1884), 11 R. (Ct. of Sess.) 1139.—*SCOT.*

**658 iv. ——— Appointment before disagreement.]—**A matter was referred to two arbitrators, with power to select an umpire to act with them in case they could not agree. The arbitrators appointed A., who sat with them & joined in the award though they did not disagree:—*Held*: the arbitrators had no right to appoint A.—*TURNER v. BURT* (1885), 24 N. B. R. 547.—*CAN.*

**658 v. ——— Award before time limit imposed on arbitrators.]—**An award of umpirage is valid, though made before the time limited for the award of the arbitrators, if they disagree & do not make an award afterwards.—*RAY v. DURAND* (1850), 1 P. R. 27.—*CAN.*

**658 vi. ——— Effect of appointment.]—**Where under a submission it was provided that arbitrators should appoint an umpire in case of disagreement:—*Held*: their appointing such an umpire was sufficient evidence of their having disagreed, without any allegation of that fact on affidavit.—*WHITE v. KIRBY* (1869), 2 Ch. Ch. 452.—*CAN.*

*Sect. 3.—Time for appointment & commencement of umpire's authority. Sect. 4: Sub-sect. 1.]*

**661. Umpire named in submission—Time limit for award.]**—If a submission be made to the award of certain arbitrators, & if they disagree, then to the umpirage of S., so that the award or the umpirage be made before May 1, the umpire cannot make any award until the disagreement of the arbitrators, & the arbitrators can make their award at any time before such day, & no time is limited for the umpire & his power is simply void. —*BARBER v. GILES* (1618), 1 Roll. Abr. 261, pl. 2.

**662. — Time for award & umpirage limited to same day.]**—If a submission be to arbitrators, & if they disagree, then to an umpire, & the award & umpirage are limited to the same day, the power of the umpire is void, unless the arbitrators disagreed & declared they would not intermeddle any more; & pltf., in such case, must show, in his declaration, the cause why the arbitrators could not make their award. —*COPPIN (COPPING) v. HURNARD* (*HARRIARD, HERNALTY, HERNALL*) (1669), 2 Wms. Saund. 127; 1 Lev. 285; T. Raym. 187; 1 Sid. 455; 2 Keb. 619; 1 Mod. Rep. 15; 85 E. R. 849.

*Annotations:—*Refd. Tippet v. Eyres (1690), 5 Mod. Rep. 457. *Mentd.* Livingston v. Ralli (1855), 5 E. & B. 132.

**663. — No express admission of disagreement.]**—By a reference all matters in dispute between the parties were submitted to the determination of two arbitrators, & in case of their not agreeing, to an umpire, the award or umpirage to be delivered on or before a stated date. The umpire made an award without the express admission of the arbitrators that they could not agree. The ct. refused to set it aside. —*HILL v. MARSHALL* (1827), 5 L. J. O. S. C. P. 161.

**664. — Necessity for formal notice of disagreement.]**—By the terms of a submission it was agreed between the parties that each should appoint his own arbitrator, who in the event of disagreement should appoint an umpire, & the award was to be given not later than July 1, whether by the two arbitrators or the umpire. An umpire having been appointed, the arbitrators subsequently requested the umpire verbally to make his award, as they themselves would be unable to agree, which award was duly delivered on June 10. On a motion to set aside the award, on the ground that the umpire had delivered his award before the expiry of the time limit under the submission, without a written notice from the arbitrators:—*Held*: as the agreement contemplated two sets of judges, the agreement contemplated that the umpire would have to act before July 1 if it became evident that the arbitrators could not agree, & the motion must be dismissed. *Qu.*: whether, in a case where the Act of 1889, Sched. I. (d) applied, it would be necessary to have a formal written notice. —*BIGLIN v. CLARK* (1905), 19 Sol. Jo. 204, D. C.

**665. — Umpire allowed additional time—Whether necessary to state disagreement.]**—Submission to the arbitrament of two, & in case they disagree to the umpirage of a third, so that the arbitrators make their award on or before a day certain, & the umpire, if they should differ, before a subsequent day. The umpire made his award before the time given to the arbitrators expired:—*Held*: the umpirage need not state that the arbitrators had disagreed. —*SPRIGENS v. NASH* (1816), 5 M. & S. 193; 105 E. R. 1021.

**666. — Appointment before time limit fixed for arbitrators' award.]**—Two arbitrators were to make an award by Aug. 20, or such other day as they should appoint, & in case they disagreed an umpire was to decide by Sept. 20 or such other day as he should appoint. The arbitrators ap-

pointed an umpire before Sept. 20 & enlarged their time to Nov. 1, & in Oct. gave the umpire notice of their being unable to agree. In Sept. the umpire enlarged his time till Dec., in which month he made his award:—*Held*: the umpire was properly appointed before Sept. 20, in order that he might extend the time for his award & so keep his power alive in case of disagreement between the arbitrators. —*Re DODINGTON & BAILWARD* (1839), 5 Bing. N. C. 591; 7 Dowl. 640; 7 Scott, 733; 8 L. J. C. P. 331; 132 E. R. 1227.

*Annotation:—*Consd. Kellett v. Tranmere L. B. of Health, Tranmere L. B. of Health v. Kellett (1864), 34 L. J. Q. B. 87.

**667. Where umpire to decide if arbitrators fail to do so within time limit—Same time limit for umpire—Appointment before expiry to time limit.]**—A. promised to stand to the arbitrament of S. & D. if they made their arbitrament & award within ten days, & if they did not make their award within ten days, that if they nominated an umpire, & he made an award within the ten days, that then, etc. S. & D. did not make any award within ten days, but the fourth day after the submission they nominated N. to be umpire, who made an award within the ten days. Dft. would not perform the award, wherefore pltf. brought an action upon an *assumpsit*:—*Held*: the action would lie, the agreement being that if an arbitrament & award be made within ten days by the first arbitrators or by the umpire, for the first arbitrators might examine the matter for two or three days, & if they could not make any award, then the umpire should have the rest of the ten days to make the award. —*FIAL (FYALL) v. VARIER* (1613), Godb. 241; 1 Roll. Abr. 261, pl. 3; 78 E. R. 140.

**668. — Additional time given for appointment of umpire—Appointment made before time limit for award.]**—On a submission to arbn., so as the arbitrators make their award on July 20, or choose an umpire before July 25, the appointment of an umpire before July 20 is void if the arbitrators make an award before their time expires, for the appointment should not be made till after the award; but it is good if they make no award at all. —*JENNINGS v. VANDEPUTT* (1632), Cro. Car. 263; 79 E. R. 829.

*Annotations:—*Refd. Donovan v. Maschall (1670), 1 Mod. Rep. 274; Doley v. Pitstow (1755), Say. 221. *Mentd.* Williams v. Jones (1823), 7 Dow. & Ry. K. B. 548.

**669. — No time limit for umpire—Award made before expiry of arbitrators' time limit bad.]**—Where a submission provides that, if the arbitrators shall not make their award to-morrow, then the umpire shall make it, the arbitrators have the whole of the named day to make their award, & the umpire has no power to make his award till the day is ended; hence his award, if made on the same day, is bad. —*BARNARD v. KING* (1651), Sty. 306; 82 E. R. 731.

*Annotations:—*Refd. Coppin v. Hurnard (1670), 1 Sid. 455; Tippet v. Eyres (1689), 5 Mod. 457.

**670. — Appointment good.]**—On a submission to arbn. on condition that, if the arbitrator do not make an award on or before Feb. 19, he may choose an umpire, the arbitrator may choose an umpire before that day; but an award made by the umpire on that day is void, unless it appear that the arbitrator had made no award. —*DONAVAN (DELLOVAN, DENOVAN) v. MASCHALL (MARSHALL, MASCALL)* (1670), 1 Mod. Rep. 274; 2 Keb. 714; 1 Lev. 302; T. Raym. 205; 86 E. R. 877.

**671. — Appointment before arbitrators' time limit expired.]**—If arbitrators choose an umpire before the time allowed for their award be expired, it is *ipso facto* void, though they absolutely resolve to make no award themselves.



**REYNOLDS v. GRAY** (1697), 1 Ld. Raym. 222; 1 Salk. 70; 12 Mod. Rep. 120; 91 E. R. 1045.

*Annotation* :—**Consd.** *Doley v. Pitstow* (1755), Say. 221.

**672.** ————.]—An award is good which is made by an umpire appointed by the arbitrators before the last day for making their award, if they in fact make no award.—**ELLIOTT v. CHEVALL** (1699), 1 Lut. 541; 125 E. R. 284.

*Annotation* :—**Refd.** *Doley v. Pitstow* (1755), Say. 221.

**673.** ————.]—An umpirage is good, although it be made by an umpire chosen before the time for making an award is expired.—**DOLEY v. PITSTOW** (1755), Say. 221; 96 E. R. 859.

**674.** ———— **Later time limit for award by umpire—Appointment after time limit for award by arbitrators.**]—Arbitrators may appoint an umpire at any time after the expiration of their own authority, & before the time limited for the umpirage. At the end of their time for award their authority for making the award expires, but not for choosing an umpire.—**ANON.** (1674), 1 Freem. K. B. 378; 89 E. R. 281.

**675.** ————.]—On a submission, so that the award be made on or before such a day, or that the arbitrators may choose an umpire, they may choose an umpire after the day named, for their power is only determined as to making the award.—**ADAMS v. ADAMS** (1677), 2 Mod. Rep. 169; 86 E. R. 1005.

**676.** ————.]—Submission “so that the arbitrators should make their award before or on June 21, but if no award should be made before or on that day, then” an umpire to be chosen & the umpirage made before June 28. The arbitrators met, but did not make an award, nor choose an umpire, before or on June 21; but they appointed an umpire before June 28, & the umpire & arbitrators made a joint award before June 28:—**Held**: the award was good, for the power to appoint an umpire did not begin till the arbitrators failed to make an award on June 21.—**BECK v. SARGENT** (1812), 4 Taunt. 232; 128 E. R. 318.

**677.** ————.]—Submission to arbn. so as the award of the arbitrators be made on or before Mar. 1, & if the award was not made within that time, then to the umpirage of an umpire to be appointed by the arbitrators, so as the umpirage be made on or before Mar. 25. The arbitrators made no award by Mar. 1, & chose an umpire on Mar. 14, who made his umpirage on Mar. 24:—**Held**: while it was very convenient for arbitrators to begin by appointing an umpire, yet if not expressly restrained they might choose an umpire at any time within the period limited for his umpirage, whether before or after the time limited for making their own award.—**HARDING v. WATTS** (1812), 15 East. 556; 104 E. R. 953.

**678.** ———— **Award made on day on which**

**674 i.** *Where umpire to decide if arbitrators fail to do so within time limit—Later time limit for award by umpire—Award within month from enlargement by arbitrators.*]—By a submission matters in difference were referred to the award, etc., of M. & B., & in case they failed to make their award before Aug. 1, then to the award, etc., of such umpire as the arbitrators should nominate & appoint, “so as the arbitrators or umpire do make & publish his & their award ready to be delivered on or before Aug. 10 next, or on or before any other day to which the arbitrators, or umpire shall, by writing indorsed on these presents, enlarge the time for making such award or umpirage.” On July 29 the arbitrators appointed J. as umpire, & on the same day, by indorsement on the award, extended the time for making the award by the arbitrators from Aug. 1 to the 25th & for the umpire from Aug. 10 to the 30th. On Aug. 25

the arbitrators further extended the time for making the award by the arbitrators to Sept. 10 & for the umpire to Sept. 20. On Sept. 20 the umpire extended the time for making his award to Sept. 30 & on that date he again extended the time to Oct. 10. On Oct. 7 he made & published the award on which plff.’s action was brought:—**Held**: under Arbn. Act the umpire had one month after the original or extended time for making the award of the arbitrators in which to make his award, & as he had made it within that time, it could not be said that he had no authority to do so.—**HOLMES v. TAYLOR** (1900), 33 N. S. L. R. 415.—**CAN.**

**s.** *Appointment not revocable by arbitrators.*]—Where an umpire is appointed & has consented to act, his appointment cannot be revoked by the arbitrators.—**KEDY v. DAVISON** (1901), 34 N. S. L. R. 233.—**CAN.**

**arbitrators’ time limit expired.**]—Submission to the award of S. & N. so that they make it before or on July 1, & if they make it not then, to the umpirage of D. so that he make it on or before July 2. The arbitrators made no award, but the umpire made his umpirage on July 1:—**Held**: the umpirage was good, for the parties had expressly given July 1 to the umpire, & since the umpire had only a conditional authority, namely if the arbitrators made no award within the time, there was no confusion of authority.—**CASE v. DARE** (1682), T. Jo. 67; 84 E. R. 1199.

*Annotations* :—**Refd.** *Cowel v. Waller* (1732), 2 Barn. K. B. 154; *Smailes v. Wright* (1815), 3 M. & S. 559.

**679.** ———— **No complete appointment if umpire refuses to act.**]—If a submission be made to arbitrators so as the award be made before Apr. 1, or else to such umpire as they shall choose, so as the umpirage be made before Apr. 16, & the arbitrators, making no award, nominate a person for umpire who refuses to act, they may choose another person umpire.—**TIPPET v. EYRES** (1689), 5 Mod. Rep. 457; 87 E. R. 762.

**680.** ———— **Appointment & award made before arbitrators’ time limit expired.**]—Submission to arbn. at the beginning of Dec. so that the arbitrators make their award by Jan. 17, & if the award should not be then made, to the determination of an umpire to be chosen by the arbitrators, so that he make it by Feb. 1. The arbitrators chose an umpire on Dec. 24, & the umpire made his umpirage on Jan. 14:—**Held**: the umpirage was good.—**COWEL v. WALLER** (1732), 2 Barn. K. B. 154; 94 E. R. 417.

**681.** ———— **Award made after notice that arbitrators had disagreed & would not decide, but before time limit for arbitrators’ award.**]—Submission to two so as they make their award on or before a day certain, but if they do not by the time aforesaid make their award, then to an umpire, provided he make his award on or before a subsequent day. The arbitrators finally disagreed before their time expired & declared they would not make any award, & did not make any:—**Held**: the umpirage might be made, after the final disagreement of the arbitrators, before the time allowed them had expired.—**SMAILLES v. WRIGHT** (1815), 3 M. & S. 559; 105 E. R. 720.

*Annotation* :—**Consd.** *Sprigons v. Nash* (1816), 5 M. & S. 193.

## SECT. 4.—ENLARGEMENT OF TIME.

### SUB-SECT. 1.—BY THE PARTIES.

**682.** **By express agreement—By deed.**]—Debt on a bond conditioned for the performance of an

*t.* *Award made by umpire after refusal to act.*]—Under deed all disputes were to be referred to two arbitrators with power to choose an umpire, who, in case of disagreement, was to decide alone all matters in dispute. The umpire refused to proceed with the reference unless the parties signed a deed, making the decision final. Both parties refused to execute such a deed. The umpire then published his award:—**Held**: the umpire had withdrawn from the arbn. & thereby terminated his authority, & he could not resume it without consent of both parties.—**RE DE CASTRES & GARD** (1882), 1 Q. L. J. 97.—**AUS.**

### PART II. SECT. 4, SUB-SECT. 1.

**682 i.** *By express agreement—Need not contain consent to being made rule of court.*]—An agreement enlarging the time need not contain a consent that it may be made rule of ct. as well as



*Sect. 4.—Enlargement of time: Sub-sects. 1 & 2.]*

award to be made within a limited time. The declaration, after setting out the condition, stated that before that time expired the parties to the bond, by deed, agreed to give the arbitrators further time for making the award, & that an award was made within the extended time, & alleged non-performance:—*Held*: the action was maintainable upon the bond.—*GREIG v. TALBOT* (1823), 2 B. & C. 179; 3 Dow. & Ry. K. B. 446; 107 E. R. 350.

*Annotation*:—*Distd. & Expld. R. v. Bingham* (1829), 3 Y. & J. 101.

**683. By waiver or acquiescence—Acting on reference.]**—An objection that the time for making an award has not been duly enlarged is waived by proceeding in the reference with a knowledge of that fact.—*LAWRENCE v. HODGSON* (1826), 1 Y. & J. 16; 148 E. R. 568; subsequent proceedings (1827), 1 Y. & J. 368.

*Annotations*:—*Mentd. Green v. Cobden* (1837), 4 Scott, 486; *Vaughan v. Wilson* (1837), 5 Scott, 404; *Doe d. Taylor v. Crisp* (1839), 7 Dowl. 584; *Miles v. Bough* (1845), 15 L. J. Q. B. 30; *Freeman v. Tranah* (1852), 12 C. B. 406.

**684. ———.]**—On a compulsory reference under C. L. P. Act, 1854, it is no objection to entering up judgment on the award, under s. 3, that the award was made more than three months after the arbitrator entered on the reference, though the order of reference names no time, & no written consent for enlarging the time has been given by the parties, if it appear that the parties have, within a month before the making of the award, acted upon the reference as still subsisting, such acting estopping them from saying that the circumstances necessary to give jurisdiction to the arbitrator did not exist.—*TYERMAN v. SMITH* (1856), 6 E. & B. 719; 25 L. J. Q. B. 359; 27 L. T. O. S. 172; 2 Jur. N. S. 860; 119 E. R. 1033.

*Annotations*:—*Consd. Watson v. Bennett* (1860), 5 H. & N. 831. *Refd. Hames v. East India Co.* (1856), 11 Moo. P. C. C. 39, P. C.; *Palmer v. Met. Ry. Co.* (1862), 31 L. J. Q. B. 259; *Ringland v. Lowndes* (1864), 17 C. B. N. S. 514.

the submission.—*CROOKS v. CHISHOLM* (1834), 4 O. S. 121.—CAN.

**682 ii. ——— After previous enlargement by rule—New submission.]**—A verdict was taken subject to reference, the time was enlarged by rule before the period limited for the award expired, & afterwards by consent again enlarged:—*Held*: the award was good under the last submission, although it would have been invalid if made under the rule.—*CHARLES v. HICKSON* (1840), 1 Ont. Dig. 100, 101.—CAN.

**682 iii. ——— Parol.]**—A deed of submission limited the time within which the arbitrator should make his award, but gave no power to enlarge that time. The parties verbally agreed to enlarge the time:—*Held*: an award made within the enlarged time was good.—*GILLANDERS v. ROSSMORE* (LORD) (1835), 1 Jo. Ex. Ir. 504.—IR.

**682 iv. ———.]**—*Held*: a verbal consent to an enlargement of the time for making an award is sufficient.—*JONES v. PRENTICE* (1866), 2 C. L. J. O. S. 205.—CAN.

**682 v. ——— Consent by attorneys — Whether new parol submission.]**—Differences were submitted to arbn. The award was to be made on or before May 1, 1877, or such further day as the arbitrators might indorse from time to time on the order. The time for making the award was extended by the arbitrators till Sept. 1, 1877. On Aug. 31, 1877, the attorneys for pltf. & defts., by consent indorsed on the rule, extended the time till Sept. 8. On Sept. 7 the arbitrators made their award:—*Held*: where the parties, through their attorneys, consent to extend the time

for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time & a continuation to the extended period of the authority of the arbitrators, & therefore, an award made within the extended period is an award valid & binding on the parties.—*OAKES v. HALIFAX CITY* (1879), 4 S. C. R. 640.—CAN.

**686 i. By waiver or acquiescence—Attendance before arbitrator after expiry of time.]**—A submission was entered into requiring decision within three months. The three months expired. No decision having been pronounced, the parties indorsed on the deed a minute of renewal. Three months again expired without a decision, & the parties continued the discussion before the arbiters. Thereafter A. insisted in a wakening of the action, which, prior to the submission, he had brought:—*Held*: under the terms of the minute of renewal, & the conduct of parties, the submission subsisted to the effect of barring any further procedure.—*HILL v. DUNDEE, PERTH & ABERDEEN RY. JUNCTION CO.* (1852), 24 Sc. Jur. 642.—SCOT.

**686 ii. ———.]**—One of the parties to a submission brought a reduction of the decree-arbitral on the ground that the submission had lapsed in consequence of the arbiter having neglected to prorogate it:—*Held*: pursuer was barred from pleading want of prorogation, because the parties had proceeded to plead before the arbiter long after the date of the alleged lapse of the submission.—*PAUL v. HENDERSON* (1867), 5 Macph. (Ct. of Sess.) 613.—SCOT.

**685. Assent to adjournment—Whether new parol submission.]**—*Semble*: (1) neither s. 9 nor s. 15 of C. L. P. Act, 1854 (as to enlargement of time for making the award) applied to orders of reference made by consent; (2) even where s. 15 did apply, the attendance of the parties before the arbitrator after the time mentioned therein had expired, & their assent to an indefinite adjournment, for the purpose of his making an award, might amount to evidence of a new parol submission for an award to be made in any reasonable time.—*WATSON v. BENNETT* (1860), 5 H. & N. 831; 157 E. R. 1412; *sub nom. BENNETT v. WATSON*, 29 L. J. Ex. 357.

**Attendance before arbitrator after expiry of time—Taking up award made out of time.]**—*Semble*: if parties attend before an arbitrator, after the time for making his award has expired, & one take up an award so made, he does not thereby admit that the arbitrator had authority to make the award (*LORD CHELMSFORD, C.*).—*DARNLEY (EARL) v. LONDON, CHATHAM & DOVER RY. CO.* (1867), 1 L. R. 2 H. L. 43; 36 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817, H. L.

**687. ——— Whether new parol submission.]**—An award bad, as being made out of time, is not cured by the party impeaching it having attended the first of several meetings after the expiration of the period limited in the order of reference. Such attendances are only good *pro tanto*, & do not justify the arbitrator in going on when the parties are absent. Nor do they constitute a parol submission to a fresh arbn. The later meetings take place on the terms of the original submission.—*DUNSTAN v. NORTON* (1866), 13 L. T. 722.

**688. ——— Under protest.]**—Where an umpire appointed under Public Health Act, 1848 (c. 63), without enlarging his time under the Act, proceeded in the reference after the time for making his award had expired, & a party attended before him under protest, but nevertheless cross-examined his adversary's witnesses & called wit-

**687 i. ——— Whether new parol submission.]**—Submission by bond with a day limited for making the award. On the last day the arbitrators were ready to make the award, but at deft.'s request put it off—all parties, however supposed that the time fixed by the submission would not expire till the next day. The next day the arbitrators heard both parties on oath & made an award about an hour after midnight:—*Held*: *assumpsit* on a parol submission was maintainable to recover the sum awarded, & the extension of the time operated as a parol submission.—*HULL v. ALWAY* (1835), 4 O. S. 375.—CAN.

**687 ii. ———.]**—Where the time for making an award has expired, & the parties afterwards meet by consent, such meetings operate as a mere parol submission, which is revocable; & if revoked, the time for making an award cannot afterwards be enlarged by the ct.—*RUTHVEN v. ROSSIN* (1860), 8 Gr. 370.—CAN.

**a. ——— Accepting the award.]**—Where one of the parties has accepted an award he is estopped from objecting that it was not made within the time limited by the submission.—*MORROW v. LINDSAY* (1907), 6 W. L. R. 386; 7 W. L. R. 48; 1 S. C. R. 5.—CAN.

**b. ——— Taking up award.]**—The fact that a person, who objects to an award on the ground that it is out of time, has taken up the award knowing it is out of time does not amount to a waiver of the objection.—*ANDERSON v. BRUNDELL & WATKINS* (1905), 24 N. Z. L. R. 938.—N.Z.

nesses on his own behalf:—*Held*: he did not thereby preclude himself from afterwards objecting that the umpire was proceeding without authority.—*RINGLAND v. LOWNDES* (1864), 17 C. B. N. S. 514; 4 New Rep. 409; 33 L. J. C. P. 337; 28 J. P. 519; 10 Jur. N. S. 850; 12 W. R. 1010; 144 E. R. 207, Ex. Ch.

*Annotations*:—*N.F. Bolssière v. Brockner* (1889), 6 T. L. R. 85. I confess I am unable to supply the reasons which the judgments (in *Ringland v. Lowndes*) do not give, & I respectfully decline to extend a decision, of the grounds of which I am ignorant, to a different state of circumstances, to which, in my judgment, it is entirely inapplicable (*CAVE J.*). *Reid. Davies v. Price* (1864), 11 L. T. 203.

689. — *Implied consent to extension of time.*] Defts. in an extent in aid agreed to submit to arbn. the question of the amount of what was due to the prosecutor, provided the award was made by a given time. The arbitrator did not make his award till after the expiration of a further period, which it had been agreed to extend the time, a consequence of defts. having delayed to furnish him with the name of a trustee, which was required as part of the award, & defts. solr. afterwards wrote a letter requiring that the arbitrator would take into consideration matters not before him during the reference, which was refused, as the reference was considered to be closed:—*Held*: in the circumstances the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority, for the act of defts. & the solr.'s letter were equivalent to consent to extend the time.—*R. v. HILL* (1819), 10 B. & C. 636; 146 E. R. 1085.

690. — *Consent to enlarge.*]—If the parties to an arbn. by the act of ct., which gives no power to enlarge the authority of the arbitrator, consent to the enlargement of that authority, such consent will constitute a sufficient agreement to maintain an action for the non-performance of an award made pursuant to the enlarged authority.—*ANON.* (1827), 5 L. J. S. K. B. 247.

691. — *Enforcement of award.*]—An award enforced, although made after the prescribed time, where both parties had, without objection, allowed the arbitrators to proceed after that time.—*HAWKSWORTH v. AMMALL* (1840), 5 My. & Cr. 281; 41 E. R. 577.

--*Mentd.* *Blackett v. Bates* (1865), 2 Hem. & M. 610.

#### PART II. SECT. 4, SUB-SECT. 2.

692 i. *Arbitrator with power to enlarge—Enlargement by other arbitrators substituted under provisions of submission.*]

—A reference provided for the appointment by A. & B. of two arbitrators, who were, before proceeding with the reference, to appoint a third, & that the "last" award should be made before July, 1843, or such other time as any two arbitrators should appoint, & that any two should have power to extend the time for making the "last" award, whether the time had previously expired or not; a master of Q. B. was, "as soon as conveniently might be" after the reference, to appoint an umpire, who was to act if no two of the arbitrators should agree; if A.'s or B.'s arbitrator should be unwilling, etc., to act, the third arbitrator or the umpire was to appoint a proper person to be arbitrator in his stead. The arbn. expired in July, no award whatever having been made under it. A's arbitrator declined to act. Neither third arbitrator nor umpire had been appointed. Some time after, the master of Q. B. being applied to by B., appointed an umpire who nominated an arbitrator for A., who, in conjunction with B.'s arbitrator, nominated a third, & extended the time:—*Held*: the time

for the reference was duly extended.—*DIMSDALE v. ROBERTSON* (1844), 7 L. Eq. R. 536; 2 Jo. & Lat. 58.—*IR.*

692 ii. — *Enlargement must be made within time limit of submission.*]—Where an order of reference to an arbitrator fixed three months' time for the award, & also empowered the arbitrator to extend the time for such submission from time to time by endorsement of the office copy of the order:—*Held*: the arbitrator could only extend the time before the time originally fixed for making the award had expired.—*Co-OPERATIVE HINDUSTAN BANK, LTD. v. BHOLA NATH BOROOAH* (1914), 19 C. W. N. 165.—*IND.*

692 iii. — *No power to enlarge umpire's time limit.*]—An agreement for submission of matters in difference to the award, etc., of M. & B., & in case they disagreed or failed to make their award before Aug. then next, then to the award, etc., of such umpire as the arbitrators should nominate & appoint, "so as the arbitrators or umpire do make & publish his & their award ready to be delivered on or before Aug. 10 next, or on or before any other day to which the arbitrators, or umpire shall, by writing indorsed on these

#### SUB-SECT. 2.—BY THE ARBITRATORS OR UMPIRE.

*See, now, Arbitration Act, 1889, s. 2, & Sched. I.*

692. *Arbitrator with power to enlarge—Successive enlargements.*]—If an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once.—*PAYNE v. DEAKLE* (1809), 1 Taunt. 509; 127 E. R. 931.

693. — *Consent to enlarge.*]—If an arbitrator has power to enlarge the time for making his award to any other day, the ct. will expound it to mean to any other days.—*BARRETT v. PARRY* (1812), 4 Taunt. 658; 128 E. R. 489.

694. — *Defect in clause giving power.*]—Pltf. & defts. agreed that in a certain event H. should say, by his award in writing, to be delivered "on or before Dec. 30 next, or on some such ulterior day as H., by a memorandum in writing under his hand to be indorsed thereon," (omitting the words "shall appoint,") what, if anything, should be paid to K.:—*Held*: there was a sufficient power to enable the arbitrator to enlarge the time.—*KIRK v. UNWIN* (1851), 6 Exch. 908; 2 L. M. & P. 519; 20 L. J. Ex. 345; 18 L. T. O. S. 64; 155 E. R. 815.

695. *Umpire—Power to enlarge.*]—Where by agreement of reference a cause & all matters in dispute were referred to two arbitrators, provided they made their award on a certain day, & power was given them to enlarge the time for making their award, & in case of their non-agreement they were to choose an umpire, who should have power to make the award "at the time & in manner aforesaid":—*Held*: these words gave the umpire power to enlarge the time by his single authority in the same manner as the arbitrators might have done.—*Re VINICOMBE & MORGAN* (1841), 10 L. J. Q. B. 128.

696. — *Power to arbitrators only.*]—A deed of submission was entered into to A. & B., & in the event of their differing in opinion, to any umpire they might appoint, & the parties agreed to submit to "whatever the arbitrators or umpire should determine by an award or awards *interim* or final," & gave powers to them to enlarge the time. Within the last enlargement of time made by A. & B. they delivered no award, but having agreed upon all the matters except two, they appointed C. as umpire in & concerning those two matters, & to that extent devolved upon him all the powers competent to an umpire. C. then

presents, enlarge the time for making such award or umpirage." On July 29 the arbitrators appointed J. as umpire, & on the same day, by indorsement on the award, extended the time for making the award by the arbitrators from Aug. 1 to the 25th & for the umpire from Aug. 10 to the 30th. On Aug. 25 the arbitrators further extended the time for making the award by the arbitrators to Sept. 10 & for the umpire to Sept. 20:—*Held*: the arbitrators had no authority to extend the time within which the umpire could make his award.—*HOLMES v. TAYLOR* (1900), 33 N. S. L. R. 415.—*CAN.*

692 iv. — *Enlargement made before submission fully signed.*]—*JOHNSTON v. CHEAPE* (1817), 5 Dow. 247; 3 E. R. 1318.—*SCOT.*

o. *Arbitrator without power—Consent of parties.*]—In an action on a bond to perform an award the declaration alleged that deft. agreed that C. should abide by an award respecting differences between C. & pltf., if made before June 6, that the arbitrators, with the consent of C., of deft., & of pltf., enlarged the time to July 1, & made their award on June 12:—*Held*: no valid enlargement.—*SEXTON v. WOODS* (1858), 15 U. C. R. 585.—*CAN.*



**Sect. 4.—Enlargement of time: Sub-sects. 2 & 3.]**

enlarged the time for making the award generally, & within that time, but after the expiry of the last enlargement made by themselves, A. & B. delivered their award regarding those matters which they had not referred to the umpire:—*Held*: the award of the arbitrators was not within the proper time, for the enlargement made by the umpire was not applicable to their award, being beyond his powers as regarded them.—*LANG v. BROWN* (1855), 25 L. T. O. S. 297, H. L.

**697. How enlargement made—Indorsement on order.]**—Where a cause was referred under a judge's order with a proviso that the arbitrator should make his award on or before a day certain, but, if he should not be then prepared, that the time should be enlarged from time to time, as he might require, & a judge of the ct. might think reasonable & just:—*Held*: the time for making the award was duly enlarged by the arbitrator indorsing on the order, on the day preceding the expiration of the original time, that he required further time, although the judge's order granting such further time was not obtained until a day subsequent.—*REID v. FRYATT* (1813), 1 M. & S. 1; 105 E. R. 1.

*Annotation*:—*Consd.* Lord v. Lee (1868), L. R. 3 Q. B. 404.

**698. ———.]**—An order of reference authorised the arbitrator to enlarge the time to Nov. 2, 1841, "or to such other or ulterior day, as the arbitrator shall ultimately appoint & signify in writing under his hand, to be indorsed on the order of reference":—*Held*: the enlargements subsequent to Nov. 2, 1841, only need be indorsed on the order of reference.—*DAVISON v. GAUNTLETT* (1841), 3 Man. & G. 550; 1 Dowl. N. S. 276; 4 Scott, N. R. 220; 133 E. R. 1260.

**699. — Indorsement on copy order.]**—*Qu.*: whether the indorsement of an extension of time by an arbitrator, upon a duplicate copy of order of reference, is good, the order of reference giving power to enlarge, such enlargement "to be certified by his indorsement hereon."—*SHOTHER v. STEPHENSON* (1847), 8 L. T. O. S. 393.

**700. — Indorsement on submission — Not stamped—Acquiescence.]**—An award, upon which *pltf.* sought to recover, was not made within the time prescribed by the condition of the *arbn.* bond. *Pltf.* relied on a signed memorandum on the *arbn.* bond whereby the parties within named, by themselves or their agents, agreed to enlarge the time. The memorandum was not stamped:—*Held*: the memorandum not being stamped could not assist *pltf.*, who was rightly non-suited.—*STEPHENS v. LOWE, STEPHENS v. STRICK* (1832), 9 Bing. 32; 2 Moo. & S. 44; 1 L. J. C. P. 150; 131 E. R. 526.

**701. — Directions of indorsement not carried out—Waiver.]**—An arbitrator, who had power to enlarge the time for making his award by indorsement on the order of reference, made the following indorsement: "I direct that a rule of this ct. shall be applied for by counsel's hand to enlarge the time of making my award." No such rule was applied for; but the parties subsequently attended meetings before the arbitrator, & made no objection to the regularity of the enlargement:—*Held*: (1) the indorsement was itself a sufficient enlargement of the time; (2) if it were not, the irregularity had been waived.—*HALLETT v. HALLETT*

**700 i. How enlargement made—Indorsement on paper connected with submission—Waiver.]**—An arbitrator was required to make his award before a date fixed, or on such further day as the arbitrator might from time to time enlarge the time for making his award in writing under his hand indorsed on the agreement. Two extensions of time for making the award were written upon another paper among the papers

connected with the *arbn.* & either inside or outside the agreement of submission:—*Held*: the irregularity referred to was not waived by the writing of a letter to the arbitrator objecting to the award on other grounds, it not being shown that at the time the letter was written either *pltf.* or his *solr.* had knowledge that the extension of time had not been properly made.—*MACKAY v. NICOL* (1895), 28 N. S. L. R. 43.—*CAN.*

(1839), 5 M. & W. 25; 7 Dowl. 389; 2 Horn. & H. 3; 8 L. J. Ex. 174; 3 J. P. 421; 3 Jur. 727; 151 E. R. 12.

**702. — Order for enlargement—Waiver.]**—By an order of reference the award was to be made by a given day, or such further time as the arbitrator should appoint, by indorsement on the order. The arbitrator enlarged the time, & before the expiration of the extended period *pltf.*, at his request, obtained a judge's order for a further enlargement; & the arbitrator afterwards, & without any indorsement of the second enlargement on the original order, made his award:—*Held*: the consent of parties to the enlargement was a waiver of the irregularity & rendered the award valid.—*LEGGERT v. FINLAY* (1829), 6 Bing. 255; 3 Moo. & P. 629; 8 L. J. O. S. C. P. 52; 130 E. R. 1278.

**703. — Appointment of subsequent meeting—Waiver by failure to object.]**—A cause was referred by order of *Nisi Prius* to the decision of an arbitrator, so as he made his award before the fourth day of Easter term, with power to enlarge the time, but the order did not direct in what mode the time was to be enlarged. Two days before the time had expired the arbitrator, in the presence of both parties, appointed another meeting on June 29, on which day, one of the parties not having attended, the arbitrator made his award:—*Held*: the appointment of a further day for the reference, neither party making any objection to it, amounted to a *de facto* enlargement of the time.—*BURLEY v. STEPHENS (STEVENS)* (1836), 1 M. & W. 156; 4 Dowl. 770; 1 Gale, 374; Tyr. & Gr. 413; 5 L. J. Ex. 92; 150 E. R. 386.

*Annotations*:—*Consd.* Newman v. Parbery, Parbery v. Newman (1840), 5 Jur. 175. *Mentd.* Nosotti v. Hudson (1868), 37 L. J. C. P. 135.

**704. — Reference to two with power to appoint third—Enlargement by two.]**—By the terms of a reference to *arbn.* the two arbitrators were to appoint an umpire before entering into consideration of the matters in difference, & to make their award before a certain day, or such time as they or any two of them should appoint. The arbitrators, before appointing an umpire, enlarged the time & afterwards held a meeting, at which the parties attended:—*Held*: the parties, being aware of these facts & having afterwards attended, could not afterwards make any objection on the ground of the enlargement of the time having been made before the appointment of the umpire.—*Re HICK* (1819), 8 Taunt. 694; 129 E. R. 554.

*Annotations*:—*Distd.* Reade v. Dutton (1836), 2 M. & W. 69. *Consd.* Cudliff v. Walters (1839), 2 Mood. & R. 232. *Distd.* Darnley v. L. C. & D. Ry. (1867), L. R. 2 H. L. 43, H. L. *Mentd.* Ringland v. Lowndes (1863), 15 C. B. N. S. 173.

**705. — ———.]**—The ct. will not grant an attachment for non-performance of an award where the reference was to two, with power to appoint a third arbitrator, they or any two of them being authorised to enlarge the time, & the two original arbitrators enlarged the time for making the award before they had appointed the third.—*READE (READ) v. DUTTON* (1836), 2 M. & W. 69; 2 Gale, 228; 6 L. J. Ex. 16; 150 E. R. 672.

**706. When order required—Waiver by attendance.]**—A judge's order of reference directed an arbitrator to make his award by such a day, or by such further day as he should appoint & a judge of

**700 ii. — Ordered by arbitrators with verbal consent of parties.]**—A rule making an enlargement ordered by arbitrators a rule of ct. was set aside, such enlargement not having been consented to by both parties, but the award was upheld, the parties having verbally assented to enlargement.—*RUTHVEN v. RUTHVEN* (1848), 5 U. C. R. 276.—*CAN.*



the ct. should order:—*Held*: the award not being made within the limited time, & the time being enlarged by the arbitrator, it was necessary to obtain a judge's order sanctioning the enlargement before any award was made.

Where, under such an order of reference, there were several attendances before the arbitrator after the time originally limited, though within the time of enlargement made by the arbitrator alone, but the arbitrator had made a further enlargement after the last attendance before him, & there was no judge's order to sanction any of the enlargements:—*Held*: if the attendance of deft. cured the previous enlargements without authority, the last enlargement was made without even any implied authority, & the award was void.—*MASON v. WALLIS* (1829), 10 B. & C. 107; 5 Man. & Ry. K. B. 85; 8 L. J. O. S. K. B. 109; 109 E. R. 391.

*Annotations*:—*Distd.* *Benwell v. Hinxman* (1835), 1 Cr. M. & R. 935. *Folld.* *Dunstan v. Norton* (1866), 13 L. T. 722. *Refd.* *Lord v. Lee* (1868), L. R. 3 Q. B. 404.

**707. — Consent to order for enlargement.**—By a judge's order, all matters in difference in a cause were referred to an arbitrator, so as the award should be made on or before a certain day, or on or before such further or ulterior day, as he should from time to time appoint & signify in writing under his hand, to be indorsed on the order, & as the ct. or a baron thereof might order. The arbitrator made an enlargement, but it was not confirmed by a judge's order, & afterwards two orders for enlargement were made by a baron of the ct., with the consent of the parties, but these were not indorsed by the arbitrator:—*Held*: an award made before the expiration of the time limited by the last order was valid.—*BENWELL v. HINXMAN* (1835), 1 Cr. M. & R. 935; 3 Dowl. 500; 5 Tyr. 509; 4 L. J. Ex. 99; 149 E. R. 1360.

**708. Necessity for notice.**—Where an award appears to have been made out of the time originally given to the arbitrator by the rule of ct., but the rule reserved to him the power of enlarging the time, it is not enough for obtaining an attachment for non-performance of the award that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit, & it should also appear that deft. had notice of such enlargement of the time within which the award was made, when served with the rule for the attachment.—*DAVIS v. VASS* (1812), 15 East, 97; 104 E. R. 781.

*Annotations*:—*Consd.* *Wohlenberg v. Lageman* (1815), 6 Taunt. 251. *Refd.* *Re Smith & Reeves* (1837), 5 Dowl. 513; *Barton v. Ranson* (1838), 1 Horn. & H. 11; *Re Dodington* (1839), 5 Bing. N. C. 591.

**709. —**—If the day for making the award have elapsed without any award made, the ct. will not grant an attachment for disobedience to the order unless notice of the enlargement of the time have been served upon the party in default.—*HILTON v. HORWOOD* (1814), 1 Marsh. 66.

**710. — Knowledge sufficient—Umpire.**—An umpire may enlarge the time for making the award though the time for entering on his umpirage has not arrived.

Notice in writing or in any particular form of the enlargement of the time for making the award by the umpire is not necessary, knowledge, not

notice, of the fact being all that is required.—*Re DODINGTON & BAILWARD* (1839), 5 Bing. N. C. 591; 7 Dowl. 640; 7 Scott, 733; 8 L. J. C. P. 331; 132 E. R. 1227.

*Annotation*:—*Apld.* *Kellett v. Tranmere L. B. of Health*, *Tranmere L. B. of Health v. Kellett* (1864), 34 L. J. Q. B. 87.

**711. Enlargement after death of party.**—By an order of reference the award was to be delivered to the parties, or, if they or either of them were dead before the making of the award, to their respective personal representatives on or before a given day, with liberty to the arbitrator to enlarge the time for making his award. Pltf. died before the award was made, & after his death the arbitrator enlarged the time for making the award:—*Held*: the award made within the enlarged time was good.—*TYLER v. JONES* (1824), 3 B. & C. 144; 4 Dowl. & Ry. K. B. 740; 107 E. R. 688.

*Annotations*:—*Consd.* *Clarke v. Crofts* (1827), 4 Bing. 143; *McDougal v. Robertson* (1827), 4 Bing. 435, Ex. Ch. *Refd.* *Bowker v. Evans* (1885), 33 W. R. 695, C. A.

### SUB-SECT. 3.—BY THE COURT.

*See, now, Arbitration Act, 1889, s. 9.*

**Statutory references.**—*See Part VI., post.*

**712. Order of reference silent.**—*Semble*: under Civil Procedure Act, 1833, s. 39, the ct. or a judge has power to enlarge the time for an arbitrator to make his award, although the order of reference does not contain any power to enlarge the time & there has been no revocation of the arbitrator's authority.—*POTTER v. NEWMAN* (1835), 2 Cr. M. & R. 742; 4 Dowl. 504; Tyr. & Gr. 29; 1 Gale, 373; 150 E. R. 314.

*Annotations*:—*Refd.* *Burley v. Stephens* (1836), 1 M. & W. 156; *Parbery v. Newnham*, *Newnham v. Parbery* (1841), 10 L. J. Ex. 169. *Mentd.* *Moore v. Darley* (1845), 1 C. B. 445.

**Under Lands Clauses Consolidation Act, 1845 (c. 18)—Under C. L. P. Act, 1854.**—*See* COMPULSORY PURCHASE OF LAND & COMPENSATION.

**Under Public Health Act, 1875 (c. 55)—Under C. L. P. Act, 1854.**—*See* PUBLIC HEALTH & LOCAL ADMINISTRATION.

— **Under Act of 1889.**—*See* PUBLIC HEALTH & LOCAL ADMINISTRATION.

**713. Civil Procedure Act, 1833, s. 39, applies generally.**—The power given to the ct. or a judge by the above sect. to enlarge the time for an arbitrator to make his award is general, & it is not confined to cases where there has been a revocation of the submission.—*BURLEY v. STEPHENS* (1836), 1 M. & W. 156; 4 Dowl. 770; 1 Gale, 374; Tyr. & Gr. 413; 5 L. J. Ex. 92; 150 E. R. 386.

*Annotations*:—*Refd.* *Newman v. Parbery*, *Parbery v. Newman* (1840), 5 Jur. 175. *Mentd.* *Nosotti v. Hudson* (1868), 37 L. J. C. P. 135.

**714. —**—*Semble*: the clause in the above sect., enabling the ct. or a judge to enlarge the time for making an award, applies generally & not merely to the case in which parties have attempted to revoke the arbitrators' authority (*LORD DEN-*

### PART II. SECT. 4, SUB-SECT. 3.

**d. Under 3 & 4 Vict. c. 105, s. 23.**—Under the above Act the ct. has power to extend the time, even where the arbitrators were able under the submission to extend the term & allowed it to expire without having so done.—*M'NEILL v. MACNEALE* (1848), 13 L. L. R. 154.—*IR.*

**e. Under 7 Will. 4, c. 3, s. 29.**—Though no power has been given by the

reference, the ct., notwithstanding, under the above Act, have power to enlarge in their discretion.—*JONES v. RUSSELL* (1849), 5 U. C. R. 303.—*CAN.*

**f. Under Common Law Procedure Act, 1856—Jurisdiction of Court of Chancery.**—The Ct. of Ch. has jurisdiction under the above Act to enlarge the time for making a final award.—*WRIGHT v. GRIFFIN* (1874), 1. R. 8 Eq. 560.—*IR.*

**g. Under R. S. O., 1887 (c. 53), s. 43—Grounds for granting.**—The ct. has jurisdiction under the above Act to enlarge the time for making an award upon voluntary submission, after the making of the award; it is "good cause" for so enlarging that the arbitrators did all they could to enlarge, but were unable to get the original submission whereon to make the indorsement.—*Re CLEMENT & DIXON* (1897), 17 P. R. 455.—*CAN.*

**Sect. 4.—Enlargement of time: Sub-sect. 3.]**

MAN, C.J.).—*Re SALKELD & SLATER & HARRISON* (1840), 12 Ad. & El. 767; 4 Per. & Dav. 732; 10 L. J. Q. B. 22; 113 E. R. 1005.

**715. When power given to arbitrator.]—*Semble*:** Civil Procedure Act, 1833, s. 39, is confined to cases where no power is given to the arbitrator to enlarge the time for making an award.—*DOE d. JONES v. POWELL* (1839), 7 Dowl. 539; 1 Will. Woll. & H. 553; 3 Jur. 41.

**Annotation:—***Reid. Parbery v. Newnham, Newnham v. Parbery* (1840), 7 M. & W. 378.

**716. —.]—**Where a cause had been referred at *Nisi Prius*, & no step had been taken from May, 1837, to Jan., 1841, & the arbitrator had inadvertently omitted to enlarge the time for making his award, the ct. refused to interfere. *Semble*: where an arbitrator has power to enlarge the time, & omits to exercise his power, the cts. have no authority to enlarge the time under Civil Procedure Act, 1833, s. 39 (*TINDAL, C.J.*).—*LAMBERT v. HUTCHINSON* (1841), 2 Man. & G. 858; 3 Scott, N. R. 221; 10 L. J. C. P. 213; 133 E. R. 991.

**717. Beyond time limited by submission.]—**The provisions of Civil Procedure Act, 1833, s. 39, enable a judge to enlarge the time for making an award upon a submission which is within the Act of 1698 to a period beyond that to which the power of the arbitrator to enlarge is limited by the submission.—*PARKES v. SMITH* (1850), 15 Q. B. 297; 19 L. J. Q. B. 405; 15 L. T. O. S. 223; 14 Jur. 761; 117 E. R. 470.

**Annotations:—***Consd. Re Ward & Secretary of State for War* (1862), 32 L. J. Q. B. 53. *Mentd. Collins v. Collins* (1858), 26 Beav. 306; *Ex p. Glaysher* (1864), 3 H. & C. 442; *Wishart v. Fowler* (1864), 3 New Rep. 373; *Re Newton & Hetherington* (1865), 19 C. B. N. S. 341; *Commings v. Heard* (1869), L. R. 4 Q. B. 669.

**718. After expiry of time limited by submission.]—**By a submission in writing the award was to be made within a month, or within such further time (not exceeding three months from the date of the submission) as the arbitrator should enlarge the time to. The award not having been made within the three months:—*Held*: a judge, in his discretion, had power to enlarge the time under C. L. P. Act, 1854, s. 15.—*DENTON v. STRONG* (1874), L. R. 9 Q. B. 117.

**Annotation:—***Apld. Re May & Harcourt* (1881), 13 Q. B. D. 688.

**719. —.]—**The ct. has power, under Civil Procedure Act, 1833, s. 39, to enlarge the time for an arbitrator to make his award where the arbitrator, having power to do so, has allowed the time limited by the submission for making the award to elapse without doing so.—*PARBERY (PARBURY) v. NEWNHAM (NEWMAN), NEWNHAM (NEWMAN) v. PARBERY (PARBURY)* (1841), 7 M. & W. 378; 9 Dowl. 288; 10 L. J. Ex. 169; 5 Jur. 175; 151 E. R. 812.

**Annotations:—***Apld. Leslie v. Richardson, Richardson v. Leslie* (1848), 6 C. B. 378. *Reid. Bowen v. Williams* (1848), 3 Exch. 93; *Watson v. Bennett* (1860), 3 L. T. 20;

**718 i. After expiry of time limited by submission.]—**A suit was referred to an arbitrator, who did not make his award within the period limited for that purpose. After that period had expired, an application was made for its extension, both parties consenting; the application was granted, & the award was made within the time so extended:—*Held*: the order extending the time was not illegal.—*LAKSHMINARASIMHAM v. SOMASUNDARAM* (1892), L. L. R. 15 Mad. 384.—**IND.**

**718 ii. — Loss of papers.]—**An arbitrator having failed, owing to the loss of the papers in the cause, to make his award within the time limited, a judge

extended the time.—*JOHNSTON ANGLIN* (1869), 5 P. R. 62.—**CAN.**

**718 iii. — Statutory period.]—**The ct. has power to enlarge the time for making an award, although the same has not been made within the statutory time limit.—*Re TORONTO CITY & SCOTT* (1880), 3 P. R. 318.—**CAN.**

**718 iv. — Submission inoperative.]—**If the period fixed for an award has expired without any report having been made, the submission becomes inoperative, & the ct. cannot thereafter grant an extension of the delay.—*BEAUDOIN v. DUBRULE* (1901), Q. R. 20 S. C. 575.—**CAN.**

*Wishart v. Fowler* (1864), 3 New Rep. 373; *Nosotti v. Hudson* (1869), L. R. 3 C. P. 293.

**720. —.]—**The ct. has power under Civil Procedure Act, 1833, s. 39, to enlarge the time for making an award where the arbitrator, to whom such a power has been given, inadvertently omits to exercise it.—*LESLIE v. RICHARDSON, RICHARDSON v. LESLIE* (1848), 6 C. B. 378; 17 L. J. C. P. 324; 12 L. T. O. S. 173; 12 Jur. 730; 136 E. R. 1297.

**Annotations:—***Apld. Edward v. Davies* (1854), 23 L. J. Q. B. 278. *Reid. Bowen v. Williams* (1848), 3 Exch. 93; *Wishart v. Fowler* (1864), 3 New Rep. 373.

**721. —.]—**Arbitrators were to award by June 25, with liberty to them to enlarge their time, but not to exceed Aug. 31; if they did not award within the time limited for them, the matters were to be determined by an umpire, who was to make his award within two months from his appointment, with liberty to him to enlarge his time, but not exceeding another two months. On Apr. 20 the arbitrators appointed an umpire, & in the appointment stated that his duties should commence officially on Sept. 1 & should terminate before Jan. 1 following. The arbitrators could not agree on an award. The umpire did not enlarge his time, & Oct. 31 passed. The ct., without deciding as to the validity or effect of the umpire's appointment, granted a rule enlarging the time of the umpire for making the award until the end of Dec.—*Re JOHNSON & COLLIE (COLLEY)* (1854), 24 L. J. Q. B. 63; 3 W. R. 76.

**722. — Reference under Public Health Act, 1875 (c. 55).]**—The above Act, s. 180 (9), deals only with the power of the arbitrators or umpire to extend the time, & does not affect the jurisdiction of the ct. Under the Act of 1889, s. 9, the ct. or a judge has jurisdiction to extend the time for making an award under Public Health Act, 1875, although the time for making the award has expired. *Re Mackenzie & Ascot Gas Co.* (1886), 17 Q. B. D. 114, overd.—*KNOWLES & SONS, LTD. v. BOLTON CORPN.*, [1900] 2 Q. B. 253; 69 L. J. Q. B. 481; 82 L. T. 229; 48 W. R. 433; 16 T. L. R. 283, C. A.

**723. After award made.]—**Pursuant to the power given by an order of reference at *Nisi Prius*, an arbitrator enlarged the time for making his award. The case proceeded, & the parties attended before the arbitrator after the time specified in the enlargement had expired. Neither party was aware that the arbitrator had omitted to keep the time enlarged. The award was made in favour of pltf. Two terms having further elapsed since the award was made, pltf. proceeded to tax his costs, on which occasion deft. discovered the want of the enlargement & objected that the award was bad. The ct., on the application of pltf., enlarged the time for making the award under Civil Procedure Act, 1833, s. 39.—*Re BROWNE (BROWN) & COLLYER* (1851), 2 L. M. & P. 470; 20 L. J. Q. B. 426; 15 Jur. 881.

**Annotation:—***Consd. Lord v. Lee* (1868), L. R. 3 Q. B. 404.

**718 v. — Previous extension by consent.]—**The time for making an award having been extended by the consent of the parties, & the written submission kept in force, an order was made, long after the time had expired, further extending the time.—*Re SOURIS SCHOOL DISTRICT CORPN.*, No. 285, & *BULLOCK* (1914), 27 W. L. R. 751.—**CAN.**

**723 i. After award made.]—**When once an award has been delivered, it is no longer competent to the ct. to grant further time, or to enlarge the period for the delivery of the award under s. 514 of the Code of Civil Procedure.—*HAR NARAIN SINGH v. CHAUDHRAIN BHAGWANT KUAR* (1887), L. L. R. 10 All. 137; L. R. 18 I. A. 355.—**IND.**



**724.** —.]—By a submission to arbn., which might be made a rule of ct., the time for making the award was limited to a day named, or such further day, not exceeding two calendar months from the date of the submission, as the arbitrator might appoint. The arbn. was closed before the day named, & the arbitrator, also before the day named, enlarged the time for making the award, but to a day later than the two months. The arbitrator made his award within the enlarged time, but after the two months:—*Held*: the ct. or a judge had power afterwards to enlarge the time for making the award under Civil Procedure Act, 1833, s. 39.—*Re WARD & SECRETARY OF STATE FOR WAR* (1862), 32 L. J. Q. B. 53; 11 W. R. 88.

*Annotations*:—*Consd.* Lord v. Lee (1868), L. R. 3 Q. B. 404; *Re Dare Valley Ry. Co.* (1869), 4 Ch. App. 554, n.

**725.** —.]—By a submission in writing the time within which the award was to be made was fixed at one month. The submission contained no power to enlarge the time. The award was in fact made after the expiration of the month:—*Held*: the ct. had power subsequently to the making of the award to enlarge the time under C. L. P. Act, 1854, s. 15.—*MAY v. HARCOURT* (1884), 13 Q. B. D. 688.

**726.** —.]—The ct. has power, by the virtue of C. L. P. Act, 1854, s. 15, to enlarge the time for making an award where a cause has been referred by a judge's order under s. 4, notwithstanding more than three months has elapsed since the arbitrator was appointed, & he has made a void award after the expiration of such three months.—*WATSON v. BENNETT (BEAVAN)* (1860), 3 L. T. 20; 6 Jur. N. S. 637; 8 W. R. 612.

**727.** —.]—The arbitrators appointed under a submission (with no power of extending the time for making the award), which was made a rule of ct., having made their award after the time specified, the ct. under Civil Procedure Act, 1833, s. 39, & C. L. P. Act, 1854, s. 8, enlarged the time & remitted the matter back to the arbitrators.—*Re WARNER & POWELL* (1866), L. R. 3 Eq. 261; *sub nom. Re WALTON SHORE ROAD, ESSEX, Re WARNER & POWELL*, 15 W. R. 303.

**728.** —.]—An arbitrator, under a submission by agreement in writing which contained no limit of time, made his award more than three months after he had entered upon the reference, & a judge afterwards enlarged the time to a subsequent day; & the award was taken up before that day, & an action brought upon it:—*Held*: (1) the judge had power to enlarge the time after the award had been made, & the effect of the enlargement was the same as if it had been made by consent of the parties, viz., to ratify what had been previously done by the arbitrator without authority; (2) the award was valid.—*LORD v. LEE* (1868), L. R. 3 Q. B. 404; 9 B. & S. 269; 37 L. J. Q. B. 121; 16 W. R. 856.

*Annotations*:—*Consd.* May v. Harcourt (1884), 13 Q. B. D. 688; Knowles v. Bolton Corpn., [1900] 2 Q. B. 253, C. A.

**729 i. After death of party.**—A submission provided that the death of either party should not operate as a revocation of the power of the arbitrator; there was no provision for an appeal from his award. The arbitrator allowed the time for making his award to run out before entering on the reference. One party died after the submission, & the survivor applied to the ct. to enlarge the time:—*Held*: the death & absence of the right of appeal would not warrant the ct. in refusing to enlarge the time.—*Re CURRY* (1888), 12 P. R. 437.—*CAN.*

**k. Application to enlarge — Made by assignees of bankrupt party.**—A. & B. submitted all matters in dispute to arbn. B. became bkpt. after arbn. had

been entered upon, & before any award had been made; the arbitrator had inadvertently allowed the period to expire without enlargement. The assignees of B., without having become privy to the proceedings under the submission, moved the ct., under C. L. P. Act (Ireland), 1856, s. 18, to enlarge the time for making the award:—*Held*: the ct., even if it had jurisdiction, would not enlarge the time, there being no mutuality between A. & the assignees of B.—*GAFFNEY v. KILLEN* (1861), 12 I. C. L. R. App. xxv.; 6 Ir. Jur. 191.—*IR.*

**l. — What must be shown.**—On applying for an order to enlarge the time, the original submission should be produced, or if in custody of the opposite

*Mentd.* Durant v. Roberts & Keighley, Maxsted, [1900] 1 Q. B. 629, C. A.

**729. After death of party.**—An order of reference gave power to the arbitrators to examine the parties. The time was enlarged twice; & the second time the period for making the award was allowed to expire, & afterwards deft. died. The umpire refused to proceed with the award, but, on a summons before Williams, J., an order was made enlarging the time, & the award was made:—*Held*: the judge having made an order to enlarge the time after the death of one of the parties, no opposition being made before the judge, the ct. would not afterwards, on the ground that there was no cause existing upon which the order could operate, set such order aside.—*BOWEN v. WILLIAMS* (1848), 3 Exch. 93; 6 Dow. & L. 235; 12 L. T. O. S. 199; 154 E. R. 770.

*Annotation*:—*Refd.* Wishart v. Fowler (1864), 3 New Rep. 373.

**730.** —.]—A cause & all matters in difference between two partners were referred by order of *Nisi Prius* to an arbitrator, who was to make his award on or before Aug. 24, 1852, or on or before such ulterior day as he might indorse on the order. In case of the death of either party, the award was to be delivered to the personal representative. When pltf. was about to be examined before the arbitrator an adjournment was agreed to with a view to a compromise, & Aug. 24 passed without any enlargement of time by the arbitrator. Deft. afterwards refused to consent to any enlargement. In June, 1853, pltf. died. His extrix. was desirous of proceeding in the reference, & applied to the ct. to enlarge the time. Deft. opposed the enlargement, & charged in his affidavit that pltf. had received large sums of money on account of the partnership which he had not brought into account:—*Held*: (1) the ct. had power to enlarge the time; (2) in the circumstances, in the exercise of its discretion, an enlargement should be refused.—*EDWARDS v. DAVIES* (1854), 23 L. J. Q. B. 278; 23 L. T. O. S. 97; 18 Jur. 448; 2 W. R. 464; 2 C. L. R. 681.

**731. After long delay.**—A cause was referred to arbn. in 1846; the parties delayed to proceed with the reference, & the arbitrator did not enlarge the time beyond Easter term, 1850. The ct. refused to enlarge the time under Civil Procedure Act, 1833, to Michaelmas term, 1852, defts. refusing to accede to such enlargement.—*ANDREWS v. EATON* (1852), 7 Exch. 221; 21 L. J. Ex. 110; 18 L. T. O. S. 260; 155 E. R. 925.

**732. Form of order.**—*Held*: an order for enlargement made under C. L. P. Act, 1854, s. 15, was not invalid for omitting to state any cause for making it; & if there was no application to set aside such order, & the award was made within the enlarged time, an objection to the award on the ground of such omission in the order could not be sustained.

*Semble*: Civil Procedure Act, 1833, s. 39, was

party, it must be shown that he refused to give it up, & it is not sufficient that the party applying swears merely that he cannot procure it.—*JOHNS v. FURZE* (1864), 1 Ch. Ch. 260.—*CAN.*

**732 i. Form of order—Motion for three months—Enlargement for two—Costs.**—On motion that the time be extended for three months, the time was extended for two months with costs of the motion as costs in the cause.—*HAZELTON v. CLEMENTS* (1893), 7 I. L. T. Jo. 429.—*IR.*

**m. Substantial review of judge's order refusing enlargement.**—A judge refused to make an order under s. 8 of Arbn. Act enlarging the time, on the ground that there was no submission, & dismissed the application with costs;



**Sect. 4.—Enlargement of time: Sub-sects. 3 4.**  
**1. 1.]**

not repealed by C. L. P. Act, 1854, s. 15.—*Re BURDON* (1858), 27 L. J. C. P. 250; 31 L. T. O. S. 164; 6 W. R. 656.

*Annotation*:—*Apld.* *Ward v. Secretary-at-War* (1862), 11 W. R. 88.

**733.** —.].—An order for enlarging the time for making an award as to matters in difference was intituled in a cause in the Queen's Bench, which was at an end:—*Held*: the title was mere surplusage, & did not invalidate the order.—*OLDFIELD v. PRICE* (1859), 6 C. B. N. S. 539; 141 E. R. 568.

**SUB-SECT. 4.—EFFECT OF ENLARGEMENT.**

**734. Enlargement by mutual consent—Effect as regards penalty in bond for performance.]—**Debt on bond. The bond was a common arbn. bond, in which the time was limited for the arbitrator to make his award. The declaration stated that the time was afterwards, by the mutual consent of both parties, enlarged, within which enlarged time the arbitrator made his award; & it then stated the breach, etc.:—*Held*: (1) debt. had bound himself to abide by an award under a penalty, if made within a given time, & that could never extend the penalty to an award made after that time under a new agreement; (2) there must be judgment for debt.—*BROWN v. GOODMAN* (1789), 3 Term Rep. 592, n.; 100 E. R. 750.

*Annotations*:—*Apld.* *Thompson v. Brown* (1817), 7 Taunt. 656. *Distd.* *Greig v. Talbot* (1823), 2 B. & C. 179. *Apld.* *R. v. Bingham* (1829), 3 Y. & J. 101.

**735.** —.].—Debt on a bond conditioned for the performance of an award, to be made within a limited time. The declaration, after setting out the condition, stated that before that time expired the parties to the bond, by deed, agreed to give the arbitrators further time for making the award, & that an award was made within the extended time, & alleged non-performance:—*Held*: the action was maintainable upon the bond.—*GREIG v. TALBOT* (1823), 2 B. & C. 179; 107 E. R. 350.

*Annotation*:—*Expld.* *R. v. Bingham* (1829), 3 Y. & J. 101.

**736. — Terms of original submission continued—Attachment.]—**Where parties, by an indorsement in general terms on the bonds of submission to arbn., agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference, amongst others, that the submission for such enlarged time

the ct., without interfering with the judge's order, made a substantive order enlarging the time.—*Re FENWICK & PORT JACKSON CO-OPERATIVE S. CO.* (1897), 18 N. S. W. L. R. 405.—**AUS.**

**n. Enlargement not presumed from order of court granted subsequently.]—**The mere fact that the ct. has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given.—*CHUBA MAL v. HARI RAM* (1886), 1 L. R. 8 All. 548.—**IND.**

**o. S. P. BHUGWAN DASS MARWARI v. NUND LALL SEIN** (1885), 1 L. R. 12 Calc. 173.—**IND.**

**PART II. SECT. 4, SUB-SECT. 4.**

**734 i. Enlargement by mutual consent.]—**When the time for making an award is enlarged by mutual deed of the parties, the effect will be the same as if the enlarged time had been that originally

inserted in the submission.—*FERGUSON v. MUNRO* (1845), 2 Kerr. 660.—**CAN.**

**734 ii. — Not renewal of oversman's appointment.]—**A power in parties to a submission to renew it will not, when exercised, renew an appointment of an oversman by the arbiters, which had fallen on expiry of the reference.—*GLASGOW, BARRHEAD & NEILSTON RY. CO. v. NITSHILL COAL CO.* (1850), 7 Bell Sc. App. 325.—**SCOT.**

**734 iii. — Original order of reference continued.]—***OAKES v. HALIFAX CITY* (1879), 4 S. C. R. 640.—**CAN.**

**p. Enlargement by arbitrators.]—**An award may be made before the time to which the arbitrators have enlarged.—*TRACEY v. HODGEST* (1851), 7 U. C. R. 5.—**CAN.**

**q. Enlargement by umpire — Renews arbitrators' authority.]—**After a submission had been prorogated, the arbiters devolved two points on which

shall be made a rule of ct., & the party is liable to an attachment for non-performance of an award made within such enlarged time under the Act of 1698.—*EVANS v. THOMSON (THOMPSON)* (1804), 5 East, 189; 1 Smith, K. B. 380; 102 E. R. 1042.

*Annotations*:—*Consd.* *Greig v. Talbot* (1823), 2 B. & C. 179; *R. v. Bingham* (1829), 3 Y. & J. 101. *Apld.* *Re Smith & Blake* (1838), 1 Will. Woll. & H. 311. *Reid.* *Gwynne v. Davy* (1840), 1 Man. & G. 857.

**737. — New submission.]—***Appls.* sought to set aside an award on the ground that the authority of the arbitrator had expired before it was executed:—*Held*: as, by mutual consent of both parties, the time had been enlarged & a fresh submission thereby entered into, giving the arbitrator power further to enlarge the time, & *appls.* had continued to attend the arbitrator & acquiesced in his authority till the *interim* award was executed, there was no ground for objecting that the authority of the arbitrator had ceased before he executed his final award.—*CALEDONIAN RY. CO. v. LOCKHART* (1860), 3 Macq. 808; 3 L. T. 65; 6 Jur. N. S. 1311; 8 W. R. 373, H. L.

*Annotations*:—*Apld.* *Palmer v. Met. Ry. Co.* (1862), 31 L. J. Q. B. 259. *Reid.* *Ringland v. Lowndes* (1864), 17 C. B. N. S. 514. *Mentd.* *Bagnall v. L. & N. W. Ry. Co.* (1862), 1 H. & C. 544, Ex. Ch.; *Stone v. Yeovil Corpn.* (1876), 1 C. P. D. 691; *Bottomley v. Ambler* (1877), 38 L. T. 545, C. A.; *R. v. Poulter* (1887), 20 Q. B. D. 132; *Holliday v. Wakefield Corpn.*, [1891] A. C. 81, H. L.; *R. v. Master Manley-Smith* (1893), 63 L. J. Q. B. 171.

**738. — —.]—***Semble*: the attendance of the parties before the arbitrator after the three months mentioned in C. L. P. Act, 1854, s. 15, had expired, & their assent to an indefinite adjournment for the purpose of his making the award, might amount to evidence of a new parol submission for an award to be made in any reasonable time.—*WATSON v. BENNETT* (1860), 5 H. & N. 831; 157 E. R. 1412; *sub nom.* *BENNETT v. WATSON*, 29 L. J. Ex. 357.

*Annotation*:—*Mentd.* *Lord v. Lee* (1868), 9 B. & S. 269.

**739. Enlargement by order of judge—Effect as regards surety for performance.]—**When an attorney undertook to pay the sum which should be awarded to be paid by his client in a particular reference, the arbitrator being to make his award by a particular day, but did not do so, & a judge's order for enlarging the time was made by consent, the attorney acting on that occasion for his client:—*Held*: he was discharged from his undertaking, he not having recognised it after the original terms for making the award had expired.—*STAITE v. HADDON* (1841), 9 Dowl. 995.

**740. — Effect as regards mutual promises to perform award.]—**In an action for non-performance of an award, the declaration, after

they differed on an oversman. The prorogation current at the date of the devolution being about to expire, the oversman further prorogated the submission, & eventually the arbiters issued a decree. In a reduction of this decree on the ground (*inter alia*) of its being issued beyond year & day from the date of the last prorogation by the arbiters themselves:—*Held*: the prorogation by the oversman was sufficient to keep alive the submission, to the effect of enabling the arbiters to pronounce such a decree.—*LANGS v. BROWN & FERGUSON* (1852), 2 Stuart. 29.—**SCOT.**

**739 i. Enlargement by order of judge—Admission that time had not expired when order made.]—**A rule, issued as of Easter Term generally, to enlarge until the last day of the term relates back to the first day of term, & operates as an admission that the time had not then expired.—*HAWKE v. DUGGAN* (1849), 5 U. C. R. 636.—**CAN.**

stating that, on Apr. 16, an action for goods sold, etc., & all matters in difference, had been referred, with liberty to the arbitrator to enlarge the time to May 1, contained an averment of mutual promises to perform the award. The declaration then alleged that the time had been enlarged by two judges' orders to May 21 & 29, & that, on the latter day, the award was made. Deft. pleaded that the arbitrator did not make any award within the time for making it under the order of reference, but at a later period:—*Held*: the order for the enlargement of the time did not affect the original promise.—*ARMITAGE v. COATES* (1849), 4 Exch. 641; 19 L. J. Ex. 95; 14 L. T. O. S. 256; 154 E. R. 1371.

**741. Rule of court—Recognisance.**—The condition of a recognisance, returned, filed, & enrolled as of record, cannot be varied by a rule of ct.—*R. v. BINGHAM* (1829), 3 Y. & J. 101; *affd.* (1830), 1 Cr. & J. 245, Ex. Ch.

**742. Enlargements to be considered part of submission.**—The enlargements of the time for making an award are to be considered as part of the submission.—*Re SMITH & BLAKE* (1838), 1 Will. Woll. & H. 406; 2 Jur. 1015.

**743. How pleaded.**—An allegation that the time for making the award was in due manner enlarged, to wit, until a certain day, does not render it necessary to prove that the time was enlarged till that day.—*SWINFORD v. BURN* (1818), Gow, 5.

*Annotations*:—*Reid. Hoggins v. Gordon* (1842), 3 Q. B. 466; *Crampton & Holt v. Ridley* (1887), 20 Q. B. D. 48.

## SECT. 5.—REMUNERATION OF ARBITRATORS AND UMPIRE.

ARBITRATION ACT, 1889, Sched. I. (i).—*The costs of the reference & award shall be in the discretion of the arbitrators or umpire, who may direct to & by whom & in what manner those costs or any part thereof shall be paid, & may tax or settle the amount of costs to be so paid or any part thereof, & may award costs to be paid as between solicitor & client.*

### SUB-SECT. 1.—HOW FIXED.

**744. At common law—No powers unless specifically granted.**—An award was set aside for so much as the arbitrators, without authority, had directed to be paid for their own expenses.—*GEORGE v. LOUSLEY* (1806), 8 East, 13; 103 E. R. 249.

*Annotations*:—*Reid. Smith v. Reeves* (1836), 2 Har. & W. 306; *Richardson v. Worsley* (1850), 5 Exch. 613. *Mentd.* *Wohlenberg v. Lageman* (1815), 6 Taunt. 251; *Re Coombs, Freshfield & Fernley* (1850), 4 Exch. 839.

**745. ———.**—Submission to arbn. by pltf's. on the one part, & defts on the other, reciting differences, & that actions had been commenced

by pltf's. against defts. & it was agreed to refer same to the award of two persons named as arbitrators, & such third person as they should choose, & that the award of the arbitrators, or any two of them, should be binding, & that the costs of the actions so commenced, & the costs & charges of the submission & of the award to be made in pursuance thereof, & all other expenses occasioned thereby, & of making the submission a rule of ct., should be borne & paid by the parties, as the arbitrators, or any two, should, by their award, direct. The arbitrators awarded that the sum of £230 8s. was due from defts. to pltf's. & that out of the sum defts. should pay to them, the arbitrators, £93 12s., being the expenses of preparing the agreement of reference, & their award, & for their charge, trouble, & attendance upon the reference & arbn., & certain costs & charges which they thereby awarded to be paid to the solrs. of pltf's. in respect of the actions so commenced as aforesaid, leaving the sum of £136 15s., the balance of the sum of £230 8s., which sum of £136 15s. they awarded should be paid by defts. to pltf's.:—*Held*: there would be danger in permitting arbitrators to award a definite sum, of which a part, including an indefinite allowance to themselves, was ordered to be paid to the arbitrators.—*ROBINSON v. HENDERSON* (1817), 6 M. & S. 276; 105 E. R. 1246.

*Annotations*:—*Folld. Taylor v. Brooke* (1846), 7 L. T. O. S. 109. *Consd. Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482, Ex. Ch.

**746. ———.**—An arbitrator or umpire has no power to fix his own fee in the award, & to make the taking up of the award conditional upon the payment of the fee, unless the submission specifically give him that power.

Certain matters in difference between A. & B. were referred to two arbitrators, with power to appoint an umpire, & to make the submission a rule of ct., which was done. By the terms of the submission, the costs of the submission & award were to be in the discretion of the arbitrators or umpire, who by their award might direct by & to whom same should be paid. An umpire was appointed who made an award, & thereby found a certain sum to be due from A. to B.; & he awarded & directed all the costs (specifying the sum) of the submission & award, including therein the costs of taking up the award, to be paid by the party taking up the award, to be paid on a specified day by A. The fees of the arbitrators & umpire were included in the costs:—*Semble*: the award was bad.—*Re COOMBS & FRESHFIELD & FERNLEY* (1850), 4 Exch. 839; 154 E. R. 1456.

*Annotations*:—*Consd. Re Cardigan & Henderson* (1852), 22 L. J. Q. B. 83. *Appld. Barnes v. Hayward* (1857), 1 H. & N. 742; *Barnes v. Braithwaite & Nixon* (1857), 2 H. & N. 569. *Consd. Crampton & Holt v. Ridley* (1887), 20 Q. B. D. 48. *Reid. Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482.

**747. ——— Power to name in award.**—By an order of reference the costs of the award were to be in the discretion of the arbitrator. The award

## PART II. SECT. 5, SUB-SECT. 1.

**r. Legality of stipulating for or accepting remuneration.**—After the acceptance of a submission, the parties bound themselves on the requisition of the arbiters to make payment of remuneration to the arbiters, who were professional accountants, & who refused to give out their notes till this was done, not only for their professional services, but for the time & trouble bestowed by them in the matters falling under the submission, a third party being to fix the amount thereof in case of difference of opinion:—*Held*: the stipulation in question did not imply corruption.—*FRASER v. WRIGHT* (1838), 16 Sh. (Ct. of Sess.) 1049.—*SCOT*.

**a. ———.**—The fact that arbitrators at the suggestion & with the consent of all parties accept a remuneration for their trouble does not make the award illegal.—*SUBRAYA PRABHU v. MANJUNATH BHAKTA* (1906), 1 L. R. 29 Mad. 44.—*IND*.

**744 i. At common law — No powers unless specifically granted.**—Arbitrators have no power to fix the amount of their own fees.—*MCCULLOCH v. WHITE* (1872), 33 U. C. R. 331.—*CAN*.

**744 ii. ——— No power to add fees to award.**—An arbitrator has no right to add his fees to an award & make them a part thereof.—*GREEN v. CAN. NORTH RY. CO.* (1915), 30 W. L. R. 572; 7 W. W. R. 107 2.—*CAN*.

**744 iii. ——— Umpire's fees included in award.**—A matter was referred to two arbitrators, with power to select a third person to act with them in case they could not agree, the costs to be in their discretion. The arbitrators appointed A., who joined in the award, though it did not appear they had been unable to agree. An award was made in which was included an amount for the fees of A.:—*Held*: as the sum included for A.'s fees was so mixed up with the total sum awarded that it could not be separated from it, the award was bad.—*TURNER v. BURT* (1885), 24 N. B. R. 517.—*CAN*.

**b. Arbitration Act, 1908, s. 9.**—*LYDERS v. FYFE & CUNNING* (1909), 28 N. Z. L. R. 1000.—*N.Z.*



**Sect. 5.—Remuneration of arbitrators & umpire:**  
*Sub-sects. 1 & 2.]*

ordered "that the costs of the award shall be paid by deft., which costs I do assess at £39 17s. 4d." Part of this amount was for the arbitrator's remuneration, & part was the sum charged by an attorney, who had been employed by the arbitrator (a layman) in examining the witnesses & in framing the award, which was very special. Def't. had not applied to have the costs of the award taxed, & they had not been taxed. On a motion for an attachment to compel payment:—*Held*: (1) an arbitrator might, in the first instance, name the amount of his costs in the award; (2) his charges were not, as a matter of course, open to taxation, & if the party affected objected to them, he must, at all events, proceed with diligence to procure their taxation; (3) as the arbitrator was a layman, it was almost of necessity that an attorney should be employed, & as no objection to his being employed was made on the part of def't. during the reference, the latter must be taken to have assented to so reasonable a course.—*THRELFALL v. FANSHAW* (1850), 1 L. M. & P. 340; 19 L. J. Q. B. 334; 15 L. T. O. S. 210.

*Annotation*:—*Dbtd. Parkinson v. Smith* (1861), 30 L. J. Q. B. 178. My brother Wightman has expressed to me considerable doubts whether *Threlfall v. Fanshawe* is good law; others of the judges whom I have consulted have also expressed some doubt (*BLACKBURN, J.*).

**748.** —By an agreement of reference matters were referred to two arbitrators, & if they failed to make an award within a limited time, to an umpire. The costs of the reference & award & umpirage were to be in the discretion of the arbitrators & umpire respectively. The parties agreed that the umpire should sit with the arbitrators, so that, if they did not make an award, it would not be necessary for him to rehear the evidence. The arbitrators did not conclude the reference within the time limited. The parties then further agreed that the arbitrators should sit with the umpire, & assist him in taking the evidence, which they did. The award ordered the losing party to pay to the other the costs "of the umpirage & of this my award," & that each party should "pay their own costs of the reference other than the costs of my umpirage & of this my award." The umpire included the charges of the two arbitrators in his costs of umpirage & award, & same were paid by the successful party on taking up the award:—*Held*: the charges of the arbitrators were costs of the umpirage, & not costs of the reference, & the successful party was entitled to have such amount as was duly charged by the arbitrators, & paid by him on taking up the award, allowed on the taxation of costs, & to have same repaid to him by his opponent.—*ELLISON v. ACKROYD* (1850), 20 L. J. Q. B. 193; 16 L. T. O. S. 346.

**749.** —No power to fix own fees & costs.]—Disputes arising out of two partnerships were referred, by agreement, to an arbitrator, who was also appointed by the parties receiver of the property of one of the partnerships, & had power to get in the estate, & dispose of it as he might think best for the parties, & the costs of the reference & award were left to his discretion. The arbitrator concluded his award by certifying that he had deducted the costs of the award out of the moneys which he had received as receiver:—*Held*: the award was bad, because the arbitrator had no power to fix his own fees & pay his own costs out of the moneys he had received.—*ROBERTS v. EBERHARDT* (1858), 3 C. B. N. S. 482; 28 L. J. C. P. 74; 32 L. T. O. S. 36; 4 Jur. N. S. 898; 6 W. R. 793; 140 E. R. 829, Ex. Ch.

*Annotation*:—*Mentd. Medwin v. Ditcham* (1882), 47 L. T. 250.

**750.** Usual practice.]—It is true that an arbitrator cannot conclusively determine the amount of his own fee. But the invariable rule & practice of the profession, & I believe, of lay arbitrators also, is, that the arbitrator fixes, in the first instance, the amount of his own fee, & retains the award until such fee is paid (*WATSON, B.*).—*ROBERTS v. EBERHARDT* (1858), 3 C. B. N. S. 482; 28 L. J. C. P. 74; 32 L. T. O. S. 36; 4 Jur. N. S. 898; 6 W. R. 793; 140 E. R. 829, Ex. Ch.

*Annotation*:—*Mentd. Medwin v. Ditcham* (1882), 47 L. T. 250.

**751.** Whether award enforceable.]—By an agreement of reference between P. & S. costs were in the discretion of the arbitrator. The award directed that £149 5s. 7d., being the costs of the award, should be paid by the parties in the following proportions: that £25 should be paid by P. to certain attorneys forthwith & £124 5s. 7d., the residue, should be paid by S. in like manner, & if P. paid any part of the £124 5s. 7d., that S. should repay it to him. On an application by P. for a rule calling on S. to pay the several sums:—*Held*: as the arbitrator had fixed in the award the amount payable to himself the matter was too doubtful to grant a rule.—*PARKINSON v. SMITH* (1861), 30 L. J. Q. B. 178; 9 W. R. 340.

**752.** Under Act of 1889, s. 2—Must be ascertained or stated in award.]—The amount of the costs directed to be paid by the arbitrators or umpire, pursuant to Sched. I. (i.) of the above Act, must be ascertained & stated in & by the award itself; otherwise the costs of the reference & award, including the arbitrators' fees, are liable to taxation in the ordinary course.—*Re PREBBLE & ROBINSON*, [1892] 2 Q. B. 602; 67 L. T. 267; 57 J. P. 54; 41 W. R. 30; 36 Sol. Jo. 744.

*Annotation*:—*Refd. Re Cannings & Middlesex County Council*, [1907] 1 K. B. 51, C. A.

**753.** Fees of each arbitrator & umpire should be stated separately.]—In making his award, an umpire ought to specify separately the sum which he himself charges for his services, the sums similarly charged by the arbitrators, & the costs of the actual award.—*Re GILBERT & WRIGHT* (1904), 68 J. P. 143; *sub nom. GILBERT v. WRIGHT*, 20 T. L. R. 164; 48 Sol. Jo. 193.

**754.** —No power to make interlocutory orders as to fees.]—An arbitrator made an interlocutory order that pl'tf. & def't., parties to the arbn., should each pay half the arbn. fees & expenses as they should accrue from time to time, threatened to adjourn the proceedings *sine die* unless the costs were paid, & made further orders as to immediate payment of costs:—*Held*: the arbitrator had no jurisdiction to make these orders.—*SCHOFIELD v. ALLEN* (1904), 48 Sol. Jo. 176, C. A.

Under Light Railways Act, 1896 (c. 48).]—*See TRAMWAYS & LIGHT RAILWAYS.*

**755.** Award by umpire—Umpire's fees & arbitrators' fees should be separated.]—An umpire ought in his award to separate the sum which he awards to himself for his charges from the sum which he awards to the arbitrators for their charges.—*Re GILBERT & WRIGHT* (1904), 68 J. P. 143; *sub nom. GILBERT v. WRIGHT*, 20 T. L. R. 164; 48 Sol. Jo. 193.

**756.** Amount fixed in award excessive—Effect of.]—It is no ground for setting aside, or sending back, an award that the arbitrator has fixed the cost of his own award (the amount not being shown to be excessive).—*ROSE v. REDFERN* (1861), 10 W. R. 91.

**757.** — — —.]—The ct. will not send back an award to the arbitrators merely because their charges for making the award are excessive & are calculated on a principle different from that which



either of the parties believed they would adopt.—**BAKER v. STEVENS** (1866), 14 L. T. 448.

**758.** ———.]—Motion to set aside so much of an award as related to the costs of the award, on the ground that the arbitrators had exceeded their jurisdiction in fixing the amount of their own fees in & by the award, & that the sum was unreasonable & excessive. The application was dismissed.—*Re STEPHENS, SMITH & Co. & LIVERPOOL & LONDON & GLOBE INSURANCE Co.* (1892), 36 Sol. Jo. 464.

*Annotation* :—*Distd. Re Prebble & Robinson*, [1892] 2 Q. B. 602.

#### SUB-SECT. 2.—TAXATION OF ARBITRATORS' AND UMPIRE'S FEES.

**759. In what cases taxation—Amount named in award.**]—If arbitrators award an excessive sum to be paid to themselves, the ct. will refer it to the prothonotary to reduce it.—*MILLER v. ROBE* (1811), 3 Taunt. 461; 128 E. R. 182.

*Annotations* :—*Refd. Dossett v. Gingell* (1841), 3 Scott. N. R. 179; *Fernley v. Branson* (1851), 15 Jur. 354; *Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482.

**760.** ———.]—The amount of the fee which an arbitrator awards to be paid to himself for his award is examinable by the prothonotary.—*FITZGERALD v. GRAVES* (1814), 5 Taunt. 342; 128 E. R. 721.

*Annotations* :—*Apld. Dixie v. Alexandre* (1850), 15 L. T. O. S. 141. *Refd. Strutt v. Rogers* (1816), 2 Marsh. 524; *Dossett v. Gingell* (1841), 2 Man. & G. 870; *Fernley v. Branson* (1851), 15 Jur. 354; *Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482.

**761.** ———.]—Where an arbitrator directs a specific sum to be paid for his charges, the party called upon to pay them may, if he thinks them unreasonable, apply to the ct. to have them reduced or taxed.—*DIXIE v. ALEXANDRE* (1850), 15 L. T. O. S. 141.

**762.** ——— No power to tax.]—An arbn. clause in a policy provided that "the costs of the reference shall be in the discretion of the arbitrators, who shall award by whom & in what manner the same shall be paid." The arbitrators having included their remuneration in the award :—*Held* : the amount so fixed could not be taxed or otherwise disputed, except on the ground of their misconduct.—*Re STEPHENS, SMITH & Co. & LIVERPOOL & LONDON & GLOBE INSURANCE Co.* (1892), 36 Sol. Jo. 464.

*Annotation* :—*Distd. Re Prebble & Robinson*, [1892] 2 Q. B. 602.

**763.** — Power of court to compel.]—The ct. has no power to compel an arbitrator to submit his costs to taxation.—*WITHINGTON v. WREXHAM WATERWORKS Co.* (1884), 32 W. R. 1000.

**764.** — Excessive charges disallowed.]—An action was referred to arbn., the costs of the arbn. & award to abide the event. The arbitrators

awarded in favour of pltf., who, in order to take up the award, paid their charges, which were exorbitant. The master, on taxation of pltf.'s costs, refused to allow the full charge paid by pltf. :—*Held* : the excessive charge was properly disallowed.—*BARNES v. HAYWARD* (1857), 1 H. & N. 742; 156 E. R. 1400.

**765.** ———.]—A cause involving a claim to a right of way was referred to a barrister. The arbitrator went from London to Hastings to view the *locus in quo*, & the inquiry was concluded on the same morning on which the view took place. He had, however, been told that the inquiry would probably last two days. In taxing the costs between the parties, the master disallowed ten guineas of the arbitrator's charges for the award, which had been paid by pltf., who had taken it up, leaving £32 13s. The ct. referred back the taxation to the master, on the ground that the sum allowed was excessive.—*WEBB v. WYATT* (1857), 29 L. T. O. S. 129; 3 Jur. N. S. 496; 5 W. R. 570.

**766. What allowed—Queen's Counsel acting as arbitrator.**]—Where a Queen's Counsel acts as arbitrator the ordinary scale of fees applies as in other cases. But it is competent to the master, in his discretion, to increase the usual allowance where he thinks the usual allowance is insufficient.—*SINCLAIR v. GREAT EASTERN RY. Co.* (1870), L. R. 5 C. P. 135; 39 L. J. C. P. 165; 21 L. T. 752; 18 W. R. 491.

*Annotation* :—*Refd. Benton v. Lever* (1885), 1 T. L. R. 499.

**767.** — Fees of legal assessor assisting lay arbitrator—Discretion.]—A master, on taxation, disallowed the whole of the fees charged by a lay arbitrator for a legal assessor, to whose appointment the parties had neither consented nor objected :—*Held* : the ct. ought not to order the master to review his taxation, even though it were shown that he had failed to take any steps to ascertain what would have been a fair charge for the lay arbitrator to have made for his services.—*Re WESTWOOD, BAILLIE & Co. & CAPE OF GOOD HOPE GOVERNMENT* (1886), 2 T. L. R. 667.

**768.** — Professional assistance.]—Assuming the right of a lay arbitrator to avail himself of, & to charge for, professional assistance in preparing his award (as to which *qu.*), the charge must be reasonable; & where a lay arbitrator charged fifty guineas for four meetings, & the master declined, on taxation as between party & party, to allow anything in addition (except the stamp duty) for the charges of an attorney for preparing the award, a rule to review was refused.—*GALLOWAY v. KEYWORTH* (1854), 15 C. B. 228; 23 L. J. C. P. 218; 2 C. L. R. 860; 139 E. R. 408.

*Annotation* :—*Refd. Behren v. Bremer* (1854), 3 C. L. R. 40.

**769.** — Scale fee charges—Ex parte taxation.]—In proceedings to determine the value of land taken by a local authority for public purposes the umpire, in each of two arbn., in addition to usual charges for inspecting the land, & for hearing evidence,

#### PART II. SECT. 5, SUB-SECT. 2.

**759 i. In what cases taxation.**]—Arbitrators' fees may be referred to the master for taxation.—*SCOTT v. GRAND TRUNK RY. Co.* (1864), 10 L. C. L. J. 72.—CAN.

**759 ii.** — All cases.]—The fee of an arbitrator, whether named in the award or not, is subject to taxation.—*LAWRIE v. RUSSELL* (1852), 1 P. R. 65.—CAN.

**766 i. What allowed—Day's sitting.**—*R. S. O.*, 1887 (c. 53), *Schedule*.]—Upon the proper construction of the above schedule arbitrators are not entitled to charge as fees for a day's sitting, which extends beyond six hours, more than the

maximum amount fixed by the schedule for a single day's sitting.—*Re THORNBURY TOWN & GREY COUNTY* (1893), 15 P. R. 192.—CAN.

**766 ii.** — Barrister acting as arbitrator—Right to fees.]—An advocate who accepts the functions of an arbitrator is an arbitrator, & not an advocate; his services, therefore, should be remunerated in the same way as those of any other arbitrator in a similar matter.—*PROVINCIAL LIGHT, HEAT & POWER Co. v. VALOIS* (1908), 10 Q. P. R. 43.—CAN.

**766 iii.** — Reference from *Nisi Prius* to county court judge—Latter entitled to

*fee.*]—When a reference is made from *Nisi Prius* to a judge of a county ct. by name, adding his description, judge of a county ct., & not to him as judge of the county ct., he is entitled to his fees as such arbitrator.—*WOOD v. FOSTER* (1874), 6 P. R. 175.—CAN.

**766 iv.** — Time for considering award.]—On taxing the costs of an arbn. : *Held* : it was not the practice to allow a sole arbitrator for the time occupied in making up his mind, but when an arbn. was before a board of arbitrators a reasonable time should be allowed for.—*Re DINGWALL & CEDAR RAPIDS RY. Co.* (1914), 7 O. W. N. 540.—CAN.

**Sect. 5.—Remuneration of arbitrators & umpire:**  
**Sub-sects. 2, 3 & 4.]**

had charged a fee for the award, which was calculated on an *ad valorem* scale varying with the amount awarded, namely, 2½ per cent. up to £1,000, & 1½ per cent. above that amount. The taxing master, being of opinion that a scale fee could not properly be charged, allowed in each case a sum of 5 guineas, which was considerably less than the amount charged by the umpire. The local authority were willing to pay the amounts charged by the umpire, & passed a resolution to that effect & refusing to sanction any proceedings against the umpire to recover the amounts disallowed. On an application to vary the taxing master's certificate by allowing the amounts charged by the umpire:—*Held*: (1) it was the duty of the taxing master to tax all bills laid before him, & to look at them the more narrowly if the taxation was *ex p.*; (2) a scale fee was not in accordance with the practice of the office, & the application must be refused.—*Re JAMES & SONS*, [1903] W. N. 99.

*Annotations*:—*Distd. Re Evans*, [1905] 1 Ch. 290; *Re Porter*, *Amphlett & Jones*, [1912] 2 Ch. 98.

**770. Fees of umpire & his solicitor—Right to tax after payment.]**—An umpire, in an arbn. under Lands Clauses Consolidation Acts, for the purpose of assessing compensation payable upon a compulsory purchase of land, employed his solrs. to draw up the award. By the award he directed that the purchaser should pay to the vendor his costs of the reference & the costs of the award, including the umpire's own fee, & in addition the costs & expenses of & incidental to preparing & perfecting the award. The purchaser having, upon taking up the award, paid to the umpire's solrs. the amount demanded for the umpire's fee & their charges, applied in the K. B. Div. for an order for the delivery by the umpire's solrs. of their bill of costs & for its taxation under Solrs. Act, 1843 (c. 73), s. 38:—*Held*: (1) the bill of costs being between solr. & client, & the purchaser being a person not chargeable therewith who had paid it, the case fell within s. 38, & the impossibility of the purchaser knowing the effect of the award when he took it up constituted a "special circumstance," justifying the order for taxation after payment of the bill; (2) the application ought to have been made in & must be transferred to the Ch. Div.—*Re COLLYER-BRISTOW & Co.*, [1901] 2 K. B. 839; 70 L. J. K. B. 941; 50 W. R. 4; 45 Sol. Jo. 724, C. A.; *sub nom. Re COLLYER, BRISTOW & Co., CROSSLEY v. LOWESTOFT WATER & GAS Co.*, 85 L. T. 208, C. A.

**771 i. Review of taxation.]**—Where the master refused to tax an arbitrator's fee upon proof only that a note had been given to the arbitrator for the amount, a judge in chambers refused to interfere.—*TYRRELL v. WARD* (1862), 8 L. C. L. J. 21.—CAN.

**PART II. SECT. 5, SUB-SECT. 3.**

**773 i. Action—Against all parties to submission.]**—An arbiter is attorney of each of the parties who has recourse to arbn., & not only of the party who has named him. He has recourse for his fees & expenses against all parties who have agreed to the deed of arbn.—*MALO v. LAND & LOAN Co.* (1894), Q. R. 5 S. C. 483.—CAN.

**773 ii. — New arbitrator.]**—J., one of the arbitrators first appointed, resigned before the award was made, & a new arbitrator was appointed in his stead. The owner took up the award, paying the fees of all the arbitrators but J., who came in on an application by the railway co. under Railway Act, R. S. C., 1906 (c. 37), s. 199, to have

its costs of an arbn. taxed by the judge, & asked that his fees be paid:—*Held*: he could have no relief on such application, but must be left to his remedy, if any, against the owner by action.—*BLACKWOOD v. C. N. R.* (1910), 20 Man. L. R. 161.—CAN.

**776 i. — Express contract to pay.]**—Deft., N., contracted to build stores for deft., D., & deft., A., signed surety for N. It was agreed that disputes were to be referred. Disputes having arisen, all defts. signed a submission to arbn. N. saw pltf., X., & asked him to act as arbitrator. X. then stated to N. that he expected to be paid for his services. D. saw pltf., M., & asked him to act as arbitrator. M. then stated what fees he expected. The arbitrators met & appointed pltf., P., as umpire. The umpire & arbitrators held many meetings at which all defts. except A. attended, & at those meetings called the attention of those defts. to the expense they were incurring by prolonging the inquiry:—*Held*: (1) there was evidence of an express contract by N. to pay D., & A., as surety for N.,

**771. Review of taxation.]**—Where a cause has been referred to arbn., & an award made, the ct. will review the taxation of the costs between party & party, if they think the charges made by the arbitrator, even though a barrister, are excessive.

Unless arbitrators are reasonable in their charges the evils of arbn. will be greater than those of litigation (*POLLOCK, C.B.*).—*WEBB v. WYATT* (1857), 29 L. T. O. S. 129; 3 Jur. N. S. 496; 5 W. R. 570.

**772. Duty of taxing officer—Act of 1889, s. 15 (3).]**—A taxing officer, when determining the remuneration to be paid to a professional arbitrator under the above sub-sect., is not entitled, if the evidence all goes to show that, in the opinion of persons in the same profession, the charges made by the arbitrator are, for a person in his position in that profession, fair, to disregard that evidence & to reduce the remuneration to such an amount as is in his opinion fair.—*MASON, LTD. v. LOVATT* (1907), 23 L. R. 486; 51 Sol. Jo. 444, C. A.

**SUB-SECT. 3.—REMEDY TO RECOVER FEES.**

**773. Action.]**—*Held*: an action to recover a sum of money due for acting as an arbitrator on the part of deft., in a dispute which he had had with his partner, was not maintainable, & pltf. was not entitled to recover anything, unless he could prove an express promise.—*VIRAMY v. WARNE* (1801), 4 Esp. 47.

*Annotations*:—*Refd. Kennedy v. Broun* (1863), 13 C. B. N. S. 677; *Crampton & Holt v. Ridley* (1887), 20 Q. B. D. 48.

**774. —.]**—*Seemle*: an arbitrator may recover a compensation for his trouble.—*SWINFORD v. BURN* (1818), Gow, 5.

*Annotations*:—*Consd. Crampton & Holt v. Ridley* (1887) 20 Q. B. D. 48. *Refd. Hoggins v. Gordon* (1842), 3 Q. B. 466.

**775. — Third arbitrator.]**—Where an award is taken up by one party, & all the costs paid to two out of three arbitrators, the third arbitrator has no remedy against either party in the cause. *Seemle*: an arbitrator has no action for his fees.—*BURROUGHS v. CLARKE* (1831), 1 Dowl. 48.

**776. — Express promise to pay.]**—A declaration in *assumpsit* alleged that, before the promise, etc., a cause, wherein defts. were pltf. & G. was deft., was referred by judge's order to the award of pltf., A. & B., & such third person as they should appoint in writing, or any two of them; that

was equally bound; (2) M. was entitled to recover against D. & the umpire was entitled to recover against the three defts. *Qu.*: whether, in the absence of evidence of express agreement, an arbitrator can recover the amount of his fees.—*DEANE v. NICCOL, MORELL v. DIXON, POOLE v. DIXON* (1885), 6 N. S. W. L. R. 145.—AUS.

**776 ii. —.]**—When a submission to arbn. provides that the arbitrators are to be paid fees, & further provides when, how, & by whom they are to be paid, then, in the absence of some express agreement varying the terms of the submission, the fees cannot be recovered in any other way than that provided.—*WATKINS v. RAILWAY COMRS.* (1889), 10 N. S. W. L. R. 252.—AUS.

**776 iii. —.]**—Where there is evidence of an express promise, founded on good consideration, to pay an arbitrator for his services, it is misdirection to withdraw same from the jury.—*PINDER v. CRONKHITE* (1898), 34 N. B. R. 498.—CAN.



afterwards, & before the promise, etc., by a writing dated Jan. 5, 1841, A. & B. appointed pltf., C., to be the third arbitrator; that defts. afterwards, in consideration that pltf., at the request of defts., would take upon themselves the burden of the reference, promised pltf. to pay them their reasonable costs of the award as they should by their award appoint; that pltf. accepted the burden, etc., & within the time limited, made their award ready to be delivered to the parties, & thereby awarded, amongst other things, that defts. should pay pltf. a certain sum for their costs, the sum to be paid to pltf. immediately after the execution of the award, whereof defts. afterwards had notice; nevertheless, though the sum was a fair sum, & a reasonable time had elapsed before the commencement of the suit, defts. had not paid:—*Held*: (1) an express promise would be intended, & the action was maintainable; (2) the consideration as alleged was sufficiently definite, being the undertaking by pltf. of a known duty; (3) the award directing payment of costs “immediately after the execution of the award” must be construed to mean “within a reasonable time after notice”; (4) the contract was joint.—*HOGGINS v. GORDON* (1842), 3 Q. B. 466; 2 Gal. & Dav. 656; 11 L. J. Q. B. 286; 6 Jur. 895; 114 E. R. 586.

*Annotations*:—*Consd.* *Crampton & Holt v. Ridley* (1887), 20 Q. B. D. 48. *Refd.* *Veitch v. Russell* (1842), 3 Gal. & Dav. 198; *Kennedy v. Broun* (1863), 13 C. B. N. S. 677.

**777. — Implied promise to pay.**—The parties in a mercantile dispute agreed to refer their differences to arbitrators (who were not in the legal profession), or in case of disagreement to their umpire. The arbitrators disagreed, & appointed an umpire, who made his award:—*Semble*: there was an implied contract by the parties jointly to pay the arbitrators & umpire reasonable remuneration for their services.—*CRAMPTON & HOLT v. RIDLEY & Co.* (1887), 20 Q. B. D. 48; 57 L. T. 809; 36 W. R. 554.

*Annotation*:—*Distd.* *Brown v. Llandovery Terra Cotta Co.* (1909), 25 T. L. R. 625.

**778. — — —**—Certain disputes between defts. & another co. were by agreement referred to arbn. N. was appointed arbitrator by defts., & the pltf. was appointed arbitrator by the other co. to the reference. The two arbitrators having failed to agree, the reference devolved upon the umpire, who by his award directed defts. to pay pltf.’s charges, but he left pltf. to recover those charges from defts. The arbn. was subject to the Act of 1889:—*Held*: pltf., although not appointed as arbitrator by defts., could maintain an action against them for his charges, as there was an implied promise by the parties to the submission

jointly to pay the arbitrators & umpire for their services.—*BROWN v. LLANDOVERY TERRA COTTA CO., LTD.* (1909), 25 T. L. R. 625.

**779. Reference by order of court—Held recoverable under Act of 1889, s. 15 (3).**—Where neither party took up an award made in a reference under an order of the ct., which contained no term as to the arbitrator’s remuneration, & an order was made under the above sub-sect. assessing his fees:—*Held*: the arbitrator was entitled to recover the amount assessed by the master under the above sub-sect.—*WILLIS v. WAKELEY BROTHERS* (1891), 7 T. L. R. 604.

**780. Lien.**—Under Lands Clauses Consolidation Act, 1845 (c. 18), if a difference between a landowner & promoters of an undertaking has been referred to arbn., & an award made, the ct. will, under s. 35, compel the promoters by *mandamus*, at the landowner’s instance, to take up the award; & the promoters must, for that purpose, pay the fees due on the award, the arbitrators or umpire having a lien on the award for such fees, which the promoters are bound to satisfy, except so far as the obligation may be limited by s. 34.—*R. v. SOUTH DEVON RY. CO.* (1850), 15 Q. B. 1043; 20 L. J. Q. B. 145; 16 L. T. O. S. 149; 15 Jur. 464; 117 E. R. 754.

*Annotations*:—*Folld.* *R. v. Barton & Immingham Light Ry. Co., Ex p. Simon*, [1912] 3 K. B. 72. *Refd.* *R. v. L. & N. W. Ry. Co.*, [1899] 1 Q. B. 921, C. A.; *L. & N. W. Ry. Co. v. Walker* (1900), 82 L. T. 93, H. L.

**781. — — —**—Arbitrators whose award has not been taken up are privileged from producing as witnesses, on the *subpoena* of a party to the submission, the submission, the award or papers obtained by them from experts for their guidance; but they are bound to produce documents handed to them during the investigations by the party who calls them as witnesses; & any objection to the production of like documents belonging to other parties can be taken only by such parties, & not by the arbitrators.—*PONSFORD v. SWAINE* (SWAYNE) (1861), 1 John. & Ill. 433; 4 L. T. 15; 70 E. R. 816.

**782. Enforcement under Judgments Act, 1838 (c. 110), s. 18.**—Where an arbitrator directs a specific sum to be paid for his charges, payment thereof may be enforced under the above sect., if the party called upon to pay them does not apply to the ct. to have them reduced or taxed.—*DIXIE v. ALEXANDRE* (1850), 15 L. T. O. S. 141.

#### SUB-SECT. 4.—REMEDY OF PERSONS PAYING EXCESSIVE FEES.

**783. Payment under protest to take up award—No jurisdiction to order repayment.**—Where certain

**777 i. — Implied promise to pay.**—Though the office of arbiter was regarded as gratuitous & was so spoken of by the institutional writers, the circumstances under which arbitrations are now carried on are so different from those existing in former days that there may be cases in which an arbiter may have a claim for his fee when acting in an arbn. not under stat.—*MURRAY v. N. B. RY. CO.* (1900), 7 S. L. T. 341.—*SCOT.*

**777 ii. — — —**—One of the parties to an arbn. refused to pay his share of the arbiter’s fee, on the ground that as no remuneration had been stipulated for, the common law rule applied that the arbiter in such a case must be presumed to act without remuneration:—*Held*: that rule was not applicable to the modern conditions of business, & a professional man could no longer be presumed to give professional services gratuitously, & he was, therefore, entitled to remuneration.—*MACINTYRE BROTHERS v. SMITH* (1913), 50 Sc. L. R. 1.—*SCOT.*

**777 iii. — — — Presumption against arbitrators being entitled to fees.**—There is a presumption that an arbiter acts without claim for remuneration, but this presumption may be redargued by facts & circumstances.—*HENDERSON v. PAUL* (1867), 5 Macph. (Ct. of Sess.) 628.—*SCOT.*

**c. By order by court—Where award set aside.**—An award was set aside but not for any misconduct of the arbitrators. One party had paid his arbitrator, & the other arbitrator applied to the ct. under Arbn. Act, 1908, s. 22, for an order for payment of his fee:—*Held*: the arbitrator was entitled to be paid his expenses, & as one party had paid his own arbitrator, the ct. had power to order & should order the other party to pay his own arbitrator.—*Re SMITH (JOHN) & Co. & HARRIS (J.)* (1910), 30 N. Z. L. R. 389.—*N.Z.*

**d. Under Arbitration Act, 1908, s. 22.**—*LYDERS v. FYFE & CUNNING* (1909), 28 N. Z. L. R. 1000.—*N.Z.*

**e. By application to court for confirmation of order making fees condition precedent to hearing.**—There is nothing in the Civil Procedure Code which authorises arbitrators to apply to the ct. for confirmation of an order passed by them making payment of their fees a condition precedent to the hearing of a reference.—*STEEL v. ROBERTS* (1881), 1 L. R. 6 Calc. 809; 8 C. L. R. 439.—*IND.*

**780 i. Lien.**—The ct. refused to set aside an award on the ground that the arbitrators had desired it not to be delivered until the costs of making it were paid.—*GEE v. ATTWOOD* (1824), Tay. 119.—*CAN.*

**f. Waiver.**—*LYDERS v. FYFE & CUNNING* (1909), 28 N. Z. L. R. 1000.—*N.Z.*

#### PART II. SECT. 5, SUB-SECT. 4.

**g. Under R. S. O., 1887 (c. 53), s. 29—When provisions apply.**—An arbitrator is not brought within the punitive provisions of the above Act



**Sect. 5.—Remuneration of arbitrators & umpire:**  
4.

large fees were paid to arbitrators under protest, the arbitrators having declined to deliver their award until such payments were made:—*Held*: (1) there was no jurisdiction to compel the arbitrators to return the fees so paid; (2) the attendance of an arbitrator before the taxing master was not a submission to the jurisdiction of the ct.—*DOSSETT v. GINGELL* (1841), 2 Man. & G. 870; 3 Scott, N. R. 179; Woll. 176; 10 L. J. C. P. 183; 133 E. R. 996.

*Annotations*:—*Consd.* *Fernley v. Branson* (1851), 20 L. J. Q. B. 178, C. A. *Refd.* *Roberts v. Eberhardt* (1858), 28 L. J. C. P. 74, Ex. Ch.

**784. — Sum recoverable as money had & received.**—If an arbitrator refuses to deliver up his award without being paid an unreasonable sum for his charges as arbitrator, & the party pays the amount under protest, he may recover back that sum as money had & received.—*GLOBE INSURANCE CO. (TRUSTEES) v. FURNLEY* (1850), 14 L. T. O. S. 351.

**785. —**—If, in the award, the arbitrator name an exorbitant sum as costs of the award, & a party to the reference is obliged to pay such sum to obtain possession of the award, such party may recover the excess beyond what a jury may deem a reasonable compensation to the arbitrator in an action against the arbitrator for money had & received to his use.—*FERNLEY v. BRANSON* (1851), Cox, M. & H. 460; 20 L. J. Q. B. 178; 16 L. T. O. S. 486; 15 Jur. 354.

*Annotations*:—*Refd.* *Barnes v. Hayward* (1857), 1 H. & N. 742; *Barnes v. Braithwaite & Nixon* (1857), 2 H. & N. 569; *Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482.

**786. —**—Where a party to an arbn. is compelled to pay to a lay arbitrator an exorbitant sum in order to take up the award, he may maintain an action for money had & received to recover the excess beyond what is a proper remuneration for the arbitrator's services.—*BARNES v. BRAITHWAITE & NIXON* (1857), 2 H. & N. 569; 157 E. R. 234.

*Annotation*:—*Refd.* *Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482.

**787. — Certificate of taxing master disallowing amounts not conclusive as to unreasonableness.**—Pltfs., who were parties to an arbn., paid a sum of £476 12s. to the arbitrators & umpire for their fees, in order to take up the award. Upon taxation of the costs of the arbn. the taxing master disallowed £119 5s. of that sum. In an action brought by pltfs. to recover back from the arbitrators & umpire the amount so disallowed:—*Held*: (1) in order to succeed, pltfs. must show that the fees charged were unreasonable & extortionate;

when the payment of the alleged excessive fees is made by cheque to an agent, who has authority to accept money only, & the arbitrator refuses to take the cheque. In order to fix an arbitrator with the penalty there must, after the expiration of the time named, be either a demand upon him to make, execute, & deliver the award & a refusal to do so unless a larger sum is paid for fees than is permitted by the Act, or actual payment of such larger sum.—*JONES v. GODSON* (1896), 23 A. R. 34.—**CAN.**

**PART II. SECT. 6.**

**h. Action of trespass.**—Trespass does not lie against arbitrators, if they had jurisdiction in the matter in which they acted. If they took an erroneous view of the merits, & mistook the law, or came to an unsound conclusion upon the evidence, when the matter referred to them was within their jurisdiction, they would be protected as justices

would be protected who are authorised by stat. to determine differences between masters & servants.—*KENNEDY v. BURNES* (1857), 15 U. C. R. 487.—**CAN.**

**k. Cannot be examined as to basis of award.**—If an award is set aside & the matter is tried as a suit before the ct., the arbitrator cannot be examined as a witness as to the grounds of his decision, but only to prove any admission which may have been made before him in the course of arbn., & which might be material evidence.—*NILMONEE BOSE v. MOHIMA CHUNDER DUTT* (1872), 17 W. R. 516.—**IND.**

**l. —**—A co. required immediate possession of pltf.'s land, the purchase price of which was to be ascertained by statutory arbn. proceedings then pending. The co. procured a bond from defts., by which defts. bound themselves to pay pltf. the purchase price within one month from the making

(2) the certificate of the taxing master was not evidence that the amounts disallowed by him were unreasonably charged.—*LLANDRINDOD WELLS WATER CO. v. HAWKSLEY* (1904), 68 J. P. 242; 20 T. L. R. 241, C. A.

**788. Money paid in respect of invalid award—Excess recoverable as money had & received.**—Certain matters in difference between A. & B. were referred to two arbitrators, with power to appoint an umpire & to make the submission a rule of ct., which was done. By the terms of the submission the costs of the submission & award were to be in the discretion of the arbitrators or umpire, who, by their award, might direct by & to whom same should be paid. An umpire was appointed who made an award & thereby found a certain sum to be due from A. to B., & he awarded & directed all the costs (specifying the sum) of the submission & award, including therein the costs of taking up the award, to be paid by the party taking up the award, & to be paid on a specified day by A. The fees of the arbitrators & umpire were included in the costs. B. having paid the amount to take up the award:—*Semle*: he might recover back the amount beyond what was reasonably due in an action for money had & received.—*Re COOMBS & FRESHFIELD & FERNLEY* (1850), 4 Exch. 839; 154 E. R. 1456.

*Annotations*:—*Consd.* *Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482. *Refd.* *Re Cardigan & Henderson* (1852), 22 L. J. Q. B. 83; *Barnes v. Hayward* (1857), 1 H. & N. 742; *Barnes v. Braithwaite & Nixon* (1857), 2 H. & N. 569; *Crampton & Holt v. Ridley* (1887), 20 Q. B. D. 48.

**789. Application for order to refund must be made promptly.**—A cause being referred, the arbitrator in 1825 received from pltf.'s attorney £87 for his fees & expenses. In 1827, the parties went before the prothonotary, when he allowed only £35. Deft., after a lapse of eight years from the time the payment was made (the attorney who paid the money having died in the *interim*), applied to the ct. to order the arbitrator to refund the difference:—*Held*: the application was too late.—*BRAZIER v. BRYANT* (1833), 2 Dowl. 757; 3 Moo. & S. 844.

**SECT. 6.—LIABILITIES AND DUTIES OF ARBITRATORS AND UMPIRE.**

As regards the Hearing, see Part III., *post*.

As regards the Award, see Part IV., Sects. 1—15, *post*.

**790. Redelivery of papers produced in reference.**—Where an attorney, having a lien on papers, delivers them to an arbitrator to examine for the purposes of the arbn., he may maintain trover, in case the arbitrator refuse to redeliver them,

of the award:—*Held*: in an action on the bond defts. could not examine one of the arbitrators to show at what he estimated the value of the land & whether general damages were awarded in addition to specific damages.—*MASSON v. ROBERTSON* (1879), 44 U. C. R. 323.—**CAN.**

**m. —**—Where the whole of a cause is ordered to be tried before an arbitrator under s. 15 of Arbn. Act, 1890, a very strong case ought to be made out before the ct. is asked to call upon the arbitrator to state the grounds of his decision or return the evidence upon which he acted.—*BELL v. FINN* (1896), 14 N. Z. L. R. 447.—**N.Z.**

**n. —**—In proceedings to enforce an award an arbitrator may be called as a witness & asked what claims were presented to the arbitrators for consideration, but he may not be asked any questions as to the reasons for his decision. — *Re PETERBOROUGH*

although at the time of giving them up he has not expressly reserved his lien.—**WHALLEY v. HALLEY** (1829), 8 L. J. O. S. K. B. 6.

**791. Negligence—Arbitrator not liable for—Broker.]**—Deft., as broker, made a contract for pltf., the seller, as follows: "Oct. 26, 1869. Sold by order & for account of Mr. D. P., to my principals, Messrs. S. H. & Son, to arrive 500 tons black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker—To be delivered here in London @ 22s. per cwt.—D. pd.—Shipment Nov. or Dec., 1869":—**Held**: deft. was employed as a sort of arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract, & he was not liable to an action for failing to exercise reasonable care & skill in coming to a decision, he having acted *bonâ fide* & to the best of his judgment.—**PAPPA v. ROSE** (1872), L. R. 7 C. P. 525; 41 L. J. C. P. 187; 27 L. T. 348; 20 W. R. 784, Ex. Ch.

**Annotations**:—**Expld. & Apld.** Tharsis Sulphur & Copper Co. v. Loftus (1872), L. R. 8 C. P. 1. **Apld.** Stevenson v. Watson (1879), 4 C. P. D. 148. **Consd.** Chambers v. Goldthorpe, Restell v. Nye, [1901] 1 K. B. 624, C. A. **Refd.** Chambers v. Goldthorpe (1900), 16 T. L. R. 180.

**792. ——— Average adjuster.]**—General average losses having been incurred, the owners of the cargo (ptf.) & the shipowner referred it to an average adjuster (deft.), to settle & adjust the proportions which the ship & cargo respectively should bear:—**Held**: (1) the average adjuster, being a person by whose decision two parties having a difference agreed to be bound, was in the position of an arbitrator; (2) an action for negligence would not lie against him if he acted in good faith.—**THARSIS SULPHUR & COPPER CO. v. LOFTUS** (1872), L. R. 8 C. P. 1; 42 L. J. O. P. 6; 27 L. T. 549; 21 W. R. 109; 1 Asp. M. L. C. 455.

**Annotations**:—**Apld.** Stevenson v. Watson (1879), 4 C. P. D. 148; **Chambers v. Goldthorpe, Restell v. Nye**, [1901] 1 K. B. 624, C. A.

**793. ——— Architect.]**—An action will not lie against an architect for not using due care & skill in ascertaining the amounts to be paid by a builder's employer to the builder under a contract, which provides that the builder is to be paid on the certificate of the architect, that all matters of dispute are to be left to the architect's decision, that he may order any additions to, or deductions from, the contract, & that the amount of such additions or deductions shall be ascertained by him at a certain fixed rate, the functions of the architect under the contract being not merely clerkly, but requiring the exercise of a judgment or opinion.—**STEVENSON v. WATSON** (1879), 4 C. P. D. 148; 48 L. J. Q. B. 318; 40 L. T. 485; 43 J. P. 399; 27 W. R. 682.

**Annotations**:—**Consd.** Young v. Blake (1887), Hudson Bldg. Contracts, 4th ed., Vol. II., p. 110; *Re Rio de Janeiro Flour Mills & Granaries & De Morgan Snell* (1891), 8 T. L. R. 108. **Apld.** Chambers v. Goldthorpe, Restell v. Nye, [1901] 1 K. B. 624, C. A. **Refd.** Restell v. Nye (1900), 16 T. L. R. 154.

**794. ———.]**—A building owner employed an architect for reward to supervise the erection of certain houses by a contractor. The building contract provided for payments on account of the works during their progress, & for payment of the balance after their completion, upon certificates of the architect, & that a certifi-

cate of the architect, showing the final balance due or payable to the contractor, should be conclusive evidence of the works having been duly completed & that the contractor was entitled to receive payment of the final balance:—**Held**: (1) the architect, in ascertaining the amount due to the contractor & certifying for same under the contract, was a quasi-arbitrator; (2) he was not liable to the building owner for negligence.

If an architect is bound to exercise his judgment impartially as between the two parties to the building contract, he is in the position of an arbitrator (**COLLINS, L.J.**).—**CHAMBERS v. GOLDTHORPE, RESTELL v. NYE**, [1901] 1 K. B. 624; 70 L. J. K. B. 482; 84 L. T. 444; 49 W. R. 401; 17 T. L. R. 304; 45 Sol. Jo. 325, C. A.

**Annotation**:—**Consd.** Kennedy v. Barrow-in-Furness Corp. (1909), Hudson Bldg. Contracts, 4th ed., Vol. II., p. 411.

*See, further*, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.

**795. Valuers.]**—Pltf., rector of F., agreed with the extrix. of the late incumbent that dilapidations should be valued as between them, by valuers to be appointed on each side, & in case the valuers disagreed, by an umpire to be appointed by the valuers, & that such valuation should be final & conclusive. Defts., who were the valuers for pltf., settled the amount with the valuer for the extrix., but, through ignorance, they valued as between incoming & outgoing tenant, instead of as between incoming & outgoing incumbent, & the amount in consequence was too small:—**Held**: (1) defts. were not sued as *quasi*-arbitrators, the cause of action being their undertaking that they were competent, & the breach of that undertaking; (2) defts. ought to have known the broad distinction between the case of an incoming & outgoing tenant & the case of an incoming & outgoing incumbent, & their ignorance in that respect was a breach of their engagement.—**JENKINS v. BETHAM** (1855), 15 C. B. 168; 24 L. J. C. P. 94; 24 L. T. O. S. 272; 1 Jur. N. S. 237; 3 W. R. 283; 3 C. L. R. 373; 139 E. R. 384.

**Annotations**:—**Distd.** Pappa v. Rose (1872), L. R. 7 C. P. 525, Ex. Ch. **Consd.** Chambers v. Goldthorpe, Restell v. Nye, [1901] 1 K. B. 624, C. A. **Refd.** Cooper v. Shuttleworth (1856), 25 L. J. Ex. 114; **Turner v. Goulden** (1873), L. R. 9 C. P. 57. **Mentd.** Harmer v. Cornelius (1858), 32 L. T. O. S. 62.

**796. —.]**—Deft. was engaged as valuer on the part of pltf. to ascertain the sum to be paid by the latter on the purchase of the goodwill, etc., of a business:—**Held**: deft. was in no sense acting as arbitrator, & was liable to an action for alleged negligence in the conduct of the valuation.—**TURNER v. GOULDEN** (1873), L. R. 9 C. P. 57; 43 L. J. C. P. 60.

**Annotation**:—**Mentd.** *Re Hammond & Waterton* (1890), 62 L. T. 808.

**797. Bill against parties & arbitrators for general account & discovery.]**—A submission, which was made a rule of ct., provided that the parties should be restrained from bringing a bill in equity against the arbitrators. They awarded a sum to be due from pltf. to the other party on the balance of accounts, whereon pltf. brought a bill against deft. & other arbitrators, charging corruption & partiality & praying for general accounts between pltf. & the other party to the submission, &

**ELECTRIC LIGHT CO.**, 8 O. W. N. 564; **MENZIES** (1868), 6 Macph. (Ct. of Sess.) 9 O. W. N. 119.—**CAN.** 279.—**SCOT.**

**o. —.]**—In an action for reduction of an award it is expedient that an arbitrator should be examined as to the motives which influenced him in pronouncing his award.—**CAMERON v.**

**p. May be examined on motion to set aside.]**—Examination of arbitrator as witness on motion to set aside award.—**Re CHRISTIE & TORONTO JUNCTION** (1895), 22 A. R. 21.—**CAN.**

**q. May be examined as to what was considered.]**—The proper evidence as to whether arbitrators took particular matters into consideration in making their award is by interrogating them.—**BROPHY v. HOLMES** (1828), 2 Moll. 5.—**IR.**



*Sect. 6.—Liabilities duties of arbitrators*

for discovery. Defts. pleaded the award. It appeared doubtful whether the award was not bad in law for want of finality:—*Held*: notwithstanding any defect in the award in point of law, the submission having been made a rule of ct., the plea after award ought to be allowed.—*LINGOOD v. CROUCHER* (1742), 2 Atk. 395; 26 E. R. 639.

*Annotation*:—*Refd.* *Padley v. Lincoln Waterworks Co.* (1850), 14 Jur. 299.

**798. Bill for discovery against arbitrators.]—**To a bill brought against an arbitrator, seeking a discovery of the grounds on which he made his award, he pleaded in bar that he was not obliged to set them forth. The ct. thought it unreasonable he should be put to so much trouble & expense, & allowed the plea.—*ANON.* (1748), 3 Atk. 644; 26 E. R. 1170.

*Annotations*:—*Refd.* *Padley v. Lincoln Waterworks Co.* (1850), 14 Jur. 299; *Tharsis Sulphur & Copper Co. v. Loftus* (1872), 42 L. J. C. P. 6.

**799.** .]—The rule that a person implicated in a fraudulent transaction may be made a party to a suit impeaching the transaction, for purposes of discovery & costs, is confined to cases in which deft. fills the position of agent (including that of attorney or solr.) or arbitrator.—*WEISE v. WARDLE* (1874), L. R. 19 Eq. 171; 23 W. R. 208.

*Annotation*:—*Distd.* *Tabor v. Cunningham* (1875), 21 W. R. 153.

**800. Bill against arbitrators to have award set aside—Misconduct alleged.]—**To a bill, in which the arbitrators were defts., to be relieved against an award upon suggestion of misbehaviour, etc., in the arbitrators, a plea by the arbitrators of the submission & award, with an averment of impartiality, etc., was overruled.—*RYBOTT v. BARRELL* (1762), 1 Coop. temp. Cott. 383; 2 Eden, 131; 28 E. R. 846.

**801.** ———.]—An arbitrator, whose award is impeached on the ground of fraud, cannot, by denying the fraud generally, protect himself from answering the interrogatories as to specific facts by which the fraud is alleged to be shown.

A contractor filed a bill against a railway co. & their engineer, whose certificates were to be conclusive as to the amount payable by the co. to the contractor. The bill alleged that the amounts mentioned in the certificates were deficient, & imputed fraud & collusion to the engineer & the co., & as evidence of the fraud, charged that certain items were of a specified value:—*Held*: the engineer could not, by denying fraud generally, protect himself by his character of arbitrator from answering as to the particular items specified.—*PADLEY v. LINCOLN WATERWORKS CO.* (1850), 2 Mac. & G. 68; 2 H. & Tw. 295; 19 L. J. Ch. 436; 14 Jur. 299; 47 E. R. 1695, L. C.

**802.** ——— No allegations of fraud.]—An award was made upon a submission, not under the Act of 1698, between two parties in difference, on which one of the parties obtained judgment against the other party, in an action at law. The unsuccessful party filed a bill against the successful party & the arbitrator to set aside the award:—*Held*: (1) whether the award was or was not impeachable

on equitable grounds, yet, inasmuch as there was no evidence to raise suspicion that the arbitrator had acted corruptly, partially, or unfairly, he ought not to have been made a party to the suit; (2) the bill should be dismissed as against him, with costs, before the ct. had come to any opinion for or against his award.—*HAMILTON v. BANKIN* (1850), 3 De G. & Sm. 782; 19 L. J. Ch. 307; 16 L. T. O. S. 81; 15 Jur. 70; 64 E. R. 703.

**803. Cannot be forced to make affidavit as to occurrence at hearing.]—**A cause had been referred to a Ch. barrister, who examined witnesses without their first taking the oath, though they were sworn to the contents of their examinations after these had been read over to them. It was also objected that the arbitrator had refused to look into some accounts & would not say whether he had looked into them. In proceedings for setting aside the award:—*Held*: as to the alleged misconduct of the referee, he should not be directed to make an affidavit, but might personally make a statement to the ct. or make an affidavit.—*MANSFIELD v. PARTINGTON* (1824), 2 L. J. O. S. K. B. 153.

**804.** ———.]—Arbitrators whose award has not been taken up are privileged from disclosing the contents of the award, or giving evidence as to the discussions which took place during the investigation, whether public or private; but they are bound to answer whether a particular subject of inquiry was pressed upon them by either party, but not as to the course of discussion & investigation which followed.—*PONSFORD v. SWAINE* (SWAYNE) (1861), 1 John. & H. 433; 4 L. T. 15; 70 E. R. 816.

**805. Cannot be forced to answer whether required to find specifically.]—**A legal arbitrator may, without impropriety, be asked by the ct. whether he was or was not required to find specifically on various claims & may, but will not be compelled to, answer.—*WILSON v. HINCKLEY* (1868), 18 L. T. 695.

**806. Production of notes.]—**The ct. rejected an application to amend the entry of a verdict according to the notes of an arbitrator, to whom the cause had been referred, on the ground that they had no power to compel such notes to be brought before them.—*SCOUGILL v. CAMPBELL* (1819), 1 Chit. 283.

*Annotation*:—*Dbtd.* *Padley v. Lincoln Waterworks Co.* (1850), 14 Jur. 299. The case clearly could not stand now (LORD COTTENHAM, C.).

**Admissibility of arbitrator's evidence to explain or qualify award.]—**See Part IV., Sect. 15, Subsect. 1, *post*.

**Admissions of mistakes by arbitrators.]—**See Part IV., Sect. 13, Subsect. 2, A., *post*.

**Whether award defective through failure to give reasons for decision.]—**See Part IV., Sect. 6, Subsect. 2, *post*.

**Liability of arbitrators to refund excessive amount charged for fees.]—**See Nos. 783—789, *ante*.

**SECT. 7.—INTERFERENCE BY THE COURT.**

**Abortive references.]—**See Nos. 441—471, *ante*.

**807. Arbitrators failing to make award at proper time in proper manner.]—**Where a reference has been made to arbn., & the judgment of the arbitrators is not given in the time & manner according to the agreement, the ct. will not substitute itself

**PART II. SECT. 7.**

**r. Party failing to nominate arbitrator—Municipal Act, s. 394—Court cannot order party to appoint.]—**Where, upon a corpn. failing to appoint an arbitrator under the above Act, an order was made by a judge under s. 8 of Arbn. Act, ordering the corpn. to appoint an arbitrator:—*Held*: the

order was made without jurisdiction, & should be set aside.—*Re NORTH VANCOUVER & LOULET* (1914), 19 B. C. R. 157.—*CAN.*

**s. Arbitrators refusing to act.]—**It is an essential principle of the law of arbn. that the adjudication of disputes by arbn. should be the result of the free consent of the arbitrators to act; & the

finality of the award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, & that such judges are willing to settle the disputes referred to them.

Where certain matters were referred to arbitrators who refused to act, & the ct. of first instance passed an order directing them to proceed & to make an award, & they, on the passing of such order,



for the arbitrators & make the award; nor will it do this, even though the substantial thing to be done is agreed between the parties, but the time & manner in which it is to be done has been left for others to prescribe.—*COOTH v. JACKSON* (1801), 6 Ves. 12; 31 E. R. 913.

*Annotations* :—*Folld. Milnes v. Gery* (1807), 14 Ves. 400; *Blundell v. Brettargh* (1810), 17 Ves. 232. *Mentd. Johnson v. Johnson* (1802), 3 Bos. & P. 162; *Ridgway v. Wharton* (1854), 3 De G. M. & G. 677, L. C.; *Re Foster v. G. W. Ry. Co., Ex p. G. W. Ry. Co.* (1882), 51 L. J. Q. B. 233, C. A.; *Maddison v. Alderson* (1883), 8 App. Cas. 467, H. L.

**808. Arbitrators failing to agree on umpire—Mandamus.**—Two arbitrators appointed under a Canal Act, which provided that they should appoint an umpire, met but could not agree upon an umpire:—*Held*: they must come to an agreement, & a peremptory *mandamus* granted accordingly.—*R. v. GOODRICH* (1806), 3 Smith, K. B. 388.

**809. Order by consent—Arbitrators failing to proceed.**—A cause having been referred to arbn., under an order by consent, the ct. will not make an order on the arbitrators to proceed.—*CRAWSHAY v. COLLINS* (1818), 1 Swan. 40; 1 Wils. Ch. 31; 36 E. R. 289.

**810. Reference by order—Failure of party to appear—No award issued.**—By an order of reference a fixed time was given to the arbitrator for making his award. Deft. neglected to appear before him, & no award was executed. The ct.

refused to grant a rule *nisi*, calling on him to consent to enlarge the time, or otherwise that pltf. should be at liberty to enter up judgment for his demand.—*WILLIAMS v. WILLIAMS* (1830), 9 L. J. O. S. Ex. 2.

**811. Time for making award intentionally allowed to expire.**—The ct. has no power under Civil Procedure Act, 1833, s. 39, to compel parties to proceed with a reference, the arbitrator having power to enlarge the time for making his award, where the time for making it has been intentionally allowed to expire.—*DOE d. JONES v. POWELL* (1839), 7 Dowl. 539; 1 Will. Woll. & H. 553; 3 Jur. 41.

*Annotation* :—*Reid. Parbery v. Newnham, Newnham v. Parbery* (1840), 7 M. & W. 378.

**812. Refusal of arbitrators to proceed after death of one party.**—A submission provided for the delivery of the award, in case of the death of a party, to his personal representatives who should require same. One of the parties died during the reference. The arbitrator declined to proceed on the request of the other party & against the protest of the extrix. of the deceased party:—*Held*: the ct. had no power to compel the arbitrator to proceed, or to compel the extrix. to attend before him.—*LEWIN v. HOLBROOK* (1843), 11 M. & W. 110; 12 L. J. Ex. 267; 152 E. R. 736.

*Annotation* :—*Reid. Edwards v. Davies* (1854), 2 C. L. R. 681.

## Part III.—The Hearing.

### SECT. 1.—DISCOVERY AND MEANS OF PROCURING EVIDENCE.

*See* Arbitration Act, 1889, s. 2, Sched. I. (f) and ss. 7, 8 & 18.

**813. Discovery—Power to direct attendance to verify vouchers.**—It is within the scope of jurisdiction of an arbitrator, to whom all matters in difference are referred, to direct one of the parties, who has acted as agent for the other in supplying provisions to the British army, to go before the commissary & verify particular documents.—*ATKYNs v. BALDWIN* (1816), 1 Stark. 209.

**814. — Where all matters in difference referred.**—Where deft. submitted all matters in difference to arbn., & the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books, & an attachment was moved for against him for not producing them:—*Held*: he could not by affidavit bring before the ct. the question whether those books related to matters in difference or not, though it was expressly sworn that the books related to old

made an award:—*Held*: all proceedings taken by the arbitrators in obedience to the order of the ct. directing them to arbitrate against their will were null & void.—*SHIBCHARAN v. RATRAM* (1884), 1 L. R. 7 All. 20.—*IND.*

t. —.]—A case was referred by a ct. to the arbn. of three persons, & the parties agreed to be bound by the majority, & one of the arbitrators refused to act:—*Held*: the ct. could only, under s. 510 of the Civil Procedure Code, appoint a new arbitrator or supersede the arbn. & proceed with the suit.—*NAND RAM v. FAKIR CHAND* (1885), 1 L. R. 7 All. 523.—*IND.*

u. *Where no provision for devolution on oversman.*—It was agreed that, should certain minerals become exhausted, or workable only at an evident loss, the tenants should be entitled to give up the lease on the same be-

ing ascertained by arbiters, mutually chosen. Defender maintained, in a declarator, that a deed of submission ought to be executed, containing provision for the devolution of the submission on an oversman in the event of the arbiters differing:—*Held*: the question must first be referred to two arbiters, one chosen by each party, & defender was not bound to enter into a submission containing a clause providing for a devolution of the submission on an oversman.—*MERRY & CUNNINGHAM v. BROWN* (1863), 35 Sc. Jur. 417.—*SCOT.*

w. *No provision for disagreement of arbitrators—Duty of court.*—Where a case has been referred to arbn., but no provision has been made in the reference for any difference of opinion among the arbitrators:—*Held*: the ct., on objection being taken to the award, should have

accounts, which had been long since settled, & which it had been agreed between them should form no part of the reference, because by the general terms of the submission it was left in the discretion of the arbitrators to say what were matters in difference & what were not.—*ARBuckle v. PRICE* (1835), 4 Dowl. 174.

*Annotation* :—*Apld. Cockburn v. Newton* (1841), Woll. 205.

**815. — Common Law Procedure Act, 1854.**—A submission to arbn., made a rule of the Ct. of Ch. under s. 17 of the above Act, is not within the provisions of s. 50 of the Act as to discovery.—*Re ANGLO-AUSTRIAN BANK* (1864), 10 L. T. 369.

**816. — Judicature Act, 1873 (c. 66), s. 89—County court judge.**—All matters in difference in a cause having been referred by a county ct. judge by an order by consent, pltf. refused to comply with the above order, which provided that certain documents & books should be produced by pltf., & deft. applied for an order for pltf.'s committal:—*Held*: the county ct. judge had jurisdiction under the above sect. to make the order asked for.—

ordered that the arbitrators should appoint an umpire, or should have declared that the decision of the majority should prevail, or should have appointed an umpire, or should have made such arrangement as the parties would have consented to, or, if they could not agree, such arrangement as it thought fit.—*HARADHAN DATT v. RADHANATH SHAIHA* (1868), 2 B. L. R. 14; 10 W. R. 398.—*IND.*

### PART III. SECT. 1.

**813 i. Discovery**—7 Will. 4, c. 3, s. 30.]—On an application under the above Act for an order on witnesses to produce documents before an arbitrator, it must be shown that the documents are such as witnesses would be compelled to produce at a trial.—*CARRALL v. BALL* (1856), 3 L. C. L. J. 12.—*CAN.*

*Sect. 1.—Discovery & means of procuring evidence.*  
2: *Sub-sect. 1.*

**RICHARDS v. CULLERNE** (1881), 7 Q. B. D. 623, C. A.

*Annotations*:—**Appld.** *Hymas v. Ogden* (1904), 74 L. J. K. B. 101, C. A. **Refd.** *Winfield v. Boothroyd* (1886), 54 L. T. 574.

**817. — Court no power to order discovery.**—

An order was taken by consent in an action referring the action & all matters in difference to the award of an arbitrator. The order provided that the parties should produce before the arbitrator all documents in their or either of their custody or power relating to the matter in difference. Pltf. having during the pendency of the arbn. applied by summons in the action under R. S. C., 1875, Ord. 31, r. 12, for an affidavit of documents:—*Held*: the application should be dismissed, on the ground that under the order of reference the whole jurisdiction as to discovery was in the hands of the arbitrator.—**PENRICE v. WILLIAMS** (1883), 23 Ch. D. 353; 52 L. J. Ch. 593; 48 L. T. 868; 31 W. R. 496.

*Annotation*:—**Mentd.** *Macalpine v. Calder*, [1893] 1 Q. B. 545, C. A.

**818. Inspection of property—Discretion of arbitrator.**—It is in the discretion of the master or other arbitrator, to whom an action in respect of a claim for work has been referred, to inspect the premises on which the work was done; & his refusal to inspect is no ground for setting aside his award.—**MUNDAY (MUNDY) v. BLUCK (BLACK)**, **BLUCK (BLACK) v. MUNDAY (MUNDY)** (1861), 9 C. B. N. S. 557; 30 L. J. C. P. 193; 7 Jur. N. S. 709; 9 W. R. 274; 142 E. R. 219.

*Annotation*:—**Mentd.** *Baggalay v. Borthwick* (1861), 10 C. B. N. S. 61.

**819. Jurisdiction of court after action referred.**—In an action against defts. for working from their mine into a seam of pltf.'s mine, which he himself had not yet worked, so that he had no "pit" or other access into it except through their mine, the question as to the amount of damages was by agreement referred to arbn., the trespass being admitted & money paid into ct. While the arbn. was pending an order was made that pltf. should be at liberty, with his mining engineers, managers, & men, & all necessary horses & appliances, to enter into defts.' mines to the airway cut through pltf.'s mines by defts., & to cut into & through the dams placed in the airway by defts., & to pass into the airway & all the workings of defts. near to the boundary between their colliery & pltf.'s, & to enable the inspection to be made, to clear away rubbish & cut away & disconnect defts.' water pipes & airway, etc. On appeal from the above order:—*Held*: it had better be left to the arbitrator whether the inspection should take place, & in what way.—**BARNETT v. ALDRIDGE COLLIERY CO., LTD.** (1887), 4 T. L. R. 16.

*Annotation*:—**Consd.** *Macalpine v. Calder*, [1893] 1 Q. B. C. A.

**820 i. Compelling attendance of witnesses—Ex parte application.**—An order compelling attendance of witnesses will be granted on an *ex p.* application, upon affidavit that the cause has been duly referred, that the arbitrator has appointed a day for proceeding, & that certain parties (giving their respective places of residence) are necessary & material witnesses for the party applying.—**GALLENA v. COTTON** (1856), 3 L. C. L. J. 47; **CARRALL v. BALL** (1856), 3 L. C. L. J. 12.—**CAN.**

**820 ii. — R. S. C. (c. 109), s. 8 (23).**—By the above Act "the arbitrators . . . may examine on oath . . . the parties, or such witnesses as may voluntarily appear before them." In an arbn. *subpoenas* were issued, & witnesses

attended upon them & were examined:—*Held*: there was no power to compel the attendance of witnesses, & those who attended must have done so voluntarily.—*Re McRAE & ONTARIO & QUEBEC RY. CO.* (1887), 12 P. R. 282.—**CAN.**

**820 iii. Witness outside jurisdiction.**—The ct. has no power to grant a warrant citing a person residing furth of Scotland to give evidence before an arbiter in Scotland.—**HIGHLAND RY. CO. v. MITCHELL** (1868), 40 Sc. Jur. 499; 6 Macph. (Ct. of Sess.) 896.—**SCOT.**

**820 iv. — C. S. C. (c. 79), s. 4.**—On a submission being made an order of ct., a suit is pending within the meaning of the above Act, so as to enable the

**820. Compelling attendance of witnesses—Witness outside jurisdiction—No writ of subpoena.**—When an action & "all matters in difference" between the parties have been referred by consent to an arbitrator, no writ of *subpoena* will be granted under 17 & 18 Vict. c. 34, s. 1, in order to compel the attendance at the hearing before the arbitrator of witnesses residing within the United Kingdom, but out of the jurisdiction of the Q. B. Div., for the hearing before the arbitrator is not a "trial" within that enactment.—**HALL v. BRAND** (1883), 12 Q. B. D. 39; 53 L. J. Q. B. 19; 49 L. T. 492; 32 W. R. 133, C. A.

**821. — — — — —**—*Held*: 17 & 18 Vict. c. 34, was not available to compel the attendance of a person in Ireland as a witness before one of the Masters of the Ct. of Common Pleas upon a compulsory reference under C. L. P. Act, 1854.—**O'FLANAGAN v. GEOGHEGAN** (1864), 16 C. B. N. S. 636; 143 E. R. 1276.

*See, now*, Arbitration Act, 1889, s. 18.

**822. — — — — — No power to order commission**—There is no power under R. S. C., Ord. 37, r. 5, to direct the issue of a commission for the examination of witnesses in a matter referred to arbn. under an agreement, unless an action is also pending in reference to the same dispute.—*Re* **RONALDSON**, [1892] 1 Q. B. 91; 61 L. J. Q. B. 111; 8 T. L. R. 85.

*Annotation*:—**Mentd.** *Re Colman & Watson* (1907), 97 T. L. R. 857, C. A.

**823. — — — — —**—One of the parties to an arbn. applied for a rule to compel the other parties to consent to a commission to take evidence abroad, otherwise the submission to arbn. to be revoked. The application was refused.—*Re* **DREYFUS & SONS & PAUL** (1893), 9 T. L. R. 358; 37 Sol. Jo. 357.

**824. — — — — — Commission ordered—Compulsory reference—Companies Act, 1862 (c. 89), s. 138.**—*Held*: where a co. was in voluntary liquidation, & a dispute had arisen as to the price to be paid for the purchase of the interest of a dissentient member, which, under s. 132 of the above Act, had been referred to arbn., the ct., on the application of the liquidators, had jurisdiction under R. S. C., Ord. 37, r. 5, to order a commission to issue for the examination of witnesses abroad, the matter being one arising in the winding-up within s. 138 of the above Act, & the reference to arbn. being compulsory under the Act.—*Re* **MYSORE WEST GOLD MINING CO.** (1889), 42 Ch. D. 535; 58 L. J. Ch. 731; 61 L. T. 453; 37 W. R. 794; 5 T. L. R. 695; 1 Meg. 347.

*Annotation*:—**Consd.** *Taylor v. Cripps* (1914), 7 B. W. C. C. 623, C. A.

**825. — — — — — Power to issue subpoena—County court judge.**—Where a matter is referred to arbn. a county ct. judge has jurisdiction to make an order, & issue a *subpoena*, to compel the attendance of a witness before the arbitrator.—*Re* **ACKARY, Ex p. BOLLAND** (1876), 3 Ch. D. 125; 45 L. J. Bcy. 133; 34 L. T. 666; 24 W. R. 932.

superior ct. to issue process to compel attendance of witnesses resident out of their jurisdiction.—**ELLIOTT v. QUEEN CITY ASSURANCE CO.** (1873), 6 P. R. 30.—**CAN.**

**822 i. — — — — — No power to order commission.**—A judge of the Ct. of Appeal has no power to order the issue of a commission to take evidence abroad for use upon a compulsory arbn. pending before an arbitrator named by a judge of that ct., under Municipal Act, 55 Vict. c. 42 (O.), s. 487 (1). Such arbn. is not a "reference by rule, order, or submission," within s. 49 of the Act respecting Arbns. & References, R. S. O., 1887, c. 53.—*Re* **MACPHERSON & TORONTO CITY** (1894), 16 P. R. 230.—**CAN.**



**826. Party to cause privileged from arrest for debt on way to & from & while at arbitration.]**—A party to a cause is privileged from arrest for debt on his way to & from & during his attendance on an arbn. —**HETLEY'S CASE** (1788), Com. Dig., 5th ed., tit. Privilege, p. 112, A (1); *sub nom.* **HETLEY v. HETLEY** (1789), Kyd on Awards, 100.

*Annotation*:—**Refd.** *Arding v. Flower* (1800), 8 Term Rep. 534.

**827. S. P. MOORE v. BOOTH** (1797), 3 Ves. 350; 30 E. R. 1047.

*Annotation*:—**Folld.** *Re Jewitt* (1864), 33 Beav. 559.

**828. S. P. SPENCE v. STUART** (1802), 3 East, 89; 102 E. R. 530.

*Annotations*:—**Expld.** & **Distd.** *Barclay v. Faber* (1819), 2 B. & Ald. 743. **Distd.** *Barrack v. Newton*, *Bicknell v. Newton*, *Williams v. Newton* (1841), 10 L. J. Q. B. 182. **Consd.** *Bateman v. Freston* (1861), 3 E. & E. 578. **Expld.** *Re Freston* (1883), 11 Q. B. D. 545, C. A.

**829. S. P. Re M'INTOSH** (1857), 30 L. T. O. S. 116.

**830. — How long privilege lasts.]**—A party in London was required to attend an arbitrator at Exeter, on a given day, & three days before set off, & went, accompanied by his attorney, to Clifton, where his wife resided, & where were certain papers necessary to be produced before the arbitrator. He was occupied for a great part of two days in selecting & arranging same, & in the afternoon of the second day was arrested:—**Held**: he was not privileged from arrest in the circumstances, having employed more than a reasonable time for the above purpose, & it not being sworn that he was occupied, during all the time he was at Clifton, in the object for which he went thither. —**RANDALL**

#### PART III. SECT. 2, SUB-SECT. 1.

**835 i. How far bound by rules of law, practice & evidence.]** Arbitrators are not limited by the technical rules, which would apply to the items entering into the composition of a verdict for which their award is substituted.—**BROPHY v. HOLMES** (1828), 2 Mol. 5. —**IR.**

**835 ii. —** .]—Arbitrators when not restrained by the submission are not bound as judges are in a ct. of law.—**GLEN v. GRAND TRUNK RY. CO.** (1859), 2 P. R. 377.—**CAN.**

**835 iii. —** .]—It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence.—**GUPPU v. GOVINDACHARYAR** (1887), 1 L. R. 11 Mad. 85.—**IND.**

**835 iv. —** .]—The arbitrator appointed by a party is not that party's agent for the purpose of assenting to irregular proceedings, & it is the duty of the arbitrators to know how to conduct their arbn. properly.—**LYDERS v. RESIDENTIAL, ETC., CHURCH OF NEW ZEALAND** (1910), 29 N. Z. L. R. 522.—**N.Z.**

**835 v. —** .]—An award of a board of arbitrators was set aside on the ground of the lax & non-judicial conduct of the proceedings.—**WRIGHT v. TORONTO RY. CO.** (1914), 26 O. W. R. 113, 749; 6 O. W. N. 119, 486.—**CAN.**

**a. — Employment of interested party as clerk.]**—The employment of the agent of one party as clerk to the arbn. will render the decree-arbitral reducible at the instance of the other party, unless such other party had consented to the employment.—**MOWBRAY v. DICKSON** (1848), 20 Sc. Jur. 405.—**SCOT.**

**b. — Discussion by correspondence.]**—Where an award was agreed upon between arbitrators, & afterwards one of them dissented, & the others, after discussing his new view by letter, published the award as first agreed upon, it was set aside, because they should have met for the discussion, a correspondence in such a case being insuffi-

cient, though the dissenting arbitrator did not object to that method.—**JEKYLL v. WADE** (1860), 8 Gr. 363.—**CAN.**

**c. — Reference to men of skill.]**—Where a reference is made to men of skill they may conduct the inquiry in any way they think proper.—**COCHRANE v. GUTHRIE** (1859), 21 Dunl. (Ct. of Sess.) 369.—**SCOT.**

**d. —** .]—Where there is a reference to experts as arbitrators they may proceed without calling evidence, unless either party, as to any particular point, wishes to adduce evidence, & may determine matters from their own expert knowledge.—**ANDERSON v. BRUNDELL & WATKINS** (1905), 24 N. Z. L. R. 938.—**N.Z.**

**f. — Allowing party to take part in deliberations.]**—**Held**: permitting the officers of deft. insurance co. to take part in the deliberations of the arbitrators was such improper conduct as to render the award bad.—**Re HUBBARD & UNION FIRE INSURANCE CO.** (1879), 44 U. C. R. 391.—**CAN.**

**g. — Cannot ignore agreement of parties.]**—An arbitrator cannot disregard an agreement between the parties, made as a condition of one party becoming a party to the reference.—**Re WALKER** (1886), 5 N. Z. L. R. 169.—**N.Z.**

**h. — Effect of custom in conduct of mercantile arbitrations.]**—Disputes arose as to the quality of goods sold not conforming to contract, as to the obligation of the purchaser to take the undelivered portion, & as to claims of damages. The parties agreed to submit all matters in dispute to two arbiters named, or their umpire. An award signed by the two arbiters & their umpire was issued in favour of the purchaser, who sued on the award. The arbn. had been conducted in an informal manner, the arbiters had made inquiries separately, had adopted the opinions of others, had been in communication with the parties who had nominated them respectively, & had consulted the umpire without devolving upon him, but such informal arbn.

*v. GURNEY* (1819), 3 B. & Ald. 252; 1 Chit. 679; 106 E. R. 656.

*Annotations*:—**Consd.** *Selby v. Hills* (1832), 1 Moo. & S. 253. **Mentd.** *Webb v. Taylor* (1843), 13 L. J. Q. B. 24.

**831. S. P. SPENCER v. NEWTON, LANE v. NEWTON** (1837), 6 Ad. & El. 623; 1 Nev. & P. K. B. 818; Will. Woll. & Dav. 122; 6 L. J. K. B. 119; 1 Jur. 52; 112 E. R. 239.

**832. Witness privileged from arrest for debt on way to & from & while at arbitration.]**—A witness attending an arbitrator upon a reference is protected from arrest, in the same manner as a witness who is attending a ct. in obedience to a *subpoena*.—**WANSELL v. SOUTHWOOD** (1829), 4 Man. & Ry. K. B. 359; 7 L. J. O. S. K. B. 227.

**833. S. P. RISHTON v. NISBETT** (1834), 1 Mood. & R. 347.

**834. S. P. WEBB v. TAYLOR** (1843), 13 L. J. Q. B. 24; 2 L. T. O. S. 106; 8 Jur. 39.

#### SECT. 2—CONDUCT OF THE HEARING.

##### SUB-SECT. 1.—ARBITRATORS MUST ACT JUDICIALLY.

**835. How far bound by rules of law, practice & evidence.]**—An arbitrator on a general reference of all matters, etc., may go farther than the ct. could to do complete justice, & may relieve against a harsh right which in a ct. of justice would prevail.—**KNOX v. SYMMONDS** (1791), 1 Ves. 369; 30 E. R. 390.

*Annotation*:—**Mentd.** *Adams v. G. N. of Scotland Ry. Co.*, [1891] A. C. 31, H. L.

were usual:—**Held**: the proceedings in the arbn. as carried out had been just such as were usual in similar mercantile arbn., & such as the parties had contemplated, & decree must be given for pursuer accordingly.—**HOPE v. CROOKSTON BROTHERS** (1890), 27 Sc. L. R. 709.—**SCOT.**

**k. — Judge acting as arbitrator.]**—Where in the Probate Ct. the judge, with concurrence of the parties, acted as a *quasi*-arbitrator, in settling differences between one of the heirs & the administrator, in respect of which he had no jurisdiction:—**Held**: his conclusion, while not strictly correct in a legal aspect, accorded to both a fair measure of justice, & the ct. would not vary the result attained.—**Re SCOTT ESTATE** (1896), 29 N. S. L. R. 92.—**CAN.**

**l. — Arbitrator giving advice to one party.]**—An action was brought to have an award set aside:—**Held**: the referee, though he had not acted in collusion with one party, had not acted impartially, having advised the agent of that party in regard to matters in dispute with pltf.—**WILKERSON v. MCGUGAN** (1912), 20 W. L. R. 651; 2 W. W. R. 121; 2 D. L. R. 11.—**CAN.**

**m. — Splitting difference.]**—In arbn. proceedings to determine the rent of property it was alleged that arbitrators did not really make an award, but that two of the arbitrators were wide apart in their estimation of a proper rental & the third arbitrator, without exercising any judgment in the matter, had induced or forced the other two to split the difference:—**Held**: if this had been proven it would be improper.—**TORONTO GENERAL HOSPITAL TRUSTEES v. SARASTON** (1916), 27 O. W. R. 515; 38 O. L. R. 139.—**CAN.**

**n. — Slipshod & irregular proceedings.]**—**Re BROOKS SCANLON O'BRIEN CO.** (1911), 17 W. L. R. 408.—**CAN.**

**p. Irregularities may be waived.]**—The nullity of an award cannot be claimed on account of irregularities in the arbitrators' proceedings, if the party making such claim had prior knowledge of the alleged irregularities & did not



*Sect. 2.—Conduct of the hearing: Sub-sect. 8, A.*

awarded, leaving, however, pltf. at liberty to enforce deft.'s agreement to enter into the rule of *Nisi Prius* for the reinstating of the premises.—*DODINGTON v. HUDSON* (1823), 1 Bing. 384; 130 E. R. 155.

**927.** ———.]—Debt on bond conditioned for the performance of an award to be made on a day therein named. One of the terms of the submission was that the arbitrator should examine the witnesses produced by the parties in difference. Plea, that the arbitrator made several appointments for proceeding with the reference, & examined witnesses produced by pltf's, & occupied the whole of the time of the meetings respectively in so doing; that pltf's., on the day when the time for making the award expired, closed their case, & deft. was called upon to enter upon his defence; that at the time an insufficient time remained for deft. to bring forward & examine his witnesses; that he requested the arbitrator to allow him reasonable time to bring forward & examine his witnesses, which the arbitrator refused, without the consent of pltf's., & which consent pltf's., although requested by deft., refused to grant, & the arbitrator refused to allow deft. any further time, although he had several material witnesses to examine, of which the arbitrators & pltf's. had notice:—*Held*: this plea was bad.—*GRAZEBROOK v. DAVIS* (1826), 5 B. & C. 534; 8 Dow. & Ry. K. B. 295; 4 L. J. O. S. K. B. 321; 108 E. R. 199.

**928.** ———.]—An action brought for the price of machinery sold was referred to arbn. Before the arbitrator a postponement was asked for on the part of deft., for the purpose of enabling him to produce a witness, whose evidence was to the effect that the machinery was defective & valueless. The adjournment was made, & was followed by some other adjournments, & at length the arbitrator peremptorily fixed Dec. 9 for the hearing & determining of the case, when judgment was given for pltf. The ct. made a rule absolute to refer the case back to the arbitrator for reconsideration.—*FENN v. FORBES* (1853), 20 L. T. O. S. 225.

**929.** ———.]—In an action to determine the right to a wall a verdict was taken, subject to a reference to a county ct. judge. The arbitrator had a view of the premises & then heard the case, making his award next day in favour of pltf. On a rule obtained by deft. calling upon pltf. to show cause why the award should not be set aside or referred back, on the grounds of surprise, & that deft. had no opportunity to adduce all his evidence:—*Held*: the arbitrator had applied himself diligently to the inquiry, & the rule must be discharged.—*RUSHWORTH v. WADDINGTON* (1859), 1 L. T. 69.

**930.** ——— Within discretion of arbitrator.]

for proof on certain conditions. The contractors refused to accept a proof on these conditions. The arbiter then cancelled the order for proof, & thereafter issued a decree-arbitral. In an action for reduction of the decree-arbitral:—*Held*: the parties had agreed to refer to the arbiter as a person of skill & experience, without the legal formalities of an arbn., & the arbiter was entitled to determine the amount that should be paid to the contractors in respect of the extra cost without taking evidence as to the amount which was actually expended by them.—*PATERSON & SON v. GLASGOW CORPN.* (1901), 3 F. (Ct. of Sess.) 34.—**SCOT.**

**933 i.** ——— *Where award referred back.*]—Where a matter was referred back to an arbitrator to answer different questions from those in the original reference,

& the arbitrator refused pltf.'s request to be allowed to give further evidence:—*Held*: pltf. had a right to be heard, as the arbitrator would have to apply his mind to a different phase of the case, even if there was sufficient evidence before him to enable him to answer the new questions.—*O'DONOGHUE v. OLIPHANT* (1903), 3 S. R. N. S. W. 47.—**AUS.**

**q.** ——— *Party as witness.*]—Where an order of reference by consent provided that the arbitrator "shall have power to examine the parties & their witnesses upon oath or affirmation":—*Held*: he had no discretion to reject the evidence of one of the parties on his own behalf.—*LISTER v. HAM* (1865), 1 C. L. J. O. S. 298.—**CAN.**

**r.** ———.]—On a contract it was agreed that the price to be paid

—It is a matter entirely in the discretion of an arbitrator, whether he will or will not postpone the reference, in order to give one of the parties an opportunity of bringing a material witness from abroad; & the ct. will not interfere, unless the circumstances in which he refuses to do so are such as to amount to misconduct.—*GINDER v. CURTIS* (1863), 14 C. B. N. S. 723; 143 E. R. 628.

**931.** ———.]—Where an application has been made to arbitrators to afford time to obtain & examine a witness who is absent, & they have honestly (even although erroneously) exercised their discretion as to the materiality of his evidence, & have refused the postponement applied for, their award will not be set aside on that ground.—*LARCHIN v. ELLIS* (1863), 11 W. R. 281.

**932.** ———.]—An action against a tenant for breach of covenant in a farming lease was, by consent of parties, referred by order of ct., dated June 13, 1863. Nothing was done until Dec. 31 following, when the arbitrator appointed Jan. 12, 1864, for proceeding with the reference, & notice of such appointment was sent by post to deft. by his attorney. Deft., however, was then absent from home, & he not having returned home as expected, his attorney was unable to see him & obtain the necessary evidence in time for the reference. The attorney attended the reference, & requested the arbitrator to adjourn the reference, on the ground of his client's absence & the importance of his evidence & that of his witnesses being taken, which, however, the arbitrator refused to do, & having examined pltf.'s witnesses, the arbitrator subsequently, on Mar. 19, made his award, assessing pltf.'s damages at £300, deft.'s attorney having previously objected to the arbitrator's proceeding with the award on the ground above mentioned. The ct. refused a rule to set aside the award, on the ground that the affidavit of deft.'s attorney was unsatisfactory & that deft. himself had made no affidavit that he was ignorant of the appointment for the proceeding with the reference.—*NARES v. DRURY* (1864), 10 L. T. 305.

**933.** ——— *Where award referred back.*]—A case was referred to an arbitrator, who found for pltf., without noticing an issue pleaded, & the ct. made absolute a rule to send the case back to him:—*Held*: the duty of the arbitrator was to amend his award, & not to re-hear the cause.—*BIRD v. PENRICE* (1840), 6 M. & W. 754; 8 Dowl. 775; 9 L. J. Ex. 257; 4 Jur. 970; 151 E. R. 617.

*Annotation*:—**Consd.** *Traherne v. Gardner* (1857), 8 E. & B. 161.

**934.** ———.]—Where an order of reference has a clause empowering the ct., if the award be disputed, to remit the matters for the reconsideration of the arbitrator, & the case is so remitted, the arbitrator must hear fresh evidence, if tendered, as on the original reference.

Where the case had been once so remitted, &

should be ascertained by arbn. The valuation was proceeded with, & the arbitrators consulted the parties to the contract as to the value of the land, finally adopting as their valuation a price agreed upon between the parties, & recording it in a statement of the whole valuation, certifying the valuation to be a "true & correct valuation":—*Held* the arbitrators having exercised their undoubted right of taking evidence of value, even from the parties themselves, the valuation was good in law.—*BOVEY v. PINE*, 1 J. R. N. S. 90.—**N.Z.**

**s.** ——— *Interested witness.*]—When arbitrators without consent examined an interested witness, & afterwards awarded in favour of the party calling him, the award was set aside.—*DAVIS v. BIRDSALL* (1846), 2 U. C. R. 199.—**CAN.**

the arbitrator had declined to hear more evidence, but amended his award, deciding in favour of the same party as before, & on motion to set aside such further award, the other party opposed a further reference to the same arbitrator, the ct. set aside the award.—*NICKALLS v. WARREN* (1814), 6 Q. B. 615; 2 Dow. & L. 549; 14 L. J. Q. B. 75; 4 L. T. O. S. 156; 9 Jur. 10; 115 E. R. 231.

*Annotation* :—*Distd. Re Huntley* (1853), 1 E. & B. 787.

**935.** ———.]—Some of the findings in the award of an arbitrator were inconsistent with each other, & the parties agreed that the award should be considered as not having been delivered & that the arbitrator should amend it, & they obtained a judge's order referring the award back. The arbitrator altered & re-delivered the award without giving notice to the parties or hearing fresh evidence or arguments. He had never been requested to hear fresh evidence or arguments :—*Held* : the amended award was good.—*BAKER v. HUNTER* (1847), 16 M. & W. 672; 4 Dow. & L. 696; 2 New Pract. Cas. 237; 16 L. J. Ex. 203; 153 E. R. 1360.

**936.** ———.]—An appeal was referred by quarter sessions to arbn. under 12 & 13 Vict. c. 45, s. 13, the arbitrator to have the same power as to costs as the sessions. The arbitrator made his award directing the appeal to be dismissed, & ordering applt. to pay costs to resp., but did not ascertain the amount of costs. A rule to refer the case back to the arbitrator was made absolute, "on the ground that he had not ascertained the amount of costs to be paid by applt. to resp.," no other objection being then suggested by applt. On the attendance before the arbitrator to inquire into the costs, applt. offered to produce additional evidence as to the merits of the appeal which he had not before brought forward. This the arbitrator refused to hear, & proceeded to make a fresh award in the same terms as before, except that it contained the amount of the costs. On an applica-

tion by applt. to set aside this award, on the ground of the refusal to hear the evidence :—*Held* : it could not be objected to on that ground, as the only purpose for which it was referred back was to ascertain the costs, & the arbitrator was not bound to hear any fresh evidence on the merits.—*Re HUNTLEY* (1853), 1 E. & B. 787; 22 L. J. Q. B. 277; 21 L. T. O. S. 113; 17 Jur. 571; 1 W. R. 305; 1 C. L. R. 426; 17 J. P. Jo. 294; 118 E. R. 631; subsequent proceedings, *R. v. HUNTLEY* (1854), 3 E. & B. 172.

**937. Arbitrator misleading party — Party not calling witnesses.**—Where it was left to an arbitrator to award either a money compensation for damage done, or, instead thereof, actual repairs of the damage done, & it was sought to set aside his award upon the allegation that the arbitrator had misled one party into believing that he would not award the damage, & that, in consequence, they had not called witnesses, as they would otherwise have done :—*Held* : on the facts, nobody was, or ought to have been at least, deceived by any such arrangement, & the application failed.—*NEWBOLD v. EAST LANCASHIRE RY. CO.* (1852), 19 L. T. O. S. 123.

#### *B. Absence of one of the Parties or both Parties.*

**938. Witnesses examined in absence of one party—After evidence closed.**—It is no ground for setting aside an award that one of deft.'s witnesses was re-examined by the arbitrator after the evidence was closed on both sides, & pltf.'s attorney gone, & gave a different testimony from what he gave at first, by which the arbitrator's opinion was influenced, unless such re-examination was brought about by the management of deft.'s attorney.—*ATKINSON v. ABRAHAM* (1797), 1 Bos. & P. 175; 126 E. R. 844.

*Annotations* :—*N.F. Dobson v. Groves* (1844), 6 Q. B. 637; *Re Plews & Middleton* (1845), 6 Q. B. 845. *Reid. Bignall v. Gale* (1841), 9 Dowl. 631.

**937 i. Arbitrators misleading party.**—After the arbitrators had commenced their investigation, pltf. & his attorney requested delay; they understood that it had been granted, but the arbitrators awarded in favour of deft. without giving further time, & without hearing all the testimony that pltf. might have offered. The award was set aside without costs.—*GRISDALE v. BOULTON* (1813), 1 U. C. R. 407.—**CAN.**

**937 ii.** ——— *Promise to take survey.*—Where a question was referred, & the arbitrators informed the parties that they would employ a surveyor, which they could do under the submission, before they made their award, but they nevertheless made their award without such survey, the ct. set aside their award.—*DOE d. ALLEN v. MURRAY* (1844), 2 Kerr, 439.—**CAN.**

**937 iii.** ——— *Insufficiency of notice after adjournment.*—Arbitrators, a few days after giving notice of adjournment for a month, sent a notice that they would proceed the same evening. The evidence showed that on the application of deft. they several times adjourned to suit his convenience. On an application to have an award set aside by reason of misconduct on the part of the arbitrators :—*Held* : their action did not amount to misconduct.—*TOOLESE MONEY DASSEE v. SUDEVI DASSEE* (1899), 1 L. R. 26 Calc. 361; 3 C. W. N. 347.—**IND.**

#### **PART III. SECT. 2, SUB-SECT. 8.—B.**

**938 i. Witnesses examined in absence of one party.**—In an arbn. it appeared that meetings were held at which accounts were submitted & discussed, without notice of the meetings being given to L., nor was he asked to lay before the arbitrators what he con-

sidered were the matters in dispute, or whether the documents placed before the arbitrators showed correctly the matters that were in dispute. He attended before the arbitrators in pursuance of a notice, & having been asked certain questions, was told by the arbitrators that he was not wanted further. He then retired, & was not present during the examination of certain witnesses whom he had asked the arbitrators to call. All the witnesses were examined separately & not in the presence of either party, & no notice was given to L. that it was the intention of the arbitrators to close the sittings :—*Held* : unless L. had waived all objections to the procedure adopted, the award should be set aside.—*LYDERS v. RESIDENTIAL, ETC., CHURCH OF NEW ZEALAND* (1910), 29 N. Z. L. R. 522.—**N.Z.**

**938 ii.** ——— *By one of three arbitrators without knowledge of others.*—*Held* : it was no objection to an award by three arbitrators, but which might have been made by any two, that one arbitrator alone examined a witness without notice to the opposite party, it being sworn that the other two arbitrators were totally ignorant of such evidence when they made the award.—*BOYLE v. HUMPHREY* (1855), 1 P. R. 188.—**CAN.**

**938 iii.** ——— *After hearing practically closed.*—An award will be set aside if arbitrators, when the hearing is practically over, hear further evidence in the absence of one of the parties without notice to him.—*ANNABLE v. ANNABLE* (1908), 8 W. L. R. 132; 1 Sask. L. R. 222.—**CAN.**

**938 iv.** ———.]—Arbitrators received the evidence of one party in the absence of the others, after the arbn. was closed :—*Held* : the award was

bad & must be set aside.—*WHITELY v. MCMAHON* (1881), 32 C. P. 453.—**CAN.**

**v.** ——— *Reference by consent in court.*—Where an arbitrator appointed in ct. by consent heard evidence behind the back of one of the parties which affected part of the award :—*Held* : Arbn. Act, 1897, s. 12 & s. 35, r. 652, did not apply & the whole award must be set aside.—*KENNEDY v. BEAL* (1898), 29 O. R. 599.—**CAN.**

**w.** ——— *Must be objected to at time — Waiver.*—Disputes having arisen as to rights of property between applt. and resp., were referred to the decision of L., who proceeded with the arbn., in which, on several occasions, he privately examined witnesses behind the back of one of the litigant parties. On an application to prevent the arbiter going on with his submission, on the ground that he had examined witnesses in applt.'s absence, it appeared that the irregularities were not objected to at the time they took place :—*Held* : they must have been consented to.—*DREW v. DREW* (1855), 18 Dunl. (Ct. of 4.—**SCOT.**

**y.** ——— *Effect of agreement.*—An arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without (if he does) giving the other side affected by such evidence the opportunity of meeting & answering it. This proposition is, however, subject to the qualification that the parties may agree that a reference may be conducted in any particular way, & such an agreement may be either express or implied from their conduct during the arbn.—*CURSETJI JEhangir KHAMBATTA v. CROWDER* (1894), 1 L. R. 18 Bom. 299.—**IND.**



*Sect. 2.—Conduct of the hearing : sect. 8, B.]*

**939.** —.]—Where an arbitrator examined a witness in the absence of one of the parties to an award after the evidence had been closed on both sides:—*Held*: this was a good ground for setting aside the award, although no improper motion was imputed to the arbitrator. *Semble*: although the attorney of the opposite party had been made aware of the irregularity, he was not bound to notice it before the award was made, as the irregularity could not be cured.—*DOBSON v. GROVES, R. v. DOBSON* (1844), 6 Q. B. 637; 1 New Pract. Cas. 101; 14 L. J. Q. B. 17; 4 L. T. O. S. 155; 9 Jur. 86; 115 E. R. 239.

*Annotations*:—*Refd.* *Stammers v. Tomkins* (1852), 1 W. R. 23; *Moseley v. Simpson* (1873), L. R. 16 Eq. 226. *Mentd.* *Re East & West India Docks & Birmingham Junction Ry. Co. & Bradshaw* (1848), 17 L. J. Q. B. 362.

**940.** — *Usage.*]—A usage for arbitrators appointed to determine, as between outgoing & incoming tenants of a farm, the value of the way-going crop & the deductions for want of repairs of the farm buildings & fences, to make their award, on inspection of the crops & premises, without notice to the parties & without evidence, may be good: but no usage can justify the arbitrators in hearing one party & his witnesses only, in the absence of, & without notice to, the other party.—*OSWALD v. GREY (EARL)* (1855), 24 L. J. Q. B. 69.

**941.** — *After notice that evidence closed.*]—An award was set aside, where the arbitrator received evidence after notice to the parties that he would receive no more, in which they acquiesced.—*WALKER v. FROBISHER* (1801), 6 Ves. 70; 31 E. R. 943.

*Annotations*:—*Distd.* *Fetherstone v. Cooper* (1803), 9 Ves. 67. *Foldd.* *Dobson v. Groves, R. v. Dobson* (1844), 6 Q. B. 637. *Consd.* *Moseley v. Simpson* (1873), L. R. 16 Eq. 226. *Refd.* *Re Plews & Middleton* (1815), 6 Q. B. 845.

**942.** ]—All the witnesses of the party against whom the award is made must have been examined, & in his presence, or it will be a ground for setting the award aside; but that must be made clearly to appear. *Qu.*: if it be not necessary to show that such examination was in point of fact required, or whether a witness having been named as to be examined be not a requisition.—*BEDINGTON v. SOUTHALL* (1817), 4 Price, 232; 146 E. R. 450.

**943.** —.]—Notice was given to one of the parties to an arbn. to attend meeting, for the purpose of taking instructions for the award, & at that meeting that party did not attend, but the other party attended, & was examined privately. On the evidence which he then gave the amount he was to pay was decreased by the arbitrators:—*Held*: this private examination of the party in his own favour was incorrect, & the award must be set aside.—*Re HICK* (1819), 8 Taunt. 694; 129 E. R. 554.

*Annotations*:—*Mentd.* *Reade v. Dutton* (1836), 2 M. & W. 69; *Cudliff v. Walters* (1839), 2 Mood. & R. 232; *Ringland v. Lowndes* (1863), 15 C. B. N. S. 173; *Darnley v. L. C. & D. Ry.* (1867), L. R. 2 H. L. 43, H. L.

**944.** —.]—It is no objection to an award that the arbitrators have in the absence of one of the

parties called in the other, & have asked him whether he admitted or disputed certain items in an account, & have merely taken his answer to that question.—*ANDERSON v. WALLACE* (1835), 3 Cl. & Fin. 26; 6 E. R. 1347, H. L.

*Annotations*:—*Mentd.* *Cale. Ry. Co. v. Lockhart* (1860), 3 L. T. 65, H. L.; *Whitmore v. Smith* (1861), 7 H. & N. 509; *Eastern Counties Ry. Co. v. Eastern Union Ry. Co.* (1863), 2 New Rep. 441; *Smith v. Whitmore* (1863), 33 L. J. Ch. 218.

**945.** —.]—A cause was referred to two lay arbitrators, & was decided by them in favour of deft. From the bill of costs sent in by deft.'s attorney, it was discovered that he had charged for business in the procurement & submission of evidence to the arbitrators which had never been made known to pltf. The ct. set aside the award. — *v. BEAUMONT* (1845), 4 L. T. O. S. 159,

**946.** *Effect of arbitrator declaring not influenced.*]—If an arbitrator, on evidence being improperly conveyed to him by one of the parties in the absence of the other, declares that he shall not receive such evidence, & that it will not influence his mind, an award made in favour of the party who improperly sent such information will not, on that ground, be set aside.—*STAMMERS v. TOMKINS* (1852), 1 W. R. 23.

**947.** —.]—An arbitrator greatly errs if he in any the minutest particular takes upon himself to listen to evidence behind the back of any of the parties to the submission.—*DREW v. DREW & LEBURN* (1855), 2 Macq. 1; 25 L. T. O. S. 282, H. L.

*Annotation*:—*Refd.* *Teacher v. Calder*, [1899] A. C. 451, H. L.

**948.** —.]—Pltf. & deft., being partners, had agreed upon a dissolution of the partnership. The ct. ordered valuers to be appointed to arbitrate between the parties. The arbitrators were duly appointed, & met for the purpose of making the valuation. Pltf. insisted upon his right to be present when evidence as to value was being taken. That right was resisted, & he withdrew under protest; a second meeting was called; he again insisted upon his right to be present, & was admitted. The award was then made:—*Held*: the award was invalid, inasmuch as the evidence as to value given in the party's absence might have prejudiced his case.—*WHITTLE v. HOLMES* (1857), 29 L. T. O. S. 122.

**949.** —.]—No custom or usage can justify an arbitrator or umpire in deciding on evidence laid before him without the knowledge of the party against whom he decides, & without giving him an opportunity of being heard.—*Re BROOK, DELCOMYN & BADART* (1864), 16 C. B. N. S. 403; 33 L. J. C. P. 246; 10 Jur. N. S. 701; 143 E. R. 1184.

*Annotation*:—*Mentd.* *Thorburn v. Barnes* (1867), L. R. 2 C. P.

**950. Information communicated in absence of one party.**] Private meetings of the arbitrators with one of the parties, & admitting him to be heard to induce an alteration in the award, is partiality, which will vitiate the award.—*BURTON v. KNIGHT* (1705), 2 Vern. 514; 23 E. R. 929.

*Annotation*:—*Refd.* *Pearse v. Pearse* (1829), 9 B. & C. 484.

**950 i. Information communicated in absence of one party.**]—A cause was referred & deft. obtained time to procure additional witnesses; in his absence the arbitrators received statements favourable to pltf., which influenced their decision:—*Held*: this was sufficient ground to set aside the award.—*ALLISON v. DESBRISAY* (1859), Cochran, 91.—*CAN.*

**950 ii.** —.]—Any communication between one of the parties to an arbn. & an

arbitrator on the subject of the reference, of which the other party & the other arbitrators are not aware & at which they are not present, is illegal, & renders the award invalid.—*PARDEE v. LLOYD* (1879), 26 Gr. 374.—*CAN.*

**950 iii.** —.]—Where an arbitrator received statements & information upon the subject in dispute, in the absence of one party, without communicating to him that he had done so, the award was set aside with costs.—*Re CRUICK-*

*SHANK & CORBY* (1879), 30 C. P. 466.—*CAN.*

**950 iv.** —.]—Where an arbitrator received certain papers & documents from defts., together with a letter, containing certain documents, & made his award without giving pltf. an opportunity of seeing the papers & documents, & of meeting the inferences deducible from them:—*Held*: there was such a breach of duty on the part of the arbitrator as entitled pltf. to have the award set



**951.** —.—.]—Where arbitrators take instructions, or talk with one party in the absence of the other, the ct. ought to be inclined to set aside the whole (LORD ELDON, C.).—FETHERSTONE v. COOPER (1803), 9 Ves. 67; 32 E. R. 526.

*Annotations* :—**Apprvd.** Dobson v. Groves (1844), 9 Jur. 86; *Re Plews & Middleton* (1845), 14 L. J. Q. B. 139. **Mentd.** Smith v. Symes (1820), 5 Madd. 74; Smith v. Whitmore (1864), 2 De G. J. & Sm. 297, L.J.J.

**952.** —.—.]—An award was set aside, on the ground of interviews having taken place between the arbitrator & one party, in the absence of the other.

Similar misconduct, on the part of the person applying, will not prevent the ct. setting aside the award, for the matter concerns the due administration of justice.—HARVEY v. SHELTON (1844), 7 Beav. 455; 13 L. J. Ch. 466; 3 L. T. O. S. 279; 49 E. R. 1141.

*Annotations* :—**Apld.** *Re Brook & Delcomyn* (1864), 16 C. B. N. S. 403. **Mentd.** Wood v. Taunton (1849), 13 L. T. O. S. 277; *Re Huddersfield Corpn. & Jacomb* (1874), L. R. 17 Eq. 476.

**953.** It is no ground for granting a rule, calling upon a party to show cause why an award should not be set aside, that after the case had been closed on both sides the arbitrator received information from each party in the absence of the other.—CROSSLEY v. CLAY (1848), 5 C. B. 581; 136 E. R. 1006.

*Annotation* : **Refd.** Moseley v. Simpson (1873), L. R. 16 Eq. 226.

**954.** — As regards accounts.]—A meeting of arbitrators took place, at which one of the parties attended, but of which meeting the other party had no notice, & did not attend. An error in the account was pointed out to the arbitrators by the party who attended, which error was then set right, & the award then made :—*Held* : the award was invalid. HODGSON v. BROWN (1856), 27

aside. — C. JEHAINGIR KHAM BATTIA v. CROWDER (1891), L. L. R. 18 Bom. 299.—IND.

**950 v.** —.—.]—In the case of an arbn. there would be no ground for setting aside or refusing to enforce an award, where one party is interviewed by the arbitrator in the absence of the other CAMPBELL v. IRWIN (1913), 25 O. W. R. 853; 5 O. W. N. 957.—CAN.

**954 i.** — Matter of accounts.]—In a reference of the accounts of a ship's husband, the referee held various communications, without the presence of the parties, with certain ship's captains, & proceeded on certain information received from them :—*Held* : as the reference related solely to the audit & adjustment of a ship's accounts, it would have been superfluous & oppressive for the arbiter to summon formal meetings of the parties & their agents on every small point of detail, on which he could easily get information by inquiry of third parties, subject to the ultimate correction of the parties.—M'NAUGHTON v. BRUCE (1852), 1 W. R. 134.—SCOT.

**956 i.** — After evidence closed.]—Where arbitrators improperly receive evidence *ex p.*, the award will be set aside without reference to the probability of their having been influenced by the evidence.

Where, after the evidence had closed, & the attorneys for the parties had left the room, deft.'s attorney made a communication to one of the arbitrators respecting a matter in controversy, in consequence of which the arbitrators obtained further information on the subject, & one of them swore that his decision was materially influenced thereby, an award in favour of deft. was set aside.—MCCAUSLAND v. TOWER (1872), 1 N. B. R. (Pug.) 125.—CAN.

**956 ii.** — —.—.]—Where, after an

L. T. O. S. 175; *sub nom. Re HODGSON & BROWN*, 4 W. R. 635.

**955.** — —.—.]—An arbitrator, in taking accounts, allowed two bills of costs sent to him by one side after the last meeting, without communicating them to the other side :—*Held* : the award must be set aside.—*Re TIDSWELL* (1863), 33 Beav. 213; 3 New Rep. 281; 10 Jur. N. S. 143; 55 E. R. 349

**956.** — After evidence closed.]—By agreement between the landlord of a farm & his outgoing tenant certain matters in dispute between them were referred to arbn., Arbn. Act, 1889, Sched. I., being incorporated in the agreement. All the evidence on both sides having been heard, the arbitrators on a subsequent day before making their award held a meeting on the farm at which the outgoing tenant was present, but without the knowledge & in the absence of the landlord :—*Held* : the award must be set aside, it being improper to take information from one side in the absence of the other.—*Re GREGGON & ARMSTRONG* (1894), 70 L. T. 106; 38 Sol. Jo. 237; 10 R. 408, D. C.

**957.** —.—.]—In an arbn. between shipowners & charterers it was agreed, if the arbitrator desired to hear further evidence, he should give notice to the parties to that effect. The arbitrator found that he required further information, & obtained it, together with certain documentary evidence relating thereto, from the charterers. It was sought to set aside the award, on the ground that the award was founded partly on information which had not been disclosed to the shippers, & that, so far as the documentary evidence was concerned, they were ignorant even of its existence until after the award was made :—*Held* : the award could not stand.—*Re CAMILLO FITZEN & JEWSON & SONS* (1896), 40 Sol. Jo. 438.

**958.** View in absence of both parties.]—An award in an action for not repairing made by

£200, retired, understanding from the arbitrators that the case was closed; B., in his absence, induced two of the arbitrators to award him £1,000, the third refusing to consent. The award was set aside on payment of costs.—VAN EDMOND v. JONES (1834), 4 O. S. 119.—CAN.

**a.** — To arbitrator after umpire appointed.—Award by umpire set aside.]—A reference was to two arbitrators with power to appoint an umpire, who was appointed & made an award, one arbitrator held private conferences with one of the parties :—*Held* : this was sufficient to avoid the award of the umpire.—*Re LAWSON v. HUTCHINSON* (1872), 19 Gr. 84.—CAN.

**b.** — Right to set aside barred by examining arbitrators.]—Where arbitrators were charged by pltf. that they went in the absence of pltf. to deft.'s attorney, who influenced them in making their award, & it was distinctly denied that they were influenced by anything other than evidence given before them :—*Held* : upon the allegations made, the arbitrators should not have been called upon to answer, but having answered, their answer was sufficient.—*Re BOLTON-HOUSE, Ex p. MILNER* (1875), 3 N. B. R. (Pug.) 96.—CAN.

**958 i.** View in absence of one party.]—Deft. having cut lumber on pltf.'s land, agreed to pay him such sum as two arbitrators should decide, it being understood at the time that pltf. was to show the bounds of his land. Pltf. afterwards, without notice to deft., pointed out his boundaries to the arbitrators, who awarded a certain sum due to him :—*Held* : the award was bad for want of notice.—*Therrian v. Therrian* (1858), 4 All. 48.—CAN.

**958 ii.** — —.—.]—A submission provided that arbitrators should fix the value of a

arbn. was closed, the agent of one party sent letters to two of the arbitrators, containing statements & arguments in favour of his principal, which the other party did not see, the award was set aside.—*Williams v. Robbin* (1858), 2 P. R. 234.—CAN.

**956 iii.** — —.—.]—In the conduct of arbn. the rule is inflexible that the arbitrators must be scrupulously guarded against any possible charge of unfair dealing towards either party.

Where one of the parties to a reference, who had been examined as a witness, after the evidence had been closed, sent his affidavit explaining some portion of his evidence, the ct. set aside the award.

*RACE v. ANDERSON* (1887), 14 A. R. 213.—CAN.

**956 iv.** What must be averred.]

Upon a motion to set aside an award on the ground that the arbitrators improperly received statements from one of the parties in the absence of the other :—*Held* : it was not necessary in such a case to impute any intentional impropriety to the arbitrators, nor to show that their decision had been influenced; it was only necessary to show that their minds might possibly have been influenced.

Where it appeared that after the close of the evidence some explanations in regard to an account were given by one party in the absence of the other, & that when the arbitrators & the parties all met, one of the arbitrators said that they had had an explanation about the account, & wanted to know what the other party had to say about it :—*Held* : the award was bad, & must be set aside.—*Re FERRIS & EYRE* (1889), 18 O. R. 395.—CAN.

**956 v.** — After evidence thought to be closed.]—On a reference by A. & B., A.'s agent attended, & after B. had given evidence of a claim to the amount of

*Sect. 2.—Conduct of the hearing: Sub-sect. 8, R. & C.]*

arbitrators upon view of the premises, without calling the parties before them, will be set aside.—ANON. (1814), 2 Chit. 44.

*Annotation:—Mentd. R. v. L. G. Board, Ex p. Arlidge* (1913), 78 J. P. 25, C. A.

**959. Witnesses examined in absence of both parties—Evidence subsequently struck out by consent.]—**Evidence having been received by arbitrators at a meeting improperly convened, at which neither pltf. nor deft. attended, & it being subsequently agreed it should be struck out, the ct. refused to set aside an award which had been made, the arbitrators swearing that they did not consider the evidence, in making their award, & the parties subsequently proceeding with their case.—KINGWELL v. ELLIOTT (1839), 7 Dowl. 423; 8 L. J. C. P. 241.

**960. ——.]**—Unprofessional arbitrators, appointed by an agreement of reference, ascertained, at a meeting, the balance due from A., one of the litigant parties, to B., the other, except a few pounds, which the arbitrators proposed to make payable by A. to B., on account of interest owing by A. to a third person, R., on a mtge. of land, the property of A., which A. was to assign to B. By arrangement between themselves, the arbitrators, without holding any further meeting, questioned R. separately, & in the absence of the parties, as to the amount of interest due; each then stated the result of his inquiry to the other, & the reports agreeing, they made their award. The ct. set the award aside, as procured by "undue means," contrary to the Act of 1698, s. 2, the course pursued having been inconsistent with natural justice.—*Re PLEWS (CLEWS) & MIDDLETON* (1845), 6 Q. B. 845; 1 New Pract. Cas. 158; 14 L. J. Q. B. 139; 4 L. T. O. S. 155, 332; 9 Jur. 160; 115 E. R. 319.

*Annotations:—Folld. Re Tidswell* (1863), 33 Beav. 213. *Reid. Stammers v. Tomkins* (1852), 1 W. R. 23; *Re Beck & Jackson* (1857), 1 C. B. N. S. 695. *Mentd. Bligh v. Cotton* (1863), 12 W. R. 102; *Re Gething & Fotheringham* 13 W. R. 90.

**961. ——. Third arbitrator.]—**An award will not be set aside, but will be sent back to the same arbitrators to be re-executed or corrected, when a third arbitrator, called in by two others, has not only heard the whole of the evidence already taken read over to him, but has asked questions of the witnesses, without notice to & in the absence of the parties & their attorneys. *Semble:* there is no necessity for notice to the parties in such a case.—ANNING v. HARTLEY (1858), 27 L. J. Ex. 145.

**962. ——.]**—An award is not necessarily bad because the arbitrator has taken evidence in the absence of both the parties. Such an irregularity may be so treated by the disputants as to prevent them afterwards taking any objection to it.—THOMAS v. MORRIS (1867), 16 L. T. 398.

farm. Each arbitrator was, with the assent of the parties, requested, "on behalf of the party whom he represented, to make a separate valuation of the farm." One arbitrator, accompanied only by the party who had nominated him, inspected the farm. When the arbn. was held, the arbitrators, after comparing their valuations, made their award:—*Held:* the award should be set aside, on the ground of misconduct in inspecting the farm in company with one party, & in the absence of the other or of any person representing him.—*Re BRIEN & BRIEN*, [1910] 2 I. R. 84.—IR.

**958 iii. —.]**—Arbitrators inspected land without notifying one of the parties:—*Held:* the award was good as the party seeking to impeach same

had not been injured.—ERBACH v. BENDER (1910), 14 W. L. R. 720.—CAN.

**959 i. Witnesses examined in absence of both parties.]—**An award set aside for irregularity of arbitrators, such as examination of witnesses in absence of parties, will be set aside without costs.—CAMPBELL v. BOULTON (1843), 1 U. C. R. 407.—CAN.

**959 ii. —.]**—In a submission in regard to a matter of accounting, the arbirer may competently seek information as to the subject of reference from third parties, although the parties to the submission are not present. *Semble:* objections to his so doing must, to a certain extent, be judged of *secundum subjectum materiam*.—BARR

**963. Waiver of irregularity—Where witnesses examined in absence of one party.]—**The ct. refused to set aside an award, on the ground of the irregular conduct of the arbitrators, in having examined witnesses in the absence of, & without notice to, one of the parties to the order of reference, where it appeared that the party complaining of the irregularity was made acquainted with it three weeks before the award was made, & gave no notice to the arbitrators of his intention to dispute the validity of their award on that account, & where it further appeared that no substantial injustice had been occasioned by the irregularity.

*Semble:* where arbitrators have examined a witness in the absence of one of the parties to the order of reference, who has been summoned to attend them, & has neglected to do so, it is the safer & regular course to give the absent party notice of what has taken place at such meeting (COLTMAN, J.).—BIGNALL v. GALE (1841), 2 Man. & G. 830; 9 Dowl. 631; Drinkwater, 151; 3 Scott. N. R. 108; 10 L. J. C. P. 169; 5 Jur. 701; 133 E. R. 980.

*Annotations:—N.F. Dobson v. Groves* (1844), 6 Q. B. 637. *Dttd. Re Plews & Middleton* (1845), 6 Q. B. 845. When *Atkinson v. Abraham* (1797), 1 Bos. & P. 175, & *Bignall v. Gale* (1841), 2 Man. & G. 830, were before us lately [in *Dobson v. Groves* (1844), 6 Q. B. 637], we did not accede to their authority, but adopted a very different rule, laid down by Lord Eldon in the commencement of his career in *Walker v. Froisher* (1801), 6 Ves. 70 (LORD DENMAN, C.J.). *Folld. Moseley v. Simpson* (1873), 28 L. T. 727.

**964. ——.]**—G. indicted D. for a nuisance, committed by erecting a fixed pier in the bed of the Thames. D. brought an action against G. for disturbing his right of waterway near the same place, by placing barges, etc., which formed a floating pier. Both cases were referred to an arbitrator. After hearing & dismissing the parties, the arbitrator sent for a deputy water bailiff, who had been examined on the reference, & questioned him as to the means of giving convenient access to the shore, supposing the fixed pier to be removed. Neither party to the reference appeared at, or had notice of, the meeting; a special pleader, who had been employed on the reference as advocate, was present, but not professionally. The party who afterwards complained of this proceeding had notice of it four days before the arbitrator made his award, but did not remonstrate. On motion to set the award aside:—*Held:* the omission to remonstrate after knowledge of the irregularity, & before making of the award, was no answer.—DOBSON v. GROVES, R. v. DOBSON (1844), 6 Q. B. 637; 1 New Pract. Cas. 101; 14 L. J. Q. B. 17; 4 L. T. O. S. 155; 9 Jur. 86; 115 E. R. 239.

*Annotations:—Reid. Stammers v. Tonkins* (1852), 1 W. R. 23; *Moseley v. Simpson* (1873), L. R. 16 Eq. 226. *Mentd. Re East & West India Docks & Birmingham Junction Ry. Co. & Bradshaw* (1848), 17 L. J. Q. B. 362.

**965. —. —.]**—The parties to an award & arbn. met on the business, & one of the parties was only present part of the time. On the following

*v. MACNAUGHTON & BRUCE* (1852), 2 Stuart, 18.—SCOT.

**959 iii. —. Award referred back.]—**Arbitrators, on a reference back, took the evidence of professional witnesses without notice:—*Held:* notice was indispensable; but as the arbitrators seemed to have acted under mistake, & not from a settled intention to do injustice, the matter should be referred back a second time.—*Re MANLEY v. ANDERSON* (1859), 2 P. R. 354.—CAN.

**959 iv. —. & in absence of other arbitrators.]—**An arbitrator permitted a witness to make statements to him with reference to the matters in dispute in the absence of the parties & of the other arbitrators:—*Held:* the award was invalid for such misconduct.—WOOD v. GOLD (1894), 3 B. C. R. 281.—CAN.



day the other party had an interview alone with the arbitrator on the business of the award, without the personal knowledge or assent of the other party. After this the arbitrator made his award:—*Held*: in the circumstances appearing in the evidence, the party absent at the interview between the other & the arbitrator must be taken to have acquiesced in it, & the award should not be set aside.—*HAMILTON v. BANKIN* (1850), 3 De G. & Sm. 782; 19 L. J. Ch. 307; 16 L. T. O. S. 81; 15 Jur. 70; 64 E. R. 703.

**966.** ———.]—Where an arbitrator examines witnesses behind the back of one of the parties, such party is justified in at once abandoning the reference & applying to a judge to rescind the submission; but if he continue, after the fact has come to his knowledge, to attend the subsequent proceedings, this will be a waiver of the irregularity, & he cannot afterwards set aside the award on that ground.—*DREW v. DREW & LEBURN* (1855), 2 Macq. 1; 25 L. T. O. S. 282, H. L.

**967.** ——— **Where witnesses examined in absence of both parties.**]—If arbitrators, after the first or second meeting, exclude both the parties & their attorneys, & examine witnesses privately, at their (the witnesses') houses, it seems that such conduct is no good ground of objection, provided it does not proceed from corrupt motives. At all events, if either party would take advantage of it, he must give notice at the time that he intends to rely on it as an objection, & if he lie by & suffer other meetings to take place, & when the arbitrators are ready to make their award, revoke his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award.—*HEWLETT v. LAYCOCK* (1827), 2 C. & P. 574.

*Annotations*:—*Dbtd. & N.F. Re Pews & Middleton* (1845), 14 L. J. Q. B. 139. *Bygnall v. Gale* (1841), 2 Man. & Gr. 830, recognised *Atkinson v. Abraham* (1797), 1 Bos. & P. 175, as well as *Hewlett v. Laycock*, but we did not think either of these cases correctly decided, when we had occasion to consider them last term (in *Dobson v. Groves* (1844), 14 L. J. Q. B. 17) (LORD DENMAN, C.J.). *Consd. Parkes v. Parkes* (1852), 2 Rob. Eccl. 518.

#### PART III. SECT. 2, SUB-SECT. 8.—C.

**968 i.** *Evidence not on oath.*]—An award is not null because witnesses examined have not been legally sworn.—*TREMBLAY v. TREMBLAY* (1853), 3 L. C. R. 482.—**CAN.**

**968 ii.** ———.]—Unsworn communications to the board of arbitrators or some of them in piecemeal fashion by a witness are improper as evidence.—*WRIGHT v. TORONTO RY. CO.* (1914), 26 O. W. R. 113, 749; 6 O. W. N. 119, 486.—**CAN.**

**968 iii.** ——— *Oath illegally administered.*]—*Held*: an oath illegally administered could not form a valid basis of an award.—*WALI-UL-LAH v. GHULAM ALI* (1877), 1 L. L. R. 1 All. 535.—**IND.**

**968 iv.** ——— *Reference to skilled arbitrators.*]—Where a lease contained a reference to persons of skill to be chosen mutually by the parties:—*Held*: the referees were not bound to put the witnesses on oath.—*COCHRANE v. GUTHRIE* (1861), 23 Dunl. (Ct. of Sess.) 865.—**SCOT.**

**968 v.** ——— *No power to administer oath on Koran.*]—On a reference to arbn. arbitrators made an award founded on evidence of deft. after he had by agreement been sworn on the Koran. An objection was taken that the arbitrators had no power to administer such oath, & that the award was invalid:—*Held*: the objection was one which vitally affected the procedure of the arbitrators, & could not be ignored in proceedings arising out of the award.—*WALI-UL-LAH*

*v. GHULAM ALI* (1877), 1 L. L. R. 1 All. 535.—**IND.**

**968 vi.** ——— *Receivable by consent of parties.*]—Evidence not on oath may be received by an arbitrator under Arbn. Act, 1890, s. 15, where the parties consent to that course.—*BELL v. FINN* (1896), 14 N. Z. L. R. 447.—**N.Z.**

**968 vii.** ——— *Positive proof of consent of parties required.*]—Under R. S. O., 1877 (c. 50), s. 224, the witnesses on an arbn. must be examined upon oath, unless there is a positive agreement to the contrary. Such consent may be shown *dehors* the submission; but *semble*: it cannot be inferred from absence of objection or mere acquiescence.—*Re RUSHBROOK & STARR* (1881), 46 U. C. R. 73.—**CAN.**

**968 viii.** ——— *Objection must be taken before arbitrator.*]—An award will not be set aside on the ground that witnesses were examined without being sworn, if the objection was not taken before the arbitrators.—*SEELYE v. KELLY* (1827), N. B. Dig. 55 (8a).—**CAN.**

**968 ix.** ———.]—If parties to an arbn. knowingly permit the arbitrators to examine witnesses without oath & do not object at the time, such omission is not a ground for setting aside the award.—*HAYDON v. DUNN* (1854), James, 256.—**CAN.**

**972 i.** ——— *Waiver of objection.*]—An award will not be disturbed where the witnesses were examined without being sworn, although the rule of reference required them to be sworn, if the party ob-

#### C. Duty to examine on Oath.

See Arbitration Act, 1889 (c. 49), s. 7 (a) & Sched. 1. (g).

**968.** *Evidence not on oath—Waiver of objection.*]—The ct. will not set aside an award on the ground of the witnesses not having been examined on oath, if no such objection was made at the time of their examination.—*RIDOAT v. PYE* (1797), 1 Bos. & P. 91; 126 E. R. 795.

**969.** ———.]—It is no ground for setting aside an award, that the arbitrator (a layman) has examined witnesses not upon oath or affirmation, if that mode of proceeding was not objected to at the time of their examination.—*BIGGS v. HANSELL* (1855), 16 C. B. 562; 25 L. T. O. S. 130; 139 E. R. 879.

*Annotation*:—*Mentd. Wakefield v. Llanelly Ry. & Docks Co.* (1865), 3 De G. J. & Sm. 11.

**970.** ———.]—It is not absolutely necessary that the evidence before an arbitrator should be taken on oath; the parties may waive it.—*WAKEFIELD v. LLANELLY RY. & DOCK CO.* (1864), 34 Beav. 245; 55 E. R. 629; *affd.* on another point (1865), 12 L. T. 509, C. A.

**971.** ——— *Submission requiring evidence on oath.*]—If a submission to arbn. be "so that the witnesses be examined on oath," affidavits cannot be read; if they are, the award may be set aside.—*BANKS v. BANKS* (1835), 1 Gale, 46.

**972.** ——— *Waiver of objection.*]—Where a cause was referred to arbn. upon an order of reference, which directed that the witnesses should be sworn before a judge, & the arbitrator took the evidence of pltf.'s witnesses not upon oath, which course was protested against by deft., who, nevertheless, permitted the evidence of his own witnesses to be so taken:—*Held*: he had thereby waived the objection, & could not be permitted to impeach the award on that ground.—*ALLEN v. FRANCIS* (1845), 4 Dow. & L. 607, n.; 1 New Pract. Cas. 245; 5 L. T. O. S. 178; 9 Jur. 691.

*Annotation*:—*Distd. Smith v. Sparrow* (1847), 4 Dow. & L. 604.

jecting to the award were present & consented to such examination.—*REILLY v. GILLAN* (1836), Ber. [211], 120.—**CAN.**

**972 ii.** ———.]—Where either party to an arbn. objects to an irregularity in conducting it, as, for instance, against a certain person administering the oath to the witnesses, & takes his chance of the award, he cannot afterwards, on the same ground, impeach the award.—*SLACK v. MCEATHRON* (1845), 3 U. C. R. 184.—**CAN.**

**972 iii.** ———.]—At a hearing, pltf.'s attorney tendered witnesses, whom the arbitrators refused to swear. The attorney continued & went into his case. On a motion to set aside the award for irregularity & not pursuing the terms of submission:—*Held*: any objection to the mode of examination was waived by the parties continuing to proceed before the arbitrators, & all examining the witnesses in the same way.—*CAMERON v. PRESBYTERIAN CHURCH MANAGERS* (1881), 6 Nfld. L. R. 335.—**NFLD.**

**c. Evidence on oath—Not authorised by submission.**]—An award will be set aside if arbitrators examine one of the parties upon oath when not authorised to do so by the submission.—*STOCKING v. CROOKS* (1827), Tay. 492.—**CAN.**

**d. ——— Necessity for.**]—Where an arbitrator to whom a claim is referred for report is empowered to take oral evidence, he cannot proceed to take such evidence without swearing the witnesses.—*POULIOT v. R.* (1887), 1 Exch. C. R. 313.—**CAN.**



*Sect. 2.—Conduct of the hearing: Sub-sect. 8, C.*

**973. Submission leaving discretion.]—**A cause was referred by order of *Nisi Prius*, which stated that "the arbitrators should be at liberty, if they should think fit, to examine the parties & their respective witnesses on oath":—*Held*: it was discretionary with the arbitrators whether they would examine the witnesses on oath or not, & it was no objection to their award that the witnesses were examined without being sworn, although the party against whom the award was made required, at the time, that they should be sworn.—*SMITH v. GOFF* (1845), 14 M. & W. 264; 3 Dow. & L. 47; 153 E. R. 475.

**974. — Sworn to before award.]—**The witnesses in an arbn. may by consent be examined without the oath having been administered, provided they take it before the award is made.—*MANSFIELD v. PARTINGTON* (1824), 2 L. J. O. S. K. B. 153.

*D. Effect of Misreception and Misrejection of Evidence.*

**975. Misreception of evidence—Whether ground for setting aside award—Legal arbitrator.]—**The ct. will not set aside an award, upon the ground that the arbitrator, a barrister, has improperly admitted evidence, or is mistaken in point of law, although the point on which the arbitrator is said to have decided erroneously arose incidentally, & was not expressly referred by the parties.—*PERRIMAN (PERRYMAN, PERYMAN) v. STEGGALL* (1833), 9 Bing. 679; 2 Dowl. 726; 3 Moo. & S. 93; 2 L. J. C. P. 151; 131 E. R. 768.

**976. — — — — —.]—**It is no ground for impeaching an award that the arbitrator, a barrister, has been mistaken in point of law as to the admissibility of certain evidence.—*ARMSTRONG v. MARSHALL* (1836), 4 Dowl. 593; 1 Har. & W. 643.

**977. — — — — —.]—**An action for the board & lodging of deft.'s wife was referred to an arbitrator, a barrister, who admitted evidence of the

wife's adultery & decided against pltf. The ct. refused to set aside the award.—*SYMES v. GOODFELLOW* (1836), 2 Bing. N. C. 532; 4 Dowl. 642; 1 Hodg. 400; 2 Scott, 769; 5 L. J. C. P. 153; 132 E. R. 208.

**978. — — — — Lay arbitrator.]—**The ct. will not set aside an award on the ground that the arbitrator has made a mistake in law, e.g. in receiving improper evidence, although the arbitrator may not happen to be a member of the legal profession. *Semble*: there is no difference between legal & non-legal arbitrators.—*HENTIG v. RALLING* (1840), H. & W. 2; *sub nom.* *HENTY v. RALLY*, 4 Jur. 1091.

**979. — — — — —.]—**Debt for two calls of £1 each upon two hundred shares in an incorporated joint-stock co. The particulars claimed £330, viz., £150 in respect of a first call upon one hundred & fifty shares, & £180 in respect of a second call upon one hundred & eighty shares. Deft. pleaded payment. The cause being referred, deft. proved payment of more than £400; it was shown that he was proprietor of six hundred & forty shares at the first call, & one thousand two hundred at the second; & the arbitrator awarded in favour of pltf.s:—*Held*: the arbitrator, by receiving evidence in respect of more than two hundred shares, had not exceeded his authority, but had, at the most, received improper evidence, & a rule for setting aside the award must be refused.—*EASTERN COUNTIES RY. CO. v. ROBERTSON* (1843), 6 Man. & G. 38; 1 Dow. & L. 498; 6 Scott, N. R. 802; 1 L. T. O. S. 257; 134 E. R. 800.

**980. — — — — —.]—**On a reference of a cause & all matters in difference to arbn., pltf. tendered in evidence his books, containing entries made by himself & others on his dictation, the which being objected to as inadmissible, the arbitrator stated that the same strictness was not required as on a trial at *Nisi Prius*, & that, although the books were not strictly admissible, he had authority to receive them, & he accordingly did so; but it did not appear that he had acted upon them:—*Held*: this did not amount to misconduct in the arbitrator so

**PART III. SECT. 2, SUB-SECT. 8.—D.**

**1. Misreception & misrejection of evidence.]—**The improper reception or rejection of evidence by an arbitrator, without any corrupt intent, does not amount to legal misconduct upon which an award will be set aside.

The evidence received consisted in statements made by pltf. *ante litem motam* in substance confirmatory of his evidence before the arbitrator, & the rejection consisted in the arbitrator's refusal to receive parts of pltf.'s examination without the whole being received. It did not appear that the arbitrator was influenced by the evidence objected to, & he made no request to be allowed to reconsider his award:—*Held*: while the evidence objected to was not strictly admissible, the award could not be interfered with on such ground, & especially so since R. S. O., 1877 (c. 50), s. 289, when it did not appear to have occasioned any miscarriage on the merits.—*WEBSTER v. HAGGART* (1884), 9 O. R. 27.—**CAN.**

**975 i. Misreception of evidence — Whether ground for setting aside award.]—**Where the arbitrator admitted upon verbal proof an agreement, which Stat. Frauds required to be in writing, the ct. set aside the award.—*GOSSE, PACK & FRYER v. KELLY* (1819), 1 Nfld. L. R. 169.—**NFLD.**

**975 ii. — — — — —.]—**An award will not be set aside because letters are put in as evidence which are not legal evidence, if the arbitrators only read the letters to judge of their admissibility & did not actually receive them as evidence.—*HOTCHKISS v. HALL* (1871), 5 P. R. 423.—**CAN.**

**975 iii. — — — — —.]—**In a case referred to arbn. deft. contended that, as he had tendered the amount awarded to pltf. before suit, he ought not to pay costs, & in support of his contention produced a letter written by pltf.'s attorney to his attorney, which was stated to be without prejudice, & the arbitrator refused pltf. costs:—*Held*: though the arbitrator was wrong in receiving a document which ought not to have been received, yet this was not a sufficient ground to justify the judge in refusing to confirm the award.—*HOWARD v. WILSON* (1878), 1 L. R. 4 Calc. 231; 2 C. L. R. 488.—**IND.**

**975 iv. — — — — —.]—**Admission of irrelevant evidence by arbitrators, if not shown to have affected the amount of award, is no ground of appeal therefrom.—*QUEBEC, MONTREAL & SOUTHERN RY. CO. v. LANDRY* (1909), Q. R. 19 K. B. 82.—**CAN.**

**g. — — — — Previous proceedings.]—**Where an arbitrator imported into his proceedings a previous inquiry alleged to have been made by him, & relied upon admissions made in the former proceedings:—*Held*: his award was bad, & the decision based upon it must be set aside.—*KANHYE CHAND GOSAMEE v. RAM CHUNDER GOSAMEE* (1875), 24 W. R. 81.—**IND.**

**h. — — — — Agreement.]—**Deft. consented to a suit being referred to arbn., on condition that the arbitrators should proceed on the basis of there having been no adjustments, & that the adjustments relied upon by pltf. should not be taken into consideration. The

arbn. was carried on before arbitrators & afterwards before an umpire, who, in spite of deft.'s protests, admitted one of the adjustments in evidence as proof of an admission by deft. that a certain item included in the adjustment was due from him to pltf. Previously the other of the two adjustments had been used by pltf. without protest from deft. to prove one item therein. Deft. protested & asked the umpire to submit a special case for the consideration of the ct. under clause 11 of Civil Procedure Code. The umpire doubted whether that clause would apply, but postponed further consideration of the item in question to enable deft. to move the ct., if so advised, for leave for the umpire to state a special case. Deft., thereupon, purported to put an end to the umpire's authority & refused to go on with the reference, which nevertheless was proceeded with before the umpire *ex p.* & an award made:—*Held*: the stipulation relied on was a rule of evidence introduced *pro hac vice*, & the honest though mistaken admission by the umpire of a document in violation of that rule would not be a ground for setting aside the award.—*AISHABAI v. ESSAJI* (1913), 1 L. R. 38 Bom. 60.—**IND.**

**k. — — — — What is admissible.]—**Evidence of surrounding circumstances & the practice & usage of conveyancers is admissible to enable a referee to decide whether a lease should contain a covenant by the lessee to pay municipal taxes.—*Re CANADIAN PACIFIC RY. CO. & TORONTO CITY* (1900), 27 A. R. 54.—**CAN.**

as to authorise the ct. to set aside the award.—**HAGGER v. BAKER** (1845), 14 M. & W. 9; 2 Dow. & L. 856; 14 L. J. Ex. 227; 5 L. T. O. S. 39; 153 E. R. 367.

*Annotation*:—**Refd.** *Hutchinson v. Shepperton* (1849), 13 Q. B. 955.

**981.** ———.]—In a cause particulars of set-off for £20 12s. 6d. enumerated certain work specifically, & concluded: “& sundry work, nails, etc.” On the hearing of a reference of the cause before a legal arbitrator, all the specified work in the particulars was proved to be worth £9; but under the concluding words, “& sundry work, nails, etc.” the arbitrator (subject to the opinion of the ct.) admitted evidence of other work done in & about the premises to the amount of £10 1s.:—**Held**: (1) there was no hardship to pltf. by the admission of the evidence on the particulars, as they stood; (2) if pltf. was not satisfied with the particulars, he should have taken out a summons for further & better particulars; (3) if pltf. had been misled at all, “he might have asked for an adjournment, which would have been granted as a matter of course by the arbitrator”; (4) the verdict ought to be entered for deft.—**EASTHAM v. TYLER** (1847), 2 Saund. & C. 136; 9 L. T. O. S. 250.

**982.** ———.]—A mere mistake in the reception of evidence is not a ground for setting aside an arbn.—**Re SIM & LENDERS** (1887), 3 T. L. R. 428.

**983.** ———.]—The ct. is very unwilling to set aside an award merely on account of a supposed mistake of the arbitrators as to the admissibility of evidence (LORD COLERIDGE, C.J.).—**Re M'CLEAN & Co. & MARCUS** (1890), 6 T. L. R. 355.

**984.** ———.]—In an action upon an award deft. pleaded that the lump sum awarded included matters, claims & demands, in respect of which the arbitrators had no jurisdiction, as not having been referable to them under the terms of the contract between the parties:—**Held**: as it appeared that the matters actually referred were those contained in the submission, the award was not bad because the arbitrators had taken evidence on matters not referred, but not shown to have been irrelevant to the inquiry, or to have been included in the award of the lump sum.—**FALKINGHAM v. VICTORIAN RAILWAYS COMR.**, [1900] A. C. 452; 69 L. J. P. C. 89; 82 L. T. 506, P. C.

*Annotation*:—**Mentd.** *National Bank of Australasia v. Falkingham*, [1902] A. C. 585, P. C.

**985.** ———.]—An arbitrator may, in his discretion, hear evidence on & deal with points not covered by the pleadings or statements of the parties in the action.—**TAVERNER v. CUFF** (1907), 51 Sol. Jo. 248.

**986.** ——— **Evidence wholly inadmissible.**]—An arbitrator, in making his award, looked to a document other than the contract, which was the only matter before him, in other words, allowed to be given, & had acted upon, evidence which was wholly inadmissible, & which went to the root of the question submitted to him for decision:—**Held**: the award must be set aside.—

**990 i.** *Misrejection of evidence—Whether ground for setting aside award.*]—The ct. refused to set aside an award, on the ground that the arbitrator refused to receive certain evidence tendered by one of the parties.—**MEREDITH v. CASTELLO** (1841), 1 Leg. Rep. 122.—**IR.**

**990 ii.** ———.]—*Qu.*: whether the erroneous refusal of the arbiter to receive competent evidence does not necessarily vitiate the award.—**FERRIER v. ALISON** (1843), 15 Sc. Jur. 227.—**SCOT.**

**990 iii.** ———.]—Where the umpire chosen upon a reference to arbn. had allowed an affidavit to be used in evidence, but remarked, when it was read, that he would not attach any weight to it, & swore that in adjudicating upon the matters in difference he did not take such affidavit as evidence, or attach any weight whatever thereto, the award, notwithstanding, was set aside, but, in the circumstances, without costs.—**McEDWARD v. GORDON** (1866), 12 Gr. 333.—**CAN.**

**990 iv.**

—.]—An award will be

**WALFORD, BAKER & Co. v. MACFIE & SONS** (1915), 84 L. J. K. B. 2221; 113 L. T. 180.

**987.** ——— **What matters arbitrators entitled to consider.**]—On rule to show cause, why an attachment should not go against deft. for not performing an award, it was stated that the arbitrators had allowed letters to be produced in evidence before them, written by the party himself, in favour of whom they made their award:—**Held**: the arbitrators had a right to make use of whatever evidence they required to inform & settle their judgments, & the attachment should be granted.—**WILMOT v. ALLEN** (1731), 1 Barn. K. B. 461; 94 E. R. 310.

**988.** ———.]—It is competent to arbitrators to inquire whether a ransom, for which pltf. seeks to be repaid, were justified by an extreme necessity within 45 Geo. 3, c. 72, s. 18, which enables a Ct. of Admlty. to allow such necessity.—**MILLER v. ROBE** (1811), 3 Taunt. 461; 128 E. R. 182.

*Annotations*:—**Refd.** *Dossett v. Gingell* (1841), 3 Scott, N. R. 179; *Fernley v. Branson* (1851), 15 Jur. 354. **Mentd.** *Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482.

**989.** ——— **Waiver by cross-examination of witness.**]—If a party to a reference objects that the arbitrators are entering upon the consideration of a matter not referred to them, & protests against it, & the arbitrators, nevertheless, go into the question & receive evidence on it, & the party, still under protest, continues to attend before the arbitrators & cross-examines the witnesses on the point objected to, he does not thereby waive his objection, nor is he stopped from saying that the arbitrators have exceeded their authority by awarding on the matter.—**DAVIES v. PRICE** (1864), 34 L. J. Q. B. 8; 11 L. T. 203; 12 W. R. 1009, Ex. Ch.

*Annotations*:—**Consd.** *Ringland v. Lowndes* (1864), 17 C. B. N. S. 514, Ex. Ch.; *Boissière v. Brockner* (1889), 6 T. L. R. 85.

**990.** **Misrejection of evidence—Whether ground for setting aside award—Legal arbitrator.**]—If an arbitrator, a barrister, reject a witness as inadmissible in point of law, the ct. will not interfere to set aside his award on that ground, although the party applying offer to pay all the previous costs incurred, considering the parties bound by his decision.—**CAMPBELL v. TWEMLOW** (1814), 1 Price, 81; 145 E. R. 1337.

*Annotations*:—**Folld.** *Wade v. Malpas* (1834), 2 Dowl. 638; *Wilson v. Martin* (1834), 3 L. J. C. P. 180; *Armstrong v. Marshall* (1836), 1 Har. & W. 643. **Refd.** *Wilson v. King* (1834), 2 Cr. & M. 689. **Mentd.** *Batthews v. Galindo* (1828), 4 Bing. 610.

**991.** ———.]—A submission to arbn. referred the amount of loss by fire on “wool in the process of woolling, carding, scribbling & spinning,” but in other parts of the submission “raw wool” was spoken of. The arbitrator conceiving that he was not justified in taking into his consideration wool which had undergone a part of the process of manufacture, but was not at the time of the fire in any of the engines, refused to receive evidence applicable to that wool:—**Held**: the arbitrator was justified in so doing, & the ct. refused to disturb an award made on that principle.—**Re HURST** (1835), 1 Har. & W. 275.

set aside if the arbitrators refuse to receive evidence properly offered & relevant to the issue.—**ANNABLE v. ANNABLE** (1908), 8 W. L. R. 132; 1 Sask. L. R. 222.—**CAN.**

**990 v.** ——— **Remedy of party.**]—When arbitrators refuse to admit the best evidence of value, an interested party may obtain a writ of *mandamus* against the arbitrators to compel them to admit such evidence.—**Re EXPROPRIATION OF ST. JOHN'S BRIDGE, JONES & LAURENT** (1885), 1 M. L. R. 438.—**CAN.**



*Sect. 2.—Conduct of the hearing: Sub-sect. 8, D. Sub-sects. 9, 10 & 11.]*

**992.** —.]—The ct. refused to set aside an award which it was sought to impeach, on the ground that the arbitrators had refused to admit certain evidence.—*Re BISHOP AUCKLAND RY. CO. & RICHARDSON* (1844), 3 L. T. O. S. 107.

**993.** —.]—Where "the amount of pltf.'s demand against deft." was referred to an arbitrator:—*Held*: the arbitrator's refusal to receive evidence of the unskilful way in which the work for which pltf. claimed was performed was a ground for setting aside the award.—*RUMHELOW v. WHALLEY* (1849), 13 L. T. O. S. 208.

**994.** —.]—Parties had submitted their accounts to arbitrators, & a report had been made, & a meeting was fixed to close the accounts. At that meeting, one of the parties tendered in evidence fresh documents which he had discovered, relating to the accounts, & the arbitrators, after looking at them, declined to go into them:—*Held*: this was not misconduct affecting the validity of the award, but a rejection of evidence within the arbitrators' authority.—*Re MARSH* (1847), 16 L. J. Q. B. 330.

**995.** —.]—Upon the trial of an indictment against defts. for a conspiracy to prevent pltf. from pursuing his business, it was referred to an arbitrator to decide which of defts. was guilty, & to award compensation to pltf. The arbitrator rejected evidence tendered of continued acts of interruption to prosecutor's business between the indictment found & the trial, & had also refused to consider the amount of prosecutor's costs in assessing the compensation payable:—*Held*: the arbitrator ought to have taken into consideration the evidence rejected, but was not entitled to award compensation for the amount of costs incurred by the prosecutor.—*R. v. BREWER* (1846), 8 L. T. O. S. 188; 10 J. P. 804.

#### SUB-SECT. 9.—POWERS OF AMENDMENT.

*See Arbitration Act, 1889, s. 7 (c).*

**996. Amending pleadings—Act of 1698, s. 23.]—***Trespass quare clausum fregit.* Plea, that there was a public highway running by & lying close to & adjoining the *locus in quo*, & that same having been obstructed by pltf., deft. was compelled to commit the trespass complained of, in order to pass. Pltf. traversed the fact that there was a highway in the terms set forth in the plea:—*Held*: an arbitrator, to whom the cause was referred, with the powers of amendment possessed by a judge at *Nisi Prius*, was justified in directing the record to be amended by inserting the words "running through" for the words "running by & lying close to & adjoining," in the plea & replication, under the above sect.—*NALDER v. BATTS* (1843), 13 L. J. Q. B. 10; 2 L. T. O. S. 105; 7 Jur. 1039.

**997. — Striking out or adding claims.]—**Where an arbitrator was appointed, having all the powers of a judge at *Nisi Prius* & of a judge at chambers:—*Held*: such arbitrator had no power to strike

out or add claims, but must make a final end & determination of all the matters before him.—*WILSON, SONS & CO. v. CONDE D'EAU RY. CO.* (1887), 51 J. P. 230.

**998. — Points of claim & counterclaim.]—**Disputes having arisen between pltf. & defts., it was agreed between them "that all points in dispute in reference to the contract" should be referred to the arbn. of some practical man. Points of claim & defence & counter-claim with particulars were delivered, & re-delivered on being amended between the parties:—*Held*: these documents were in the nature of pleadings or particulars, & could be amended by the arbitrator in his discretion, & all points in dispute between the parties relating to the subject-matter could be so raised, although not in the first instance disclosed by such documents.—*LLOYD (EDWARD), LTD., v. STURGEON FALLS PULP CO., LTD.* (1901), 85 L. T. 162.

*Annotations:—Consd. Re Crighton & Law Car & General Insce. Corpn., [1910] 2 K. B. 738. Rejd. Harrison v. Knowles & Foster, [1917] 2 K. B. 606.*

**999. — At conclusion of arbitration.]—***TAVERNER v. CUFF*, No. 925, *ante*.

**1000. — Discretion must be exercised judicially.]—**Where points of claim & points of defence have been delivered by the parties to an arbn., the arbitrator is not bound to allow an amendment by deft. setting up a defence not disclosed by the points of defence. It is within the discretion of the arbitrator to admit or to refuse to allow such an amendment, but he must exercise his discretion on judicial principles.—*Re CRIGHTON & LAW CAR & GENERAL INSURANCE CORPN., LTD., [1910] 2 K. B. 738; 80 L. J. K. B. 49; 103 L. T. 62.*

*Annotation:—Mentd. Re Unione Stearinerie Lanza & Wiener, [1917] 2 K. B. 558.*

#### SUB-SECT. 10.—EXCLUSION OF PARTIES AND STRANGERS.

**1001. Exclusion of parties & their attorneys.]—***HEWLETT v. LAYCOCK*, No. 967, *ante*.

**1002. Exclusion of strangers—Assisting party.]—**The ct. refused to set aside an award, on the ground that the arbitrator had declined to permit a stranger to be present for the purpose of assisting deft.'s attorney with practical hints for the conduct of the defence.—*TILLAM v. COPP* (1847), 5 C. B. 211; 136 E. R. 857.

*Annotation:—Apprvd. Re Macqueen & Nottingham Caledonian Soc. (1861), 9 C. B. N. S. 793.*

**1003. — With valuable evidence.]—**Where an arbitrator proceeded in such way that a third party, who could have shown matter very material to be considered, had not sufficient time to instruct counsel properly to appear before him, the ct. referred back to the arbitrator to reconsider his award & amend it if necessary.—*DICKENSON v. ROOKE* (1852), 20 L. T. O. S. 104, 263.

**1004. — Son of party & shorthand writer.]—**Disputes relating to certain collieries, their management & the dealings with them for many years were referred to arbn. One of the parties had a

#### PART III. SECT. 2, SUB-SECT. 9.

**996 i. Amending pleadings.]—**An arbitrator, having power to amend the pleadings, allowed a plea to be added; the parties affected proceeded with the reference & applied for relief against the award on the ground that the amendment was improper. The application was refused, although the ct. thought,

on the materials before it, the amendment ought not to have been allowed.—*SEVERN v. COSGRAVE* (1866), 2 C. L. J. O. S. 11.—**CAN.**

#### PART III. SECT. 2, SUB-SECT. 10.

**1001 i. Exclusion of parties.]—**The exclusion of the parties during the examination of a witness before arbitrators will not necessarily invalidate the award.

—*MOORE v. POWLEY* (1840), 1 Thom., 2nd ed. 315.—**CAN.**

**1001 ii. — Refusal to hear evidence.]—**Where arbitrators receive no evidence & turn the parties out of the room during the investigation an award is invalid.—*PARSONS v. CITIZENS INSURANCE CO.* (1878), 43 U. C. R. 261.—**CAN.**



son, who was well acquainted with the mining accounts, & had assisted his father in the business, & this party applied to the arbitrator to allow his son to be present, but he refused to permit him to be present, on the ground of his behaviour in the matter. A shorthand writer, whose presence the same party required that he might take notes at the meetings, was also excluded:—*Held*: the award must be set aside, the exclusion by the arbitrator of the son & the shorthand writer having been made without adequate ground, & the acquiescence of the party complaining, in the proceedings under the reference after their exclusion, not being such as to deprive him of his right to have the award set aside.—*Re HAIGH, HAIGH v. HAIGH* (1861), 3 De G. F. & J. 157; 31 L. J. Ch. 420; 5 L. T. 507; 8 Jur. N. S. 983; 45 E. R. 838, L.J.J.

*Annotation*:—*Mentd.* Ringland v. Lowndes (1863), 15 C. B. N. S. 173.

#### SUB-SECT. 11.—PROCEEDINGS BEFORE THE UMPIRE.

**1005. Umpire may sit with arbitrators—But may not interfere.**—Where a matter in difference is referred to two arbitrators, one to be named by each of the parties, with a proviso that if they disagree they shall name an umpire, & that he shall make the award, & the two disagree & appoint an umpire, it is no ground of objection to the award that all three have sat & heard the evidence together, & then the umpire has made the award, provided the umpire has not peremptorily interfered, so as to prevent a final agreement between the arbitrators.—*Re FLAG LANE CHAPEL, SUNDERLAND (OWNERS), v. SUNDERLAND CORPN.* (1859), 5 Jur. N. S. 894.

**1006. Must adjudicate on whole subject-matter.**—Arbitrators determined the whole matter referred to them, excepting one single part of it, which related to an account of interest which was to be taken. To settle this matter they appointed an umpire, who made his umpirage concerning that account of interest only:—*Held*: the umpire could not determine part without determining the whole.—*TASKER v. KEARY* (1733), 2 Barn. K. B. 317; 94 E. R. 525.

**1007.** —.]—Under a submission to arbitrators, or their umpire, of all controversies & demands, etc., the arbitrators met & determined upon five matters, & referred a further remaining question to the umpire. The arbitrators & umpire afterwards made an award, reciting that the arbitrators could not agree on one point, which they had referred to the umpire, who stated that he determined it as followed, etc.:—*Held*: the award was bad, the arbitrators & umpire not being authorised by the terms of the submission to make the award in a detached manner as they had done.—*TOLLIT v. SAUNDERS* (1821), 9 Price, 612; 147 E. R. 198.

*Annotation* *Refd.* Lang v. Brown (1855), 25 L. T. O. S. 297, H. L.

#### PART III. SECT. 2, SUB-SECT. 11.

**1005 i. Umpire may sit with arbitrators.**—Two arbiters nominated an oversman, with whom they consulted throughout. He accompanied them to an inspection, took part in the examination of witnesses, & was present at an oral debate. The arbiters having ultimately differed, signed a minute of devolution, after which the oversman issued a draft decree-arbitral:—*Held*: (1) the arbiters had not been vitiated nor the oversman disqualified by his having taken part in the proceedings throughout; (2) the parties were not entitled as a matter of right to be reheard.—*CRAWFORD v. PATERSON* (1858), 20 Dunl. (Ct. of Sess.) 488.—*SCOT*.

**1005 ii.** —.]—The fact that an umpire was appointed before & sat with the

arbitrators during the hearing is not a ground for setting aside the award.—*ANNABLE v. ANNABLE* (1908), 8 W. L. R. 132; 1 Sask. L. R. 222.—*CAN.*

**1006 i. Must adjudicate on whole subject-matter.**—Where arbiters differ they must devolve the whole reference, not only the points they have differed on, unless there is special power to that effect in the submission.—*FREDERICK v. CUNNINGHAM & MAITLAND* (1865), 37 Sc. Jur. 563.—*SCOT*.

**1009 i. Must give sufficient notice.**—After the arbitrators & umpire had heard plffs.' witnesses, defts. refused to give their evidence, & their arbitrator would not concur in the award. The umpire, in consequence, gave notice to defts. to produce their witnesses, but the time which he gave was too short,

**1008.** —.]—If "all or any of the matters in difference between the parties" are referred to arbitrators, who disagree, but only as to the costs, yet the umpire must adjudicate on the whole question.—*WICKS v. COX* (1847), 11 Jur. 542.

**1009. Necessity for notice to parties.**—On a submission by two arbitrators to an umpire, the umpire must not make his award without summoning the parties to attend.—*PASCHAL v. TERRY* (1733), Kel. W. 132; 25 E. R. 530.

**1010.** —.]—Where an umpire made his umpirage without convening the parties before him:—*Held*: the parties to the submission ought to have had notice given them before the award was made.—*TASKER v. KEARY* (1733), 2 Barn. K. B. 317; 94 E. R. 525.

**1011. — & to arbitrators.**—A reference was made to two arbitrators & an umpire to be chosen by them, who was to be present & decide each reference as it might arise, & either might make an award. The umpire, in the presence of the arbitrators, disallowed plff. part of his claims, which made the balance in favour of deft., & afterwards, without notice to one of the arbitrators or deft., made his award in favour of plff. The ct. set aside the award.—*POTTER v. NEWMAN* (1835), 4 Dowl. 504.

*Annotations*:—*Refd.* Moore v. Darley (1845), 1 C. B. 445. *Mentd.* Burley v. Stephens (1836), 1 M. & W. 156; Parbery v. Newnham, Newnham v. Parbery (1841), 10 L. J. Ex. 169.

**1012.** —.]—A cause & all matters in difference were referred to the award of two named persons, & such third person as they should appoint, or of a majority of them. A difference having arisen between the originally named arbitrators, a statement was made by each to the third as to what he thought the award should be. An award having been made by an umpire & one of the arbitrators, without any further meeting, the ct. set aside the award.—*Re TEMPLEMAN & REED* (1841), 9 Dowl. 962; 6 Jur. 324.

**1013. Duty to receive evidence from parties.**—A railway co. & the owners of land, which was required by the co., appointed, under Lands Clauses Consolidation Act, 1845 (c. 18), arbitrators, who appointed an umpire. The arbitrators & umpire met on Nov. 4, & adjourned to the following day. On that day the co.'s arbitrator did not attend. The other arbitrator & the umpire proceeded in his absence, notwithstanding the protest of the co.'s solr., & examined a witness. The co.'s solr. left the meeting without examining his witnesses. No meeting was held after the 5th, nor had the co. any notice to attend on the 6th or any subsequent day. On the 22nd the landowners' solr. informed the umpire that the arbitrators had not made an award, & required him to make his award, which he did on the 29th, without any evidence on the part of the co. having been given:

& he awarded on the evidence already heard. The ct. set the award aside.—*PROUDFOOT v. TROTTER* (1843), 6 O. S. 163.—*CAN.*

**1013 i. Duty to receive evidence from parties.**—Where a case is referred to the award of two persons, & in case of disagreement to the decision of a third, either as an umpire or as a third arbitrator, the parties have the right to insist that such third person shall have before him the evidence & witnesses produced before the two arbitrators, as well as the right to appear & state their case to such third arbitrator or umpire, before a binding award can be made.—*Re SOULES v. MORTON* (1868), 4 P. R. 249.—*CAN.*

**1013 ii.** —.]—*View taken in absence.*—Pursuer & defender entered into a sub-

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Sub-sect. 11.]

(1) whether there was or not any general rule that an umpire need not receive evidence or be active in summoning the parties, the umpire, in the above circumstances, ought to have made no award without tendering to the co. an opportunity of producing evidence before him or addressing him; (2) he was bound to take up the proceedings *de novo*, or from the close of Nov. 4; (3) in the circumstances, his skill or competency to decide from personal observation made no difference; (4) his award was bad, & ought to be set aside.—*Re HAWLEY & NORTH STAFFS RY. CO.* (1848), 2 De G. & Sm. 33; 5 Ry. & Can. Cas. 383; 10 L. T. O. S. 518; 11 L. T. O. S. 121; 12 Jur. 389; 64 E. R. 15.

**1014. Umpire making award with assistance of one arbitrator—Whole evidence not taken down.]**—Where an umpire made the award with the assistance chiefly of one of the arbitrators, who omitted to take down part of the evidence in favour of one party, the other arbitrator interfering very little, the ct. refused to set aside the award.—*WALTON-SHAW v. MARSHALL* (1835), 1 Har. & W. 209.

**1015. Failure to re-examine witnesses—At request of one party—Previous agreement that re-examination would not be required.]**—Where an umpire undertook the burden, upon the understanding on both sides that he was to receive the evidence from the arbitrators, without re-examining the witnesses, & on June 10, the time for making the award expiring on the 28th, one of the parties required him to examine the witnesses, & he declined, & made his award without doing so, the ct. set aside the award.—*Re SALKELD & SLATER & HARRISON* (1840), 12 Ad. & El. 767; 4 Per. & Dav. 732; 10 L. J. Q. B. 22; 4 Jur. 1131; 113 E. R. 1005.

**1016. ———.]**—The parties to a written submission to reference agreed, by parol, that notes of the evidence should be taken in writing

mission whereby they referred all disputes to two arbiters or an oversman in case of difference of opinion. After some proceedings, a minute of devolution was executed by the arbiters upon an oversman, F. F. later made an inspection with defender, but with no representative of pursuer. F. subscribed a formal decree in his own name only:—*Held*: the award must be set aside as pronounced without giving pursuer an opportunity of being heard.—*DUNMORE (EARL) v. M'INTURNER* (1835), 13 Sh. (Ct. of Sess.) 356.—**SCOT.**

**1013 iii. — Oversman present during whole proceedings.]**—A decree-arbitral having been pronounced by an oversman, was sought to be reduced, on the ground that, after devolution, the oversman had pronounced his award without hearing one of the parties:—*Held*: as the oversman had, by the consent of parties, been present at the taking of proof & the several hearings before the arbiters, there were no grounds for reducing the award.—*CRAWFORD v. PATERSON* (1858), 30 Sc. Jur. 263.—**SCOT.**

**1013 iv. — Failure to allow proof.]**—In a reduction of a decree-arbitral, it was averred that the oversman had refused to allow a proof of certain averments offered to be proved:—*Held*: the averment that he had not allowed the proof was irrelevant.—*LEDINGHAM v. ELPHINSTONE & BEATTIE* (1859), 32 Sc. Jur. 102.—**SCOT.**

**1013 v. — Arbitrators & umpire experts.]**—A submission having been made to men of skill, they differed, & devolved on a third man of skill as oversman, who pronounced an award, after hearing parties, but without allowing a proof craved by one party:—*Held*: the arbiter was sole judge of the

propriety of allowing a proof, & the refusal of it raised no presumption of "corruption." *Semble*: it is often the duty of an arbiter, especially when he is a man of skill, to refuse to allow a proof.—*LEDINGHAM v. ELPHINSTONE* (1859), 22 Dunl. (Ct. of Sess.) 245.—**SCOT.**

**1021 i. Evidence taken from arbitrators.]**—A landlord was bound to put houses & fences in repair, to the satisfaction of two parties named or an oversman. This oversman on considering the reports & opinions of the referees, & after inspecting the premises, issued an award without hearing parties:—*Held*: his award was not liable to reduction, on the ground that parties were not heard.—*M'GREGOR v. STEVENSON* (1847), 9 Dunl. (Ct. of Sess.) 1056.—**SCOT.**

**1021 ii. —.]**—The valuation of a sheep-stock was referred to two referees & any oversman they might select if they differed in opinion. The referees, having differed, devolved the reference on A. Both referees submitted their valuations to the oversman, who made his award without hearing the referees:—*Held*: there was no occasion for the oversman to hear parties, & he was entitled to apply his own knowledge & skill to the valuation of the stock.—*MACKENZIE v. HILL, ETC.* (1868), 5 S. L. T. 578.—**SCOT.**

**1021 iii. —.]**—Arbitrators, being agreed that a certain sum was due by debt., but differing as to the parties by whom the action could be legally brought, by a memorandum indorsed upon the submission, appointed R. as umpire. The latter having heard from the arbitrators the statement of facts in which they both concurred, decided that plffs. were the proper parties, & so awarded in conjunction with the

by a clerk & signed by the arbitrators, & that, in case of their disagreeing, the umpire should be at liberty to make his award on the notes so taken, without examining the witnesses. The notes were so taken, & the arbitrators disagreed. The umpire having refused to examine any witnesses, though required to do so by one of the parties, & having made his award on reading the notes, the ct. refused to set aside the award.—*Re FIRTH v. HOWLETT* (1850), 1 L. M. & P. 63; 19 L. J. Q. B. 169.

**1017. Failure to examine witnesses proposed by party.]**—Where an umpire neglected to examine certain witnesses proposed by one of the parties, the ct. granted a rule *nisi* to set aside the award.—*McKAYE v. GRAHAM* (1843), 1 L. T. O. S. 112.

**1018. Refusal to hear further evidence.]**—If an umpire refuses to hear further evidence, the award may be set aside.—*Re JENKINS & LEGGO* (1841), 1 Dowl. N. S. 276; 11 L. J. Q. B. 71; 6 Jur. 397.

**1019. Refusal to rehear evidence given to arbitrators.]**—If an umpire refuses to rehear the evidence already given before the arbitrators, the award may be set aside.—*Re JENKINS & LEGGO* (1841), 1 Dowl. N. S. 276; 11 L. J. Q. B. 71; 6 Jur. 397.

**1020. — Award made on evidence taken before arbitrators.]**—Where matters in difference are referred to arbitrators, & if they disagree, to an umpire, & the arbitrators, after hearing witnesses, disagree, the umpire must rehear the witnesses. If he omits doing so, & makes his award on the evidence taken down by the arbitrators, the award will be set aside.—*Re SALKELD & SLATER & HARRISON* (1840), 12 Ad. & El. 767; 4 Per. & Dav. 732; 10 L. J. Q. B. 22; 4 Jur. 1131; 113 E. R. 1005.

**1021. Evidence taken from arbitrators.]**—Where an umpire took the facts to be as the arbitrators stated them to him, without hearing the parties:—*Held*: the umpirage ought to be set aside for his

arbitrator with whom he agreed. Deft. took exception to the award on the grounds that the umpire had not himself heard the evidence of the parties, & that deft. had no notice of the appointment or opportunity of producing testimony:—*Held*: the award was sustainable, & rule for setting it aside discharged.—*EATON v. CAMPBELL* (1871), 2 N. S. D. 314.—**CAN.**

**1021 iv. —.]**—An award decided by an umpire who does not hear the witnesses himself, but takes their evidence from notes taken by the arbitrators, & from their statements of the nature of it, will be set aside, unless there was an express consent to such a course by both parties.—*MORDEN v. WIDDIFIELD* (1874), 6 P. R. 179.—**CAN.**

**1021 v. — In absence of one of them.]**—After an arbn. had closed the umpire sent for both arbitrators, who had differed. Only one of them attended, & the umpire held a communication with him in the absence of either of the parties. This fact was afterwards communicated to the attorney of the other side, who objected. A rule *nisi* having been obtained to set aside the award, the ct. discharged it, upon affidavits of the umpire & the witness with whom he had communicated, showing that nothing had passed between them which could affect the decision of the umpire.—*Re FOWLER & SINNOTT* (1879), 5 V. L. R. 320.—**AUS.**

**1021 vi. — Mistake arising therefrom.]**—Where it is not suggested that an umpire has acted otherwise than in good faith, but he has made a mistake in his conduct of the reference owing to the way in which the case was put before him by the arbitrators, the proper procedure is to send the award back to



hearing the arbitrators only, & not the parties to the submission.—*TASKER v. KEARY* (1733), 2 Barn. K. B. 317; 94 E. R. 525.

**1022. — Failure to examine witnesses—Not required to do so.]**—The ct. will not set aside the award of an umpire, because he received the evidence from the arbitrators without examining the witnesses, unless he were required to re-examine them before the making of his award.—*HALL v. LAWRENCE* (1792), 4 Term Rep. 589; 100 E. R. 1191.

**1023. — Arbitrators & umpire experts.]**—An order was made in an action referring the question in dispute, which was the rent to be paid under a lease of a mill, to two persons, who had acted as agents of the parties, as arbitrators, & in case of their disagreement, to a person therein named, as umpire. The arbitrators, having disagreed, submitted the matter to the umpire. The latter, without giving any notice to the parties or their solrs., & without any witnesses being examined before him, but having merely heard the statement of the two arbitrators & inspected the premises, made his award in writing, in which he recited that he had “heard, examined & considered the allegations, witnesses, & evidence of all the parties”:—*Held*: there was no ground for disturbing the award, as the arbitrators & the umpire were all experts, & it was evidently the intention of the parties that they should settle the value, & not act as formal arbitrators.—*BOTTOMLEY v. AMBLER* (1877), 38 L. T. 545; 26 W. R. 566, C. A.

**1024. Agreement to be bound by experiment of expert.]**—A dispute as to the quality of yarn supplied was referred to two persons of experience in the trade, who were to appoint an umpire. The arbitrators heard the parties & differed, & referred the matter to an umpire, a manufacturer of great experience, who had some of the yarn furnished to him & tested it, the parties, as he understood, agreeing to be bound by the result of his experiment:—*Held*: the parties had agreed to be bound by the result of the experiment to be made by the umpire.—*WRIGHT v. HOWSON* (1888), 4 T. L. R. 386, C. A.

**Arbitrators' power to delegate.]**—See Nos. 853—880, *ante*.

**1025. Waiver of objection—Attendance without objection.]**—An award was made by an umpire:—*Held*: good, although the arbitrators had no authority to appoint one, & although the umpire examined the parties separately, they having attended him, & made no objection.—*MATSON v. TROWER* (1824), Ry. & M. 17.

*Annotations*:—*Distd.* *Lock v. Vulliamy* (1833), 5 B. & Ad. 600. *Expld.* *Re Plews & Middleton* (1845), 6 Q. B. 845.

**1026. — No request to hear further evidence.]**—An umpire, being furnished by the arbitrators with the evidence taken before them & having himself viewed the premises, the condition of which was in question, made his award without calling

for further evidence, or giving any notice on that subject to the parties:—*Held*: the award could not be objected to on that ground by a party, who knew that the case had gone before the umpire, & made no application to him to hear further evidence.—*Re TUNNO & BIRD* (1833), 5 B. & Ad. 488; 2 Nev. & M. K. B. 328; 3 L. J. K. B. 5; 110 E. R. 870.

*Annotations*:—*Mentd.* *Re Jamieson & Binns* (1836), 4 Ad. & El. 945; *Re Greenwood & Titterton* (1839), 9 Ad. & El. 699; *Re Hodson & Drowry* (1839), 7 Dowl. 569; *James v. Attwood* (1839), 7 Scott, 841; *Re Hopper, Barningham & Wrightson* (1867), 36 L. J. Q. B. 97.

**1027. — Clear proof must be given.]**—Where matters in difference are referred to arbitrators, & if they disagree, to an umpire, & the arbitrators having disagreed, the umpire makes his award on the evidence taken down by the arbitrators, without rehearing the witnesses, the objection to such proceeding by the umpire may be waived, but, to prevent the award being set aside, clear proof must be given of the waiver.—*Re SALKELD & SLATER & HARRISON* (1840), 12 Ad. & El. 767; 4 Per. & Dav. 732; 10 L. J. Q. B. 22; 4 Jur. 1131; 113 E. R. 1005.

**1028. — No objection at time of taking up award.]**—If an umpire either refuse to rehear the evidence already given before the arbitrators, or to hear further evidence, it is no waiver of the objection that the party did not insist on it at the time he attended to take up the award.—*Re JENKINS & LEGGO* (1841), 1 Dowl. N. S. 276; 11 L. J. Q. B. 71; 6 Jur. 397.

**1029. — Knowledge of irregularity without objection.]**—Pending a reference to arbn., the umpire held a communication with the agents of one of the parties, this fact being known to all the parties at the time, & not objected to by any of them, & the reference having proceeded, & the award having been subsequently made:—*Held*: it was too late for either of the parties, after the award was made, to object to it, on the ground of such communication between the umpire & the agents of one of them.—*MILLS v. BOWYERS' SOCIETY, BOWYERS' SOCIETY v. MILLS* (1856), 3 K. & J. 66; 69 E. R. 1024.

*Annotations*:—*Refd.* *Re Aitken's Arbitration* (1857), 3 Jur. N. S. 1296; *Clayton v. Westminster Brymbo Coal & Coke Co.* (1864), 11 L. T. 366; *Re Walton Shore Road, Essex & Warner & Powell* (1866), 15 W. R. 303; *Flynn v. Robertson* (1869), L. R. 4 C. P. 324; *Dinn v. Blake* (1875), L. R. 10 C. P. 388; *Re Whiteley & Robert's Appln.*, [1891] 1 Ch. 558; *Re Keighley, Maxsted, & Durant*, [1893] 1 Q. B. 405, C. A.

**1030. Arbitrator acting as advocate.]**—It was sought to set aside the award of an umpire on the ground that one of the arbitrators had acted as advocate:—*Held*: although the ct. would be strict in seeing that persons acting as arbitrators comported themselves as arbitrators, yet it was not a case in which the ct. would interfere, having regard to the fact that the party complaining knew what was happening & did not protest.—*BIGLIN v. CLARK* (1905), 49 Sol. Jo. 204, D. C.

him for reconsideration.—*Re RIVERTON BOROUGH & NEW ZEALAND DREAD-NOUGHT GAS CO., LTD.* (1916), 35 N. Z. L. R. 601.—N.Z.

**1022 i. — Failure to examine witnesses—Bar.]**—Pltf. & deft. referred a matter to two arbitrators, with power to appoint a third in case they should differ, the reference containing an undertaking by deft. “that he would not bring any suit of error, etc.” The two arbitrators entered on the arbn., were attended by counsel & heard witnesses, & differing, appointed an umpire, & made an unanimous award for pltf. No counsel or witnesses were heard before the umpire

nor was any notice given to deft. Deft. obtained a rule to set aside award on the ground that the umpire had not examined the witnesses himself or heard the parties:—*Held*: deft. was precluded by his *cognovit* from availing himself of the benefit of any objection which he might take, unless he could establish fraud.—*PENNYCOOK v. FINLAY* (1859), 4 Nfld. L. R. 365.—NFLD.

**1. Umpire discussing matter with arbitrators before entering on duties.]**—Where arbitrators refer the matter to an umpire who has not sat with them, & the umpire, after holding an independent inquiry & hearing both parties

to the arbn., publishes his award, the ct. will not set aside the award merely on the ground of an admission by the umpire that he had discussed the matter with the arbitrators & had heard all they knew & their views before he sat on the reference.—*PALMER v. FLAOK* (1905), 39 I. L. T. 113, 165.—IR.

**1025 i. Waiver of objection—Attendance without objection.]**—An appearance before the umpire without objection to his procedure for some months estops an objection that an award of the umpire alone was invalid.—*KUPU RAU v. VENKATARAMYAR* (1881), I. L. R. 4 Mad. 311.—IND.



—*Conduct of the hearing: Sub-sects. 12 & 13. Sect. 3: Sub-sect. 1.*

**SUB-SECT. 12. EFFECT OF ACCEPTING HOSPITALITY.**

**1031. After hearing, but before award made.]**—It is no ground for granting a rule, calling upon a party to show cause why an award should not be set aside, that an arbitrator has after the hearing, but before making the award, dined with one of the parties & his witnesses.—*CROSSLEY (CROCKLEY) v. CLAY* (1848), 5 C. B. 581; 10 L. T. O. S. 375; 136 E. R. 1006. *Annotation:—Folld. Moseley v. Simpson* (1873), L. R. 16 Eq. 226.

**1032. —.]**—Upon an arbn. between W. & B., after the last meeting of the arbitrators & their umpire, & before the award of the umpire, W., one of the parties, an innkeeper, invited the two arbitrators, the umpire & his own attorney to dinner at his inn. They all dined together, the other party not being present, & the matters of the reference were mentioned, but in a jocular manner:—*Held*: although this proceeding was very improper, the ct. would not set aside the award (made in W.'s favour) on that ground, there being nothing to show that W. intended to corrupt or influence the mind of the umpire, or that the mind of the umpire was, in fact, influenced by the conduct of W.—*Re HOPPER* (1867), L. R. 2 Q. B. 8 B. & S. 100; 36 L. J. Q. B. 97; 15 W. R. 443; *sub nom. WRIGHTSON v. HOPPER*, 15 L. T. 566; 31 J. P. 182.

*Annotations:—Apld. Moseley v. Simpson* (1873), L. R. 16 Eq. 226. *Mentd. Turner v. Goulden* (1873), L. R. 9 C. P. 57; *Re Dawdy* (1885), 15 Q. B. D. 426, C. A.; *Re Hammond & Waterton* (1890), 62 L. T. 808.

**1033. During hearing—No corrupt motive.]**—Certain matters in dispute were referred to three arbitrators, one to be chosen by each of the parties, & one by the two so chosen. On several occasions during the arbn. one of the parties provided luncheon at his expense, of which the arbitrator appointed by him & the third arbitrator, as well as his solr. & one or two other persons, partook in the absence of the other party (who would not sit at the same table with his adversary) & of his arbitrator:—*Held*: inasmuch as it was not shown that the parties were influenced by corrupt motives, or were affected by the luncheons, the award could not be set aside on the ground of the luncheons.—*MOSELEY v. SIMPSON* (1873), L. R. 16 Eq. 226; 42 L. J. Ch. 739; 28 L. T. 727; 37 J. P. 789; 21 W. R. 694.

**SUB-SECT. 13.—WAIVER OF OBJECTIONS TO CONDUCT OF THE HEARING.**

*See Nos. 850—852, 887, 888, 907, 963—967, 968—970, 972, 989, 1025—1030, ante.*

**SECT. 3.—SPECIAL CASE.**

*See Arbitration Act, 1889, s. 19.*

**SUB-SECT. 1.—STATEMENT OF SPECIAL CASE DURING REFERENCE.**

**1034. Power to state case—Act of 1889, s. 19—Building Societies Act, 1874 (c. 42).]**—In an arbn.

**PART III. SECT. 3, SUB-SECT. 1.**

**1034 i. Power to state case.]**—A reference, "with power to the arbitrator, if either party requires it," to submit questions of law to the ct.:—*Held*: enabling only, not compulsory.—*KESTEVEN v. GOODERHAM* (1861), 20 U. C. R. 500.—**CAN.**

**1034 ii. — Whether obligatory.]**—The reference was expressed to be "subject to such points of law as will properly

arise on the pleadings & evidence":—*Held*: this rendered it imperative on the arbitrators to state for the ct. any legal point raised.—*ROSS v. BRUCE COUNTY* (1870), 21 C. P. 41.—**CAN.**

**1034 iii. — Duty to state case.]**—Where power is given in a reference to state a case on points of law, & the umpire is urged to state a case on such point, the umpire should state one.—*Re BAILEY & MART* (1883), 9 V. L. R. 311.—**AUS.**

under the above Act of 1874, one of the parties to the arbn. obtained at chambers an order *nisi*, calling upon the arbitrators to show cause why they should not be required to state a case for the opinion of the ct. Later on the same day, but without having had notice of the order *nisi*, the arbitrators made & signed their award:—*Held*: the jurisdiction of the ct. was not ousted, & the order *nisi* was rightly made absolute.

During the progress of an arbn. it may be seen that the arbitrator has mistaken the law & is about to act upon his error, & the power of putting him right used to consist in the right of either party to revoke the submission to arbn. That power has been greatly controlled by legislation, & now it may be extremely difficult for a party to make such a case to a ct., as will induce them to make an order giving leave to revoke unless a case is stated (*LORD HALSBURY, C.*).—*TABERNACLE PERMANENT BUILDING SOCIETY v. KNIGHT*, [1892] A. C. 298; 62 L. J. Q. B. 50; 67 L. T. 483; 56 J. P. 709; 41 W. R. 207; 8 T. L. R. 616; 36 Sol. Jo. 538, H. L.

*Annotations:—Consd. British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. Co. of London*, [1912] A. C. 673, H. L. *Refd. Re Gough & Liverpool Corpn.* (1892), 36 Sol. Jo. 270, C. A.; *May v. Mills* (1914), 30 T. L. R. 287. *Mentd. Re Kirkleatham L. B. & Stockton & Middlesborough Water Board*, [1893] 1 Q. B. 375, C. A.; *Re Kent County Council & Sandgate L. B.* (1895), 72 L. T. 725; *Re Spillers & Baker & Leatham*, [1897] 1 Q. B. 312, C. A.; *Strohmenger v. Finsbury Permanent Investment Bldg. Soc.*, [1897] 2 Ch. 469, C. A.; *Re Palmer & Hosken*, [1898] 1 Q. B. 131, C. A.; *Re Montgomery, Jones & Liebhenthal* (1898), 78 L. T. 406, C. A.; *Re Holland S.S. Co., National S.S. Co. & Bristol Steam Navigation Co.* (1906), 23 T. L. R. 59, C. A.; *Shrewsbury v. Shrewsbury* (1907), 23 T. L. R. 224, C. A.; *Sidney v. N. E. Ry. Co.*, [1916] 2 K. B. 760; *Lobitos Oilfields v. Admiralty Comrs.*, *Crown S.S. Co. v. Admiralty Comrs.* (1917), 86 L. J. K. B. 1444.

**1035. Not excluded by agreement.]**

A contract for the delivery of maize, in addition to a clause of reference, contained the further provision that neither party should require, nor should apply to the ct. to require, any referee, arbitrator or umpire to state in the form of a special case for the opinion of the ct. any question of law arising in the course of the reference. A dispute arose between the buyers & sellers, which was referred to arbitrators. On the application of one of the parties the arbitrators were ordered to state a special case.—*Re HANSLON & REINHOLD, PINNER & Co.* (1895), 1 Com. Cas. 215.

**1036. — Whether agreement not to require case valid.]**—*Qu.*: whether an agreement, that the parties to an arbn. will not ask that a special case shall be stated for the opinion of the ct., is valid.—*MONTGOMERY, JONES & Co. v. LIEBENTHAL & Co.* (1898), 78 L. T. 406, C. A.

**1037. — After award made.]**—The Act of 1889, s. 19, impliedly confers on a party to an arbn. the right, at any stage of the proceedings, to apply to the ct. for an order directing the arbitrator to state in the form of a special case for the opinion of the ct. any question of law arising in the course of the reference, but an arbitrator cannot, after he has made his award, state a case for the opinion of the ct. under the sect., & the power of the ct. to order a case to be stated under

**1034 iv. — Arbitration Act, R. S. O., 1897 (c. 62), s. 1—Question of law.]**—*ROGERS v. LONDON & CANADIAN LOAN AGENCY* (1908), 18 O. L. R. 8.—**CAN.**

**1037 i. — After award made.]**—After an award is made it is too late to make an application for an order under the above Act directing the arbitrators to state a case for the opinion of the ct. as to the inadmissibility & relevancy of evidence, or for the arbitrators to state a case for the opinion of the ct.—

that sect. is limited in like manner.—*Re PALMER & Co. & HOSKEN & Co.*, [1898] 1 Q. B. 131  
L. J. Q. B. 1; 77 L. T. 350; 46 W. R. 49 14  
T. L. R. 28; 42 Sol. Jo. 32, C. A.

*Annotation*:—*Reid. Re Montgomery, Jones & Liebenthal* (1898), 78 L. T. 406, C. A.

**1038. Effect of party failing to apply for case to be stated.**—An agreement of reference, in an appeal against a poor rate, contained a clause enabling the arbitrators, at the request of either party, to state a case, to be settled by the umpire, for the opinion of the ct. The arbitrators having disagreed, the umpire made his umpirage, & subsequently, at the request of applts., set out the principles upon which he had acted, with a view of enabling applts. to have the question discussed in ct. Upon a rule calling upon defts. to show cause why the umpirage should not be sent back to the umpire, in order that he might state the facts more fully, the ct. refused to interfere, as applts. had had the opportunity of getting a case stated, & instead of doing so, had taken their chance of getting the umpirage made in their favour.—*LONDON DOCK CO. v. SHADWELL PARISH* (1862), 1 New Rep. 91; 32 L. J. Q. B. 30; 7 L. T. 381; 27 J. P. 324; 11 W. R. 89.

**Effect of refusal to state case.**—See Part IV., Sects. 16, Sub-sect. 2, 17, Sub-sect. 2, *post*.

**1039. Form of case—Facts must be stated.**—An action of trover against a pawnbroker was referred to arbn., & his liability to damage depended on whether or not he had made sufficient inquiries when the goods were pledged. The arbitrator, in a case stated for the opinion of the ct., having declared that he was unable to find whether or not deft. had made sufficient inquiries, the ct. referred it back to him to find affirmatively or negatively whether or not sufficient inquiries had been made.—*FERGUSON (FERGUSSON) v. NORMAN* (1837), 4 Bing. N. C. 52; 3 Hodg. 241; 1 Arn. 418; 5 Scott, 304; 1 Jur. 797; 132 E. R. 708.

**1040. Application to compel statement of case—Discretion of arbitrator.**—Where a case is referred, the arbitrator to be at liberty to state any point of law for the opinion of the ct., & he declines to do so, the ct. will not interfere with his discretion.—*MILLER v. SHUTTLEWORTH* (1849), 7 C. B. 105; 12 L. T. O. S. 403; 137 E. R. 43.

**1041. — Compulsory reference under Common Law Procedure Act, 1854, s. 3.**—*Semle*: in the case of a compulsory reference under the above sect., a party has not a right to demand a case to be stated for the opinion of the ct., but whilst the

reference is pending before the arbitrator, he may apply to a judge, under s. 4, for an *interim* order to state a case.—*BAGGALAY (BAGULEY, BAGUELLY) v. BORTHWICK (MARKWICK)* (1861), 10 C. B. N. S. 61; 30 L. J. C. P. 342; 4 L. T. 245; 9 W. R. 537; 142 E. R. 372.

*Annotation*:—*Reid. Gibbon v. Parker* (1860), 5 L. T. 584.

**1042. — Question as to principle of assessment.**—Where, in an arbn., an important question arose with reference to the principle on which compensation should be assessed for premises ordered to be pulled down as being unfit for habitation:—*Held*: a case should be stated by the arbitrator for the opinion of the ct.—*Re GOUGH & LIVERPOOL CORPN.* (1890), 6 T. L. R. 453, D. C.

**1043. — Building Societies Act, 1874 (c. 42).**—The power given to the ct. by the Act of 1889, s. 19, to order an arbitrator to state in the form of a special case for the opinion of the ct. any question of law arising in the course of the reference, applies to an arbn. under the above Act of 1874.—*TABERNACLE PERMANENT BUILDING SOCIETY v. KNIGHT*, [1892] A. C. 298; 62 L. J. Q. B. 50; 67 L. T. 483; 56 J. P. 709; 41 W. R. 207; 8 T. L. R. 616; 36 Sol. Jo. 538, H. L.

*Annotations*:—*Consd. British Westinghouse Electric & Manufacturing Co. v. Underground Electric Rys. Co. of London*, [1912] A. C. 673, H. L. *Reid. Re Gough & Liverpool Corpn.* (1892), 36 Sol. Jo. 270, C. A.; *May v. Mills* (1914), 30 T. L. R. 287. *Mentd. Re Kirkleatham L. B. & Stockton & Middlesborough Water Board*, [1893] 1 Q. B. 375, C. A.; *Re Kent County Council & Sandgate L. B.* (1895), 72 L. T. 725; *Re Spillers & Baker & Leatham*, [1897] 1 Q. B. 312, C. A.; *Strohmenger v. Finsbury Permanent Investment Bldg. Soc.*, [1897] 2 Ch. 469, C. A.; *Re Palmer & Hosken*, [1898] 1 Q. B. 131, C. A.; *Re Montgomery, Jones & Liebenthal* (1898), 78 L. T. 406, C. A.; *Re Holland S.S. Co., National S.S. Co., & Bristol Steam Navigation Co.* (1906), 23 T. L. R. 59, C. A.; *Shrewsbury v. Shrewsbury* (1907), 23 T. L. R. 224, C. A.; *Sidney v. N. E. Ry. Co.*, [1916] 2 K. B. 760; *Lobitos Oilfields v. Admiralty Comrs., Crown S.S. Co. v. Admiralty Comrs.* (1917), 86 L. J. K. B. 1444.

**1044. — Mere existence of question of law.**—The fact of there being a question of law to be decided is not sufficient ground for a case to be ordered, unless there is some evidence that the arbitrators are going beyond their jurisdiction or are about to act contrary to the law.—*Re GRAY, LAURIER & Co. & ROUSTEAD & Co.* (1892), 8 T. L. R. 703; 36 Sol. Jo. 666.

**1045. — Local Government Act, 1888 (c. 41).**—Where, under the above Act, differences are directed to be determined by arbn. of the Local Govt. Board, the Board must proceed under s. 63 of that Act, with the consequence that they, or

*Re GRAND TRUNK RY. CO. & PETRIE* (1901), 21 C. L. T. 529 2 O. L. R. 284.  
—CAN.

**1039 i. Form of case—Facts must be stated.**—An arbitrator who states a special case, involving a question of law, for the adjudication of the ct., should set forth the facts necessary to enable the ct. to determine the question.—*SHERIDAN v. NAGLE* (1872), 1 R. 6 C. L. 110.—IR.

**1039 ii. —**—The words "special case" in Arbn. Act, s. 22, have the same meaning as in marginal r. 389 of the Supreme Ct. Rules, & a "stated case" thereunder must be based on a statement of fact, either admitted or judicially ascertained. It is not the province of a ct. to advise parties what their rights would be under a hypothetical case. All facts admitted or ascertained, necessary to raise the question of law upon which the opinion of the ct. is asked, must be stated.—*Re LAURSEN & SOUTH VANCOUVER CORPN.* (No. 1) (1913), 18 B. C. R. 528.—CAN.

**1039 iii. — Cannot delegate whole matter to court.**—Arbitrators cannot in

stating a case delegate the decision of the whole matter to the ct.—*Re JAVA, CHINA & JAPAN LUN & OLAF WIJK & Co. CHINA AGENCIES, LTD.* (1911), 6 Hong Kong, 122.—HONG KONG.

**1040 i. Application to compel statement of case.**—*R. S. O.*, 1897 (c. 62), s. 41.—When questions of law arise any party may apply to the arbitrator, under the above Act, to state a case for the opinion of the ct., & in the event of his refusal may apply to the ct. to compel him so to do. The application may be made before the arbitrator rules on the questions of law, & making an order is in each case a matter of discretion, the order granting or refusing the direction to the arbitrator being subject to appeal.—*Re JENISON & KAKABEKA FALLS LAND & ELECTRIC CO.* (1898), 25 A. R. 361.—CAN.

**1040 ii. —**—On an application by one of the parties to an arbn. under the above Act for a direction to the arbitrators to state a special case:—*Held*: (1) the question as to the proper construction of the agreement was a question of law "arising in the course of

the reference," within the above Act, & a special case might properly be directed as to it; (2) a special case having been directed as to the principal question, it might properly be made to include two other questions in dispute though, had they been the only questions, it would not have been proper to direct a case as to them; (3) a party to a reference was not entitled *ex debito justitiae* to have a special case directed whenever a question of law arose in the course of a reference, but it was a matter in the discretion of the ct.; (4) there was no general rule that when the arbitrators were specially qualified to decide a question of law, this direction should not be given.—*Re RATIBURN CO. & STANDARD CHEMICAL CO.* (1905), 23 C. L. T. 66; 5 O. L. R. 286; 2 O. W. R. 36.—CAN.

**m. Opinion of court on special case.**—A single judge has no jurisdiction to pronounce the opinion of the ct. upon a special case stated by arbitrators pursuant to Arbn. Act, R. S. O., 1897 (c. 62), s. 41.—*Re GEDDES & COCHRANE* (1901), 21 C. L. T. 436; 2 O. L. R. 145.



**Sect. 3.—Special case; Sub-sects. 1 & 2, A.]**

the arbitrator appointed by them, may be compelled, under the Act of 1889, to state a case for the opinion of the ct.—*Re KENT COUNTY COUNCIL & SANDGATE LOCAL BOARD*, [1895] 2 Q. B. 43; 64 L. J. Q. B. 502; 72 L. T. 725; 59 J. P. 456; 43 W. R. 601; 11 T. L. R. 421; 39 Sol. Jo. 505; 15 R. 452.

*Annotation* :—*Re Id. Re Isle of Wight R. D. C. & Isle of Wight County Council* (1900), 65 J. P. 87.

**1046. — Before arbitrator has expressed opinion.]**—It is no bar to the right to apply for a direction to an arbitrator to state, in the form of a special case for the opinion of the ct., a question of law arising in the course of the reference, that the arbitrator has expressed no opinion adverse to the party making the application.—*Re SPILLERS & BAKER, LTD., & LEETHAM & SONS*, [1897] 1 Q. B. 312; 66 L. J. Q. B. 326; 76 L. T. 35; 45 W. R. 241; 13 T. L. R. 152; 41 Sol. Jo. 208, C. A.

**1047. — Where no application for case during reference.]**—An arbitrator cannot be directed by the ct. or a judge to state a special case, for the opinion of the ct., under the Act of 1889, s. 19, when no request or application to state a case has been made before the award has been made & the arbn. concluded.—*MONTGOMERY, JONES & Co. v. LIEBENTHAL & Co.* (1898), 78 L. T. 406, C. A.

**1048. — Substantial & serious point of law.]**—By a contract for the construction of a railway for a lump sum, it was provided that, “in the event of any dispute or question arising as to the intent & meaning of any part of the specification . . . or the interpretation, meaning or effect of the clauses & conditions of the contract, or as to any other matter or thing whatever connected with, or arising out of, the contract or incidental thereto, or not thereby provided for, such questions or disputes should be referred to the consulting engineer, whose decision should be conclusive & binding on both parties.” The cost of construction was greatly increased by the necessity of blasting rock instead of excavating earth, & the contractor claimed a large sum beyond the contract price, alleging that the contract provided for excavation of earth only. This claim was referred to the consulting engineer, as arbitrator:—*Held*: as a substantial & serious point of law arose upon the construction of the contract, the case was one in which the ct. would, in the exercise of its discretion, order the arbitrator to state a special case, for the opinion of the ct., under the Act of 1889, s. 19.—*Re NUTTALL & LYNTON & BARNSTAPLE RY. CO.* (1899), 82 L. T. 17, C. A.

**1049. — Where no definite question has arisen.]**—An application that an arbitrator be directed to state a case to raise a point of law arising in the course of the arbn. was refused, on the ground that no real definite question had so clearly arisen between the parties as to justify calling upon the arbitrator to state a case.—*Re WOKING URBAN DISTRICT COUNCIL (BASINGSTOKE CANAL) ACT, 1911* (1913), 77 J. P. 321.

**1050. — Question of law—Admiralty Transport Arbitration Board.]**—The Admlty. requisitioned two ships for use in Govt. service, under a Proclamation of Aug. 3, 1914, which provided that the owners of ships requisitioned should receive payment for their use & service during their employment in Govt. service, & compensation for loss or damage thereby occasioned, to be arranged by mutual agreement, or, failing agreement, by the award of the Admlty. Transport Arbn. Board. No terms were agreed upon, nor was any charter-party signed, although the Admlty. sent to the owners charterparty T. 99, under which the ship-owners were to be liable for marine risks & the

Admlty. for war risks. One of the steamers was totally lost, & the other steamer was damaged on the voyage, as the owners alleged, through not being properly loaded. The owners of both steamers claimed compensation from the Admlty., alleging that the loss of & damage to the steamers were due to war risks. The Admlty. alleged that the loss & damage were due to marine risks, for which the shipowners were responsible. By consent, the disputes were referred to three arbitrators, to be nominated by the President of the Admlty. Transport Arbn. Board, under r. 6 of the rules governing the constitution of that Board. In one case there was a written submission, & in the other case, correspondence which amounted to a submission. Rule 6 provided that “The President may direct that any claim coming before the Board may be heard & disposed of by a tribunal consisting of the President or Vice-President sitting with two arbitrators selected by the President from the panel, & that the award of any two members of such tribunal shall be final & conclusive, & shall not be subject to appeal or review.” The President nominated two arbitrators to sit with the Vice-President, in order to deal with each case, but he did not direct that the award of any two members of the tribunal should be final & conclusive. The shipowners, in each case, asked the arbitrators, under the Act of 1889, s. 19, to state a case for the opinion of the High Ct., but the arbitrators refused to do so, unless ordered by the ct.:—*Held*: (1) the provision in r. 6 that the award of the arbitrators should be final & conclusive, did not apply, as the President had not so directed; (2) even if the President had so directed, the arbitrators could still be ordered by the ct., under the sect., to state a special case for the opinion of the ct., upon questions of law arising in the reference.—*LOBITOS OILFIELDS, LTD., v. ADMIRALTY COMRS., CROWN S.S. CO. v. ADMIRALTY COMRS.* (1917), 86 L. J. K. B. 1444; 117 L. T. 28; 33 T. L. R. 472; 14 Asp. M. L. C. 97.

**1051. — Grounds for refusal.]**—A. & Co. entered into a contract for the purchase, from B. & Co., of 300 tons of Penang tapioca flour, upon the terms of the rules of the General Produce Brokers’ Assocn., of London. In these rules provision was made for arbn. in all cases of dispute. The award of the arbitrators or umpire was to be final, subject to an appeal to the council of appeal. Clause 4 of the rules provided: “Whenever it may be admitted by the seller, or decided by arbn., that the seller has failed to fulfil the terms of this contract, the buyer shall ‘close’ by invoicing back the produce to the seller at once at a price & weight to be fixed by arbn., which price shall not be less than 2 per cent. & not more than 10 per cent. over the estimated market value of the shipment contracted for on the day upon which default occurs, the difference to be due, in cash, in fourteen days; no discount.” B. & Co. declared their inability to perform the contract & to give delivery thereunder, as the Penang sellers had tendered to them flour that was unsatisfactory, & an arbn. was demanded. Meantime the price fell; arbitrators & umpire were appointed, & an award was made, awarding to B. & Co., notwithstanding their default, the difference between the contract price of 8s. 9d. per cwt. & 7s. 9d., the price fixed by the umpire. A. & Co. having appealed to the council of appeal:—*Held*: the council of appeal ought not to be directed to state a case upon the point whether damages could be awarded in favour of a defaulting seller, to be paid by a buyer who had committed no breach of the contract.—*Re GRAY, LAURIER & Co. & BOUSTEAD & Co.* (1892), 8 T. L. R. 703; 36 Sol. Jo. 666.



## PART III.—THE HEARING.

**1052. Appeal from order to state case—Judicature (Procedure) Act, 1884 (c. 16)—Practice & procedure.]**—An appeal will not lie direct to the Ct. of Appeal against an order of a judge at chambers directing an arbitrator to state a case pending an arbn., the matter not being one of practice & procedure within s. 1 (4) of the above Act.—*Re FRERE & STAVELEY TAYLOR & CO. & NORTH SHORE MILL CO., LTD.*, [1905] 1 K. B. 366; 74 L. J. K. B. 208; 92 L. T. 194; 53 W. R. 242; 21 T. L. R. 188; 49 Sol. Jo. 221, C. A.

*Annotation* :—**Consd.** *Miller, Gibb v. Smith & Tyrer*, [1916]

**1053. Costs.]**—Except so far as there may be power, under the Act of 1889, s. 20, to impose terms as to costs on making an order for the statement of a special case, the ct. has no power to make an order as to the costs of a special case under s. 19.—*Re KNIGHT & TABERNACLE PERMANENT BUILDING SOCIETY*, [1892] 2 Q. B. 613; 62 L. J. Q. B. 33; 67 L. T. 403; 57 J. P. 229; 41 W. R. 35; 8 T. L. R. 783; 4 R. 67, C. A.

*Annotations* :—**Consd.** *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Rys. Co. of London*, [1912] A. C. 673, H. L. **Refd.** *Re Gough & Liverpool Corpn.* (1892), 36 Sol. Jo. 270, C. A.; *May v. Mills* (1914), 30 T. L. R. 287. **Mentd.** *Re Kirkleatham L. B. & Stockton & Middlesborough Water Board*, [1893] 1 Q. B. 375, C. A.; *Re Holland S.S. Co., National S.S. Co. & Bristol Steam Navigation Co.* (1906), 23 T. L. R. 59, C. A.; *Shrewsbury v. Shrewsbury* (1907), 23 T. L. R. 224, C. A.; *Sidney v. N. E. Ry. Co.*, [1916] 2 K. B. 760; *Mambre Saccharine Co. v. Corn Products Co.* (1918), 24 Com. Cas. 89.

**1054. Appeal from opinion of court on case — Interlocutory order.]**—The decision of the High Ct., upon a special case stated for its opinion by an arbitrator, who is thereupon to make his award, is an "interlocutory order" within R. S. C., Ord. 58, r. 15, & an appeal from the decision must be brought within twenty-one days.—*COLLINS v. PADDINGTON VESTRY* (1880), 5 Q. B. D. 368; 49 L. J. Q. B. 264; 42 L. T. 573; 28 W. R. 588, C. A.

*Annotations* :—**Distd.** *Shubbrook v. Tufnell* (1882), 9 Q. B. D. 621, C. A. The first clause of the headnote is too wide. The ct. did not decide the general proposition there laid down, but only held that where the decision of the ct. on the point submitted to it could not in any event necessitate the entering of final judgment for either party, the decision was interlocutory (*JESSEL, M.R.*). **Consd.** *Cusack v. L. & N. W. Ry. Co.*, [1891] 1 Q. B. 347, C. A.; *Re Coles & Ravenshear*, [1907] 1 K. B. 1, C. A. **Refd.** *Re Tippet, Ex p. Tippet* (1885), 2 Morr. 229, C. A.; *Bradshaw v. Warlow* (1886), 54 L. T. 438, C. A. **Mentd.** *Carter v. Stubbs* (1880), 43 L. T. 746, C. A.; *Kettlewell v. Watson* (1883), 52 L. J. Ch. 818, C. A.; *R. v. Worcester County Court Judge* (1886), 54 L. T. 875; *Brown v. Dorset* (1886), 34 W. R. 776; *R. v. Kettle* (1886), 17 Q. B. D. 761; *Isaacs v. Salbstein*, [1916] 2 K. B. 139, C. A.

**1055. Final order.]**—An arbitrator, under an order of reference, stated a case for the opinion of the ct., which provided that, if the opinion of the ct. should be one way, the case was to be referred back to the arbitrator, if the other way, judgment was to be entered for deft. with costs. A Divisional Ct. decided in favour of pltf., & referred the case back to the arbitrator. Deft. appealed :—**Held** : (1) an appeal could be brought from the order; (2) it was a final order, & the appeal must be entered in the general & not in the interlocutory list.—*SHUBROOK v. TUFNELL* (1882), 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740, C. A.

*Annotations* :—**Folld.** *Bozson v. Altrincham U. C.*, [1903] 1 K. B. 547, C. A. **Consd.** *Isaacs v. Salbstein*, [1916] 2 K. B. 139, C. A.

**1056. — No appeal—Jurisdiction consultative only—Arbitrator not functus officio.]**—No appeal

**1056 i. Appeal from opinion of court on case—No appeal.]**—On a reference at *Nisi Prius* the order required the arbitrator, at the request of either party,

to state any special facts for the ct. The arbitrator having stated a case, the ct. made a rule thereon :—**Held** : no appeal would lie, & as judgment had

lies from the decision of the Div. Ct. on a special case, stated by an arbitrator under the Act of 1889, s. 19, for the purpose of obtaining the opinion of the ct. for his guidance, the jurisdiction of the High Ct. under that sect. being consultative only.—*Re KNIGHT & TABERNACLE PERMANENT BENEFIT BUILDING SOCIETY*, [1892] 2 Q. B. 613; 62 L. J. Q. B. 33; 67 L. T. 403; 57 J. P. 229; 41 W. R. 35; 8 T. L. R. 783; 4 R. 67, C. A.

*Annotations* :—**Consd.** *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Rys. Co. of London*, [1912] A. C. 673, H. L. **Refd.** *Re Gough & Liverpool Corpn.* (1892), 36 Sol. Jo. 270, C. A.; *May v. Mills* (1914), 30 T. L. R. 287; *Mambre Saccharine Co. v. Corn Products Co.* (1918), 24 Com. Cas. 89. **Mentd.** *Re Kirkleatham L. B. & Stockton & Middlesborough Water Board*, [1893] 1 Q. B. 375, C. A.; *Re Holland S.S. Co., National S.S. Co. & Bristol Steam Navigation Co.* (1906), 23 T. L. R. 59, C. A.; *Shrewsbury v. Shrewsbury* (1907), 23 T. L. R. 224, C. A.; *Sidney v. N. E. Ry. Co.*, [1916] 2 K. B. 760.

**1057. —.]**—Arbitrators stated a special case, in which the question for the opinion of the ct. was thus stated : "Whether our construction of the contracts upon the two points above stated is correct. If both points are correctly decided, this our award is to stand. If either or both points is, or are, wrongly decided, the matter is to be remitted to us to give effect to the true construction of the contract in our *interim* & final awards. The costs of the special case are referred to the ct." :—**Held** : the special case was stated under the Act of 1889, s. 19, & not under s. 7, & an appeal would not lie to the Ct. of Appeal from the decision of the High Ct.—*Re HOLLAND S.S. CO. & BRISTOL STEAM NAVIGATION CO.* (1906), 95 L. T. 769; 23 T. L. R. 59; 51 Sol. Jo. 65, C. A.

**1058. — — — —.]**—No appeal lies from the decision of the High Ct. upon a special case stated by an arbitrator, with regard to a question of law arising in the course of the reference, under the Act of 1889, s. 19.—*SHREWSBURY v. SHREWSBURY* (1907), 23 T. L. R. 224, C. A.

**1059. — — — Where erroneous award can be set aside.]**—Although the opinion of the High Ct. upon a special case stated by an arbitrator under the Act of 1889, with regard to a question of law arising in the course of the reference, cannot be the subject of an appeal, yet, if that opinion is erroneous, an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award.—*BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING CO. v. UNDERGROUND ELECTRIC RYS. CO. OF LONDON*, [1912] A. C. 673; 81 L. J. K. B. 1132; 107 L. T. 325; 56 Sol. Jo. 734, H. L.

*Annotation* :—**Refd.** *Re King & Duveen*, [1913] 2 K. B. 32.

**1060. Arbitrator bound to follow opinion of court.]**—An arbitrator, who has stated a case for the opinion of the ct., is entitled, if not bound, to follow that opinion.—*PEARSON & SON v. GREAT WESTERN RY. CO.* (undated), cited [1912] 3 K. B. at p. 136.

### SUB-SECT. 2.—STATEMENT OF AWARD IN FORM OF SPECIAL CASE.

*See Arbitration Act, 1889, s. 7 (b).*

*A. Power to state Award in form of Special Case.*

**1061. Common Law Procedure Act, 1854, s. 5—Lands Clauses Consolidation Act, 1845 (c. 18).]**—The umpire in an arbn. under the above Act of

not been entered, error could not be brought.—*MILLS v. KING* (1864), 14 C. P. 223; 3 E. & A. 120.—**CAN.**

*Sect. 3.—Special case: Sub-sect. 2, A. B. C. D. E. & F.]*

1845, in which each party had appointed an arbitrator, made his award in the form of a special case for the opinion of a superior ct.:—*Held*: he had the power to state a case, the appointment of an arbitrator being, by the terms of s. 25, a submission to arbn. on the part of the party by whom same was made, & the arbn. being an arbn. by consent within C. L. P. Act, 1854, s. 5.—*RHODES v. AIREDALE DRAINAGE COMRS.* (1876), 1 C. P. D. 402; 45 L. J. Q. B. 861; 35 L. T. 46; 24 W. R. 1053; 3 Char. Pr. Cas. 433, C. A.

*Annotations:—Appld. Re Bidder & North Staffordshire Ry. Co.* (1878), 4 Q. B. D. 412, C. A.; *Re Carpenter & Bristol Corpn.* (1907), 71 J. P. 417, C. A. *Refd. Warburton v. Haslingden L. B.* (1879), 48 L. J. Q. B. 451; *Bexley L. B. v. West Kent Main Sewerage Board* (1882), 9 Q. B. D. 518; *Knowles v. Bolton Corpn.* (1900), 69 L. J. Q. B. 481, C. A.

**1062. — Special Act—Insurance company.]—**Defts.' special Act provided for the reference to arbn. of any question arising on any of their contracts of insurance, & that the "submission to any such arbn." might be made a rule of ct.:—*Held*: the umpire in a reference under the Act had power to state a special case for the opinion of the ct. under C. L. P. Act, 1854, s. 5.—*ISITT v. RAILWAY PASSENGERS ASSURANCE CO.* (1889), 22 Q. B. D. 504; 58 L. J. Q. B. 191; 60 L. T. 297; 37 W. R. 477.

*Annotations:—Mentd. Re Etherington & Lancashire & Yorkshire Accident Insee.*, [1909] 1 K. B. 591, C. A.; *Ystradowen Colliery Co. v. Griffiths*, [1909] 2 K. B. 533, C. A.

**1063. — Local Act—Local Government Board.]—**By West Kent Main Sewerage Act, 1875 (c. clxiii.), s. 93, it was enacted that, if any difference should arise respecting any assessment of a main sewer rate, or any determination of the Sewerage Board, or any controversy or other matter under the Act, same should be referred for decision to the Local Govt. Board, whose decision thereon & respecting the costs of the reference should be final & binding. A dispute having arisen between the Sewerage Board & a Local Board, respecting a claim made by the Local Board against the Sewerage Board for compensation for damage done to the highways, etc., of the district, the disputants, with the consent of the Local Govt. Board, stated a case for the opinion of the ct.:—*Held*: it was not competent to them to do so, the Local Govt. Board being, by the above sect., constituted the tribunal, whose decision on the matter was to be final & binding, & this not being a submission to arbn. within C. L. P. Act, 1854, s. 5.—*BEXLEY LOCAL BOARD v. WEST KENT MAIN SEWERAGE BOARD* (1882), 9 Q. B. D. 518; 51 L. J. Q. B. 456; 47 L. T. 192; 46 J. P. 519; 31 W. R. 119.

*Annotations:—Distd. Lobitos Oilfields v. Admiralty Comrs., Crown S.S. Co. v. Admiralty Comrs.* (1917), 86 L. J. K. B. 1444. *Refd. Re Kent County Council & Sandgate L. B.*, [1895] 2 Q. B. 43.

**B. Effect of Refusal to State Award in Form of Special Case.** See Part IV., Sects. 16, Sub-sect. 2, 17, Sub-sect. 2, *post*.

#### C. Form of Award.

**1064. Certificate of arbitrator.]—**Where by an order of reference a verdict was taken for pltf., subject to the award of an arbitrator, to inquire & determine certain specific matters pointed out in the order of reference, & to the opinion of the Ct. of King's Bench upon a special case, & that the arbitrator should have further power to certify any other fact which, in his judgment, should appear necessary to be stated to the ct. in a special case, in order to raise & decide the issues in the cause:—*Held*: (1) it must be taken to have been

the meaning of the order of reference that the facts found by the arbitrator should be those on which, in a special case, the ct. were to decide; (2) the certificate of the arbitrator was in substance the special case, & it should be set down in the special paper as the special case to be argued.—*BOTFIELD v. DIXON* (1836), 6 L. J. K. B. 33.

**1065. Facts must be found.]—**An arbitrator to whom a cause was referred, with liberty, if he should think fit, to report specially to the ct., set out in his award a long statement of the evidence, leaving the ct. to draw inferences of fact:—*Held*: this was not a due exercise by the arbitrator of the authority intrusted to him.—*JEPHSON v. HOWKINS* (1841), 2 Man. & G. 366; 2 Scott, N. R. 605; 133 E. R. 787.

**1066. — Finality.]—**The ct. having referred to a barrister, who was empowered to direct "that a nonsuit or a verdict for pltf. or defts. should be entered, as he should think proper," & who was, at the request of either party, to state any point of law upon the face of his award for the opinion of the ct.:—*Held*: (1) it was not incumbent on the arbitrator to decide finally as to the amount of damages to be recovered, & to direct how the judgment should be entered up; (2) having by his award disposed of all the issues joined on the record, & assessed damages separately in respect of each subject-matter of complaint in the declaration, & having referred to the ct. the question as to the right of pltf. to recover damages in respect of some of the grievances stated in the declaration at the request of defts., & at the request of pltf. the question as to the validity of custom & the allegations in the second plea, & as to pltf.'s right to judgment *non obstante veredicto* on the second plea, should the issue thereon be found for defts., he had properly discharged his duty, & he was not bound definitely to determine as to the validity of the custom.—*BRADBEE v. LONDON CORPN. (GOVERNORS OF CHRIST'S HOSPITAL)* (1842), 4 Man. & G. 714; 2 Dowl. N. S. 164; 5 Scott, N. R. 79; 11 L. J. C. P. 209; 134 E. R. 294.

*Annotation:—Mentd. R. v. Longton Gas Co.* (1860), 29 L. J. M. C. 118.

**1067. — Affirmatively, not alternatively.]—**A special case, stated by an arbitrator upon an appeal against an assessment to poor rates, set out two alternative modes, neither contrary to law, for ascertaining the value of the tenements assessed:—*Held*: (1) the arbitrator must find the facts affirmatively, & not in the alternative; (2) the case must be remitted to be restated.—*NORTH & SOUTH WESTERN JUNCTION RY. CO. v. BRENTFORD UNION ASSESSMENT COMMITTEE* (1888), 13 App. Cas. 592; 58 L. J. M. C. 95; 60 L. T. 274, H. L.

*Annotations:—Mentd. East London Ry. Joint Com. v. Greenwich & St. Olave's Unions & St. Matthew, Bethnal Green* (1902), Ryde's & Konstam's Rat. App. 59; *East London Ry. Joint Com. v. Bermondsey & Greenwich Assmt. Com.* (1907), 5 L. G. R. 922; *G. C. Ry. Co. v. Banbury*, [1907] 1 K. B. 717, C. A.; *London United Tramways v. Brentford Union Assmt. Com.* (1907), 96 L. T. 528, C. A.; *G. C. Ry. Co. v. Banbury Union Assmt. Com.*, *Sheffield Union Assmt. Com. v. G. C. Ry. Co.* (1908), 100 L. T. 89, H. L.; *L. & N. W. Ry. Co. v. Thrapston Union* (1912), 10 L. G. R. 1067; *East London Joint Com. v. Greenwich Union Assmt. Com.*, *Same v. Bermondsey Assmt. Com.*, *Same v. Stepney Com.*, [1913] 1 K. B. 612, C. A.; *G. W. & Met. Ry. Cos. v. Kensington Assmt. Com.*, *G. W. & Met. Ry. Cos. v. Hammersmith Assmt. Com.*, [1916] 1 A. C. 23, H. L.

**1068. Findings of fact binding.]—**In an arbn., in which damages were claimed in respect of interference with the light enjoyed by pltf., the umpire found as a fact that there remained sufficient light to pltf.'s premises for all purposes of ordinary user. On a special case stated by the umpire in his award:—*Held*: so far as the question was one of fact, & not matter of law, the ct. could not interfere with the umpire's finding.—*AMBLER & FAWCETT v.*



GORDON, [1905] 1 K. B. 417; 74 L. J. K. B. 185; 92 L. T. 96; 21 T. L. R. 205.

*Annotation* :—**Mentd.** Higgins v. Betts, [1905] 2 Ch. 210.

#### D. Hearing of Special Case.

**1069. Case under Bankruptcy Act, 1883 (c. 52)—Hearing evidence.**—In a special case under the above Act, the ct. heard evidence on one of the points in dispute.—*Re WILSON, Ex p. HASTINGS (LORD)* (1893), 62 L. J. Q. B. 628; 10 Morr. 219; 5 R. 455.

*Annotations* :—**Mentd.** *Re Howells, Ex p. Mandleberg*, [1895] 1 Q. B. 844; *Rochester v. Le Fanu*, [1906] 2 Ch. 513.

**1070. Burden of proof on party disputing award.**—When a rule to set aside an award is made into a special case, the counsel who objects to the award ought to begin & have the reply.—*DIPPINS v. ANGLESEA (MARQUIS)* (1834), 2 Dowl. 647.

**1071.** —.]—Where an arbitrator gives an award in favour of claimants in the arbn., subject to the opinion of the ct. on a special case, on the argument of the case, the burden is on resps. to the arbn. who dispute the award, & it is for their counsel to open the case.—*CAVALLOTTI v. CAR-RUTHERS & Co.* (1916), 33 T. L. R. 101.

#### E. Costs.

**1072. Jurisdiction of court over costs.**—A dispute between plffs. & defts. was referred to an arbitrator, the costs of the award not being submitted to him. The arbitrator having made an award, by which he stated a special case for the decision of the ct. :—**Held** : on the hearing of the special case the ct. had jurisdiction to order the costs to be paid, & the costs of the hearing should follow the event.—*PORTISHEAD WAREHOUSE Co. v. BRISTOL & PORTISHEAD PIER & RY. Co.*, [1887] W. N. 75.

**1073. Lands Clauses Consolidation Act, 1845 (c. 18)—Effect of Act of 1889—Costs incident to arbitration.**—The costs of a special case stated by an arbitrator, under Waterworks Clauses Act, 1847 (c. 17), are costs incidental to the arbn. within s. 34 of the above Act of 1845, & are costs over which the Ct. of Appeal has no jurisdiction.—*Re HOLLIDAY & WAKEFIELD CORPN.* (1888), 20 Q. B. D. 699; 57 L. J. Q. B. 620; 59 L. T. 248; 52 J. P. 644, C. A.

*Annotations* :—**Consd.** *Re Gonty & M. S. & L. Ry. Co.*, [1896] 2 Q. B. 439, C. A. *Re Holliday & Wakefield Corpn.* came before this ct. before the Act of 1889 was in force; that case is no longer applicable, for that Act has repealed C. L. P. Act, 1854, s. 5, under which it was decided, & has given the ct. a discretion as to costs (LORD ESHER, M.R.). **Mentd.** *Re Gerard & L. & N. W. Ry. Co.*, [1895] 1 Q. B. 459, C. A.; *G. E. Ry. Co. v. L. C. C.* (1906), 51 Sol. Jo. 132; *Fletcher v. Birkenhead Corpn.*, [1906] 1 K. B. 605; *Manchester Corpn. v. New Moss Colliery*, [1906] 2 Ch. 564, C. A.; *Re Eden & Joicey & N. E. Ry. Co.* (1906), 71 J. P. 91, C. A.

**1074.** —.]—The fact that an arbitrator, in an arbn. under the above Act of 1845, could not have stated a special case for the opinion of the ct. before the passing of the Act of 1889, does not prevent the costs of such a special case from being "incident to" the arbn. within s. 34 of the earlier Act. Such costs are not in the discretion of the arbitrator, under Sched. 1 (i.) of the Act of 1889, but must be borne by the promoters, unless the sum awarded is equal to, or less than, that offered by them.—*SIDNEY v. NORTH EASTERN RY. Co.*, [1916] 2 K. B. 760; 86 L. J. K. B. 142; 116 L. T. 444; 61 Sol. Jo. 28.

**1075. Act of 1889, s. 20—Jurisdiction of Court of Appeal.**—The Ct. of Appeal has power, under the above Act, to deal with the costs of an appeal on an award stated in the form of a special case for the opinion of the ct.—*Re GONTY & MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. Co.*, [1896]

2 Q. B. 439; 65 L. J. Q. B. 625; 75 L. T. 239; 45 W. R. 83; 12 T. L. R. 620; 40 Sol. Jo. 715, C. A.

*Annotations* :—**Mentd.** *Cale. Ry. Co. v. Turcan*, [1898] A. C. 256, H. L.; *Stretford U. D. C. v. Manchester, South Junction & Altrincham Ry.* (1903), 1 L. G. R. 683, C. A.; *G. E. Ry. Co. v. L. C. C.* (1906), 51 Sol. Jo. 132; *S. E. Ry. Co. v. Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12, C. A.; *G. C. Ry. Co. v. Balby with Hexthorpe U. C., A.-G. v. G. C. Ry. Co.*, [1912] 2 Ch. 110.

**1076. Reserved for arbitrator.**—On the hearing of a special case stated by an arbitrator, the costs do not follow the result of the judgment, since, by s. 20 of the above Act, the question of costs in special cases is specially reserved for the arbitrator.—*GREAT EASTERN RY. Co. v. LONDON COUNTY COUNCIL* (1906), 51 Sol. Jo. 132.

**1077. — In discretion of court—Case should not interfere.**—An award in the form of a special case, after stating the facts & the question to be submitted for the opinion of the ct., & dealing with the costs of the arbn. & award & special case, provided that the costs of the argument of the special case should be paid by the buyers or the sellers, according as the question submitted should be answered by the ct. in the affirmative or the negative :—**Held** : the arbitrators ought not to interfere with the discretion of the ct. in reference to the costs of the argument of the special case.—*KARBERG (ARNOLD) & Co. v. BLYTHE, GREEN, JOURDAIN & Co., SCHNEIDER (THEODOR) & Co. v. BURGETT & NEWSAM*, [1915] 2 K. B. 379; 84 L. J. K. B. 1673; 113 L. T. 185; 31 T. L. R. 351; 21 Com. Cas. 1; *affd.*, [1916] 1 K. B. 495, C. A.

*Annotations* :—**Mentd.** *Weis v. Credit Colonial et Commercial* (1915), 114 L. T. 168; *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1917] 1 K. B. 320, C. A.; *Mambre Saccharine Co. v. Corn Products Co.* (1918), 24 Com. Cas. 89; *Produce Brokers v. Weis* (1918), 87 L. J. K. B. 472.

#### F. Appeal.

**1078. Common Law Procedure Act, 1854—Could not bring error.**—**Held** : where an action was referred by order of *Nisi Prius* to an arbitrator, who, at the request of the parties, stated his award as to part in the form of a special case for the opinion of one of the superior ct.s., as provided for by s. 5 of the above Act, & judgment was entered according to the opinion of the ct., such judgment was not one upon which, as provided for by s. 32, proceedings in error could be had.—*GUMM v. FOWLER* (1860), 2 E. & E. 890; 29 L. J. Q. B. 189; 2 L. T. 282; 6 Jur. N. S. 1093; 8 W. R. 436; 121 E. R. 332.

*Annotations* :—**Folld.** *Courtauld v. Legh* (1869), L. R. 4 Exch. 187; *Jones v. Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A.

**1079.** —.]—An arbitrator, to whom a cause was referred, was required by the order of reference to state a case for the opinion of the Ct. of Exch. at the request of either party; he stated a case, which was heard & decided by the ct. :—**Held** : this decision was not a judgment on which error could be brought.—*COURTAULD v. LEGH* (1869), L. R. 4 Exch. 187; 38 L. J. Ex. 124; 20 L. T. 496.

*Annotation* :—**Refd.** *Re Bidder & North Staffordshire Ry. Co.* (1878), 4 Q. B. D. 412, C. A.

**1080. — Agreement not to appeal.**—By an order of reference made by consent, & before the coming into operation of the Jud. Acts, it was ordered that neither plffs. nor defts. should bring any writ of error against each other concerning the matters referred. The arbitrator made an award dependent on the opinion of the ct., upon a special case stated by him. The ct. gave judgment for plffs. Defts. appealed :—**Held** : no appeal could be brought.—*JONES v. VICTORIA GRAVING DOCK*



**Sect. 3.—Special case: Sub-sect. 2, F. Part IV. Sects. 1 & 2.]**

**Co., LTD. (1877), 2 Q. B. D. 314; 36 L. T. 347; 25 W. R. 501, C. A.**

**Annotations:—Mentd.** *Re* Great Northern Salt & Chemical Works, *Ex p.* Fenwick (1891), 36 Sol. Jo. 42; *Evans v. Hoare*, [1892] 1 Q. B. 593; *Re* Queensland Land & Coal Co., *Davis v. Martin* (1894), 1 Mans. 355; Griffiths (John) Cycle Corp'n. *v.* Humber, [1899] 2 Q. B. 414, C. A.; Daniels *v.* Trefusis, [1914] 1 Ch. 788.

**1081. Judicature Act, 1873 (c. 66), s. 19—Appeal lies to Court of Appeal.]—**The Ct. of Appeal has jurisdiction to entertain an appeal from the decision of the High Ct. of Justice upon a special case, stated by an umpire appointed under Lands Clauses Consolidation Act, 1845 (c. 18), to assess the compensation for lands taken for the purposes of an undertaking or injured by the execution of the works thereof.—*Re* BIDDER & NORTH STAFFORDSHIRE RY. Co. (1878), 4 Q. B. D. 412; 48 L. J. Q. B. 248; 40 L. T. 801; 27 W. R. 540, C. A.

**Annotations:—Mentd.** *Jolley (J.) v. N. E. Ry. Co.*, [1907] 1 K. B. 402, C. A.; *Rugby Portland Cement Co. v. L. & N. W. Ry. Co.*, [1908] 1 K. B. 925.

**1082. Act of 1889, s. 19—Appeal lies to Court of Appeal—Arbitration under local Act.]—**In an arbn. under a local Act, the arbitrator made his award in the form of a special case for the opinion of the ct. It was contended on appeal from the Q. B. Div. that no appeal lay, as the order of the arbitrator to state a special case must have been under the above sect.:—*Held*: an appeal lay.—*Re* KIRKLEATHAM LOCAL BOARD & STOCKTON

& MIDDLESBOROUGH WATER BOARD, [1893] 1 Q. B. 375; 62 L. J. Q. B. 180; 67 L. T. 811; 57 J. P. 421; 4 R. 194, C. A.; *affd.*, on another point, *sub nom.* STOCKTON & MIDDLESBROUGH WATER BOARD *v.* KIRKLEATHAM LOCAL BOARD, [1893] A. C. 444, H. L.

**Annotations:—Consd.** *Re* Montgomery, Jones & Liebenthal (1898), 78 L. T. 406, C. A.; *Re* Holland S.S. Co. & Bristol Steam Navigation Co. (1906), 95 L. T. 769, C. A. **Mentd.** *Edinburgh Street Tram. Co. v. Edinburgh Corp'n.*, [1894] A. C. 456, H. L.; *Re* L. C. C. & London Street Tram. Co., [1894] 2 Q. B. 189, C. A.; *Re* Dudley, Stourbridge & District Electric Traction Co. & Dudley Corp'n. (1906), 70 J. P. 502; *Dudley, Stourbridge & District Electric Traction Co. v. Dudley Corp'n.* (1907), 96 L. T. 340, C. A.; *Dudley Corp'n. v. Dudley, Stourbridge & District Electric Traction Co.* (1907), 97 L. T. 556, H. L.; *Re* Wolstanton United U. D. C. & Burslem Corp'n. (1907), 72 J. P. 28; *Hamilton Gas Co. v. Hamilton Corp'n.*, [1910] A. C. 300, P. C.; *Perth Gas Co. v. Perth Corp'n.*, [1911] A. C. 566, P. C.

**1083. Appeal from Divisional Court — Interlocutory order.]—**Where, in an arbn. held under a submission to arbn. contained in an agreement, the arbitrator made his award in the form of a special case, but a Divisional Ct. subsequently made an order setting the award aside, on the ground of misconduct on the part of the arbitrator:—*Held*: the order so made was an interlocutory, & not a final, order.—*Re* CROASDELL & CAMMELL, LAIRD & Co., LTD., [1906] 2 K. B. 569; 75 L. J. K. B. 769; 95 L. T. 441; 54 W. R. 620; 22 T. L. R. 759; 50 Sol. Jo. 682, C. A.

**Annotation:—Mentd.** *Re* Jerome, [1907] 2 Ch. 145, C. A.

*See, also*, Nos. 1054, 1055, *ante*.

## Part IV.—The Award.

### SECT. 1.—IN GENERAL.

**1084. General requisites of award.]—**To every award are five things incident—matter of controversy, submission, parties to the submission, arbitrators & the delivery of the award.—*BROWNE v. MEVERELL* (1561), 2 Dyer, 216b; 73 E. R. 478.

**Annotations:—Refd.** *Middleton v. Weeks* (1607), Cro. Jac. 200; *Berry v. Perry* (1615), 3 Bulst. 62. **Mentd.** *Sallows v. Girling* (1611), Cro. Jac. 277; *Lee v. Elkins* (1701), 12 Mod. Rep. 585.

**1085. Nature of award.]—**An award, in its nature, is the determination of a third person, who is to judge of disputes existing between two others or more, who submit to the judgment of such third person giving him power to decide, & the duty incumbent on the parties to obey his decision arises from the contract of submission (*RICHARDSON, J.*).—*WINTER v. WHITE* (1819), 1 Brod. & Bing. 350; 3 Moore, C. P. 674; 129 E. R. 758.

**Annotation:—Mentd.** *Rees v. Waters* (1847), 16 M. & W. 263.

### PART IV. SECT. 2.

**a. Submission to seven directors—Award by them & two strangers.]—**Pursuer was appointed to wind up the affairs of deft. bank, & agreed to leave his remuneration "to be settled by the present directors." The directors were seven in number. The shareholders appointed the directors to report on the accounts, & named two gentlemen to assist them. The directors, having advised with the two named persons, fixed the remuneration at £1,000; pursuer repudiated the award & raised an action. The ct. refused to sustain the award.—*M'CULLOCH v. SOUTHERN BANK OF SCOTLAND* (1853), 1 W. R. 374.—**SCOT.**

**b. Submission to five—Award by four—Fifth withdrawing.]—**Five arbitrators came to a decision, & made,

dated, & signed a rough draft of their award; deft. then withdrew from the submission; a fair copy was made, bearing the same date as that of the rough draft, but signed by only four arbitrators.—*Held*: the award was complete at the date of the rough draft, & its validity was not affected by the subsequent occurrences.—*KULA NAGABUSHANAM v. KULASESHACHALAM* (1863), 1 Mad. 178.—**IND.**

**c. ——— Death of one before re-hearing.]—**Matters in dispute were referred to the arbn. of five persons, of whom four made their award, subsequently granting an application for re-hearing. Before the matter was re-heard, one of the four died, & an order striking off the application was made by two of the surviving arbitrators:—*Held*: the award was not a valid &

**1086. .]—**An award is the decision of one having a limited authority to determine those matters submitted to him by the parties or by a stat. & no other (*BLACKBURN, J.*).—*BUCCLEUCH (DUKE) v. METROPOLITAN BOARD OF WORKS* (1870), L. R. 5 Exch. 221; 39 L. J. Ex. 130; 23 L. T. 255; *reversd.* on other grounds (1872), L. R. 5 H. L. 418, H. L.

### SECT. 2.—BY WHOM IT MUST BE MADE.

**Necessity for arbitrators being present & acting together during hearing.]—***See* Nos. 842—852, *ante*.

**1087. Award by arbitrators & third party.]—**Arbitrators cannot make their arbitrament in the names of themselves & of a third person to whom no submission was made.—*ANON.* (1468), Y. B., 8 Edw. 4, fo. 1, pl. 1; *Jenk.* 128; 145 E. R. 90.

**final award.—***BOONJAD MATHOOR v. NATHOO SHAHOO* (1877), 1 L. R. 3 Calc. 375; 1 C. L. R. 455.—**IND.**

**d. ——— Award signed by two—Purporting to be made by all.]—**Three out of five arbitrators were not present at the time the award was made & did not sign, although it purported to have been signed by all of them:—*Held*: misconduct on the part of the arbitrators within Civil Procedure Code, s. 521.—*RAM NARAIN ROY v. BAIS NATH MALLA* (1901), 1 L. R. 29 Calc. 36.—**IND.**

**e. ——— Award by three.]—**Parties agreed to refer disputes to five persons, & did not agree to accept the decision of any less number. Three only of the arbitrators nominated were proceeding with the arbn., & one had declined to act. The ct. released attachments at

**1088. Submission to four or any three—Award by three.]**—A submission to the arbn. of four persons, so as the award be made at such a time by the four, or by any three of them, creates a divided authority, & an award by any three of them is good.—*BERRY (BARREY, BERRIE) v. PENRING (PERIN, PERRY, PERRIE)* (1616), 3 Bulst. 62; Moore, K. B. 849; 1 Roll. Rep. 375; Cro. Jac. 399; 81 E. R. 54.

*Annotations*:—*Refd.* Winter v. White (1819), 3 Moore, C. P. 674. *Mentd.* Elletson v. Cummins (1740), 2 Stra. 1144.

**1089. Award purporting to be by four—Signed by three only.]**—Where an agreement of reference provides that the award shall be made by four persons, or any three of them, & the award purports to be the award of the four, but is executed by three of them only, it is void.—*THOMAS v. HARROP* (1823), 1 Sim. & St. 524; 57 E. R. 207.

*Annotation*:—*Dbtd.* White v. Sharp (1844), 1 Dow. & L. 1030.

the instance of the three arbitrators, who proposed to authorise plffs. to collect the debts:—*Held*: the act of the three arbitrators which led to the issue of the order could not be supported, & the order was *ultra vires*, & void.—*PARMESHAH DAT v. HARI NAIK*, 7 N. W. 357.—*IND.*

**f. — — —.]**—Where the parties agreed to refer a suit to arbn., but no provision was made that a decision by the majority of arbitrators should be binding, & two of five arbitrators withdrew:—*Held*: a decision by the majority was invalid.—*GURUPATHAPPA v. NARASINGAPPA* (1883), 1 L. R. 7 Mad. 174.—*IND.*

**g. — — — Or any three—Two acting as pleaders & not signing award.]**—A case was referred to five persons with a proviso that, in the event of two being absent, the arbn. should be continued by the other three. Two of the arbitrators named were the pleaders on either side, & with the consent of the parties ceased to act as arbitrators, but argued the matter before the other arbitrators:—*Held*: the award made by the three arbitrators named was valid.—*DEBENDRA NATH SHAW v. AUBHOY CHURN BAGCHI* (1883), 1 L. R. 9 Cal. 905; 12 C. L. R. 525.—*IND.*

**1092 i. Submission to three or any two—Award by two.]**—A decree-arbitral signed by two of three arbiters, in a case where the submission provides for an award by any two of them, in case of their differing in opinion, is good.—*McCALLUM v. ROBERTSON* (1825), 4 Sh. (Cl. of Sess.) 66.—*SCOT.*

**1092 ii. — — — Other not present at signing.]**—Where the submission gives authority to any two of three arbitrators to make an award, the presence of the three at the time the award is signed is not necessary.—*PURDY v. BURBRIDGE* (1856), 2 Thom. 150.—*CAN.*

**1092 iii. — — — Necessity for notice to third.]**—Where a cause is referred to three arbitrators, whose award, or that of any two of whom, is to be final, two of these cannot proceed to make an award without giving notice to the third.—*RAYMOND v. LUKE* (1836), Ber. [205], 116.—*CAN.*

**1092 iv. — — — No notice given.]**—Under a submission to three, the award to be by any two, the award was drawn up as though to be executed by the three, but was executed by two only; no final meeting was had of all three, nor notice given to the one who did not sign it, until some days after:—*Held*: the award was invalid.—*MARTIN v. KERGAN* (1859), 2 P. R. 370.—*CAN.*

**1092 v. — — — Notice given.]**—The submission empowered three arbitrators, or any two of them, to make an award. The three arbitrators sat & read all the evidence, & adjourned to

meet at H., but the award was executed by two in the absence of the third, who did not attend the meeting of which he had notice, & at which the award was signed:—*Held*: the award was duly made. *Qu.*: as to the power of the two arbitrators to make the award in the absence of the third.—*CREELMAN v. McMULLEN* (1885), 6 R. & G. 138; 6 C. L. T. 450.—*CAN.*

**1092 vi. — — —.]**—A fire loss was referred to L. & C., & a third person to be appointed by them, an award by any two of them to be binding. L. & C. appointed M. third arbitrator. L. & M. agreed on an amount, but C. said he would not sign such award, & an appointment was then made for the next day, C. being present, to meet & sign it. The award was accordingly made on the following day by L. & M., C. not attending:—*Held*: C.'s absence formed no objection.—*Re HUBBARD & UNION FIRE INSURANCE CO.* (1879), 44 U. C. R. 391.—*CAN.*

**1092 vii. — — — Consent of parties.]**—A reference under British Columbia Arbn. Act authorised two out of three arbitrators to make an award. After notice of the final meeting the third arbitrator failed to attend, but no objections were raised on account of his absence by the parties who appeared at the time appointed. The other two arbitrators made the award:—*Held*: in the circumstances the arbitrators present had jurisdiction to decide whether or no the award should be made by them in the third arbitrator's absence.—*DOBERER v. MEGAW* (1903), 34 S. C. R. 125.—*CAN.*

**1092 viii. — — — Award altered without consent of or sufficient notice to third.]**—A reference was to two, with power to appoint a third, the award to be made by any two. The arbitrators met, & two of them determined the award in a particular way:—*Held*: the award must be set aside.—*Re McDONALD & PRESANT* (1858), 16 U. C. R. 84.—*CAN.*

**h. Submission to three—Award must be unanimous.]**—Where a submission to arbn. provides that the award thereunder shall be made by three arbitrators, the award to be valid must be made by the three unanimously.—*Re O'CONNOR & FIELDER* (1894), 25 O. R. 568.—*CAN.*

**k. — — — Majority award invalid.]**—Where a submission is referred to three arbitrators, an award cannot be made by the majority unless the submission plainly so provides.—*MASSIE v. CAMPBELLFORD, LAKE ERIE & WESTERN RY. CO.* (1914), 26 O. W. R. 180, 421; 6 O. W. N. 161, 457.—*CAN.*

**l. — — — Third arbitrator distinguished from umpire.]**—A submission was to S. & N., & such third person as "the arbitrators" should appoint,

**1090. Submission to four or two—Award by two.]**—Debt upon a bond to perform an award. After *nullum fecere arbitrium* pleaded, plff. set forth that they submitted to the award of four, so that they made it by Nov. 16, & signified it under the hands & seals of two of them, & then alleged the award under two of their seals, to which deft. demurred, conceiving the award to be void, because the submission was to four. The ct. gave judgment for plff.—*HILL v. LANGLEY* (1670), 1 Vent. 50; 86 E. R. 36.

**1091. Submission to four or any three or two—Award by two.]**—On a submission to four, so as any three or two make an award under hands & seals, an award by two is good.—*SALLOWS v. GIRLING* (1611), Cro. Jac. 277; 79 E. R. 238.

*Annotations*:—*Appld.* Berry v. Penring (1616), Cro. Jac. 399. *Mentd.* Wilkinson v. Page (1842), 1 Hare, 276.

**1092. Submission to three or any two—Award by two—Award altered after being agreed to by**

"so that the arbitrators or umpire" make his or their award, etc. Before entering upon their duties, S. & N. appointed E. as third arbitrator, & the award was executed by S. & E. only, but professed, in the body of it, to be the award of the three:—*Held*: (1) E. was a third arbitrator, not an umpire; (2) the word "umpire," in the submission, must be rejected as surplusage; (3) the award was invalid, not having been made by all three arbitrators.—*WILLSON v. YORK* (1881), 46 U. C. R. 289.—*CAN.*

**m. — — — Award by two.]**—An award by two of three arbitrators is sufficient.—*MEIKLEJOHN v. YOUNG* (1811), 1 R. de L. 510.—*CAN.*

**n. — — — With consent of parties.]**—If two of the arbitrators award by consent in the absence of the third arbitrator, neither of the litigants can object afterwards.—*Re MCCLUNY & MORTLEY* (1860), 6 U. C. L. J. 92.—*CAN.*

**p. — — — Third not finally consulted.]**—Three arbitrators, C., D., M., having discussed all matters referred, separated, unable to agree, M. expressing his dissent as final. The attorney for one party wrote to D., requesting that the amounts on the different heads might appear on the face of the award, etc. C. & D. considered this communication, & determined to disregard it, but no notice was given to M., & an award was made by C. & D., without further consulting him in any way:—*Held*: the award should be set aside.—*Re TORONTO CITY & LEAK* (1864), 23 U. C. R. 223.—*CAN.*

**Third not consulted.]**—A submission was to three arbitrators. The award was signed by two without consulting the third:—*Held*: the award was bad.—*KELLY v. MACDONALD* (1877), 2 P. E. I. 173.—*CAN.*

**r. — — — Third dissenting.]**—A reference was before three arbitrators, & the award was executed by two of the three only. It appeared that a rough sketch of the award was drawn up & agreed to & signed by two, but dissented from by the third, & on the following day the formal award was drawn up & signed by the two, without reference to the dissenting arbitrator:—*Held*: the award was invalid.—*ANGLIN v. NICKLE* (1879), 30 C. P. 72.—*CAN.*

**s. — — — Third withdrawing.]**—An award was made by two arbitrators after the other (the arbitrator appointed by defts.) had withdrawn, at defts.' request, after all the evidence on either side had been heard, having been duly notified of their intention to make an award:—*Held*: under Railway Act, C. S. C. (c. 66), s. 11, the two arbitrators had power to proceed as they did.—*WIDDER*



*Sect. 2.—By whom it must be made.]*

**third.]**—A reference was to three arbitrators, or any two of them. They met on Jan. 19, when one of them declared he could not meet any more, an award being signed, but not sealed & stamped, on that date. The other two, without further notice to the first, met again on Jan. 22, & made alterations in the award, which was then delivered:—*Held*: the award was good.—**BURTLET v. SMITH** (1734), 2 Barn. K. B. 412; 94 E. R. 587.

**1093. ——— Third having notice of meetings.]**—When a cause is referred to three persons, if they or any two of them are empowered to make an award, an award made by two of them is good, if the third had notice of the meetings, etc., but if he had no such notice, then such an award is bad.—**DALLING v. MATCHETT** (1740), Willes, 215; 125 E. R. 1138.

**1094. ——— Ignoring suggestions of third.]**—A dispute was referred to the decision of three arbitrators, or any two of them. A proposed award was shown at a meeting of the three, to which one of them objected, & he, after a discussion, declared that, if the other two would not alter their view, they must make the award by themselves, & he would not join in it. Afterwards a draft, different from that of the proposed award, was sent by mistake to the last-mentioned arbitrator, by the other two; & he returned it with comments & objections. The two others subsequently made an award corresponding with that originally proposed, without again submitting it to the third arbitrator. The ct. set the award aside.—*Re PERRING (PERRING) & KEYMER* (1835), 3 Ad. & El. 245; 1 Har. & W. 285; 111 E. R. 406.

**1095. ——— Without consulting third.]**—Upon a reference to three arbitrators, or any two of them, an award made by two, in the absence of, & without finally consulting, the third, cannot be supported.—*Re BECK & JACKSON* (1857), 1 C. B. N. S. 695; 140 E. R. 286.

**1096. ——— Award by one—Executed by second at different place & date.]**—A submission was made to A., a barrister, & B. & C., two merchants, or any two of them, & after evidence had been given on each side, A. & B. agreed to make their award in favour of plffs. for a certain sum, subject to the decision of A. upon a point of law. To this award C. did not altogether agree, but he agreed to the point of law being left to A., & the latter, without any further communication with either B. or C., decided the point of law for plffs., & drew up the award in their favour for the sum which had been mentioned, & after signing it at Birmingham, sent it to London to be executed by whichever of the other arbitrators agreed with him, where it was executed on the following day by B. The ct. set

the award aside. If A. & B., having finally agreed on the terms of the award when they last met, had affixed their signatures thereto at different places & times:—*Qu.*: whether the award could have been objected to on that ground.—**LITTLE v. NEWTON** (1841), 2 Man. & G. 351; 9 Dowl. 437; 2 Scott, N. R. 509; 10 L. J. C. P. 88; 5 Jur. 246; 133 E. R. 781.

*Annotations*:—**Consd.** *Hare v. Fleay* (1851), 11 C. B. 472; *Wade v. Dowling* (1854), 4 E. & B. 44; *Whitmore v. Smith* (1860), 5 H. & N. 824. **Reid.** *Jones v. Ives* (1850), 10 C. B. 429; *Re Beck & Jackson* (1857), 1 C. B. N. S. 695. **Mentd.** *Re Hopper* (1867), 36 L. J. Q. B. 97.

**1097. Award purporting to be made by three—Signed by two only.]**—A cause & all matters in difference having been referred to three arbitrators, with power to any two of them to make their award, an award made & signed by two, the third having refused to concur, stated that it was made by the three. An action having been brought on this award, & an issue raised on the averment in the declaration that the two arbitrators duly made their award:—*Held*: the averment was supported, & the award was good.—**WHITE v. SHARP** (1844), 12 M. & W. 712; 1 Dow. & L. 1030; 13 L. J. Ex. 215; 8 Jur. 344; 152 E. R. 1385.

**1098. Submission to one or three—Three appointed—Award by two.]**—Where a matter in dispute is referred to the decision of three arbitrators, all three must concur in the making of the award; an award made by two of them only is bad.

An agreement to refer disputes to arbn. provided for a reference to "the decision of one or of three disinterested arbitrators as mutually agreed," & that, if three arbitrators were appointed, one should be nominated by each of the parties, & the third by the two so nominated. Three arbitrators having been duly nominated & having entered upon the reference, two of them made an award from which the third dissented:—*Held*: the award was invalid. — **UNITED KINGDOM MUTUAL S.S. ASSURANCE ASSOCN. v. HOUSTON**, [1896] 1 Q. B. 567; 65 L. J. Q. B. 484; 1 Com. Cas. 357.

**1099. Submission to two or, failing agreement, to three or any two—Award by original two without concurrence of third.]**—Where, under a submission of reference, the cause was referred to two, & if they could not agree, then to a third, conjointly with them, & if the three could not agree, then the award was to be made by any two of them:—*Held*: an award, made by the two arbitrators after they had called in the assistance of the umpire, which was not submitted to the umpire, was bad.—*Re ALLEN & PERRING* (1835), 5 Nev. & M. K. B. 374 4 L. J. K. B. 199.

**v. BUFFALO & LAKE HURON RY. CO.** (1865), 24 U. C. R. 222.—**CAN.**

**t. ———.]**—Where the conduct of one of three arbitrators amounts to a definite withdrawal, the others, if competent under the deed of submission, may make their award in his absence.—**McKELLAR v. WHITE** (1869), 1 N. Z. Jur. 1.—**N.Z.**

**u. ———.]**—A co. resisted an award on the ground that their arbitrator withdrew from the arbn. after the amount had been agreed upon by the other two arbitrators:—*Held*: the co. could not object to the award on the ground that their arbitrator had not been asked to sign it.—**MOORE v. CENTRAL ONTARIO RY. CO.** (1883), 2 O. R. 647.—**CAN.**

**w. ———.]**—On an arbn. one of the arbitrators said he could not concur in the sum agreed upon, & withdrew. The other two then signed the

award in the presence of each other:—*Held*: after reviewing the authorities, the award was valid at common law.—**FREEMAN v. ONTARIO & QUEBEC RY. CO.** (1884), 6 O. R. 413.—**CAN.**

**x. ——— Third failing to attend at signing—No notice.]**—*Held*: where the co.'s arbitrator had not been notified pursuant to the stat. of time & place appointed for signing awards between the co. & land owners, such awards were invalid by C. S. C. (c. 66), s. 11 (11).—**NORVELL v. CANADA SOUTHERN RY. CO.** (1884), 9 A. R. 310.—**CAN.**

**y. ——— After notice given.]**—After the evidence in a reference to three arbitrators was closed the arbitrators discussed their award generally, agreed upon it, but not finally, & adjourned to a subsequent day to put their decision in writing. On that day one of the arbitrators did not attend the meeting, & the other two arbitrators made an award differing from the one

generally agreed upon by all three arbitrators:—*Held*: the award of the two arbitrators was not invalidated where the third arbitrator, having a notice of a final meeting, voluntarily absented himself from it.—**GLENNY v. EGLINGTON LAND CO., LTD.** (1891), 17 V. L. R. 676.—**AUS.**

**z. ——— Suggestion ignored.]**—Although a third arbitrator has previously suggested some further audit of accounts already examined, it is not necessarily misconduct for the other two to make an award in his absence.—**DOBERER v. MEGAW** (1903), 10 B. C. R. 48; 34 S. C. R. 125.—**CAN.**

**a. ——— Award by four.]**—An award was held invalid, because it purported to be the award of four persons, whereas the order of reference was addressed only to three.—**PHIRAN v. BAHARAN**, 7 N. W. 367.—**IND.**



**1100. Submission to two — Award by one.]—**An award by one of two referees is bad, unless there is distinct evidence of a submission thereto by all the parties to the reference.—*MARRYAT v. BRODERICK* (1837), 2 M. & W. 369; Murp. & H. 96; 6 L. J. Ex. 113; 1 Jur. 242; 150 E. R. 799.

**1101. Award by umpire—Arbitrators also signing.]—**If arbitrators join with an umpire in his deed of umpirage, it is only surplusage, & stands good.—*SOULSBY v. HODGSON* (1764), 1 Wm. Bl. 463; 96 E. R. 268.

*Annotation* :—*Appld. Bates v. Cooke* (1829), 9 B. & C. 407.

**1102.** .]—Submission “so that the arbitrators should make their award before or on June 21, but, if no award should be made before or on that day, then” an umpire to be chosen & the umpirage made before June 28. The arbitrators met, but did not make an award, nor choose an umpire, before or on June 21, but they appointed an umpire before June 28, & the umpire & arbitrators made a joint award before June 28:—*Held*: the award was good, for the joining of the arbitrators in the award did not vitiate it, any more than the joining of a stranger would vitiate it.—*BECK v. SARGENT* (1812), 4 Taunt. 232; 128 E. R. 318.

**Award in name of arbitrators.]**

A declaration on an award made under a submission to the award of two persons, & authorising the appointment of an umpire by them, if they should disagree, after stating the choice of an umpire, alleged that the arbitrators & umpire made the award:—*Held*: taking the whole together, it was substantially an allegation that the umpire made the award.

The award, after reciting that A. & C. had been appointed arbitrators, & that they had appointed E. umpire, proceeded, “We, the arbitrators, do award,” etc., & was signed by the two arbitrators & the umpire:—*Held*: the latter by signing the award adopted the language as his.—*BATES v. COOKE* (1829), 9 B. & C. 407; 109 E. R. 151.

**1100 i. Submission to two—Partial disagreement.]—**A partial disagreement of two arbitrators does not nullify their award as a whole.—*PANAOLAH v. TUMEEZODEEN* (1864), 2 W. R. 32.—*IND.*

**1100 ii.** *their nominee—Award by original two only.]—*Where a submission is to two, & such third person as they shall choose before proceeding, an award by the two only, the third not having acted, is bad.—*SLOAN v. HALDEN* (1857), 14 U. C. R. 495.—*CAN.*

**1100 iii.** .]—Where two named arbitrators were to appoint a third & award to be made by any two of them, a plea which averred that the award had not been made by the arbitrators “in the condition mentioned”:—*Held*: bad.—*FINKLE v. ARNOLD* (1848), 6 U. C. R. 168.—*CAN.*

**1100 iv.** *Award by nominee alone.]—*An agreement nominated arbitrators, & provided that in case of any disagreement between them, they should have power to choose an umpire, whose decision should be final between them. The arbitrators, having differed, called in an umpire, & he made an award:—*Held*: the umpire acted within scope of his authority, the meaning of the submission being that the final decision should be his, not that of the arbitrators.—*GREENE v. BRACKEN* (1851), 2 I. C. L. R. 176.—*IR.*

**1101 i. Award by umpire — & arbitrators—Umpire to act only if arbitrators failed to make award.]—**Where a submission was to abide the award of two arbitrators if made by a certain day, but if they failed to make an award, then to abide by an umpirage to be made on the same day:—*Held*: an

**1104. Appointed by arbitrators without authority — Acquiescence of parties.]—Held**: An award was good though made by an umpire, the arbitrators having no authority to appoint one, the parties having attended him & made no objection.—*MATSON v. TROWER* (1824), Ry. & M. 17.

*Annotations* :—*Distd. Lock v. Vulliamy* (1833), 5 B. & Ad. 600. *Consd. Re Plews* (1845), 14 L. J. Q. B. 139.

**1105. & one arbitrator—Without consulting other.]—**A rule to set aside an award, on the ground that the umpire & one referee had made their award without reference to the other, was made absolute.—*HINTON v. MEAD* (1855), 24 L. J. Ex. 140; 24 L. T. O. S. 222; 1 Jur. N. S. 46; 3 W. R. 161; 3 C. L. R. 325.

**1106. Submission to arbitrators & umpire—Award by umpire only.]—**A deed of submission authorising arbitrators to appoint an umpire in, or to concur with them in considering & determining the matters referred, does not bind the parties to an award made by that umpire alone.—*BEDDALL v. PAGE* (1827), 5 L. J. O. S. K. B. 101.

**1107.—Award by arbitrators only.]—**A cause was referred to two arbitrators, & such third person as they should nominate as an umpire, & the parties agreed to perform the award made by the two & their umpire. The award having been made by two only, the ct. refused to grant an attachment for non-performance of it.—*HETHERINGTON (HEATHERINGTON) v. ROBINSON* (1839), 4 M. & W. 608; 7 Dowl. 192; 8 L. J. Ex. 148; 150 E. R. 1564.

**1108. Submission to several arbitrators—All must be present & agree.]—**Where there are several arbitrators they must all agree in the award, for though the greater part make an award, yet if one is absent the award is void, because the absent person being made a judge, it may be intended that if he had been present he might have been able to bring the arbitrators to his opinion, if he differed from them.—*SOWTON v. SPRY* (1673), Cas. temp. Finch, 87; 23 E. R.

award would be valid made by the two arbitrators, although the umpire joined with them.—*FERGUSON v. MUNRO* (1845), 2 Kerr. 660.—*CAN.*

**1101 ii.** *Umpire only to act on disagreement.]—*The fact that an umpire joined in an award with the arbitrators when they had not disagreed does not vitiate the award.—*RITCHIE v. SNOWBALL* (1887), 26 N. B. R. 258.—*CAN.*

**1101 iii.** .]—Parties entered into a submission by which they referred questions to arbitrators mutually chosen, & in case of their differing in opinion, to an oversman to be named by the arbiters. The award bore to be the award of & signed by the arbiters & oversman:—*Held*: *ex facie* the award was invalid in respect that it bore to be the award of a tribunal to which the parties had not agreed to submit their disputes, & it was incompetent by parol evidence to prove that the oversman had never acted & that the award was the award of the arbiters only.—*DAVIDSON v. LOGAN*, [1908] S. C. 350.—*SCOT.*

**1101 iv.** .]—*Submission to two with liberty to appoint umpire.]—*Bond of submission of an action & other matters to two arbitrators with liberty to appoint an umpire. Plea that the arbitrators before entering on the arbn. appointed an umpire, who with the arbitrators made an award:—*Held*: bad, for, if the award could be supported at all, it could only be as the award of the two arbitrators, & should have been so set out in accordance with the submission.—*RODDY v. LESTER* (1855), 14 U. C. R. 259.—*CAN.*

**1105 i.** *one arbitrator—Umpire's appointment invalid.]—*In an

action to enforce an award:—*Held*: the award was invalid, being signed only by one of two arbitrators named & a third party as oversman, who had no written appointment in his favour.—*FREDERICK v. MITTLAND & CUNNINGHAM* (1865), 3 Macph. (Ct. of Sess.) 1069.—*SCOT.*

**1105 ii.** .]—*Other refusing to attend.]—*An award made by one of the arbitrators & the umpire in the absence of the second arbitrator, who declined to attend:—*Held*: not a valid award.—*BUSUNT RAI v. GRIDHAREE SINGH* (1868), 3 Agra, 93.—*IND.*

**1106 i. Submission to arbitrators & umpire—Award by umpire only.]—**Where the ct. appointed two arbitrators & an umpire, & referred a case to them for decision:—*Held*: an award by the umpire alone, the arbitrators being unable to decide, was valid.—*KUPU RAI v. VENKATARMAYAR* (1881), I. L. R. 4 Mad. 311.—*IND.*

**1106 ii.** .]—*Award by umpire & one arbitrator.]—*Where a submission provided, not for two arbitrators, & in the event of their disagreement, an umpire, but for an award by themselves & such other person as they might appoint, & such other person only considered the case in the absence of the parties & heard evidence from the notes of the original arbitrators & gave a decision with one of them, the other dissenting:—*Held*: such decision was bad.—*O'BRIEN v. THOMAS* (1852), 3 Nfid. L. R. 301.—*NFLD.*

**1108 i. Submission to several arbitrators—All must be present & agree.]—**Three surveyors met & agreed upon the starting point of a licence & did not then determine the correctness of its line, but referred to the Crown Land Depart-

**Sect. 2.—By whom it must be made. Sects. 3,**

**1109. — Must act together.]—**An award ought to be signed by all the arbitrators in the presence of each other. The ct., however, refused to set aside an award on motion, because it was signed by the several arbitrators at different times & places, but intimated that they should not enforce it by attachment or rule.—**STALWORTH (STALLWORTH) v. INNS** (1844), 13 M. & W. 466; 2 Dow. & L. 423; 14 L. J. Ex. 81; 9 Jur. 285; 153 E. R. 194.

**Annotations:—**Consd. *Wade v. Dowling* (1854), 4 E. & B. 44; Lord v. Lord (1855), 5 E. & B. 404. *Appld. Re Bock & Jackson* (1857), 1 C. B. N. S. 695; Consd. *Parr v. Winteringham* (1859), 5 Jur. N. S. 787. *Reid. Peterson v. Ayre* (1854), 14 C. B. 665; *Re Hopper, Barningham & Wrightson* (1867), L. R. 2 Q. B. 367.

**1110. —.]—**A case was referred to the arbn. of three persons, the award to be that "of the arbitrators or any two of them." The award was signed by one of the arbitrators in London, & afterwards sent to another arbitrator at Bristol, who signed it there:—*Held*: the arbitrators should together have executed the award, & their not having done so rendered the award invalid.—**WADE v. DOWLING** (1854), 4 E. & B. 44; 23 L. J. Q. B. 302; 23 L. T. O. S. 187; 18 Jur. 728; 2 W. R. 567; 2 C. L. R. 1642; 119 E. R. 18.

**Annotations:—**Consd. *Wrightson v. Hopper* (1867), 15 L. T. 566. *Mentd. May v. Mills* (1914), 30 T. L. R. 287.

**1111. —.]—***Seemle*: an award is invalid if both the arbitrators do not sign it at the same time.—**EADS v. WILLIAMS** (1854), 4 De G. M. & G. 674; 3 Eq. Rep. 244; 24 L. J. Ch. 531; 24 L. T. O. S. 162; 1 Jur. N. S. 193; 3 W. R. 98; 43 E. R. 671, L.C.

**Annotations:—**Consd. *Levy v. Stogdon*, [1898] 1 Ch. 478. *Mentd. Whitmore v. Smith* (1860), 5 H. & N. 824; *Barclay*

ment for information; they did not meet thereafter but signed a paper at different times:—*Held*: their decision was not binding as an award.—**RITCHIE v. SNOWBALL** (1887), 26 N. B. R. 258.—CAN.

**1108 ii. — All must execute award.]—**Where several arbitrators are appointed, & the parties do not agree to be bound by the act of the majority, the award, in order to be valid & binding, must be executed by all the arbitrators.—**SURUJEET NARAIN SINGH v. GOURIE PERSHAD NARAIN SINGH** (1867), 7 W. R. 260.—IND.

**1108 iii. —.]—**An award not signed by all the arbitrators is illegal, unless there has been an agreement to abide by the decision of the majority, or that the voice of the umpire should prevail.—**NEM ROY v. BHARUT ROY** (1874), 22 W. R. 129.—IND.

**1108 iv. — Majority award invalid.]—**Where the terms of submission give no authority for the majority of the arbitrators to make the award, it should be made by the whole of the arbitrators. An award made by the majority only would not be valid.—**JUNGLEE RAM v. RAM HEET SAIHOY** (1873), 19 W. R. 47.—IND.

**1108 v. — Except where provision for majority award.]—**Where the majority of the arbitrators have the right to make an award, the absence of the dissentient arbitrator at the time the award was signed is not a ground of nullity.—**MILLS v. ATLANTIC & NORTH-WEST RY. CO.** (1888), 4 M. L. R. 302.—CAN.

**1109 i. — Must act together.]—**Three arbitrators on the close of the evidence agreed on their finding, & a minute thereof was made but not signed, & it was understood that nothing further was to be done but have a formal award drawn up & executed. Next day the award was drawn up & executed by two

of the arbitrators in the presence of each other, but in the absence of the third arbitrator, who two days afterwards executed it in the presence of one of the other arbitrators:—*Held*: the award was invalid.—**NOTT v. NOTT** (1884), 5 O. R. 283.—CAN.

**1109 ii. — One arbitrator dissenting after agreement.]—**An award was agreed upon between the arbitrators, & afterwards one of them having taken a new view of the case dissented, & the others after discussing, by letter, the dissenting arbitrator's views made & published the award as formerly agreed upon:—*Held*: a correspondence in such case was insufficient notwithstanding the dissenting arbitrator did not object to that method.—**JEKYLL v. WADE** (1860), 8 Gr. 363.—CAN.

**1109 iii. — Formal award signed separately.]—**Arbitrators having signed a memorandum of their judgment at the same time & place, may execute a formal award separately & at different times, but within the time allowed.—**WILLIAMS v. SQUAIR** (1853), 10 U. C. R. 24.—CAN.

**1109 iv. —.]—**By s. 516 of the Code all the arbitrators must agree to the terms of the award, but there is no provision of law requiring them to sign it in the presence of each other.—**MUTHUKUTTI NAYAKAN v. ACHA NAYAKAN** (1894), 1 L. R. 18 Mad. 22.—IND.

**1109 v. —.]—**An award should be signed by arbitrators in the presence of each other. The parties are entitled to the judgment of each arbitrator & that judgment should be expressed when the arbitrators are all together. But the reducing of the judgment to writing & the signatures need not be done while they remain together.

An award had been settled by all the arbitrators before it was signed by two, & the witness to their signatures took it next day to the third arbitrator, who signed it. The award was upheld.—

*v. Messenger* (1874), 43 L. J. Ch. 449; *Bottomley Ambler* (1877), 38 L. T. 545, C. A.

**1112. —.]—**Where a matter is referred to the award of three arbitrators, or any two of them, the two who execute the award must do so at the same time & place, & in the presence of each other, otherwise it is not what the parties stipulated for, viz. the joint judgment of the two.—**PETERSON v. AYRE** (1855), 15 C. B. 724; 24 L. T. O. S. 260; 139 E. R. 610.

**Annotation:—***Distd. Re Hopper* (1867), 36 L. J. Q. B. 97.

**1113. —.]—**When an award has been executed by one of several arbitrators at a different time & place from the others, or when any similar error has occurred, involving no misconduct in the arbitrators or substantial injustice to the parties, the award will not be set aside, but will be sent back to the same arbitrators to be re-executed or corrected.—**ANNING v. HARTLEY** (1858), 27 L. J. Ex. 145.

**SECT. 3.—WHEN TO BE MADE.**

Time limit within which award must be made, see Part II., Sect. 2, *ante*.

Enlargement of time, see Part II., Sect. 4, *ante*.

**SECT. 4.—HOW IT MUST BE MADE.**

**1114. Award to be delivered under hands & seals—Award sealed but not signed.]—**A submission to arbn. provided that the award should be delivered under the "hands & seals" of the

*v. REID* (1852), 1 P. R. 247.—

CAN.

**1109 vi. — Award signed by dissenting arbitrator after filing.]—**Two out of three arbitrators agreed in making an award, but the third did not agree, & the award was filed in the ct. of first instance without the signature of the dissentient arbitrator, who, however, subsequently came into ct. & signed it. The ct. thereupon made a decree in accordance with the award:—*Held*: (1) after the award had been filed in ct. it was not open to the dissentient arbitrator to come in & sign the award, nor had the ct. any power to allow him to sign it; (2) the award was invalid & illegal.—**RAMESH CHANDRA DHAR v. KARUNAMOYI DUTT** (1906), 1 L. R. 33 Calc. 498.—IND.

**1109 vii. — Three separate awards issued.]—**On a reference under Arbn. Act, the arbitrators, being unable to agree, drew up & rendered three separate awards. Two of the arbitrators agreed in their findings:—*Held*: the arbitrators having acted *separatim* in making their award, an objection to a finding so made was fatal.—**MCLEOD v. HOPE & FARMER** (1908), 14 B. C. R. 56; 9 W. L. R. 315.—CAN.

**PART IV. SECT. 4.**

**b. Need not be in duplicate.]—**An award need not be made in duplicate.—**Re OULTON & ALLEN** (1885), 25 N. B. R. 19.—CAN.

**c. Award to be under seal—Award not under seal.]—**A submission provided that the award should be made under seal:—*Held*: an award not under seal constituted no bar to a suit in equity.—**MURPHY v. KELLER** (1851), 2 L. Ch. R. 417; 3 Ir. Jur. 187.—IR.

**d. R. S. O., 1877 (c. 174), s. 383—Written statement not filed.]—**The omission of the written statement required by the above Act to be put in by arbi-



arbitrators. They delivered an award sealed, but not signed:—*Held*: good, as sealing presupposed their signing, & in former times the sealing of deeds was sufficient without signing.—*THAIRE (THAYER) v. THAIRE (THAYER)* (1620), Palm. 109, 112; 81 E. R. 1002, 1003.

1115. ———.]—If a submission to arbn. provide "that the award be in writing under hand & seal," the pleading such award under seal only is bad.—*COLUMBEL v. COLUMBEL* (1676), 2 Mod. Rep. 77; 86 E. R. 951.

1116. Award to be written, signed & sealed—Award written & sealed but not signed.]—The award of S. was to be written, signed & sealed by him. It was written & sealed by him, but not signed:—*Held*: good.—*BRADSHAW v. WALKER* (1620), Palm. 97; 81 E. R. 996.

1117. Award to be by writing or by word—Parol award by one of three arbitrators.]—If a matter in dispute is submitted to the arbn. of three persons, who are to make the arbitrament by writing or by word, & the three arbitrators agree on their award & one pronounce it, & the others agree to it, this is not a good award, & three persons cannot make an award by word of mouth, because it cannot be jointly pronounced, but it ought to be in writing.—*LAWSON'S CASE* (1633), Clay. 17.

1118. Award to be written or parol before two witnesses—Award made by parol not in presence of witnesses.]—Where there was a submission to the award of an umpire, the award to be written, or parol before two witnesses, & plff. averred that the umpire had made an award by word of mouth, but did not aver that it was in the presence of two witnesses, deft. had judgment.—*WILSON v. CONSTABLE* (1698), 1 Lut. 536; 125 E. R. 282.

1119. Award to be in writing under hand.]—Where a submission is "so that the award be in writing under the hand of the arbitrator," it must be shown in pleading that the award is under hand, as well as in writing.—*EVERARD v. PATERSON* (1816), 6 Taunt. 625; 2 Marsh. 304; 128 E. R. 1178, Ex. Ch.

*Annotations*:—*Consd.* *Buchanan v. Kinning* (1851), 2 L. M. & P. 526, Ex. Ch. *Refd.* *Wright v. Goddard* (1838), 3 Nev. & P. K. B. 361; *Howard v. Gosset* (1845), 10 Q. B. 359.

trators is not necessarily a ground for setting aside their award, & it may be afterwards supplied.—*Re COLQUHOUN & BERLIN TOWN* (1880), 44 U. C. R. 631.—CAN.

f. *Informal award — Improbative document.*]—An informal & improbate award was issued by the arbiters in a submission:—*Held*: the submission, & the arbiters' powers under it were not so exhausted as to preclude them, five years afterwards, from resuming consideration of the reference, & issuing a formal award substantially to the same effect as the previous improbate one.—*BANNATYNE v. GIBSON & CLARK* (1862), 35 Sc. Jur. 56.—SCOT.

g. — *Letter neither holograph nor tested.*]—A dispute as to whether seed conformed to sample was referred by informal letters to a person in the seed trade. He announced his award to the parties by letters signed by him, but not holograph nor tested:—*Held*: the award being *in re mercatoria* did not require to be authenticated by the statutory solemnities, & looking into the informal nature of the submission, the parties had contemplated an equally informal award.—*DYKES v. ROY* (1869), 7 Macph. (Ct. of Sess.) 357.—SCOT.

h. *Award in English form—Scotch submission.*]—A submission, to a referee in England, executed in Scotland by Scotchmen, in the Scotch form, in relation to the management of a Scotch heritable subject, was followed by an award in England, in a form competent there, but invalid in Scotland:—*Held*:

it was binding in Scotland.—*HOPETOUN (EARL) v. SCOTS MINES CO. & BORRON* (1856), 28 Sc. Jur. 322.—SCOT.

1122 i. *Parol award.*]—An oral award is valid.—*ERBACH v. BINDER* (1914), 14 W. L. R. 720.—CAN.

1122 ii. ———.]—*Semble*: the award of a prize by a committee, appointed to decide who is entitled thereto, need not be in writing.—*JENKINS v. KNIPE* (1885), 11 V. L. R. 269.—AUS.

1122 iii. ———.]—Where there is no stipulation that an award should be in writing, an oral award may be made.—*SAVLAPPA v. DEBOHAND VAIOHAND* (1901), 1 L. R. 26 Bom. 132.—IND.

1122 iv. — *By umpire.*]—*Semble*: an umpire may make an oral award, though the award of an arbitrator under Arbn. Act, 1908, must be in writing.—*Re KEE & NATIONAL MORTGAGE & AGENCY CO. OF NEW ZEALAND, LTD.* (1917), N. Z. L. R. 173.—N.Z.

1122 v. — *Decision must be manifested.*]—The parties submitted their differences to an arbitrator, who made a verbal award:—*Held*: the arbitrator must manifest the mental conclusion he had arrived at by some external act, & the mere mental act without any external manifestation did not constitute the making of an award.—*THOMSON v. MILLAR* (1867), 1 R. 1 O. L. 90.—IR.

1122 vi. — *Followed by improperly executed formal award.*]—Matters in dispute were referred to seven arbitrators. They held sittings extending over some

1120. Award to be under hand & seal—Award under hand only.]—Where, by the terms of the submission, an award is to be made under the hand & seal of the arbitrator, & an award is made under his hand only, the ct. will not grant an attachment for contempt; but neither will the ct. set aside the award.—*ANON.* (1826), 5 L. J. O. S. K. B. 16.

1121. Award to be in writing indented—Award not indented.]—On a motion for an attachment for non-performance of an award, it was objected that the arbitrators had not pursued their authority, because the submission confined the award to be made in writing indented, & the award produced was not indented:—*Held*: the objection was immaterial, & an attachment should go.—*GATLIFFE v. DUNN* (1738), Barnes, 55; 94 E. R. 804.

1122. Parol award.]—Debt does not lie against an exor. upon an award by parol made in the time of testator.—*HAMPTON v. BOYER* (1597), Cro. Eliz. 557; 78 E. R. 802.

*Annotation*:—*Refd.* *Freeman v. Bernard* (1696), 1 Salk. 69.

1123. ———.]—A parol award held good, & an attachment granted for non-payment of money pursuant thereto.—*RAWLING v. WOOD* (1735), Barnes, 54; 94 E. R. 803.

1124. — *Award to be delivered.*]—If a bond of arbn. be conditioned "so as it be made & ready to be delivered to the parties on or before such a day," the arbitrators may make a parol award, for such an award is capable of being delivered, & the words do not necessarily import that it must be in writing.—*OATES v. BROMELL (BROMHILL)* (1704), 6 Mod. Rep. 160, 176; 1 Salk. 75; 87 E. R. 917, 931.

*Annotation*:—*Refd.* *Roberts v. Watkins* (1863), 14 C. B. N. S. 592.

#### SECT. 5.—PUBLICATION AND DELIVERY OF AWARD.

1125. What amounts to publication.]—*Semble*: an award may be said to be published, when they who are interested have notice that it is ready for delivery, on payment of reasonable costs.—

months, & at each sitting came to a decision, either unanimously or by a majority, on different questions. At their last sitting the arbitrators all agreed, & informed the parties that the decisions so arrived at constituted the final award, & gave directions for embodying those decisions in a formal document, which was signed by four only:—*Held*: the actual award was an oral award made by all the arbitrators on the last day of their joint sitting, & the drawing up of the formal award was a purely ministerial act.—*DANDEKAR v. DANDEKAR* (1882), 1 L. R. 6 Bom. 663.—IND.

1122 vii. — *Delivered to parties on different days—Formal award subsequently signed at different dates.*]—In the case of a private award where the arbitrators verbally pronounced their judgment to one party, & on another day to the other party, & on a subsequent date wrote out the award which was signed on a particular date by one arbitrator, who sent it to others elsewhere for signature on a different date:—*Held*: the award ought not to be enforced under Act VIII. of 1859, s. 327.—*NADER ALI v. MAJO* (1874), 21 W. R. 377.—IND.

#### PART IV. SECT. 5.

1125 i. *What amounts to publication.*]—An award was filed with the prothonotary of the county in which the cause was pending enclosed in an envelope, & on the same day was opened by deft. in the office in presence & by authority



**5.—Publication & delivery of award. Sect. 6:  
Sub-sects. 1 & 2**

**MUSSELBROOK v. DUNKIN** (1833), 9 Bing. 605; 1 Dowl. 722; 2 Moo. & S. 740; 2 L. J. C. P. 71; 181 E. R. 741.

*Annotations.*—**Appld.** **Brooke v. Mitchell** (1840), 6 M. & W. 473. **Refd.** **Macarthur v. Campbell** (1833), 5 B. & Ad. 518. **Mentd.** **Moore v. Darley** (1845), 1 C. B. 445; **Fernley v. Branson** (1851), Cox, M. & H. 460; **Roberts v. Eberhardt** (1857), 3 C. B. N. S. 482.

**1126.** —.]—The term "publication" in a submission to arbn. does not mean that there shall be notice; it is satisfied, if the award is complete, that is, if the arbitrator has so finally adjudicated upon the matters before him that it is out of his power to alter the award.

A submission to arbn. gave power to appoint an umpire, who was to make & publish his umpirage ready to be delivered to the parties or such of them as should require same on or before July 15. The award was duly executed & attested on the 11th, & on the following day, notice was sent to the attorneys of both parties by the umpire, between the hours of twelve & one, that he was about to deliver his award, & requesting them to attend him for that purpose, at five o'clock that evening, which they accordingly did, when the umpire read over & declared his award. On the same day, at ten o'clock, a.m., one of the parties to the reference died:—*Held*: the award was made & published in the lifetime of both parties.—**BROOKE v. MITCHELL** (1840), 6 M. & W. 473; 8 Dowl. 392; 9 L. J. Ex. 269; 4 Jur. 656; 151 E. R. 498.

**1127. Award presumed to have been delivered same day as made.**—In pleading that an arbitrator "by writing made & delivered under his hand & seal, dated on such a day, awarded, etc.," it shall be intended to have been made & delivered the same day.—**BASPOOLE v. FREEMAN** (1611), Cro. Jac. 285; 79 E. R. 244.

**1128. One copy should be delivered to each party.**—One part of the award ought to be delivered to

of one of the arbitrators:—*Held*: the award was duly published.—**CREELMAN v. McMULLEN** (1885), 6 R. & G. 138; 6 C. L. T. 450.—CAN.

**1125 ii.** —.]—An award is published (so far as regards the time for an application to set it aside) when the parties have notice that it may be had on payment of charges. Notice of the contents of the award is not necessary to constitute publication.—**REDICK v. SKELTON** (1889), 18 O. R. 100.—CAN.

**1125 iii.** —.]—An award of arbn. which has neither been pronounced nor signified to the parties, whatever knowledge they may have had of it otherwise, is null & void.—**HERBERT v. WRIGHT** (1889), 18 R. L. S. C. 538.—CAN.

**1125 iv.** —.]—"Publication" of an award, signifying its completion so far as the arbitrator is concerned, is made when he executes it in the presence of a witness or does any other act showing his final mind, upon which he becomes *functus officio*.—**HUYCK v. WILSON** (1898), 18 P. R. 44.—CAN.

**1125 v.** —.]—The award of arbitrators is final & conclusive provided public notice is given thereof; & until that formality is observed, they may re-open the proceedings to take further evidence & then modify their decision at will.—**LACHINE, ETC. Co. v. THEBERGE** (1914), 46 Q. R. S. C. 504; 20 D. L. R. 703.—CAN.

**1125 vi.** — *Transmission of copies insufficient.*—Arbiters with authority to pronounce decree or decrees partial or total pronounced two *interim* decrees, which were drawn up & signed by the

respective arbiters, & copies certified by the clerk were transmitted to the parties, the principal decrees never leaving the possession of the clerk. The arbiters never directed the clerk to deliver the decree-arbitrals nor to put them on record:—*Held*: delivery of copies was not equivalent to formal delivery of the awards.—**M'NAIR v. GRAY & WOODROW** (1831), 5 Wils. & S. 305.—SCOT.

**1125 vii.** — *Posting completed award to clerk.*—*Held*: the posting of a completed award to the clerk to the reference was sufficient delivery.—**M'QUAKER v. PHOENIX ASSURANCE Co.** (1859), 31 Sc. Jur. 418.—SCOT.

**1125 viii.** — *Original delivered to one party—Copy to other.*—If an award is duly executed & delivered to the party in whose favour it is made, it is sufficient to give a copy to the other party.—*Re OULTON & ALLEN* (1885), 25 N. B. R. 19.—CAN.

**1125 ix.** — *Award sent by mail.*—During the pendency of a suit matters were referred to arbn. In due course a document purporting to be the arbitrator's award, was received by the other through the post:—*Held*: the so-called award was never delivered by the arbitrator & was in fact & in law no award at all.—**SHAM LAL v. MISRI KUNWAR** (1907), 1 L. L. R. 29 All. 426.—IND.

**k. Award to be made & served by stated day—Service.**—An agreement provided that an award should be made & signed on or before Feb. 19, 1875, & that copies of it should be served on the parties within ninety days from the date of the agreement. The award was made & signed on Feb. 18, 1875, & copies

each of the parties to the submission.—**PARKER v. PARKER** (1595), Cro. Eliz. 448; 78 E. R. 688.

**1129. Delivery before day specified.**—On a submission, so as the award be delivered on the 28th at the shop of A., a delivery on the 27th is good.—**BEALE v. BEALE** (1634), Cro. Car. 383; 79 E. R. 934.

**1130. Award to be ready to be delivered by particular day at particular place.**—Where an award is to be ready to be delivered by a particular day at a particular place, an averment that it was made elsewhere, ready to be delivered there, is good.—**DOYLEY v. BURTON** (1700), 1 Ld. Raym. 533; 91 E. R. 1256.

**1131.** —.]—Under a submission so as the award be ready to be delivered on such a day, a declaration on an award made before the day, without saying it was ready to be delivered, is good.—**BRADSEY v. CLYSTON** (1639), Cro. Car. 541; 79 E. R. 1066.

—.]—An award which is required to be made in writing, etc., ready to be delivered at such a time, is complete if made in writing & ready to be delivered by the arbitrator within the time, though not actually delivered.—**BROWN v. VAWSER** (1804), 4 East, 584; 102 E. R. 954.

*Annotation.*—**Dbtd.** **Brooke v. Mitchell** (1840), 8 Dowl. 392. I am inclined to dissent from the doctrine laid down in *Brown v. Vawser* (PARKE, B.).

**1133. Submission by four—Award to be delivered to parties or one of them—Delivery to any one of either party by parol sufficient.**—Where four submit to abide an award to be delivered to the parties or to one of them, delivery to any one of either party, & by parol only, is sufficient.—**COCKS v. MACCLEFIELD (MACCLESFELDE)** (1562), 2 Dyer, 218, b.; Benl. C. P. 97; 73 E. R. 483.

*Annotation.*—**Consd.** **Oates v. Bromell** (1704), 6 Mod. Rep. 160. The case of *Cocks v. Macclefield*, as it is reported in Benloe, has neither head nor tail to it, but as it is reported in Dyer it is a strong authority for plff. (HOLT, C.J.).

served on that day, ninety-one days after the date of the agreement:—*Held*: the objection that copies had not been served within the time stipulated could not prevail, as the award was made & served within the time named in the agreement.—*Re WEIR & CUMMINGER* (1876), 2 R. & C. 173.—CAN.

**1130 i. Award to be ready to be delivered by particular day.**—Where the submission is, that the award shall be delivered by a certain day, if it be ready for delivery by that day it is sufficient.—**GALBRAITH v. WALKER** (1838), 1 Ont. Dig. 103.—CAN.

**1130 ii.** —.]—An award which is required to be made in writing & delivered to the parties at a certain day is complete when ready to be delivered, & does not require delivery to give it effect.—**SANFORD v. SANFORD** (1846), 2 Thom. 266.—CAN.

**1130 iii.** — *Demand subsequent to date must be averred.*—A plea averred that the arbitrators had been requested on or before the time limited for delivering their award, but did not deliver the award:—*Held*: bad, & the averment should have been that the request was made after the day named.—**FINKLE v. ARNOLD** (1848), 6 U. C. R. 168.—CAN.

**l. Award announced in place specified but rendered in another.**—The nullity of an award cannot be claimed on the ground that it has been rendered in a place different from that in which it was agreed that it should be rendered, if it was announced to the parties at the place agreed upon.—**R. v. MCGREEVY** (1885), 15 R. L. Q. B. 595.—CAN.

## SECT. 6.—FORM AND CONTENTS.

## SUB-SECT. 1.—GENERALLY.

**1134. Incorporating opinion of experts.]**—Where two arbitrators, with the consent of the parties, refer part of the matter to experts, & the experts make their award, this is incorporated in the award of the arbitrators, & the whole is one entire award.—*CHURCH v. ROPER* (1639), 1 Rep. Ch. 140; 21 E. R. 531.

**1135. In form of opinion.]**—An award may be sufficient, though in the form of an opinion.—*MATSON v. TROWER* (1824), Ry. & M. 17.

*Annotations* :—*Distd.* *Lock v. Vulliamy* (1833), 5 B. & Ad. 600; *Re Flews* (1845), 14 L. J. Q. B. 139.

**1136. Good in substance.]**—Although an award, which finds the special facts, is in the nature of a special verdict, it is not to be construed with so much strictness; but the award is to be maintained, if it is good in substance.—*HARDING v. HARRISON* (1827), 5 L. J. O. S. K. B. 249.

**1137. Statement of points of law.]**—A cause was referred to an arbitrator, with liberty to him to state upon his award any point of law raised by either party in reference to the matters thereby referred. Certain points of law were accordingly submitted to the arbitrator, which he set out upon his award (but without reference to any particular state of facts), & certified that he had over-ruled them. The arbitrator's decision upon these points, as abstract propositions, being correct, the ct. refused either to refer it back to him to amend his award by setting forth the facts, upon which the questions of law arose, or to set aside the award.—*JAY v. BYLES* (1833), 3 Moo. & S. 86.

**1138. Stating facts.]**—An action to recover copyhold fines was referred to an arbitrator, with power, at the request of either party, to set out the copyhold premises, & to state any facts for the opinion of the ct. The arbitrator found a gross sum to be due from deft. to plff., & he set out the copyhold premises, but omitted to state the facts on which he formed his opinion, although requested to do so:—*Held*: the award was not bad by reason of this omission, as the arbitrator was not bound to set out the facts.—*WOOD v. HOTHAM* (1839), 5 M. & W. 674; 9 L. J. Ex. 3; 151 E. R. 286.

**1139. Award that action brought to try a right—Not bound to state what right.]**—Where, in an action by a reversioner, which was referred, by order of *Nisi Prius*, to an arbitrator, he awarded (*inter alia*) that the action was brought to try a right, besides the mere right to recover damages:—*Held*: he was not bound to state what was the right which the action was brought to try.—*ANGUS v. REDFORD* (1843), 11 M. & W. 69; 2 Dowl. N. S. 735; 12 L. J. Ex. 180; 152 E. R. 719.

*Annotations* :—*Expld.* *Toby v. Lovibond* (1848), 5 C. B. 770; *Expld. & Distd.* *Richardson v. Worsley* (1850), 5 Exch. 613. *Consd.* *Nicholls v. Jones* (1851), 6 Exch. 373. *Refd.* *Grenfield v. Edgecombe* (1845), 14 L. J. Q. B. 322. *Mentd.* *Miller v. De Burgh* (1850), 4 Exch. 809.

## PART IV. SECT. 6, SUB-SECT. 1.

**1134 i. Incorporating opinion of umpire.]**—Where arbitrators disagree in some items, & during the investigation call in an umpire to give his opinion thereon, & adopt it as their own, he need not sign the award.—*Re CAYLEY & McMULLEN* (1846), 3 U. C. R. 124.—*CAN.*

**m. Adoption of agreement arrived at by parties.]**—Where an award, which purported to be a considered award of the arbitrators, was found to be merely the adoption by the arbitrators of an agreement arrived at by the parties:—*Held*: this would not prevent the

award being a valid & binding award between the parties.—*GOBARDHAN DAS v. JAI KISHEN DAS* (1900), I. L. R. 22 All. 224.—*IND.*

**1135 i. In form of opinion.]**—Under a submission giving no power to award a verdict, the award was: "I am of opinion that defts. are entitled to the verdict in this cause, & by the authority vested in me as arbitrator, confirm this opinion, & decide the case accordingly":—*Held*: the award might be upheld as an informal expression of opinion in favour of defts., there being no express direction to enter a verdict.—*CREIGHTON v. BROWN* (1852), 1 P. R. 331.—*CAN.*

## SUB-SECT. 2.—RECITALS.

**1140. Whether necessary to recite—Enlargement of time.]**—An award within the enlarged time is good on the face of it, though it do not recite that the arbitrators did not, in fact, enlarge the time.—*GEORGE v. LOUSLEY* (1806), 8 East, 13; 103 E. R. 249.

*Annotations* :—*Refd.* *Wohlenberg v. Lageman* (1815), 6 Taunt. 251; *Smith v. Reeves* (1836), 2 Har. & W. 306. *Mentd.* *Re Coombs, Freshfield & Fernley* (1850), 4 Exch. 839; *Richardson v. Worsley* (1850), 5 Exch. 613.

**1141. Bond of reference.]**—The ct. will grant a rule *nisi* to set aside an award, where the award does not recite the bond of reference.—*DODSLEY v. DODSLEY* (1822), 1 L. J. O. S. K. B. 7.

**1142. — Matters in difference other than action referred.]**—Where a cause & all matters in difference are referred, a recital in the award that the action was referred, without mentioning other matters in difference, does not constitute an objection to the award on the face of it.

Such an objection should be made the ground of a separate application to set aside the award, supported by affidavits showing what were the other matters in difference.—*PAULL (PAUL) v. PAULL (PAUL)* (1833), 2 Cr. & M. 235; 2 Dowl. 340; 4 Tyr. 72; 3 L. J. Ex. 11; 149 E. R. 747.

*Annotations* :—*Refd.* *Re Dodington* (1839), 7 Scott, 733. *Mentd.* *Mendell v. Tyrrell* (1841), 9 M. & W. 217.

**1143. Taking of view.]**—Where, by an agreement of reference, an arbitrator was directed to take a view, which was taken accordingly:—*Held*: it was no objection to the award that the view was not set out.—*SPENCE v. EASTERN COUNTIES Ry. Co.* (1839), 3 Jur. 846.

**1144. — That evidence was taken on oath.]**—Where an arbitrator omitted to state in his award that the evidence he had heard was upon oath:—*Held*: the award was good.—*HANNAN v. JUBE* (1846), 10 Jur. 926.

**1145. — Judge's order remitting back award.]**—A cause & all matters in difference between the parties were referred to arbn. by order of *Nisi Prius*, which contained a clause enabling the ct., in case the award should be disputed, to remit the matters referred to the re-determination of the arbitrator. The attorneys on each side, considering the award defective, agreed that it should be amended, & subsequently a judge's order was drawn up by consent, whereby it was ordered that the matters arbitrated upon should be referred back to the arbitrator, to make such alterations as he should think fit. The arbitrator altered the award, & re-delivered it, without giving notice to the parties of his intention so to do, & the amended award did not recite the judge's order:—*Held*: such amended award need not recite the judge's order.—*BAKER v. HUNTER* (1847), 16 M. & W. 672; 4 Dow. & L. 696; 2 New Pract. Cas. 237; 16 L. J. Ex. 203; 153 E. R. 1360.

**n. In form of recommendation.]**—A document, although headed as an "award" & signed by the arbitrator, which merely recommends a solution of the questions referred to arbn., will not be treated by the ct. as an award on an application made under Code of Civil Procedure, s. 525.—*NUNDOLLOL MOOKERJEE v. CHUNDER KANT MOOKERJEE* (1885), I. L. R. 11 Calc. 356.—*IND.*

**p. Memorandum of instructions as to preparation of award.]**—A memorandum in writing, signed by arbitrators, as instructions to a solr. to draw up an award is not a binding award.—*SHAW v. MORTON* (1863), 13 C. P. 223.—*CAN.*



*Sect. 6.—Form & contents: Sub-sect. 2. Sects. 7 & 8: Sub-sects. 1 & 2, A.]*

**1146. Principles of decision.]—**A patent had been obtained by K. & Co., & A. & others agreed to enter into partnership with them for the purpose of working the patent. Differences arose, which were submitted to arbn. It was sought to set aside the award, on the ground that the arbitrator had not stated on what principles he had made his award, so that the award would be of no use in the event of future differences. It did not appear that he was bound to state on what principle he decided, nor was he requested to do so:—*Held*: the award should not be set aside.—*Re KEANE'S AWARD* (1847), 9 L. T. O. S. 59.

**1147. Effect of errors in recitals—Cause referred by judge's order—Award reciting same to be referred by order of Nisi Prius.]—**By a judge's order, made at chambers, upon hearing the attorneys on both sides, & by their consent, a cause was referred to arbn. It was recited in the award that the cause was referred by an order of *Nisi Prius*:—*Held*: such award was bad, & the performance of it could not be enforced by attachment.—*CHRISTIE v. HAMLET* (1828), 5 Bing. 195; 2 Moo. & P. 316; 7 L. J. O. S. C. P. 77; 130 E. R. 1035.

*Annotations:—Expld. Baker v. Hunter* (1847), 16 M. & W. 672. *Distd. Browne v. Collyer* (1851), 20 L. J. Q. B. 426.

**1148. — Christian name of arbitrator.]—**A misrecital, in an award by an umpire, of the Christian name of one of the original arbitrators, by whom he has been duly appointed, does not vitiate the award.—*TREW v. BURTON* (1833), 1 Cr. & M. 533; 3 Tyr. 559; 2 L. J. Ex. 236; 149 E. R. 511.

**1149. — Extension of arbitrator's powers.]—**An untrue recital in an award of an extension of the arbitrator's power by agreement of the parties will not cure an excess, where the truth appears upon affidavit.—*PRICE v. POPKIN* (1839), 10 Ad. & El. 139; 2 Per. & Dav. 304; 8 L. J. Q. B. 198; 3 Jur. 433; 113 E. R. 53.

*Annotations:—Mentd. Waddle v. Downman* (1844), 12 M. & W. 562; *Miller v. De Burgh* (1850), 4 Exch. 809; *Mays v. Cannell* (1854), 15 C. B. 107.

**1150. — As to decision of umpire.]—**By a judge's order, a cause was referred to A., B. & C., the award to be made by them or any two of them, & it was provided that the arbitrators, or any two of them, should, as to certain work, adopt the opinion or decision of C., & as to certain other work, the opinion or decision of A. & B., or, in case

A. & B. should differ in opinion, then that the arbitrators, or such two of them, as should make an award, should adopt the opinion or decision, as to such last-mentioned work, of an umpire to be nominated by A. & B. before proceeding with the reference. A. & B. appointed an umpire, & afterwards made an award, in which they recited that they had heard & duly considered the allegations & evidence of the parties, & had considered the decision of the umpire. There had, in fact, been no difference of opinion on the part of A. & B., & no opinion or decision had been required of, or given by, the umpire:—*Held*: the introduction of these words did not vitiate the award.—*HARLOW v. READ* (1845), 1 C. B. 733; 3 Dow. & L. 203; 14 L. J. C. P. 239; 5 L. T. O. S. 175; 9 Jur. 642; 135 E. R. 730.

**1151. — Of date of enlargement.]—**A misrecital in an award of the date of an enlargement is immaterial.—*Re LLOYD & SPITTLE, Re ADDISON & SPITTLE* (1849), 18 L. J. Q. B. 151; 13 Jur. 587.

**1152. — Original submission altered by act of parties—Award reciting original submission.]—**Where an arbitrator has, by agreement of the parties, jurisdiction to determine disputes which may arise as to certain matters specified in the agreement, & the parties submit to him for adjudication matters not within his jurisdiction, both the arbitrator & the parties being under the misapprehension that the matters so submitted are within his jurisdiction, the recital in an award, made in such circumstances, of the original agreement to refer will not invalidate the award.—*THAMES IRON WORKS & SHIPBUILDING CO., LTD. v. R.* (1869), 10 B. & S. 33; 20 L. T. 318.

#### SECT. 7.—PRESUMPTION IN FAVOUR OF VALIDITY.

**1153. Presumption in favour of award.]—**An award should always be supported, unless there be some unanswerable objection to it (*BEST, J.*).—*CARGEY v. AITCHESON* (1823), 2 B. & C. 170; 3 Dow. & Ry. K. B. 433; 1 L. J. O. S. K. B. 252; 107 E. R. 346; *affd. sub nom. AITCHESON v. CARGEY* (1824), 2 Bing. 199, Ex. Ch.

*Annotations:—Refd. Harrison v. Lay* (1863), 13 C. B. N. S. 528. *Mentd. Plummer v. Lee* (1837), 2 M. & W. 495; *Kendrick v. Davies* (1837), 5 Dowl. 693; *Stone v. Phillips* (1837), 4 Bing. N. C. 37; *Re Marshall & Dresser* (1842), 3 Q. B. 878; *Perry v. Mitchell* (1844), 12 M. & W. 792; *Mays v. Cannell* (1854), 15 C. B. 107.

has been selected as referee, with the approval of both parties, & he reports, those who would take objections are bound to prove their objections by clear & satisfactory evidence which shall satisfy the mind of the ct. that it ought not to be maintained.—*THE JAMES FRASER, Y. A. D.* 160.—CAN.

**1153 ii. —.]—**That an award was executed by the arbitrators at the same time need not be shown in the first instance. It is assumed until questioned.—*SULLIVAN v. KING* (1864), 24 U. C. R. 161.—CAN.

**1153 iii. —.]—**The ct. are always inclined to support the validity of an award, & will make every reasonable intendment & presumption in favour of it.—*CLIFT v. GRIEVE* (1856), 4 Nfld. L. R. 109.—NFLD.

**1153 iv. —.]—**Where a declaration shows a submission on a certain date & an award within a few days thereafter, the ct. will intend it to have been within the stipulated time & within a reasonable period from the appointment of the arbitrator.—*REID v. REID* (1866), 16 C. P. 247.—CAN.

**1153 v. —.]—**The ct., if possible, should uphold an award.—*Re GRAVES &*

#### PART IV. SECT. 6, SUB-SECT. 2.

**1146 i. Whether necessary to recite -- Principles of decision.]—**Arbitrators should give their reasons of decision at the time they make their award. If they do not do so, then they should never do it afterwards.—*PERRY v. TOOGOOD* (1828), 2 Ir. L. Rec. 1st ser.—IR.

**1146 ii. —.]—**Where an award is good on its face, the ct. will not refer the matters back that the arbitrators may state the grounds of their decision, & thus enable a motion to be made against it if illegal.—*WELLS v. GRZOWSKI* (1858), 16 U. C. R. 42.—CAN.

**1146 iii. —.]—**In an award, the arbitrators are not obliged to give reasons for their reward.—*FORGET v. LACHINE, JACQUES CARTIER, ETC. RY. CO.* (1915), Q. R. 24 K. B. 174.—CAN.

**1146 iv. — Municipal Arbitrations Act, R. S. O., 1914 (c. 199), s. 4.]—**Under the above Act an arbitrator must, where he makes his award partly on view or upon any special knowledge or skill possessed by himself, state such matters in his reasons for his award sufficiently to enable an appellate ct. to determine the weight to be attached

thereto.—*Re WATSON & TORONTO CITY* (1916), 27 O. W. R. 367.—CAN.

**1147 i. Effect of errors in recitals — Mistake as to number of defendants.]—**In an action on an award the submission as set out in the declaration mentioned three defts., & the award in reciting the submission only noticed two, but referred to the rule by which the submission was made as annexed to the award, in which rule the three defts. were named:—*Held*: the variance between the submission & the recital in the award was immaterial.—*HALE v. MATTHESON* (1830), Dra. 63.—CAN.

**1147 ii. — Mistake as to matters referred.]—**All matters in issue in a Ch. cause were referred to arbitrators; the award recited that all matters in dispute between the parties were referred to the arbitrators:—*Held*: the misrecital in the award of the submission would not vitiate the award, unless matters were included in the award not in issue.—*M'CABE v. GREY* (1849), 13 I. L. R. 343.—IR.

#### PART IV. SECT. 7.

**1153 i. Presumption in favour of award.]—**Where a thoroughly competent person



**1154. Notwithstanding formal objection.]—**An award held good, notwithstanding some objections in point of form.—**THOMLINSON v. ARRISKIN** (1719), 1 Com. 328; 92 E. R. 1096.  
*See, also, Nos. 1167—1170, post.*

## SECT. 8.—REQUISITES OF VALID AWARD.

### SUB-SECT. 1.—MUST FOLLOW SUBMISSION.

**1155. Must conform to submission.]—**On a submission touching monies laid out for a wife before her coverture at her request, an award made for money, without saying it was laid out at her request, is void.—**WATERS v. BRIDGE** (1622), Cro. Jac. 639; 79 E. R. 551.

*Annotation:—*Refd. **Bradford Old Bank v. Sutcliffe**, [1918] 2 K. B. 833, C. A.

**1156. —.]—**An award must pursue the submission in point of form as well as in point of substance.—**HENDERSON v. WILLIAMSON** (1718), 1 Stra. 116; 93 E. R. 420.

**1157. —.]—**A declaration stated that pltf. had commenced an action against T., to recover a sum of money alleged to be due on an account delivered to T., & that, in consideration that pltf. had consented to stay all proceedings in that cause, on security being given to him for the payment of such sum of money as might be found due from T. upon the account, which was to be submitted to arbn., defts. undertook to pay pltf. so much as, on such arbn., should be found due. Breach, non-payment of the sum found due. Defts. set out, in their plea, the certificate of the arbitrators, which ran thus: "We certify that there is now due from T. to pltf. £120, which we direct & order to be paid by the securities (defts.)"; & then traversed, without this, that the arbitrators "made their certificate in writing of & concerning the matters so referred to them as aforesaid, in manner & form," etc. It was not proved that the arbitrators had confined themselves to the particular account:—*Held*: this was a fatal variance in the declaration, as the above certificate appeared to have been made on all matters in difference.—**KING v. BOWEN** (1841), 8 M. & W. 625; 1 Dowl. N. S. 21; 10 L. J. Ex. 433; 151 E. R. 1189.

*Annotation:—*Refd. **May v. Mills** (1914), 30 T. L. R. 287.

**1158. — Wrong parties named.]—**In an action against E. H. & W. T., at the suit of L., upon a

reference, the award, purporting to be made in an action against E. H. & E. T., at the suit of L., ordered E. H. & E. T. to pay a sum of money to L. An attachment for non-performance of the award was refused.—**LEES v. HARTLEY** (1840), H. & W. 61; Woll. 86.

**1159. — Submission in explicit terms.] —****SLOWMAN v. WIGGINS**, No. 228, ante.

**1160. — Whether necessary to state that evidence outside submission was rejected.]—**In an action upon an award defts. pleaded that the lump sum awarded included matters, claims & demands in respect of which the arbitrators had no jurisdiction, as not having been referable to them under the terms of the contract between the parties:—*Held*: as it appeared that the matters actually referred were those contained in the submission, the award was not bad on the face of it by reason that it did not state that matters not referred had been rejected from consideration.—**FALKINGHAM v. VICTORIAN RAILWAYS COMR.**, [1900] A. C. 452; 69 L. J. P. C. 89; 82 L. T. 506, P. C.

*Annotation:—*Refd. **National Bank of Australasia v. Falkingham**, [1902] A. C. 585, P. C.

### SUB-SECT. 2.—MUST BE WITHIN SUBMISSION.

#### A. In General.

**1161. General rule.]—**Arbitrators have no authority to arbitrate that which is not submitted to them; hence an award which is outside the submission is void.—**BEDELL v. MOOR** (1588), Gouldsb. 91; 75 E. R. 1016.

—.]—If a lump sum be awarded by an arbitrator, & it is shown that matters have been taken into account which the arbitrator had no jurisdiction to consider, the award is bad.—**FALKINGHAM v. VICTORIAN RAILWAYS COMR.**, [1900] A. C. 452; 69 L. J. P. C. 89; 82 L. T. 506, P. C.

*Annotation:—*Refd. **National Bank of Australasia v. Falkingham**, [1902] A. C. 585, P. C.

**1163. — Excess pro non scripto where severable.]—**Where an arbitrator in his award goes beyond the limits of the submission, this does not vitiate the whole award, but the excess is *pro non scripto*, & the award good to the extent of the power.—**JOHNSTON v. CHEAPE** (1817), 5 Dow. 247; 3 E. R. 1318.

**TENTLER** (1911), 19 W. L. R. 361; 21 Man. L. R. 417.—CAN.

**1153 vi. —.] —**Where corruption, fraud, partiality or wrong-doing is charged against arbitrators, it must be distinctly established, the presumption being in favour of the award.—**CAMPBELL v. IRWIN** (1913), 25 O. W. R. 853; 5 O. W. N. 957.—CAN.

## PART IV. SECT. 8, SUB-SECT. 1.

**a. Must conform to order of reference.]—**An award was held invalid for want of a proper return of the evidence & facts as required by the rule of reference.—**ROSS v. BRUCE COUNTY** (1871), 21 C. P. 548.—CAN.

## PART IV. SECT. 8, SUB-SECT. 2.—A.

**1161 i. General rule.]—**A suit on an award, in which the arbitrators have exceeded their powers, is not maintainable.—**DURJAN SINGH v. SIBIA**, 7 N. W. 329.—IND.

**1161 ii. —.]—**To debt on a bond conditioned to perform an award, it is a good plea in bar, that part of one entire sum awarded by the arbitrators arose out of a matter not included in the

submission.—**HILL v. COY** (1839), 1 Kerr, 187.—CAN.

**1161 iii. —.]—**An award is bad which imposes conditions beyond the authority of the arbitrators.—**HILL v. HILL** (1854), 11 U. C. R. 262.—CAN.

**1161 iv. —.]—**In making an award on a question not submitted:—*Held*: the arbitrators had exceeded their authority.—**ABBOTT v. SKINNER** (1861), 7 U. C. L. J. 158.—CAN.

**1161 v. —.]—**The decision of arbitrators in a matter not in difference between the parties, nor referred to them, is null & void for want of jurisdiction.—**MOSHAI SINGH v. KONOMUTTY BEWA** (1871), 15 W. R. 172.—IND.

**1161 vi. —.]—**Where a private award determined a matter not referred to arbn.:—*Held*: a claim under s. 525 of Act X. of 1877 that such award should be filed in ct. was properly dismissed.—**JUALA SINGH v. NARAIN DAS** (1881), 1 L. R. 3 All. 541.—IND.

**1161 vii. —.]—**When an arbitrator awards one sum in respect of matters, some of which are within, & some without his jurisdiction, the award must be set aside.—**COCKBURN v.**

**IMPERIAL LUMBER CO.** (1898), 26 A. R. 19.—CAN.

**1161 viii. —.]—**An award that goes beyond the terms of reference is to that extent *ultra vires*.—**MOHAMMED MUMTAZ ALI KHAN v. SAKHAWAT ALI KHAN** (1901), 1 L. R. 23 All. 394.—IND.

**1161 ix. —.]—**An award was set aside where the referee went beyond the terms of submission.—**WILKERSON v. MCGUGAN** (1912), 20 W. L. R. 651; 2 W. W. R. 121; 2 D. L. R. 11.—CAN.

**1161 x. —.]—**Where an umpire deals with matter which is outside the order of reference to him, the award is bad, although his action may make no practical difference in the result.—**RIVERTON BOROUGH & NEW ZEALAND DREADNOUGHT GAS CO., LTD.** (1916), 35 N. Z. L. R. 601.—N.Z.

**1161 xi. — Not applicable to matters included at request of parties.]—**Where the amounts allowed in an award in respect of lands were agreed on by the parties & put in the award at their request:—*Held*: the rule that an arbitrator cannot go beyond the submission did not apply to such circumstances.—**Re GRAVES & TENTLER** (1911), 19 W. L. R. 361; 21 Man. L. R. 417.—CAN.

**Sect. 8.—Requisites of valid award: Sub-sect. 2, A. B. & C.]**

**1164. — Void in toto where inseverable.]** — Where arbitrators had awarded on a matter which was not referred to them, & what they had so awarded, without authority, could not be separated from the other parts of their award:—*Held*: the award was bad & must be set aside.—*BOWES v. FERNIE* (1838), 4 My. & Cr. 150; 41 E. R. 59.

—If an arbitrator has awarded something beyond the authority, the award is *pro tanto* void, & if the void part is so mixed up with the rest that it cannot be rejected, the award is void altogether, otherwise those against whom the award is made would be compelled to fulfil the void part (*BLACKBURN, J.*).—*BUCCLEUCH (DUKE) v. METROPOLITAN BOARD OF WORKS* (1870), L. R. 5 Exch. 221; 39 L. J. Ex. 130; 23 L. T. 255; *reversd.* on another point (1872), L. R. 5 H. L. 418, H. L.

**Annotations:—***Refd.* *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 380; *Selby v. Whitbread*, [1917] 1 K. B. 736. **Mentd.** *City of Glasgow Union Ry. Co. v. Hunter* (1870), L. R. 2 Sc. & Div. 78, H. L.; *Holt v. Gas Light & Coke Co.* (1872), L. R. 7 Q. B. 728; *McCarthy v. Metropolitan Board of Works* (1872), L. R. 7 C. P. 508; *Lyon v. Fishmongers' Co. & Thames Conservators* (1875), 10 Ch. App. 681, n.; *R. v. Sheward* (1880), 5 Q. B. D. 179; *Cale. Ry. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259, H. L.; *R. v. Essex* (1884), 14 Q. B. D. 753; *Cowper, Essex v. Acton L. B.* (1889), 14 App. Cas. 153, H. L.; *Re L. T. & S. Ry. Co. v. Gower's Walk Schools* (1889), 24 Q. B. D. 326, C. A.; *O'Rourke v. Railways Comr.* (1890), 15 App. Cas. 371, P. C.; *Re Whiteley & Roberts*, [1891] 1 Ch. 558; *R. v. Scard* (1894), 10 T. L. R. 545; *Falkingham v. Victorian Railways Comr.*, [1900] A. C. 452, P. C.; *L. & N. W. Ry. Co. v. Walker* (1903), 88 L. T. 705, H. L.; *London & India Dock Co. v. North London Ry. Co.* (1903), *Times*, Feb. 6; *Re Tynemouth Corp'n. & Northumberland Tynemouth Corp'n. & Trevelyan, Tynemouth Corp'n. & Orde* (1903), 67 J. P. 425; *R. v. Mountford, Ex p. London United Tramways*, [1906] 2 K. B. 814; *L. & N. W. Ry. Co. v. Reddaway* (1907), 23 T. L. R. 279; *A.-G. of Southern Nigeria v. Holt*, [1915] A. C. 599, P. C.; *Odium v. City of Vancouver* (1915), 85 L. J. P. C. 95, P. C.; *Recher v. North British & Mercantile Insce.*, [1915] 3 K. B. 277, C. A.

**1166. Unless submission extended by tacit agreement.]**—Where an arbitrator has, by agreement of the parties, jurisdiction to determine disputes which may arise as to certain matters specified in the agreement, & the parties submit to him for adjudication matters not within his jurisdiction, both the arbitrator & the parties being under the misapprehension that the matters so submitted are within his jurisdiction, the award of the arbitrator is good.—*THAMES IRON WORKS & SHIP-BUILDING Co., LTD. v. R.* (1869), 10 B. & S. 33; 20 L. T. 318.

**1164 i. — Void in toto where inseverable.]**—Where costs were awarded without authority, & could not be separated from the sum awarded, the award was set aside.—*WEBSTER v. BLACK* (1840), 6 O. S. 105.—**CAN.**

**1164 ii. —**—Where an amount awarded includes money under an agreement not submitted & such amount is not separable from the rest of the award, the award cannot be supported.—*TULLY v. CHAMBERLAIN* (1871), 31 U. C. R. 299.—**CAN.**

**1164 iii. —**—Where the decree ordaining parties to execute mutual discharges was *ultra vires*:—*Held*: the award fell to be reduced *in toto*, that portion of it which was *ultra vires* being inseparable from the rest.—*MILLER & SON v. OLIVER & BOYD* (1903), 41 Sc. L. R. 26.—**SCOT.**

**1164 iv. —**—Where arbitrators go beyond the scope of their commission, & such excess is not separable from what might have been legitimately determined, the award is void & cannot be enforced.—*MADER v. HARRISON, HARRI-*

*SON v. MADER* (1913), 13 E. L. R. 102.—**CAN.**

**1167 i. Presumption against award.]**—An award was not supported where on the facts set out nothing appeared to show that a certain matter, not included in the written reference, had been verbally submitted as alleged.—*MARTIN v. KERGAN* (1859), 2 P. R. 370.—**CAN.**

**PART IV. SECT. 8, SUB-SECT. 2.—B.**

**r. General rule.]**—If the arbitrators have exceeded their powers by awarding interest when there was no jurisdiction to do so, the award must be set aside.—*HUMPHREYS v. VICTORIA CITY* (1912), 17 B. C. R. 258.—**CAN.**

**s. —**—An arbitrator has no right to allow interest on the amount of compensation awarded & to include it in his award.—*GREEN v. CAN. NORTH RY. Co.* (1915), 30 W. L. R. 572; 7 W. W. R. 1072.—**CAN.**

**t. Interest allowed on sum claimed.]**—When a sum of money had been deposited by a servant with his master, & an action brought to recover the

**1167. Presumption in favour of award.]**—It need not be averred in pleading that an award was authorised by & within the terms of the submission.—*FULLER v. SPACKMAN* (1587), Cro. Eliz. 66; 78 E. R. 326.

**1168. —**—An award shall be intended to be within the terms of the submission, unless the contrary appear.—*VANVIVEE v. VANVIVEE* (1590), Cro. Eliz. 177; 78 E. R. 434.

**1169. —**—The matter of an award shall be presumed to be within the terms of the submission.—*BASPOOLE v. FREEMAN* (1611), Cro. Jac. 285; 79 E. R. 244.

**1170. — May be void quoad excess.]**—An award shall not be intended out of the terms of the submission, unless it be so averred, but if it contain matter not submitted, it is void as to so much.—*BUSFIELD v. BUSFIELD* (1620), Cro. Jac. 577; 79 E. R. 494.

**Annotations:—***Refd.* *Lee v. Elkins* (1701), 12 Mod. Rep. 585. **Mentd.** *Wood v. Adcock* (1852), 7 Exch. 488.

**Construction of award generally.]—See Sect. 15, post.**

**B. Awards allowing Interest.**

*See, also, Nos. 1312, 1707, 1708, 2075, post.*

**1171. Compound interest.]**—An award is not to be impeached for allowing compound interest; for it may be allowed in case of a contract for it, either express or to be inferred from the nature of the dealings between the parties, as if it is according to the course of their trade; therefore, it is a conclusion of fact, on which the judgment of the arbitrators is final, but this doctrine as to interest has no relation to mtges.—*MORGAN v. MATHER* (1792), 2 Ves. 15; 30 E. R. 500.

**Annotations:—***Consd. Re Whiteley & Roberts*, [1891] 1 Ch. 558. *Refd.* *Rufford v. Bishop*, *Bishop v. Rufford* (1829), 7 L. J. O. S. Ch. 108. **Mentd.** *Plews & Middleton* (1845), 6 Q. B. 845.

**1172. Interest allowed when court would not have granted same.]**—Where, on a reference of a Ch. suit, & all matters in difference between the parties, the arbitrator allowed interest, when it would not be allowed by a ct. of law or equity, the ct. refused to set aside the award on that ground.—*Re BADGER* (1819), 2 B. & Ald. 691; 106 E. R. 517.

**Annotation:—***Mentd.* *Bedecchund v. Elphinstone* (1830), 2 State Tr. N. S. 379.

**1173. Submission re-executed—Award of interest after date of original submission.]**—The time for

balance of the deposit, & the case was, by consent, referred to arbitrators:—*Held*: the arbitrators were at liberty to allow interest on the balance.—*BEAHAN v. WOLFE* (1832), Alc. & N. 233.—**IR.**

**u. Interest allowed after date of submission.]**—*Held*: in Apr. gave in a statement of his claim, with interest up to that time. Time was allowed deft. to prove his defence, & in making their award on Oct. 6 arbitrators added interest up to Sept. 1 on the sum claimed in Apr. for principal & interest:—*Held*: they had power to do this, & to award interest on the amount until paid.—*STEWART v. WEBSTER* (1861), 20 U. C. R. 469.—**CAN.**

**w. Liability for interest decided—Amount incapable of ascertainment.]**—Under a submission "to determine which of the several items of claim the estate of Mrs. B. is bound as matter of law to pay":—*Held*: the arbitrator was authorised to consider the liability for interest, although he could not correctly find the amount due.—*ARMSTRONG v. CAYLEY* (1867), 2 Ch. Ch. 128.—**CAN.**



making an award was enlarged by the parties altering & re-executing the arbn. bonds, & the arbitrator awarded interest on a principal sum found to be due from the one to the other, beyond the date of the original submission, but within that of the re-execution:—*Held*: he had authority so to do, for the date of the submission had been extended to the time of re-executing the bonds. *Qu.*: whether an award of interest, on a sum due on securities carrying interest beyond the submission & till payment, be good.—*WATKINS v. PHILLPOTTS* (1825), *M'Cle. & Yo.* 393; 148 *E. R.* 465.

*Annotation*:—*Mentd.* *Bignall v. Gale* (1841), 2 *Man. & G.* 364.

**1174. Award that parties should account—Arbitrator taking accounts himself & allowing interest.]**—Where an arbitrator, appointed to determine all matters in difference between the parties, decided that they should account & took the account himself:—*Held*: as he did not act simply as an auditor assigned under the common law judgment *quod computet*, although such judgment was ultimately to be entered, it was competent to him to take the accounts as they really stood between the parties, & award interest upon such accounts, at a higher rate than would be payable here.—*BAXTER v. HOZIER* (1839), 5 *Bing. N. C.* 288; 7 *Scott*, 233; 1 *Arn.* 519; 8 *L. J. C. P.* 169; 132 *E. R.* 1115.

*Annotations*:—*Mentd.* *Cottam v. Partridge* (1842), 4 *Man. & G.* 271; *Purcell v. Harding* (1866), 15 *W. R.* 128.

**1175. First award of gross sum remitted back — Amended award showing part of gross sum as interest.]**—It was sought to set aside an award, which had been referred back, on the ground (*inter alia*) that a former award had some defects to remedy, & the further award was required on account of an excess of jurisdiction:—*Held*: as all matters in difference were referred to arbn., & the arbitrator explained that £314 was the debt, & that the first award was made for £328, the sum of £14 being claimed & due for interest, the objection failed.—*Re COOK* (1849), 14 *L. T. O. S.* 207.

**1176. Reference of "all matters in difference"—No demand for interest in notice of action.]**—*Held*: an arbitrator, under a submission of "all matters in difference," might award *pltf.* interest, notwithstanding the notice of action did not contain any demand of interest.—*EDWARDS v. GREAT WESTERN RY. Co.* (1851), 11 *C. B.* 588; 21 *L. J. C. P.* 72; 138 *E. R.* 603.

*Annotations*:—*Mentd.* *Parker v. G. W. Ry. Co.* (1851), 11 *C. B.* 545; *Crouch v. G. N. Ry. Co.* (1856), 11 *Exch.* 742; *Baxendale v. G. W. Ry. Co.* (1863), 14 *C. B. N. S.* 1; *Sutton v. G. W. Ry. Co., Sutton v. S. E. Ry. Co.* (1865), 3 *H. & C.* 800, *Ex. Ch.*; *G. W. Ry. Co. v. Sutton* (1869), *L. R.* 4 *H. L.* 226, *H. L.*; *Lyles v. Southend-on-Sea Corp.* (1905), 92 *L. T.* 586, *C. A.*

**1177. When liability for interest admitted.]**—Where it appeared that one party had admitted, before the arbitrator, that the other party was entitled to interest on a sum, & this claim was not adjudicated on by the arbitrator, the *ct.* granted a rule for referring matters back to the arbitrator.—*BENNETT & HARVEY v. BOWNESS* (1858), 32 *L. T. O. S.* 108.

#### C. Arbitrations under Arbitration Clauses in Mercantile Contracts.

**1178. Disputes amounting to claims for breach of warranty—Award directing abatement from price.]**—*Deft.* bought of *pltf.*, at a price named, "413 bales of wool, to arrive *ex S.*, or any vessel they may be transhipped in. The wool to be guaranteed about similar to samples in the selling brokers' possession; & if any dispute arises, it shall be decided by the selling brokers, whose decision shall be final." On the arrival of the wool, it turned out not about similar to sample, & the brokers, after protest from *deft.*, awarded that *deft.* should take it at a certain abatement in the price of different bales:—*Held*: (1) as the contract was for the sale of specific goods, the guarantee was not a condition, but only a warranty, & *deft.* could not reject the wool on account of its inferiority; (2) the brokers had power to award as they had, & *deft.* was bound to take the wool accordingly.—*HEYWORTH v. HUTCHINSON* (1867), *L. R.* 2 *Q. B.* 447; 36 *L. J. Q. B.* 270.

*Annotations*:—*Refd.* *Azemar v. Casella* (1867), 36 *L. J. C. P.* 263, *Ex. Ch.*; *Re Green & Balfour, Williamson* (1890), 63 *L. T.* 97.

**1179. Dispute as to right to reject — Award directing acceptance at reduced price.]**—A contract for the sale of wheat to arrive contained a clause that any dispute arising thereout should be referred to arbn., as therein provided. On its arrival, the buyer claimed the right to reject it, on account of inferiority in quality. The sellers at once called for an arbn. The arbitrators made an award that the purchaser should take the wheat with an allowance:—*Held*: (1) the award was invalid, inasmuch as the only question submitted to the arbitrators was the buyer's right to reject; (2) no custom existed in the Liverpool corn trade compelling a buyer to accept, with an allowance, wheat inferior in quality to that contracted for, if not sea-damaged.—*SINIDINO, RALLI & Co. v. KITCHEN & Co.* (1883), 1 *Cab. & El.* 217.

**1180. ———.]**—*G. & Co.* contracted to buy, from *B. W. & Co.*, about 1,000 cases, at 32s. per case, of tinned salmon, quality guaranteed good; & the contract provided that there should be the "usual examination for customary allowances, & general brokers' conditions, any dispute to be settled by arbn." Subsequently *G. & Co.* objected that the samples tendered were not equal to contract guarantee, & proposed arbn. Both sides then appointed arbitrators, who made an award "that the buyers accept the salmon, & that the sellers make an allowance to the buyers of 1s. 6d. per case." Thereupon *G. & Co.* applied to the *ct.* for an injunction to restrain *B. W. & Co.* from making the awards a rule of *ct.*, & to have the award set aside or remitted to the arbitrators for reconsideration, mainly on the ground that they had exceeded their jurisdiction. The question was whether the submission to the arbitrators extended, not only to the point as to the quality of the salmon, but also to the right of the buyers to reject the goods, if not equal to guarantee. The evidence showed that there was a custom of the trade that, where there was a deficiency or inferiority in the quality of goods tendered under a contract, arbitrators might by their award make

#### PART IV. SECT. 8, SUB-SECT. 2.—C.

**a. Submission of all disputes, etc.—Award that seller take back goods.]**—*Pltf.* sold to *defts.* two thousand casks of cement, to be delivered in merchantable condition, & it was agreed that "all disputes, differences, claims & demands, matters & things between them in respect of the contract" should be referred to arbn. The arbitrators awarded that the cement was not merchantable & that

*pltf.* should take back one thousand six hundred & thirty-nine casks:—*Held*: the arbitrators had power so to direct, as the cement was unmerchantable.—*SAHL v. MACDONNELL* (1886), 7 *N. S. W. L. R.* 385.—*AUS.*

**b. Submission to Chamber of Commerce—Award incorporating trade custom.]**—An award was made by the Bengal Chamber of Commerce, who, it was alleged, had acted in excess of juris-

diction in having disregarded the fact that the contract was made by *pltf.* as brokers. *Pltf.* alleged there was a custom in the market, by which brokers were liable upon such contracts, & such custom was well-known to the Chamber:—*Held*: (1) the custom existed; (2) the Chamber knew of it; (3) the matter was within their jurisdiction, & the award was properly made.—*JOYHALL & Co. v. MONMOTHA NATH MULLIK* (1916), 20 *C. W. N.* 365.—*IND.*



**Sect. 8.—Requisites of valid award: Sub-sect. 2,**

the buyer take the goods with an allowance by way of compensation, fixed by the award:—*Held*: (1) the submission did not extend to the latter point; (2) the arbitrators had exceeded their authority in attempting to bind the buyers by making a new contract, by which they were not bound in point of law, or to deprive the buyers of their right to reject the goods, & any custom of the trade to that effect was an unreasonable one; (3) the matter must be referred back to the arbitrators.—*Re GREEN & Co. & BALFOUR, WILLIAMSON & Co.* (1890), 63 L. T. 325; 6 T. L. R. 445, C. A.

**1181.** ———.]—Defts. contracted to supply plths. with 20,000 cases of tinned salmon at 23s. 9d. per case, "allowances, as customary, to be settled on result of examination before delivery, of not less than 10 per cent. of the cases for average." Any dispute was to be settled by arbn. In due course defts. tendered 14,000 cases as part of the 20,000, each tin of which was labelled, "Tinned salmon; 1 lb.; first quality." A dispute arose as to the weight of some of the tins, & plths. gave notice of their intention to reject the goods, inasmuch as a sale of them with a false statement as to weight would render the vendors liable to criminal proceedings, under Merchandise Marks Act, 1887 (c. 28), ss. 2, 3. The parties thereupon proceeded to arbn., arbitrators & an umpire being appointed. On investigation, it was found that about sixty tins in every twenty-five cases were deficient in weight. The umpire made his award, finding, (1) the salmon was a fair tender under the contract, & no sufficient cause existed for rejecting the same; (2) the weight was "irregular & unusually deficient"; & awarding 1s. per case compensation to plths. The evidence showed that in the trade the "customary allowance" for deficiency in weight was 7s. 6d. for twenty-five cases, whereas the umpire's allowance was 25s. Plths. moved to restrain defts. from making the award a rule of ct., & that the matter in dispute might be remitted to the arbitrators & umpire for reconsideration:—*Held*: (1) the deficiency being, according to the umpire's award, "irregular & unusual," the award was, on the face of it, bad; (2) in the circumstances, the umpire had no power to force the parties to enter into a new contract by the insertion of a new price, instead of the "customary allowances," he having considered that "customary allowances" did not apply; (3) the matter must go back to the arbitrators & umpire.—*HOOPER & Co. v. BALFOUR, WILLIAMSON & Co.* (1890), 62 L. T. 646.

**1182.** ——— **Award determining right to reject subsequent shipments & rescind contract.**—A contract was entered into for the sale of 1,100 pieces of timber, to be delivered in two instalments. Upon delivery of the first instalment, the purchasers refused to accept the goods, on the ground that they did not fulfil the terms of the contract, & further, intimated that they would refuse the second instalment, on the ground that the first instalment was such a departure from the contract as to justify them in refusing to accept either parcel. The matter was referred to arbn., & the arbitrator found & awarded that the first shipment was so far from complying with the requirements of the contract, as to entitle the buyers to repudiate & to rescind the whole contract, & to refuse to accept the first shipment & all further shipments under the contract. Upon a motion by the

vendors to set aside the award, upon the ground that it was bad upon its face:—*Held*: the umpire was entitled to draw the inference, from the defective delivery of the first instalment, that the second would also be bad, & the award could not be said to be bad upon its face.—*MILLAR'S KARRI & JARRAH Co.* (1902) *v. WEDDEL, TURNER & Co.* (1908), 100 L. T. 128; 11 Asp. M. L. C. 184; 14 Com. Cas. 25.

**1183. Dispute as to quantity — Award deciding basis of ascertaining same.**—A contract for the sale of a cargo of wheat provided that disputes should be referred to arbitrators, & "any deficiency on bill of lading weight to be paid by the seller, & any excess over bill of lading weight to be paid by buyer, at contract price." On a reference to arbn., the buyers were awarded a deduction from the gross weight by custom. The gross actual weight of the wheat was not disputed, but there was a question as to an allowance of 1 lb. per 500 lb. from the gross weight, which was given when the weighing was by "hopper," as at Newcastle, in order to give the buyer the benefit of the "turn of the beam," which he would get if the weighing were by scale. The sellers, H. & Co., applied to set aside the award as beyond the jurisdiction as to this allowance:—*Held*: the arbitrators had jurisdiction, & there was no ground for setting aside the award.—*HARRIS BROTHERS v. SMYTH* (1888), 4 T. L. R. 569.

**1184. Dispute as to quality — Award deciding average weight on which quality based.**—On an informal reference to two brokers, it appeared the contract in dispute was for the sale of hides of an average weight of 69 lbs., to come out at 63 lbs. on delivery. In awarding damages, the arbitrators took into consideration the proportion of light hides to heavy, as well as the failure to reach the average:—*Held*: (1) the arbitrators were entitled, under the submission, to award damages both for the low average & the large proportion of light hides; (2) the award could not be set aside.—*Re BRANDT & Co. & BOUTCHER & Co.* (1890), 7 T. L. R. 140.

**1185. Submission of "any dispute arising on this contract" — Award as to existence of trade custom.**—By a contract in writing, defts. "sold to" plths. a cargo of cotton seed cake of a specified quality. The contract contained a clause that, "should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance, together with any dispute arising on this contract, is to be settled by arbn." Defts. signed the contract, with the addition of the word "brokers," & were acting as agents. Some time after the contract was signed, defts. named their principals. The cargo proved to be of inferior quality, & an arbn. (which plths. did not attend), to determine the liability of defts., was held; the arbitrators decided, by their award, that defts. were not liable, inasmuch as a custom existed that a broker, upon naming his principals, ceased to be liable on the contract. At the trial of the action, the jury found that the alleged custom did not exist:—*Held*: defts. were not relieved from liability by the award, inasmuch as the arbitrators had exceeded their jurisdiction.—*HUTCHESON v. EATON* (1884), 13 Q. B. D. 861; 51 L. T. 846, C. A.

**Annotations:**—*Folld. Re North Western Rubber Co. & Hüttenbach*, [1908] 2 K. B. 907, C. A.; *Olympia Oil & Cake Co. v. Produce Brokers Co.* (1914), 84 L. J. K. B. 1153, C. A. *Overd. Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1916] 1 A. C. 314, H. L. *Mentd. Re Green & Balfour, Williamson* (1890), 63 L. T. 325, C. A.; *Larsen v. Sylvester* (1908), 99 L. T. 94, H. L.; *May v. Mills* (1914), 30 T. L. R. 287.

**1185 i. Submission of any disputes, so as to control the meaning of the TRANSVAAL MINES LABOUR CO., LTD. etc.—Award as to existence of trade contract, is not referable to arbn. as v. ROBINSON GROUP OF MINES (1911), custom.]—A question whether a custom a dispute arising out of the contract.—T. H. 191.—S. AF.**  
is to be added to a written contract,

**1186.** —.]—A contract for the sale of rubber contained the following arbn. clause: "Any dispute on this contract to be settled by arbn. here, in the usual way." On arrival at Liverpool, the buyers refused to take delivery, on the ground that the goods were not in accordance with the contract. The dispute was referred to arbitrators, who found that the goods were not in accordance with contract, but must be accepted by the buyers at an allowance of 10s. per ton. The award was based upon the existence of an alleged custom applicable to contracts for raw materials to be shipped to this country, to the effect that the buyers should accept the goods with an allowance for inferiority of quality, where that inferiority was, in the opinion of the arbitrators, not excessive or unreasonable. Upon a motion by the buyers to set aside the award, the ct. directed an issue to determine the existence of the alleged custom, & upon the trial of the issue, the alleged custom was found not to exist:—*Held*: the arbitrators had no jurisdiction to deal conclusively with the question of the existence of the custom for the purpose of making their award, & as the custom upon which they based their award had been found not to exist in fact, the award compelling the buyers to accept goods not in accordance with the written contract was bad, & must be set aside.—*Re NORTH WESTERN RUBBER CO., LTD., & HÜTTENBACH & CO.*, [1908] 2 K. B. 907; 78 L. J. K. B. 51; 99 L. T. 680, C. A.

*Annotations*:—*Folld. Re Olympia Oil & Cake Co. & Produce Brokers Co.* (1914), 84 L. J. K. B. 1153, C. A. *Overd. Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1916] 1 A. C. 314, H. L. *Reid. Miller, Gibb v. Smith & Tyrer*, [1917] 2 K. B. 141, C. A.

**1187.** — — —.]—Under a clause in a contract referring to arbn. any dispute arising under the contract, the arbitrator has jurisdiction finally to determine the existence of a custom affecting the rights & liabilities of the parties under the contract, where such custom is not inconsistent with the terms of the contract, inasmuch as he cannot decide what the contract is without introducing the custom. *Hutcheson v. Eaton*, No. 1185, *ante*, & *Re North Western Rubber Co., Ltd., & Hüttenbach & Co.*, No. 1186, *ante*, *overd.*—*PRODUCE BROKERS CO., LTD., v. OLYMPIA OIL & CAKE CO., LTD.*, [1916] 1 A. C. 314; 85 L. J. K. B. 160; 114 L. T. 94; 32 T. L. R. 115; 60 Sol. Jo. 74; 21 Com. Cas. 320, H. L.

**1188.** — — — **Dispute as to measure of damages for non-delivery—Award appropriating cargoes to particular contracts.**—A contract for the sale of a cargo of coals contained an arbn. clause in respect of all matters arising out of the contract. A dispute having arisen between buyer & seller, whether the measure of damages in respect of the non-delivery of the cargo was the difference between the contract price & the market price at the time of the breach, or the difference between the contract price & the price at which the buyer sold to G., a third party, the matter was referred to arbn. under the terms of the contract. The arbitrator found that the buyer intended to re-sell to G. the cargo due to him from the seller, & appropriated that cargo to his contract with G., & he gave his award

in the form of a special case:—*Held*: the arbitrator had no jurisdiction to deal with matters outside the contract, & the true measure of damages was the difference between the contract price & the market price at the time of the breach.—*WILLIAMS BROTHERS v. AGIUS (E. T.), LTD.*, [1914] A. C. 510; 83 L. J. K. B. 715; 110 L. T. 865; 30 T. L. R. 351; 58 Sol. Jo. 377; 19 Com. Cas. 200, H. L.

*Annotations*:—*Mentd. Jamal v. Moolla Dawood*, [1916] 1 A. C. 175, P. C.; *Weir (Andrew) v. Dobell*, [1916] 1 K. B. 722.

**D. Awards for Payment to Strangers or affecting their Rights and Interests.**

**1189. Award to make payment to stranger.**—An award is void if it is outside the submission, as where A. & B. submit to the award of C., who awards that A. shall make payment to D., a stranger, for he cannot award a man to do a thing which lies not in his power, for D. might refuse to accept the money.—*ANON.* (1581), Godb. 12; 78 E. R. 8.

**1190.** — — —.]—Debt upon an obligation to stand to the award of S., who awarded that one of the parties should pay to the son of the other party £5, which was bequeathed to him; & for non-payment action was brought:—*Held*: the action did not lie, for he was not bound to pay or tender the money to a stranger to the award.—*ECCLESTADE v. MALIARD* (1582), Cro. Eliz. 4; 78 E. R. 270.

*Annotation*:—*Reid. Cooke v. Whorwood* (1672), 2 Saund. 337.

**1191.** — — —.]—An award to pay money to a stranger, unless it is shown to be for the benefit of one of the parties, is bad.—*BEDAM v. CLERKSON* (1696), 1 Ld. Raym. 123; 91 E. R. 979.

**1192. Attorney's bill.**—An award that one of the parties shall pay the attorney's bill is good.—*NELSON v. BAEL* (1739), 7 Mod. Rep. 305; 87 E. R. 1257.

**1193. — — — Bad unless it appear to be for benefit of party.**—*Qu.*: if an award of money to be paid to a third party be good, unless it appear to be for the benefit of one of the parties.—*BIRD v. BIRD* (1703), 1 Salk. 74; 91 E. R. 70.

*Annotation*:—*Folld. Adcock v. Wood* (1851), 6 Exch. 814.

**1194.** — — —.]—An award directing payment of a sum of money to a stranger is not good, unless it appears, on the face of the award, that such payment is for the benefit of a party to the submission.—*Re LAING (LANG) & TODD* (1853), 13 C. B. 276; 20 L. T. O. S. 210; 138 E. R. 1204.

**1195. — — — Directing payment of costs to attorney's clerk.**—A submission of reference, after referring the amount of damages caused by certain trespasses, provided that the costs & the charges of the agreement, & the costs, charges & expenses of, & attending or incident to, the arbn., including the payment to be made to the referees & their umpire, & for any proofs that might be required by them, should be borne & paid by S., & should be awarded accordingly. The award found the amount of damages, & then found a further sum to be due for costs, but did not distinguish the

**PART IV. SECT. 8, SUB-SECT. 2.—D.**

**1189 i. Award to make payment to stranger.**—A direction in an award to pay money to a stranger to the reference:—*Held*: bad.—*Re CAMPBELL v. BROWN* (1857), 2 P. R. 291.—CAN.

**1189 ii.** — — —.]—A dispute in respect of the title to certain land was referred:—*Held*: even if the arbitrators were authorised to make a bargain between the parties as to the terms on which the land should be sold by one to the other, they had no right to direct that a

portion of the money which was to be paid should be apportioned to the wife of one of the parties without his consent.—*BOND v. BOND* (1865), 15 C. P. 613.—CAN.

**c. Award that one party pay sums due by other to stranger.**—Where a submission recited that A. agreed to give up his stock to B., & to assign him all claims due in respect thereof, on payment of such sums as arbitrators should decree, & they awarded that B. should pay a certain sum, & assume

the payment of debts due by A. on account of the stock:—*Held*: the award was warranted by the submission.—*FOWKE v. LISTER* (1839), 1 Ont. Dig. 165.—CAN.

**d. Award that one party give bill endorsed by stranger.**—An award directing that debts should give to pltf. a good indorsed negotiable promissory note for the sum found due is bad as requiring a third party as indorser.—*GEORGE v. SMITH* (1854), 4 C. P. 291.—CAN.



**Sect. 8.—Requisites of valid award: Sub-sect. 2, D. & E.]**

amount due to the referees, & awarded the sum so found due for costs to be paid to O., who was only mentioned in the attestation clause of the award as clerk to the attorneys of the successful party:—*Held*: a rule might be granted to compel payment of the sum awarded for damages, for, if the award of the costs were in any degree defective, it was separable from the rest of the award.—*Re LLOYD & SPITTLE, Re ADDISON & SPITTLE* (1849), 18 L. J. Q. B. 151; 13 Jur. 587.

**1196. — For use of one party.]—**An award that money shall be paid to a stranger for the use of one of the parties to a submission is sufficient.—*SNOOK v. HELLYER* (1818), 2 Chit. 43.

*Annotations*:—*Folld. Wood v. Adcock* (1852), 7 Exch. 468. *Refd. Re Laing & Todd* (1853), 13 C. B. 276.

**1197. Award directing payment or execution of release to stranger.]—***Semble*: an award is not bad for directing one of the parties to pay or execute a release to a stranger.—*LYNCH & TEMPLEMAN v. CLEMENCE* (1699), 1 Lut. 571; 125 E. R. 300.

**1198. Award binding one party that stranger should pay other party.]—**If A. & S. are bound to abide by an award, & the award be that S. be bound that G. pay A. £20:—*Semble*: (1) the award is void, for G. is a stranger to the submission (*YELVERTON, J.*); (2) S., being a party, should be compelled to make G. pay A., or else forfeit his obligation (*ILLINGWORTH, J.*).—*ANON.* (1468), Y. B., 8 Edw. 4, fo. 2, pl. 1.

**1199. —.]—**An award that one of the parties pay to the other £10, & cause three other parties to become bound to pay the other £10 a piece severally, is wholly void.

There is a difference between the condition of an obligation & an award. In an award, the law intends that the arbitrators shall be indifferent & equal judges between the parties, & that is not consistent with causing a man to prove a matter which depends on the will of a stranger, whether he perform it or not (*per CUR.*).—*ANON.* (1477), Y. B., 17 Edw. 4, fo. 5, pl. 3.

**1200. Award that one party & two strangers become bound by deed—Award severable.]—**Award that one of the parties pay the other 12*d.*, & that he & two others become bound by deed for the payment, is void as to the strangers, but good as to the party himself.

The award was severable, & not wholly void (*BRIAN, C. J., & CHOKE, J.*).—*ANON.* (1478), Y. B., 18 Edw. 4, fo. 22, pl. 3.

**1201. —.]—**An award that debt. & two strangers be bound as obligors, is void as to the strangers, but good as to the party to the submission.—*INGRAM v. ROUCHE* (1479), Y. B., 19 Edw. 4, fo. 1, pl. 1.

*Annotations*:—*Consd. Cooke v. Whorwood* (1672), 2 Saund. 337. *Refd. Ecclestone v. Mallard* (1582), Cro. Eliz. 4. *Mentd. Osborn's Case* (1613), 10 Co. Rep. 130 a; *Gray v. Gray* (1619), Cro. Jac. 525.

**1202. —.]—**An award that debt. & a stranger to the submission, which was between pltf. & debt., be bound is void as to the stranger (*BRIAN, C. J., & CHOKE, J.*).—*ANON.* (1481), Y. B., 21 Edw. 4, fo. 75, pl. 8.

**1203. Award requiring party to get lord of manor to grant copyhold—Or stranger to grant release.]—**If a submission to an award is as to the right, title & possession of certain lands, the arbitrators cannot order one of the parties to get the lord of the manor to grant a copyhold, or a stranger to make a release or confirmation.—*ANON.* (1542), Moore, K. B. 3 (11); 72 E. R. 399.

**1204. Award that defendant & stranger (his wife) should have land—Award inseverable.]—**An award

that debt. & his wife (she not being a party to the submission) shall have the lands in question is void, for the arbitrators have not any power to award a thing to be done for the benefit of a stranger. The award being void in part, is void as to the whole. It is otherwise where two things are appointed to be done, the one within the submission, & the other not, for then, if they are severally awarded, the part within the submission is good.—*SAMON v. PITT* (1595), Cro. Eliz. 432; 78 E. R. 672; *sub nom. SAMON'S CASE*, 5 Co. Rep. 77, b.

*Annotations*:—*Apld. Thinne v. Rigby* (1612), Cro. Jac. 314. *Distd. Simmonds v. Swaine* (1809), 1 Taunt. 549. *Refd. Grove v. Crane* (1621), Palm. 145; *Bird v. Bird* (1703), 1 Salk. 74; *Armist v. Breame* (1704), 1 Salk. 76. *Mentd. Candler v. Fuller* (1738), Willes. 62.

**1205. Award of lease for life — Remainder to stranger.]—**An award of a lease for life, with remainder to a stranger, is good for the particular estate, but the pleading must name where it was made.—*BRETTON v. PRAT* (1600), Cro. Eliz. 758; 78 E. R. 990.

*Annotation*:—*Refd. Bird v. Bird* (1703), 1 Salk. 74.

**1206. Award that party shall make acknowledgment before stranger.]—**An award that debt. should make an acknowledgment before the Mayor of Taunton:—*Semble*: good.—*SPIGURNELL v. JENE* (1660), 1 Sid. 12; 82 E. R. 940.

**1207. Award that party shall find surety.]—**An award that one of the parties shall be bound in a bond to another, is good, but not that he shall find a surety to enter into a bond.—*COOKE v. WHORWOOD* (1671), 2 Saund. 337; 2 Keb. 767; 85 E. R. 1135.

*Annotations*:—*Folld. Brown v. Watson* (1839), 6 Bing. N. C. 118; *Re Goddard & Mansfield* (1850), 1 L. M. & P. 25. *Mentd. Rudder v. Price* (1791), 1 Hy. Bl. 547.

**1208. Award to make assignment of apprentice.]—**An award that one of the parties should make an assignment of his apprentice is bad.—*PIERN v. DRYDEN* (1710), 11 Mod. Rep. 272; 88 E. R. 1035.

**1209. Award cancelling deed of apprenticeship.]—**Arbitrators cannot cancel a deed of apprenticeship where the apprentices are not parties to the submission.—*WICKS v. COX* (1847), 11 Jur. 542.

**1210. Award on matters in difference between parties to submission & strangers thereto.]—***FISHER v. PIMBLEY*, No. 209, *ante*.

**1211. Award affecting fund in which strangers interested.]—**The submission being of all matters in difference between the parties, an award directing a sum to be paid by pltf. to debt. out of a partnership fund, in which others were interested:—*Held*: bad.—*INGRAM v. MILNES* (1807), 8 East, 445; 103 E. R. 414.

*Annotation*:—*Refd. Gisborne v. Hart* (1839), 5 M. & W. 50.

**1212. Award directing payment at house of stranger.]—**An award appointing one of the parties to pay money at or in the house of a stranger is good.—*TAVERNOR v. SKINGLE* (1631), Cro. Car. 226; 79 E. R. 797.

*Annotation*:—*Mentd. Horton v. Benson* (1675), 1 Freem. K. B. 204.

**1213. Award directing waste on land of stranger.]—**An award between a lessee & a neighbour, awarding an act to be done for the benefit of the latter by the lessee, which would be waste upon the estate of the lessor, is bad.—*ALDER v. SAVILL* (1814), 5 Taunt. 454; 128 E. R. 766.

**1214. Award directing work on land of stranger.]—**An action of trespass *quare clausum fregit*, in which there was a justification of a public right of way, was referred to an arbitrator, with power to direct what should be done between the parties. He directed a verdict for debt., & that pltf. should



put up a stile & bridge upon the way, in a place described. That place was not on land of either pltf. or deft. :—*Held* : this latter part of the award was void.

The terms of the submission extend only to what is to be done between these parties : the moment the interests of third parties come in it is beyond the authority given by the submission. So far, therefore, as the award refers to anything to be done on the land of third persons, it is not within the submission : no action could be maintained for not doing it (PARKE, B.).—TURNER v. SWAINSON (1836), 1 M. & W. 572 ; 2 Gale, 133 ; Tyr. & Gr. 933 ; 5 L. J. Ex. 266 ; 150 E. R. 563.

*E. Awards directing entry of, or setting aside, Verdict.*

See, also cases in Sub-sect. 3, O., post.

**1215. General rule.]—Semble** : at whatever stage of proceeding a cause may have arrived, an arbitrator can have no authority of himself, & without the intervention of a jury, to direct the entry of a verdict.—JACKSON v. CLARKE (1824), 13 Price, 208 ; M'Cle. 72 ; 147 E. R. 967 ; subsequent proceedings (1825), M'Cle. & Yo. 200.

*Annotations* :—*Folld.* Donlan v. Brett (1834), 2 Ad. & El. 344 ; Cock v. Gent (1845), 3 Dow. & L. 271. *Distd.* Law v. Blackburn (1853), 14 C. B. 77. *Dbtd.* Everest v. Ritchie (1862), 7 H. & N. 698.

**1216. Reference of cause.]—A** submission to refer a cause, & the subject-matter thereof, & the issue therein, to the award of a barrister, does not authorise him to order a verdict to be entered up.—HUTCHINSON v. BLACKWELL (1832), 8 Bing. 331 ; 1 Dowl. 267 ; 1 Moo. & S. 513 ; 1 L. J. C. P. 98 ; 131 E. R. 421.

*Annotation* :—*Mentd.* Cock v. Gent (1845), 15 L. J. Ex. 33.

**1217. Power to decide whether plaintiff has right of action.]—Under** an order of reference of a cause & all matters in difference between the parties, the costs of the suit & of the reference & award, & all other costs, were to abide the event, & final judgment was to be entered up for pltf. or deft., according to the award. The arbitrator awarded that pltf. had no cause of action against deft., & that pltf. should pay to deft. a certain sum, which he found to be due from pltf. to deft. The arbitrator then declared that his award was not intended to exclude pltf. from receiving the commission to which he would be entitled under a certain agreement :—*Held* : the arbitrator had no power to direct in which way the verdict was to be entered, but only to decide whether pltf. had a right of action against deft., & a rule to set aside the award should be refused.—HARDING v. FORSHAW (1836), 1 M. & W. 415 ; 4 Dowl. 761 ; Tyr. & Gr. 472 ; 150 E. R. 496.

*Annotations* :—*Folld.* Cockburn v. Newton (1841), 2 Man. & G. 899. *Distd.* Kilburn v. Kilburn (1845), 14 L. J. Ex. 160. *Folld.* Hobson v. Stewart (1847), 2 New Pract. Cas. 64.

**1218. Same powers as judge at Nisi Prius.]—An** action of trespass was referred by order of *Nisi Prius*, which empowered the arbitrator to amend the pleadings, & to certify for costs, in the same manner as a judge at *Nisi Prius*. The arbitrator awarded a verdict for pltf., with nominal damages, & certified in his award that the action was brought to try a right, etc. :—*Held* : he had power to do so, & pltf. was entitled thereon to his full costs.—SPAIN v. CADELL (CADELL) (1841), 8 M. & W. 129 ; 9 Dowl. 745 ; 10 L. J. Ex. 313 ; 5 Jur. 322 ; 151 E. R. 978.

*Annotations* :—*Apld.* Perry v. Dunn (1843), 1 L. T. O. S. 337. *Refd.* Wiggins v. Cook (1859), 28 L. J. C. P. 312 ; Bedwell v. Wood (1877), 2 Q. B. D. 626.

**1219. Cause referred before trial.]—Where** a case

is referred to an arbitrator before trial, he has no power to direct a verdict to be entered.—STANNIFORTH v. RYALL (1844), 3 L. T. O. S. 100.

**1220. No express power to direct verdict.]—A** cause in which issue had been joined & all matters in difference were referred by a judge's order to arbn., without any power to the arbitrator to direct a verdict to be entered, the costs of the cause to abide the event, & the costs of the reference & award to be in the discretion of the arbitrator. The arbitrator directed that a verdict should be entered for defts. on all the issues, that each party should pay their own costs of the reference, & that a moiety of the costs of the award should be paid by each of the parties. He then awarded that the parties should execute mutual general releases of all & all manner of actions, etc., to each other :—*Held* : the arbitrator having exceeded his authority in directing a verdict to be entered, that part of the award could not be rejected as surplusage, as it was an event inconsistent with the award of the releases with respect to costs, & if the release did not extend to the action referred, there was no final determination of the action.—HAWKYARD v. STOCKS (1845), 2 Dow. & L. 936 ; *sub nom.* HAWKYARD v. GREENWOOD, 14 L. J. Q. B. 236 ; 10 Jur. 14.

*Annotations* :—*Folld.* Cock v. Gent (1845), 14 M. & W. 680. *Distd.* Doe d. Body v. Cox (1846), 15 L. J. Q. B. 317. *Refd.* Everest v. Ritchie (1862), 31 L. J. Ex. 350.

**1221. .]**—Where a cause was referred by a judge's order, & the arbitrator directed a verdict to be entered for pltf., the order giving him no power to do so, the ct. refused to set aside the award on motion.—COCK v. GENT (1845), 13 M. & W. 364 ; 3 Dow. & L. 271 ; 15 L. J. Ex. 33 ; 153 E. R. 151.

*Annotations* :—*Refd.* Wood v. Wylde (1847), 8 L. T. O. S. 394 ; Everest v. Ritchie (1862), 7 H. & N. 698. *Mentd.* Law v. Blackburn (1853), 14 C. B. 77.

**1222. Intention of arbitrator clear.]—An** action of ejectment, upon two several demises, was, after issue joined, referred by a judge's order to the award, arbitrament, final end & determination of an unprofessional arbitrator, the costs of the cause & of the reference & award to abide the event of the award. The arbitrator, professing to make his award "of & concerning the matter to him referred," ordered that "the verdict in the cause should be entered for the lessors of pltf." :—*Held* : although the submission gave the arbitrator no power to enter a verdict, yet, inasmuch as the words used by him were not precise & technical words, the ct. was at liberty to deal with them as a mere intimation of his intention substantially to decide in favour of the lessors of pltf., & the award might be enforced by action.—LAW v. BLACKBURROW (1853), 14 C. B. 77 ; 23 L. J. C. P. 28 ; 22 L. T. O. S. 146 ; 18 Jur. 130 ; 2 W. R. 104 ; 2 C. L. R. 28 ; 139 E. R. 33.

*Annotations* :—*Apld.* Everest v. Ritchie (1862), 7 H. & N. 698. *Refd.* Mays v. Cannell (1854), 15 C. B. 107.

**1223. .]**—By a judge's order, after issue joined, an action was referred to a lay arbitrator, who by his award ordered "that there should be a verdict for pltf. for £7 9s. 11d." :—*Held* : although there was no power to enter a verdict, the award was good & an action maintainable upon it, for the award must be read as an expression of the arbitrator's opinion that pltf. was entitled to the sum mentioned, & not as an award that a verdict should be entered for that sum.—EVEREST v. RITCHIE (1862), 7 H. & N. 698 ; 31 L. J. Ex. 350 ; 158 E. R. 650.

**1224. No power to set aside verdict.]—The** order of reference of an action of *replevin* provided "that, if the arbitrator should find that pltf. is not entitled to any damages at all, then the verdict

**Sect. 8.—Requisites of valid award: Sub-sect. 2, E. F. & G.]**

is to be void, & instead thereof, to be entered for debts." The arbitrator found for debts on all the issues but one, & that issue the arbitrator found for pltf., with one farthing damages, over & above costs & charges. It was contended that the arbitrator had no power to set aside the verdict for pltf., unless pltf. was not entitled to recover any damages at all, whereas he had found that pltf. was entitled to a farthing:—*Held*: that was to be rejected as surplusage.

Too little vitiates an award; too much is only bad *pro tanto* (ALDERSON, B.).—RIDGWAY v. LLOYD (1847), 8 L. T. O. S. 345.

**F. Where Verdict taken subject to References.**

See Sect. 11, *post*.

**G. Other Cases.**

**Construction of submission in regard to what is referred.]—See Nos. 166—238, *ante*.**

**Who decides what is referred.]—See Nos. 166—172, *ante*.**

**What date claims under submission are to be assessed to.]—See Nos. 173—204, *ante*.**

**Between what parties & in what capacity disputes may be within submission.]—See Nos. 205—216, *ante*.**

**Meaning & effect of various expressions in submission.]—See Nos. 217—238, *ante*.**

**1225. Abandoned claim.]—An arbitrator, to whom a cause was referred from *Nisi Prius*, found that pltf. was entitled to a right of way for carriages, which he had at first claimed by his declaration, but afterwards abandoned:—*Held*: this was an excess of jurisdiction, & the award must be set aside *pro tanto*.—HOOPER v. HOOPER (1825), M'Cle. & Yo. 509; 148 E. R. 514.**

**Necessity for adjudicating on abandoned claims.]—See Sub-sect. 8, C. (d), *post*.**

**1226. Account—Power to take.]—An arbitrator, appointed to determine all matters in difference between the parties, decided that they should account & took the account himself:—*Held*: as he did not act simply as an auditor assigned under the common law judgment *quod computet*, although such judgment was ultimately to be entered, it was competent to him to take the accounts as they really stood between the parties.—BAXTER v. HOZIER (1839), 5 Bing. N. C. 288; 7 Scott, 233; 8 L. J. C. P. 169; 132 E. R. 1115.**

**Annotation:—Mentd. Cottam v. Partridge (1842), 4 Man. & G. 271.**

**1227. Accounts—Award that no partnership existed — & that shares should be delivered up on payment of sum named.]—By bond of submission dated Mar. 19, 1859, it was referred to an arbitrator to determine of & concerning all matters**

of accounts then pending between A. & B. The arbitrator, by his award, reciting the submission, awarded "of & concerning the premises," that, "up to Oct. 31, 1857, the accounts between A. & B., in reference to W. Farm, were adjusted, & that the balance then due from A. to B. amounted to £4,314 14s. 10d., & that no partnership existed between A. & B. in respect of the farm"; & he further awarded "that A. do pay to B. the sum of £781 5s. 3d., the amount due from him in respect of the farm, & that A. do pay to B. the sum of £1,137 17s., due from him to B. in respect of shares in W. Co., & that, on payment of such last-mentioned sum, B. do deliver to A. one hundred & eighteen shares in the co., held by him as collateral security for the sum." In an action to enforce payment of the two sums so awarded:—*Held*: the arbitrator had not exceeded the authority given to him by the submission, in awarding that no partnership existed between A. & B., or that the shares held by B. as collateral security for the £1,137 17s. should be delivered up to A. on payment of that sum.—HARRISON v. LAY (1863), 13 C. B. N. S. 528; 1 New Rep. 437; 143 E. R. 209. See, further, PARTNERSHIP.

**1228. Bankruptcy—Right of proof.]—In a contract between a co. & S., the latter agreed to execute certain works, & to provide materials, labour, engines, tools, implements, etc. S. inclosed land of the co., so as to exclude the public, & erected steam-engines, & placed implements & materials thereon, for the purpose of carrying on the works. S., after some time, by letters, in which he referred to & enumerated the machinery & materials he had placed upon the premises, applied for & obtained advances from the co., upon the faith of his agreement that the engines, implements & materials, then on, or afterwards to be brought on, the premises, should be a security. The amount of those advances always exceeded the value of the property on the premises. S. having become bkpt., the co. erased his marks on the engines, implements & materials on the premises, & substituted their own. In trover by his assignees against the co., the cause & all matters in difference being submitted to arbn.:—*Held*: the arbitrator had no authority to award as to debts, right to prove under the commission, for their advances, or as to the extent of such proof.—CROWFOOT v. LONDON DOCK CO. (1834), 2 Cr. & M. 637; 4 Tyr. 967; 4 L. J. Ex. 267; 149 E. R. 915.**

**Annotations:—Mentd. Hawthorn v. Newcastle-upon-Tyne & N. Shields Ry. Co. (1840), 2 Ry. & Can. Cas. 288; Lunn v. Thornton (1845), 14 L. J. C. P. 161.**

**1229. Building contract.]—By a deed which recited a contract by W. to execute certain railway works for pltf., & a provision therein for the reference to arbn., in case W. should be hindered**

**PART IV. SECT. 8, SUB-SECT. 2.—G.**

**1229 i. Building contract.]—Terms of a clause of arbn. in a building contract:—*Held*: not to entitle the arbiter to decide as to claims for extra work.—BIRRELL v. EVANS (1856), 29 Sc. Jur. 46; (1859), 31 Sc. Jur. 346.—SCOT.**

**1229 ii. —.]—Where differences between the parties to a building contract as to extra work were referred, & the arbitrators awarded on matters in regard to the original contract not relating to extra work, & the bad part of the award could not be separated, the award was set aside.—Re KNOWSLLEN v. INGLIS (1860), 7 U. C. L. J. 124.—CAN.**

**1229 iii. —.]—A tradesman & his employer referred the value of work to arbiters & an oversman. The oversman issued a decree-arbitral finding the value of the work done, & finding the**

employer liable to pay that amount:—*Held*: the finding one of the parties liable in a specified amount was *ultra fines compromissi*.—CALDER v. MACKAY (1860), 22 Dunl. (Ct. of Sess.) 741.—SCOT.

**1229 iv. —.]—*Held*: a reference of disputes "as to the contract, or as to the true intent, meaning, or effect thereof," did not give the arbiter jurisdiction to determine all questions arising upon the construction of the contract, but only such questions as required to be determined in order to enable him to explicate his jurisdiction.—MACKAY & SON v. LEVEN P. COMRS. (1893), 20 R. (Ct. of Sess.) 1093.—SCOT.**

**1229 v. —.]—A clause in a building contract gave power to proceed to arbn. upon certain definite claims specified in the clause. The contractor proceeded to arbn. & put forward a**

number of claims many of which were non-referable under the clause, but one claim was in respect of a matter referable & amounted to £30,000. The arbitrators made an award giving the contractor £16,000 in one bulk sum:—*Held*: as the award recited that the arbitrators had taken into consideration & duly weighed the evidence & made their award upon the matters referred to, the award was bad on its face as including non-referable items.—WATSON v. BOARD OF LAND & WORKS (1897), 23 V. L. R. 421.—AUS.

**1229 vi. —.]—A building contract provided that work must be executed in a certain manner, the whole work to be executed in a tradesmanlike manner. In arbn. proceedings the arbiter observed: "A first-class tradesmanlike job could not possibly be executed or expected at the contract prices." The**



in the execution of the works by pl'tfs. or their engineers, & that W. & pl'tfs. had made out an account containing a variety of matters in respect of which he claimed compensation, a copy whereof was contained in a schedule to the deed, & that, with the exception of the claims contained in the schedule, pl'tfs. & W. had settled every other account, claim or demand which the parties had against each other arising out of the contract, but the claims of W. set forth in the schedule were disputed, & that it had been agreed that the claims of W. in the schedule should be referred to the award of G., the parties covenanted to abide by the award of G.:—*Held*: the arbitrators were confined to the matters mentioned in the schedule, & the admission did not create an estoppel, but was made for the purpose of the reference only.—*SOUTH EASTERN RY. CO. v. WARTON* (1861), 6 H. & N. 520; 31 L. J. Ex. 515; 158 E. R. 214.

**1230.** —.]—A contract relating to the construction of certain docks stipulated that a schedule of prices should form the basis thereof, & that all work should be priced in accordance therewith, or, in the event of "any other description of work," at such prices as might be agreed to by the engineer. A dispute having arisen between the parties, the matter was referred to arbn. under a clause in the contract. The arbitrator decided that, as certain excavating work under the contract had turned out to be wholly different from that for which the schedule of prices had been framed, he had power to hear evidence as to the nature of the soil to be excavated, & to say what was the proper price to be allowed for such work:—*Held*: (1) the arbitrator had jurisdiction to determine the question whether the removal of a large quantity of soft & swampy soil

was "excavation" within the contract, or whether it came within the exception as to "any other description of work," & it would be impossible to determine that question without evidence as to the nature of the soil whereon the work was to be performed, which evidence was manifestly material; (2) the arbitrator would not be exceeding his jurisdiction by admitting such evidence.—*KIRK & RANDALL v. EAST & WEST INDIA DOCK CO.* (1886), 55 L. T. 245; 2 T. L. R. 692, C. A.; *reversd.* on another point, *EAST & WEST INDIA DOCK CO. v. KIRK & RANDALL* (1887), 12 App. Cas. 738, H. L.

*Annotations*:—*Appld.* *Re Sim & Lenders* (1887), 3 T. L. R. 428. *Mentd.* *Bush v. Whitehaven Town & Harbour Trustees* (1888), 52 J. P. 392; *James v. James & Randall* (1889), 22 Q. B. D. 669; *Tabernacle Permanent Bldg. Soc. v. Knight* (1892), 62 L. J. Q. B. 50, H. L.; *Re Palmer & Hosken*, [1898] 1 Q. B. 131, C. A.; *Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 106 L. T. 451, C. A.

*See, generally, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.*

**1231. Cause only referred—Matters outside dealt with.**—Where a cause only was referred to an arbitrator, in which pl'tf. claimed, by his particulars of demand upon the balance of an account, a sum of £34 17s. 4½d., & def't. paid into ct. the sum of £9 3s. 3d., but the arbitrator, upon a supposition that he was entitled to settle all matters in difference between the parties, awarded to pl'tf. the sum of £33 7s. 10d., the ct. set aside the award, upon the ground that the arbitrator had exceeded his authority.—*ATKINSON v. JONES* (1843), 1 Dow. & L. 225; 7 Jur. 881; 111 E. R. 170.

**1232. — Award for amount exceeding original particulars—Pleadings withdrawn.**—In an action against a lead mine for damage to cattle & trespass,

employer raised a reduction of the arbirer's award on the ground that it was founded on the above passage as showing *ex facie* of the award that it had been influenced by a consideration foreign to the question at issue, namely, the price:—*Held*: the award should be sustained.—*ALSTON & ORR v. ALLAN'S TRUSTEES* (1910), 47 Sc. L. R. 203.—*SCOT.*

**1229 vii.** —.]—A building contract provided that all disputes arising thereout should be referred to arbn., except as to matters which, under certain clauses, were left to the discretion of the architect. The award was of a sum "in final settlement of all matters relating to the contract":—*Held*: the reference & award were not too wide, although in terms including disputes which were expressly excluded from arbn.—*Cox v. JOHNSON* (1914), 14 S. R. N. S. W. 240.—*AUS.*

**f. Charterparty.**—A charterparty containing an arbn. clause was entered into for a certain period. The charterers by telegraph asked for further use of the vessel which was agreed to. In arbn. proceedings the arbirer pronounced a decree-arbitral dealing with matters arising during the extended time:—*Held*: (1) the meaning of the communication by telegraph was merely to prorogate the time; (2) it was not *ultra vires* of the arbirer to deal with matters arising in the extended time.—*BIRRELL v. M'CULLOCH & FIFE* (1866), 5 Macph. (Ct. of Sess.) 94.—*SCOT.*

**g. Compensation—Matters wrongly included.**—Arbitrators appointed to value land taken by a railroad co. which bordered on water allowed a large sum for water frontage, to which the owner had no legal or equitable right:—*Held*: the sum was awarded in respect of a matter not within the submission, & award set aside.—*Re MILLER*

& *GREAT WESTERN RY. CO.* (1855), 13 U. C. R. 582.—*CAN.*

**h. — Sum for increased fire risk.**—A railway co. required immediate possession of pl'tf.'s land, & procured def'ts. to give their bond to pl'tf. for the purchase money to be paid within one month from the making of the award, under the statutory reference then pending:—*Held*: the award was not necessarily vitiated by reason of the arbitrators having allowed compensation for increased risk of loss by fire.—*MASSON v. ROBERTSON* (1879), 44 U. C. R. 323.—*CAN.*

**i. — Award as to maintenance of wall.**—An arbitrator, to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway, has no power to direct the corpn. to maintain a retaining wall.—*Re BURNETT & DURHAM TOWN* (1899), 31 O. R. 262.—*CAN.*

**k. Consignment of money as condition of allowing proof.**—A. & B. submitted a question to the decision of C. After a proof C. appointed one of the parties to consign the sum in dispute as the condition of his being allowed to lead further evidence:—*Held*: the party ordered to consign was not justified in refusing to proceed with his proof, & an award pronounced on his failure so to do was not reducible, either as being *ultra vires* of the arbirer, or on the ground of legal corruption.—*COX BROTHERS v. BINNING & SON* (1867), 6 Macph. (Ct. of Sess.) 161.—*SCOT.*

**l. Contract—Award assessing damages.**—A railway co.'s engineer was made by contract deed the arbirer as to the furnishings supplied by a contractor, with power to decide disputes as to the meaning of the contract, & the quantities & state of materials supplied. The arbirer awarded damages for

breach against the co.:—*Held*: the arbirer had power to construe the agreement, but not to assess the amount of damages for alleged non-implementation of the agreement.—*ABERDEEN RY. CO. v. BLAIKIE BROTHERS* (1852), 1 Pater. App. 119.—*SCOT.*

**m. —.]—Re CAMPBELL v. BROWN (1857), 2 P. R. 291.—*CAN.***

**n. Damages.**—Where one of the objects of a suit was to require def'ts. to submit their differences to arbn. under an agreement to do so, & by the rule of reference all matters in difference in the suit were submitted to their award:—*Held*: the award could not be set aside because the arbitrators awarded damages to pl'tfs.—*TREMAIN v. MACKINTOSH* (1873), R. E. D. 447.—*CAN.*

**p. —.]—An arbitrator has no power to assess damages, unless he is empowered so to do expressly by the submission.**—*MACKAY & SON v. LEVER P. COMRS.* (1893), 20 R. (Ct. of Sess.) 1093.—*SCOT.*

**q. —.]—An award was held void, as the arbitrators had exceeded their power in giving damages not recoverable in the cause referred.**—*HILL v. HILL* (1854), 11 U. C. R. 262.—*CAN.*

**r. Discharge of judgment & writs of execution.**—Upon a reference of certain matters in dispute between J. & M., it was left to the arbitrators to determine whether or not M. or J. was liable in respect of a judgment on certain promissory notes, & to make any orders which the arbitrators should think proper. The arbitrators awarded that J. was liable to pay all the balance of money still unpaid upon the judgment, & that J. should pay & satisfy same within one calendar month, & should cause the judgment & writs of execution to be satisfied & discharged:—*Held*: the latter part of the award (which was objected to) was authorised.—*Re MACLEAN v. JONES* (1866), 2 C. L. J. N. S. 206.—*CAN.*



**Sect. 8.—Requisites of valid award: Sub-sect. 2, G.]**

the cause was referred at *Nisi Prius* to an arbitrator, with power of a judge as to amendment, & the pleadings were withdrawn. At the reference, pltf. produced particulars of damage amounting to a much greater sum than the claim sent to defts. before action. Notwithstanding defts.' objection, the arbitrator received evidence upon the new particulars, & awarded against defts.:—*Held*: as there were no particulars in the action, the arbitrator did only what was continually done at *Nisi Prius*, & had not exceeded his jurisdiction.—**HAMMOND v. KIRKBY** (1867), 17 L. T. 147.

**Sufficiency of award where cause only referred.]—**See cases in Sub-sect. 9, *post*.

**1233. Cause & other matters referred—Award covering matters which might have arisen out of cause.]—****COX v. KERSLAKE**, No. 229, *ante*.

**Sufficiency of award where a cause & other matters are referred.]—**See cases in Sub-sect. 9, *post*.

**1234. Claim not made—Non-delivery of goods.]—**

An agreement of reference stated that disputes had arisen between G. & a navigation co., respecting certain goods shipped by G. on board the co.'s vessels, & which G. complained had not been delivered; that G. had commenced an action in Scotland against the co. for the recovery of the goods or their value, of the damage sustained by the non-delivery, & of the costs incurred in the action; & that the parties agreed to refer the differences to arbitrators, the costs of the reference & award, & also of the action, to be in their discretion. The arbitrators awarded that £238 were due from the co. to G.; that the sum, with £30, the costs of the reference & award, should be paid by the co. on a certain day; & that the co. should keep the goods, which were then in their possession:—*Held*: the award of the goods to the co. was not void as an excess of authority.—**Re GILLON & MERSEY & CLYDE NAVIGATION CO.** (1832), 3 B. & Ad. 493; 110 E. R. 178.

**Annotations:—***Refd.* **Harrison v. Creswick** (1853), 13 C. B. 399. *Mentd.* **Wilcox v. Wilcox** (1849), 4 Exch. 500.

**1235. Distress—Right to confer power of.]—**To a plea in bar, deft. replied a power of distress, given by the award of an arbitrator to whom all matters in difference between the parties had been referred:—*Held*: ill, without averring that the arbitrator had authority to confer a power of distress, or that the right to distrain was one of the matters in difference.—**PASCOE v. PASCOE** (1837), 3 Bing. N. C. 898; 3 Hodg. 188; 5 Scott, 117; 6 L. J. C. P. 322; 132 E. R. 656.

**Annotation:—***Mentd.* **Jolly v. Arbuthnot** (1859), 4 De G. & J. 224, L.C.

**1236. Fire insurance.]—**Claims under policies for goods damaged by fire were referred to arbn. The agreement for reference classified the goods under schedules A., B., C., & C.a., & recited that it had been agreed that the claim in respect of the goods in schedule A. should be settled for £2,771 19s. 5d., & referred the claims as to the goods in the other schedules. The arbitrators found that £8,288 0s. 7d. was the total sum which ought to be paid in respect of damage to the goods in schedules B., C., & C.a. They also found that the loss or damage sustained exceeded the sums insured, & that the whole salvage & proceeds of the salvage of & from the fire belonged absolutely to pltf.:—*Held*: in awarding that pltf. was en-

titled to the salvage—which it appeared from the record, arose solely from the goods particularised in schedule A.—the arbitrators had exceeded their jurisdiction.—**SKIPPER v. GRANT** (1861), 10 C. B. N. S. 237; 142 E. R. 442.

**1237. Indemnity—Power to order.]—**By an agreement for the sale of lands, it was stipulated that the title should be made out to the satisfaction of a third person. A dispute as to the validity of the title was referred to an arbitrator, with power to settle all questions arising out of the agreement, & he awarded that the title should be taken with a bond of indemnity, in case of eviction:—*Held*: the award was bad, because the arbitrator had exceeded his authority in ordering a bond of indemnity to be taken.—**ROSS v. BOARDS** (1838), 8 Ad. & El. 290; 3 Nev. & P. K. B. 382; 1 Will. Woll. & H. 376; 7 L. J. Q. B. 209; 2 Jur. 567; 112 E. R. 847.

**Annotations:—***Distd.* **Murphy v. Glass** (1869), 6 Moo. P. C. C. N. S. 1. *Mentd.* **Cockburn v. Newton** (1841), 10 L. J. C. P. 207; *Re* **Greene & Balfour, Williamson** (1890), 63 L. T. 325, C. A.

**1238. .]**—M. built a ship for G. & others, & also purchased stores for the vessel on his own credit. On reference of all matters in difference between M. & G., G. took upon himself the payment of the bills, & requested the umpire to fix the liability in respect of them upon him. The umpire directed G. to pay to M. the balance which he found due to the latter after giving G. credit for the amount of the bills, & awarded that G. should be solely liable in respect of the bills, & should execute a bond to indemnify M. against them:—*Held*: the umpire had authority to order G. to be liable for & to pay the bills, & to execute the bond of indemnity.—**Re GODDARD & MANSFIELD** (1850), 1 L. M. & P. 25; 19 L. J. Q. B. 305.

**1239. — With particular recitals.]—**An arbitrator, to whom certain causes & matters in difference between the parties were referred, with power to him to direct the reconveyance by one of them to the other of certain property which had been purchased & held by the former in trust for the latter, & to direct an indemnity & release of the former by the latter, by his award directed an indemnity with particular recitals of the transactions between them, & concluding with the general words, "or for, or in consequence of, any other act, deed, matter or thing whatsoever, in anywise relating or referring to, or arising out of, the premises, whether hereinbefore recited or mentioned or not":—*Held*: he had not exceeded his authority, as general words in a release were to be limited & restrained by the particular words in the recitals.—**BOYES v. BLUCK, BLUCK v. BOYES, CLOSSMAN v. BLUCK, BLUCK v. CLOSSMAN** (1853), 13 C. B. 652; 22 L. J. C. P. 173; 1 C. L. R. 215; 138 E. R. 355.

**1240. Judgment—Power to order judgment to be arrested.]—**Where an action against deft. for continuing certain walls & rooms wrongfully erected upon pltf.'s premises was referred to an arbitrator by a judge's order, which empowered him to direct the entry of a verdict for either party, & to determine what he should think fit to be done by either party:—*Held*: (1) the arbitrator had no power under the order of reference to direct the judgment to be arrested; (2) (**PARKE, B., diss.**) the arbitrator was not bound, under the order of reference, to order something to be done.—

**1236 i. Fire insurance—Claim of set-off]**—A claim against an insurance club was referred to arbn. The arbitrators found an amount due to claimants, & referred to the ct. the question of the right of the club to set-off against such claim a payment erroneously made to claimants by the club in the preceding

year:—*Held*: the question of set-off was beyond the scope of the submission, & the award was remitted.—**Re JOB BROTHERS & CO. & NFLD. MUTUAL MARINE INSURANCE CLUB** (1904), 9 Nfld. L. R. 54.—**NFLD.**

**1237 i. Indemnity—Power to order.]—**

*Re* **ANDERSON v. COTTON** (1856), 2 P. R. 109.—**CAN.**

**s. Jurisdiction.]—**An arbitrator has no power to award as to his own jurisdiction.—**YOUNG v. BOARD OF LAND & WORKS** (1872) 3 V. R. 110.—**AUS.**

ANGUS v. REDFORD (1843), 11 M. & W. 69; 2 Dowl. N. S. 735; 12 L. J. Ex. 180; 152 E. R. 719.

**Annotations:**—**Consd.** Toby v. Lovibond (1848), 5 C. B. 770. There appears to be a mistake in the report in 11 M. & W. 69; according to the report in 2 Dowl. N. S. 735 the reference was of the cause & all matters in difference (WILLIAMS, J.). **Distd.** Richardson v. Worsley (1850), 5 Exch. 613. **Expld.** Nicholls v. Jones (1851), 6 Exch. 373. *Angus v. Redford* is incorrectly reported: there the words of the submission were obligatory (PARKE, B.). **Refd.** Grenfield v. Edgecombe (1845), 14 L. J. Q. B. 322. **Mentd.** Miller v. De Burgh (1850), 4 Exch. 809.

**1241. — Power to direct judgment to be entered up.**—After issue joined in an ejectment, the matters at issue in an action, together with all claims in respect of *mesne* profits, & all matters in difference between the parties, & of the costs of the action & of the reference, were referred by a judge's order. The award directed judgment to be entered for pltf. in the action, with 1s. damages, & that pltf. should recover, under the same judgment, a plot of land (describing it by metes & bounds), & that deft. should pay £12 as *mesne* profits, & pltf.'s costs in the action, to be taxed by the proper officer, & part of the costs of the reference & award:—**Held:** (1) the arbitrator had no authority to direct judgment to be entered up, & final judgment, which had been signed, must be set aside; (2) rejecting all that related to the judgment, the award sufficiently decided the matters referred.—DOE d. BODY v. COX (1846), 15 L. J. Q. B. 317; 10 Jur. 982.

**1242. — — —**—Where a cause & all matters in difference were referred to a legal arbitrator, pending a demurrer to one of deft.'s pleas, & the arbitrator, by his award, directed judgment to be entered on that demurrer for deft., the ct. refused to set aside his award on that ground.—MATHEW v. DAVIES (1842), 1 Dowl. N. S. 679.

**1243. — Power to order judgment non obstante veredicto.**—By order of *Nisi Prius*, a cause & all matters in difference were referred to the award of A., with power to enter a verdict for either party, the costs to abide the event, & neither party to be at liberty to bring a writ of error. It was contended, before the arbitrator, that the third & sixth pleas were bad in law, & though

proved in point of fact, the pltf. was entitled, on the issues raised on them, to judgment *non obstante veredicto*. The award directed a verdict to be entered for pltf. on the second & fifth issues, with 1s. damages, "which sum, except for my finding upon the other issues, pltf. would be entitled to recover in the cause." The first, third, fourth & sixth issues were found for deft.:—**Held:** the arbitrator had no power to order judgment *non obstante veredicto*.—TOBY v. LOVIBOND (1848), 5 C. B. 770; 3 New Pract. Cas. 137; 17 L. J. C. P. 201; 11 L. T. O. S. 65; 12 Jur. 436; 136 E. R.

**1244. Landlord & tenant.**—Agreement for a lease for sixty-three years from May 1, 1801, the lessee to be allowed three years from that time for winning the colliery without payment of any rent. An arbitrator, being authorised to give such direction for a lease, according to the agreement, as he should think fit, directed a lease for sixty-three years from May 1, 1804:—**Held:** he had exceeded his authority, & the award was bad.—BONNER v. LIDDELL (1819), 1 Brod. & Bing. 80; 129 E. R. 653.

**1245. — Replacement of fixtures.**—On submission of a cause & all matters in difference between lessor & lessee, the costs to abide the event, an award that certain fixtures have been wrongfully removed by the lessor, to the value of £11, & that the lessee shall set up others in their place, to be left for the lessor at the end of his term, & that the lessor shall pay the lessee £11 on a specified day, is bad, for want of authority, though the removal of such fixtures was, in fact, a matter in difference on the arbn.—PRICE v. POPKIN (1839), 10 Ad. & El. 139; 2 Per. & Dav. 304; 8 L. J. Q. B. 198; 3 Jur. 433; 113 E. R. 53.

**Annotations:**—**Expld.** Waddle v. Downman (1844), 12 M. & W. 562. **Consd.** Mays v. Cannell (1854), 15 C. B. 107. **Mentd.** Miller v. De Burgh (1850), 4 Exch. 809.

**1246. Partition—Award of undivided moieties.**—An arbitrator, to whom the question of the right of two rectors to the tithe of certain lands was referred, had power to devise all means to prevent future litigation between the parties, & to settle

**1244 i. Landlord & tenant—Award for meliorations.**—A landlord having obtained a decree of irritancy of his tenant's lease, in which there was no stipulation as to meliorations, entered into a submission with him of "all claims, questions, disputes & differences of every kind depending & subsisting betwixt them, upon any account, transaction, or occasion whatever, preceding the date hereof," & the arbiter having found the tenant entitled to a sum for meliorations:—**Held:** he had not exceeded his powers.—PITCAIRN v. DRUMMOND (1825), 1 Wils. & S. 194.—SCOT.

**1244 ii. — Award of sum of money.**—A tenant sublet his farm, with an agreement that he was, at the entry of the subtenant, to put the houses & fences into a state of repair at the sight of referees mutually chosen:—**Held:** competent for the referees to award a sum of money to the subtenant, in lieu of a specific completion of the repairs.—M'GREGOR v. STEVENSON (1847), 19 Sc. Jur. 455.—SCOT.

**1244 iii. — Estimating repairs & fixing damages.**—A lease provided that the arbitrators "should view the premises & consider what may be necessary for additional improvements." The bond recited that the parties had appointed arbitrators to examine the premises, & that "in order to bring all matters to a satisfactory conclusion" they had appointed an umpire in case the arbitrators should not agree. In the bond the parties submitting also gave power to the umpire to make an "award

which shall be binding on all parties." The arbitrators estimated the value of the premises & of repairs & fixed the damages to be paid:—**Held:** they had not exceeded the submission.—MCGILL v. PROUDFOOT (1847), 4 U. C. R. 40.—CAN.

**1244 iv. — Award as to future damage.**—A landlord & tenant entered into a submission to determine whether the landlord had failed to fulfil certain obligations under the lease, & if so to fix the damage, & from time to time during the currency of the lease, or after the expiry thereof, to fix the damage that might thereafter be sustained by the tenant. The award (*inter alia*) found the landlord liable to the tenant in payment of certain annual sums payable from the date of entry, & continuing during the currency of the lease, "in respect of loss & damage sustained & to be sustained" by him:—**Held:** the award, so far as finding the landlord liable for damage to be sustained in future years, was *ultra fines compromissi*.—TRAILL v. COGHILL (1885), 22 Sc. L. R. 616.—SCOT.

**1244 v. — Award fixing rent.**—A. leased a right of way over a railway, from B., at a rental to be determined by arbitrators, & covenanted to run "at least one train per day, with leave to run more, the maximum number of trains to be fixed by the arbitrators." An award fixing a rental for ensuring four trains a day instead of one:—**Held:** bad, & referred back.—FOWLER v. PORT HOPE, LINDSAY, & BEAVERTON

RY. Co. (1860), 6 U. C. L. J. 13.—CAN.

**t. Logging contract.**—**Held:** arbitrators had exceeded their jurisdiction in awarding money to pltf. for logging done under a verbal agreement, which was not within the submission under which they were appointed, & this amount not being separable from the rest, the award could not be supported, & such excess of authority afforded a good defence to an action.—TULLY v. CHAMBERLAIN (1871), 31 U. C. R. 299.—CAN.

**u. —**—Pltf. claimed deft. was indebted to him for work in sawing logs, & deft. claimed a set-off. The matter was referred to arbitrators, who awarded in favour of deft. & found that the logs remaining unsawn were deft.'s property:—**Held:** this finding was outside the jurisdiction of the arbitrators, but, being separable from their finding on matters within their jurisdiction, was a mere nullity not affecting the validity of the award.—CREELMAN v. McMULLEN (1885), 6 R. & G. 138; 6 C. L. T. 450.—CAN.

**w. Matters subsequent to submission.**—An award was held bad where arbitrators awarded upon matters not submitted & accruing after the submission.—STEWART v. WEBSTER (1861), 20 U. C. R. 469.—CAN.

**1246 i. Partition.**—A submission was: "We authorise, etc., A., B., & C. to divide into three equal shares that farm & mill occupied, etc." The arbitrators divided the premises, & thereby



**Sect. 8.—Requisites of valid award: Sub-sect. 2, G.]**

all matters in difference between them, & to determine what he should think fit to be done by either of the parties touching the matters in dispute:—*Held*: he did not exceed his powers by awarding undivided moieties of the tithes to the two rectors.—*PROSSER v. GORINGE* (1811), 3 Taunt. 426; 128 E. R. 169.

**Sufficiency of award directing partition of lands.]—See Nos.**

**Partnership disputes.]—See PARTNERSHIP.**

**Partnership dissolution.]—See PARTNERSHIP.**

**1247. Patents—Disputes as to.]—**By a submission to arbn. between patentees all matters in difference between the parties relating to gutta percha were referred to the decision of the arbitrator, who was empowered to set aside certain deeds which had been executed by the parties, if he thought fit, & to order assignments to be executed for vesting in trustees all patents, & applications for patents relating to gutta percha, taken out or made, or to be taken out thereafter by the parties, or any of them. By the award the arbitrator, "if & so far as he had power & jurisdiction," set aside altogether certain deeds which he specified, but, if he had not "power or jurisdiction to set same or any or either of them aside," or to award any other matter in that his award contained, he declared that the rest of his award was yet to stand. He also, by the award, decided upon the rights of the parties under the deeds executed by them, & not thereby set aside, & directed that neither of the parties should grant any licence of or work any of the patents, save under a licence from the trustees to be appointed under the award, which required the parties to nominate their respective trustees within fourteen

days, & to signify their election to take licences within two calendar months from the date of the award. The award also directed that the parties should covenant with one another that they & their licencees should assign to the trustees any assignable interest which they might respectively have in any patents relating to gutta percha. The submission was made a rule of a common law ct. In a suit for a specific performance of the award:—*Held*: the award was bad, for excess of authority.—*NICKELS v. HANCOCK* (1855), 7 De G. M. & G. 300; 3 Eq. Rep. 689; 1 Jur. N. S. 1149; 44 E. R. 117, LJJ.

**Annotation:—***Distd. Blackett v. Bates* (1865), 2 Hem. & M. 610.

**1248. ———.]—**The owner of a licence under a patent executed a declaration of trust of it in favour of a firm of which he was a member. A partnership action was commenced by G., one of the partners, & an order was made for a stay of proceedings on certain terms, including an assignment by G. to his partners of his share in the partnership, at a price to be fixed by arbn., & a term that the form of deed of dissolution & assignment, & any other question arising in respect thereof, should be referred to the arbitrator. On a motion by G. to set aside the arbitrator's award:—*Held*: the arbitrator had not exceeded his jurisdiction in inserting in the deed of dissolution a covenant prohibiting G. from manufacturing according to the patent.—*GONVILLE v. HAY* (1903), 21 R. P. C. 49.

**See, also, PARTNERSHIP; PATENTS & INVENTIONS.**

**1249. Payment—Fixing time & place for.]—**An arbitrator ordered a certain sum & costs to be paid on a Sunday, & before deft. could have an oppor-

exempted one of the divisions from the payment of any portion of tithe or county cess:—*Held*: the award so exempting one of the divisions from county cess was warranted by the terms of the submission.—*HOOD v. HOOD* (1840), 1 Craw. & D. 413.—**IR.**

**a. Payment—Power to order.]—**A submission referred a controversy between A. W., J. W., & M. in relation to the amounts due & paid on a mtge. made by M. to a loaning co., & as to the proportion of the mtge. paid by the parties to the co. The arbitrators awarded that M. had overpaid his proportion by \$627, in which sum A. W. was indebted to him, & that A. W. should pay that sum to him on or before June 1, 1882:—*Held*: the arbitrators had not exceeded their powers in directing payment by A. W.—*WHITELY v. MCMAHON* (1882), 32 C. P. 453.—**CAN.**

**b. ———.]—**A., who sold petroleum consigned to him by B., rendered the latter an account bringing out a balance due by him. Part of the petroleum having been lost by leakage, the parties entered into a reference who should bear the loss. The arbiter awarded that the loss should fall on B., ordering him to pay the balance brought out in A.'s account. In a reduction of the award by B.:—*Held*: the award was effectual as deciding that the loss should be borne by B., but should be reduced as *ultra vires* so far as it ordered payment of the balance brought out on A.'s account.—*COX BROTHERS & MANDATORIES v. BINNING & SON* (1867), 40 Sc. Jur. 93.—**SCOT.**

**c. ——— Amount awarded exceeding sum in bond.]—**An award is not invalid because the amount awarded exceeds the penalty of the arbn. bond.—*FERRISON v. MUNRO* (1845), 2 Kerr. 660.—**CAN.**

**d. ——— Ordering payment with penalty.]—**Where the Crown lands de-

partment, in deciding to allow one of two appcts. to purchase land, directed that the amount properly payable by him to the other should be ascertained by arbn., & the arbitrators found a certain sum due, but directed, in the event of the payee failing to deliver up possession to the other in two months, that \$400 should be deducted from this amount:—*Held*: beyond their authority, their duty being simply to find the amount payable.—*BARNES v. BOOMER* (1864), 10 Gr. 532.—**CAN.**

**f. ——— No claim for same in matters referred.]—**Award on a submission in two suits, set aside for excess of authority in awarding payment of any sum whatever, there being no claim for payment embraced in either action.—*Re WHEELER v. MURPHY* (1855), 2 P. R. 32.—**CAN.**

**g. ——— Submission alternative.]—**The parties to a suit referred the difference between them, stating in the submission in the alternative what the arbitrators were to direct—either that defts. should deliver up the premises, or that a lease should be executed. They awarded that a lease should be executed, & that, should it be deemed necessary for the mutual benefit of the parties that during the term certain work should be done, defts. should pay one-fifth of the expense thereof:—*Held*: the arbitrators exceeded their power in ordering defts. to pay, etc.—*ABBOTT v. SKINNER* (1861), 11 C. P. 309.—**CAN.**

**1249 i. ——— Directing time for.]—**Where a reference is general, as of a contract & all matters relating to it, arbitrators can name a day for paying the money; but it is different where only a cause is to be decided upon.—*ADDISON v. CORBEY* (1854), 11 U. C. R. 433.—**CAN.**

**1249 ii. ———.]—***Held*: in an action between school trustees & teacher, the arbitrators exceeded their powers in

awarding payment within thirty days.—*VAN BUREN v. BULL* (1860), 19 U. C. R. 633.—**CAN.**

**1249 iii. ———.]—**On a reference under 16 Vict. c. 219, & 29 Vict. c. 80, the sum awarded was directed to be paid forthwith, whereas the stats. allowed a year from the award:—*Held*: this part of the award, which was clearly bad, might be separated from the rest.—*Re TORONTO CITY & LEAK* (1864), 23 U. C. R. 223.—**CAN.**

**1249 iv. ———.]—**Where the reference was only for the purpose of ascertaining the damages sustained by pltf. by a fire negligently set by deft.:—*Held*: the arbitrators had no power to give a month for payment of the sum awarded.—*Re EGGLESTON & TAYLOR* (1881), 45 U. C. R. 479.—**CAN.**

**h. ——— Power to fix legal liability.]—**A submission was made to an arbitrator "to determine which of the several items of claim the estate of Mrs. B. is bound as matter of law to pay":—*Held*: this confined the authority to deciding the question of legal liability, & did not authorise the arbitrator to find sums payable.—*ARMSTRONG v. CAYLEY* (1867), 2 Ch. Ch. 128, 163.—**CAN.**

**k. Preservation of assets—Award deciding who entitled to administration.]—**Two causes, one of which was instituted to preserve assets pending a suit for administration, were referred to arbn.:—*Held*: the arbitrators had not jurisdiction to decide who was entitled to the administration.—*FAGAN v. F.* (1849), 12 I. Eq. R. 483.—**IR.**

**l. Real property—Award giving way of necessity.]—**Part of a dispute submitted to arbn. consisted of the right to a field:—*Held*: the arbitrators had jurisdiction to decide that one of the parties was entitled to a way of necessity.—*FAGAN v. F.* (1849), 12 I. Eq. R. 483.—**IR.**



tunity of moving to set aside the award :—*Held* : these were no grounds for setting aside the award.—*HOBDELL v. MILLER* (1840), 6 Bing. N. C. 292; 2 Scott, N. R. 163; 133 E. R. 115.

*Annotations* :—*Consd.* *Little v. Newton* (1840), 1 Man. & G. 976; *Jones v. Ives* (1850), 10 C. B. 429. *Expld.* *Hare v. Fleay* (1851), 11 C. B. 472. *Consd.* *O'Toole v. Pott* (1857), 7 E. & B. 102.

**1250.** —.].—An arbitrator, who had the power of a judge at *Nisi Prius*, did not award execution, but ordered the damages & costs to be paid at a stated time & place :—*Held* : that part of the award was void *pro tanto*, as surplusage.—*REES v. WATERS* (1847), 16 M. & W. 263; 4 Dow. & L. 567; 153 E. R. 1187.

**1251.** —.].—In an arbn. under Lands Clauses Consolidation Act, 1845 (c. 18), the arbitrator fixed the price, & directed it to be paid to a party named within three days of the award. The arbitrator's authority was merely to fix the price :—*Held* : there could be no attachment for non-payment, as the direction to pay was beyond the arbitrator's authority & a nullity.—*LINDSAY v. DIRECT LONDON & PORTSMOUTH RY. CO.* (1850), 19 L. J. Q. B. 417; 15 Jur. 224.

**1252.** —.].—An arbitrator found that a sum of money was due from deft. to pltf., which he directed to be paid on or before a particular day, & that, upon payment of that sum, all proceedings should cease :—*Held* : the arbitrator had exceeded his authority in giving a particular day of payment.—*BENWELL v. HINXMAN* (1835), 1 Cr. M. & R. 935; 3 Dowl. 500; 5 Tyr. 509; 4 L. J. Ex. 99; 149 E. R. 1360.

**1253.** —.].—The rules of a benefit building society authorised the directors to invest the funds on mtges. for ten years, at any rate of interest, or in building on or improving land mtged. to them, & authorised members to withdraw their shares upon giving a certain notice, & provided that such members should not be liable to any future fines, but should be entitled to receive the net amount of their subscriptions paid, with interest, & also a share of profits, but no time was specified in making such payments. The directors had power to pay such claims in the order in which they arose. The amount payable to a withdrawing member having been referred to arbn. :—*Held* : it was competent to the arbitrator to consider when, consistently with the due prosecution of the other objects of the society, such payment should be made, & to fix a time for such payment accordingly.—*ARMITAGE v. WALKER* (1855), 2 K. & J. 211; 26 L. T. O. S. 182; 20 J. P. 53; 2 Jur. N. S. 13; 69 E. R. 756.

*Annotations* :—*Consd.* *Callaghan v. Dolwin* (1869), L. R. 4 C. P. 288; *Walker v. General Mutual Bldg. Soc.* (1887), 36 Ch. D. 777, C. A. *Refd.* *Davies v. Second Chatham Permanent Bldg. Soc.*, *Mackenzie v. Everton & West Derby Permanent Bldg. Soc.* (1889), 61 L. T. 680.

Necessity for specifying date & manner of payment, *see* Nos. 1282—1298, *post*.

**1258 i. Releases.**].—In an arbn. various claims were lodged by one of the parties, & each of the parties claimed damages for breach of contract. The arbitrator issued an award, by which (*inter alia*) he ordained the parties to execute & deliver mutual discharges :—*Held* : the decree ordaining the parties to execute mutual discharges being *ultra vires*, the award fell to be reduced *in toto*, as that part of it which was *ultra vires* was inseparable from the rest.—*MILLER & SON v. OLIVER & BOYD* (1903), 41 Sc. L. R. 26.—**SCOT.**

**m. Sale of land.**].—By a condition of a contract of sale of land it was provided that, in case of mistake in the description of the premises, or any error in the

particulars of the property, compensation, to be fixed by an arbitrator, should be given to the purchaser. The purchaser, before the conveyance was executed, informed the vendor of a defect in title to some ten feet of the land sold. The purchaser subsequently took a conveyance, & accepted title of the land sold. Afterwards the purchaser claimed & obtained from an arbitrator compensation in respect of the ten feet, & brought an action to recover the amount awarded :—*Held* : the defect of title was not a mistake in the description of the premises within the meaning of the arbn. clause, & the award was bad.—*BRUCE v. STURT* (1889), 15 V. L. R. 370.—**AUS.**

**1254.** **To arbitrators.**].—An award that deft. should pay pltf. a sum of money on Apr. 1, & 25s. apiece to the arbitrators on May 1 :—*Held* : void as to the payment of the 25s. to the arbitrators.—*ABRATHUT v. BRANDON* (1713), Gilb. 118; 93 E. R. 279.

**1255.** **For benefit of party.**].—Upon a reference of partnership disputes, a direction in the award that some of the parties to the reference pay a sum of money (which is one of the matters included in the submission) to the arbitrator, & that he apply same to the payment of certain specified demands (also part of the matters submitted), is bad, & vitiates the award, although the payments appear by the tenor of the award to be for the benefit of the parties submitting, & not of the arbitrator.—*Re MACKAY, WEST & HOLT* (1834), 2 Ad. & El. 356; 111 E. R. 138.

*Annotation* :—*Distd.* *Wood v. Adcock* (1852), 7 Exch. 468.

**1256.** —.].—A. on the one part, & B. & C. on the other, mutually referred their differences to two arbitrators, who awarded, *de præmissis*, that B. should pay to one of the arbitrators a sum of money, & that he should, immediately on receipt thereof, pay it over to A. :—*Held* : the direction to pay the money to the arbitrator did not vitiate the award, as it sufficiently appeared that the payment was for the benefit of one of the parties.—*WOOD v. ADCOCK* (1852), 7 Exch. 468; 21 L. J. Ex. 204; 18 L. T. O. S. 332; 16 Jur. 251; 155 E. R. 1033, Ex. Ch.

*Annotations* :—*Expld.* *Buchanan v. Kinning* (1851), 20 L. J. C. P. 252, Ex. Ch. *Distd.* *Re Laing & Todd* (1853), 13 C. B. 276; *Roberts v. Eberhardt* (1857), 27 L. J. C. P. 70. *Refd.* *Roper v. Levy* (1851), 21 L. J. Ex. 23.

**Awards directing payment of arbitrators' fees, etc.**].—*See* Nos. 744—758, *ante*.

**Payment to strangers.**].—*See* Nos. 1189, 1197, 1212, *ante*.

**1257. Possession of house—Power to award.**].—Under a submission of "all actions, suits, debts, trespasses, damages & demands," the arbitrators may award the surrender of the possession of a house.—*MARKS (MARKES) v. MARRIOT (MARRYOTT)* (1696), 1 Ld. Raym. 114; 1 Lut. 520; 91 E. R. 972.

**1258. Releases.**].—Under a particular submission an award of mutual general releases according to the extent of the submission is good.—*DOYLEY v. BURTON* (1700), 1 Ld. Raym. 533; 91 E. R. 1256.

**1259.** —.].—Where an award did not, in express terms, put an end to an action, which was one of the subject-matters referred, but directed the parties to execute mutual releases :—*Held* : this was a sufficient determination of the action, as the release might be pleaded *puis darrein continuance*.—*WHARTON v. KING* (1831), 2 B. &

**n. Shipbuilding contract.**].—An arbitrator, to whom disputes as to a contract for building a ship had been submitted, having gone out of the contract, & decreed for more than the contract price :—*Held* : the decree-arbitral was *ultra vires* & reducible.—*NAPIER v. WOOD* (1844), 7 Dunl. (Ct. of Sess.) 166.—**SCOT.**

**p. Title — Award making bargain for sale.**].—On a reference of dispute respecting the title to certain land, the arbitrators are not authorised to make a bargain between the parties as to the terms on which the land should be sold by one to the other.—*BOND v. BOND* (1865), 15 C. P. 613.—**CAN.**

**Sect. 8.—Requisites of valid award: Sub-sects. 2, G. & 3, A & B.]**

Ad. 528; 9 L. J. O. S. K. B. 271; 109 E. R. 1238.

**Annotations:—***Reid*. Lievesley v. Gilmore (1866), L. R. 1 C. P. 570. *Mentd.* *Re* Beaufort, & Swansea Harbour Trustees (1860), 6 Jur. N. S. 979.

**1260. Right to sue in other party's name.]—**An arbitrator, who had authority to decide on what terms a partnership agreement should be cancelled, directed (*inter alia*) that the agreement should be cancelled, & that one of the partners should have all the debts due to the firm, & should, if necessary, sue for them in the name of his late partner:—*Held*: in authorising one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority.—*BURTON (BURT) v. WIGLEY (WIGMORE)* (1835), 1 Bing. N. C. 665; 1 Scott, 610; 1 Hodg. 81; 4 L. J. C. P. 176; 131 E. R. 1273.

**1261. —.**—An action of trespass to houses & lands was referred to an arbitrator, who was to settle at what price & on what terms deft. should purchase pltf.'s "property." The order of reference gave the arbitrator no power to determine what the property in question was, nor was there any dispute on the subject. The arbitrator fixed a certain sum as the price at which deft. should "purchase pltf.'s property," & awarded that deft. might use pltf.'s name to enforce certain rights & remedies:—*Held*: the award was not bad, on the ground of an excess of authority in respect of the use of pltf.'s name.—*ROUND v. HATTON* (1842), 10 M. & W. 660; 2 Dowl. N. S. 446; 12 L. J. Ex. 7; 152 E. R. 636.

**1262. Shares—Dispute as to—Award of sum of money.]—**A declaration stated that a difference existed between pltf. & deft. concerning shares bought by pltf. for deft. at his request, & for which pltf. had paid £122; that they submitted themselves to the award of W. & P. concerning the difference; that deft. promised to fulfil the award; that W. & P. made their award concerning the difference, & decided in favour of pltf., & found that £50 which had been deposited by deft. with pltf. was in part payment of the shares, & "by their award," they "requested" deft. to pay the balance of the account:—*Held*: it sufficiently appeared that the arbitrators had authority to make the award, & to award a specific sum of money, although the nature of the difference was not stated. *Qu.*: whether the allegation that they awarded that deft. should pay the "balance" would have been good, if it had been pointed out on special demurrer that no specific sum was awarded.—*SMITH v. HARTLEY* (1851), 10 C. B. 800; 2 L. M. & P. 304; 20 L. J. C. P. 169; 15 Jur. 755; 138 E. R. 317; subsequent proceedings, 11 C. B. 678.

**Strangers—Awards for payment to.]—***See* Nos. 1189—1197, 1212, *ante*.

**—Awards affecting rights & interests of.]—***See* Nos. 1198—1211, 1213, 1214, *ante*.

**1263. Stet processus—Arbitrator without power over.]—**If a cause is referred to an arbitrator, the costs to abide the legal event, it is an excess of authority to award a *stet processus*. An arbitrator can only award a *stet processus* when he has power over the costs.—*HUNT v. HUNT* (1836), 5 Dowl. 442; Will. Woll. & Dav. 62; 1 Jur. 135.

**Annotations:—***Consd.* *Rennie v. Mills* (1839), 7 Scott, 276;

**1265. Trespass—Award as to discharge of mortgage.]—**Deft. sold land to L., & took a mtge. for part of the purchase-money. L. conveyed to pltf. subject to the mtge. Deft. still owned adjoining land, & disputes as to the boundary having arisen, pltf. brought trespass,

which, with all matters in difference, was referred. The arbitrator awarded for pltf., & directed that deft. should discharge the mtge.:—*Held*: beyond his authority.—*STEWART v. BROWN* (1857), 2 P. R. 158.—**CAN.**

*Re* *Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483. *Reid.* *Fenton v. Dines* (1840), 4 Jur. 554; *Arthur v. Owen* (1841), 5 Jur. 340.

**1264. Surrender—Of arbitration bonds.]—**Arbitrators cannot direct the surrender of the arbn. bonds.—*DOYLEY v. BURTON* (1700), 1 Ld. Raym. 533; 91 E. R. 1256.

**1265. Trespass—Award as to repairs.]—**By an agreement of reference, reciting (among other matters of dispute) that there was a controversy between B. & D. respecting the property in a certain pump, & the right to use it, & also respecting the alleged removal by D. of a boundary hedge between his lands & those of B., & that B. had commenced an action against D. for alleged trespasses upon the pump & hedge, the cause & all matters in difference were referred to an arbitrator, who was empowered to award how & by whom the pump & hedge, & the ditch adjoining the hedge, should in future be enjoyed & occupied, " & who should have the care & management thereof." The arbitrator awarded that B. was entitled to the pump as his sole & exclusive property, except that D. was entitled to the free use of water from it, in common with B. In a subsequent part of the award he directed that the pump should, in future, be considered as belonging jointly to B. & D., & be repaired at their joint expense. He further awarded that the hedge should be kept in repair by D., who should be at liberty to use the mud of the ditch for repairing the hedge bank, but not otherwise, & that, subject to such privilege, the ditch should be considered as the property of B.:—*Held*: the directions as to repairs were not an excess of the arbitrator's authority.

The words "care & management" in the agreement of reference warrant such a direction as this (*LORD DENMAN, C.J.*)—*BOODLE v. DAVIES* (1835), 3 Ad. & El. 200; 1 Har. & W. 420; 4 Nev. & M. K. B. 788; 111 E. R. 389.

**Annotations:—***Consd.* *Staples v. Hay* (1843), 1 Fow. & L. 711. *Distd.* *Matlock Gas Light Co. v. Peters* (1856), 6 E. & B. 215. *Consd.* *Re Marsack & Webber* (1860), 2 E. & B. 637; *Stevens v. Chapman* (1871), L. R. 6 Exch. 213. *Reid.* *Allenby v. Proudlock* (1835), 4 Dowl. 54; *Yates v. Knight* (1835), 2 Scott, 470; *Jones v. Powell* (1838), 6 Dowl. 483; *Gray v. Leaf* (1840), 8 Dowl. 654; *Dunn v. Warlters* (1842), 9 M. & W. 293; *Dunhill v. Moore* (1867), 17 L. T. 148.

**1266. Use of stream—Award regulating future use.]—**An arbitrator, in regulating the future use of a stream of water, the right to which was divided between the parties, interfered with the customary enjoyment by one of them of another stream, which exclusively belonged to him, & was not a matter in difference, & which joined the first:—*Held*: he had a power to do so, incidental to, & resulting from his former direct & larger power. *Qu.*: whether, if an arbitrator, after regulating on the subject-matter referred to him in its present state, goes on & regulates prospectively on the same subject-matter reduced to a different state, & thereby in some degree altered, that be a proceeding beyond his authority.—*WINTER v. LETHBRIDGE* (1824), 13 Price, 533; *M'Cle.* 253; 147 E. R. 1074.

**Annotation** —*Consd.* *Stonehewer v. Farrer* (1845), 6 Q. B. 730.

**Verdict—Power to enter or set aside.]—***See* Nos. 1215—1224, *ante*.

**r. Will—Construction of.]—**Where questions of law as to the construction of a will are submitted to arbitrators they cannot add to or alter the terms of the will.—*SODAMINI GHOSH v. GOPAL CHANDRA GHOSH* (1914), 19 C. W. N. 948.—**IND.**



## PART IV.—THE AWARD.

### SUB-SECT. 3.—MUST BE FINAL, CERTAIN AND CONSISTENT.

#### A. In General.

**1267. General rule.]**—Award held ill for uncertainty, & not being final or mutual.—*TIPPING v. SMITH* (1735), 2 Stra. 1024; 93 E. R. 1010.

**1268. —.]**—An award which leaves in doubt whether some of the questions have been decided cannot be enforced.—*WAKEFIELD v. LLANELLY RY. & DOCK CO.* (1865), 3 De G. J. & Sm. 11; 12 L. T. 509; 11 Jur. N. S. 456; 13 W. R. 823; 46 E. R. 542, L.JJ.

**1269. Award as final as circumstances admit.]**—An award by an umpire that pltf. should enter into a covenant with deft. to save him harmless from the costs & damages of a *qui tam* action, & that thereupon mutual releases of all former matters in difference should be executed:—*Held*: good, being as final & certain as the matters in difference could bear, & although it did not of itself put a final end to the matter.—*PHILLIPS (PHILIPS) v. KNIGHTLEY* (1731), Fitz-G. 167, 752; 1 Barn. K. B. 84, 151, 387, 457, 463; 2 Stra. 903; 94 E. R. 703, 752.

*Annotations:—Expld.* *Rowe v. Young* (1820), 2 Hll. 391, H. L. *Folld.* *Brown v. Watson* (1839), 6 Bing. N. C. 118; *Re Goddard & Mansfield* (1850), 1 L. M. & P. 25. *Refd.* *Burton v. Wigley* (1835), 1 Bing. N. C. 665.

**1270. —.]**—An arbitrator, appointed under Mines & Minerals Consolidation Act (R. N. S. (5th series), c. 7), s. 19, on behalf of a landowner to estimate damages to be paid to him by lessees from the Crown of gold mines under the stat., gave the landowner a fixed sum as estimated damages for all works or occupation necessary to or required by the mining lessees:—*Held*: having regard to the subject-matter & scope of the above Act, the award was not bad for uncertainty.—*PALGRAVE GOLD MINING CO. v. McMILLAN*, [1892] A. C. 460; 61 L. J. P. C. 85; 67 L. T. 425, P. C.

**1271. Award with recommendation as to comparison of documents.]**—Two parties agreed to be bound by the opinion of a professional man upon the construction of an Act of Parliament, who gave his opinion in favour of one:—*Held*: such opinion was final & conclusive, though it recommended the printed Act to be compared with the Parliament-Roll before the matter was settled, under a doubt whether the Act was not misprinted.—*PRICE v. HOLLIS* (1813), 1 M. & S. 105; 105 E. R. 40.

*Annotations:—Mentd.* *Cramp v. Symons* (1822), 1 Bing. 104; *Sybray v. White* (1836), 1 M. & W. 435.

**1272. No precise form of words necessary—Must be decision, not suggestion.]**—No precise form of words is necessary to constitute an award; it is sufficient if the arbitrator express by it a decision

upon the matter submitted to him. But where an arbitrator, to whom a dispute between an architect & his clerk, respecting a claim by the latter to wages, was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not show experience or ability to the extent to justify a demand for remuneration in the circumstances, but in consideration of the clerk's services out of the office on some occasions, & to meet the case in a liberal manner, he proposed that the architect should pay the clerk £10:—*Held*: the latter part of the letter was a mere suggestion of the arbitrator, & not a decided opinion that the clerk was or was not entitled to recover £10, & was not a good award.—*LOCK v. VULLIAMY* (1833), 5 B. & Ad. 600; 2 Nev. & M. K. B. 336; 110 E. R. 912.

*Annotation:—Expld. & Distd.* *Smith v. Hartley* (1851), 2 L. M. & P. 304.

**1273. Request.]**—*Held*: a "request made in an award was equivalent to a direction to pay.—*SMITH v. HARTLEY* (1851), 10 C. B. 800; 2 L. M. & P. 304; 20 L. J. C. P. 169; 15 Jur. 755; 138 E. R. 317; subsequent proceedings, 11 C. B. 678.

**1274. — "Paying."]**—An award "that one shall keep & enjoy the goods, paying so much money to the other," is good, for it should be taken according to the intent, which was clearly that money should be paid.—*STILES v. TRISTE* (1661), 1 Sid. 54; 82 E. R. 965.

*Annotation:—Expld.* *Hopkins v. Davies* (1835), 1 Cr. M. & R. 846.

**1275. All matters decided by necessary inference.]**—A finding by an arbitrator, leading by necessary inference to the decision of the issues in the cause, is sufficient, though there be no express direction for which party one of the issues shall be entered.—*AVELETT v. GODDARD* (1843), 11 L. J. C. P. 123.

*Annotation:—Mentd.* *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483.

#### B. As to the Party who is to Perform.

**1276. Award that A. or B. should perform.]**—An award that A. or B. shall do a certain act is bad, for uncertainty.—*LAWRENCE v. HODGSON* (1826), 1 Y. & J. 16; 148 E. R. 568; subsequent proceedings (1827), 1 Y. & J. 368.

*Annotation:—Mentd.* *Doe d. Taylor v. Crisp* (1839), 2 Will. Woll. & H. 117.

**1277. Award that money be paid by some or one of several named parties.]**—An award for the payment of money directed that it should be paid by some or one of several named persons on demand:—*Held*: the award was bad, for un-

### PART IV. SECT. 8, SUB-SECT. 3.—A.

**1267 i. General rule.]**—An award ought to be precise & certain upon the matter or principle submitted to the arbitrators.—*LA COMPAGNIE DE CHEMIN DE FER DU NORD v. BEAUDET* (1885), 11 Q. L. R. 239.—CAN.

**1267 ii. —.]**—Where an award is uncertain & indefinite in its terms, it is not capable of enforcement by the ct.—*Re MITCHELL & MITCHELL* (1910), 14 W. L. R. 701.—CAN.

**1272 i. No precise form of words necessary.]**—In an award certainly to a common intent is sufficient.—*MILNER v. BRYDGES* (1876), 2 P. & B. 87.—CAN.

### PART IV. SECT. 8, SUB-SECT. 3.—B.

**s. Award against firm without specifying partners thereof.]**—An award made against a firm, without ascer-

taining as to who are the persons who constitute it, is, on the face of it, bad.—*HURDWARY MULL v. AHMED MUSAJI SELAJI* (1908), 13 C. W. N. 63.—IND.

**t. Payer not specified.]**—A submission stated that the costs of preparing & executing the reference & a duplicate thereof should be in the discretion of the arbitrators. The ct. set aside the award, on the ground that the arbitrators had not determined by whom the costs of preparing & executing the reference should be paid.—*Re WARBY v. ROSE* (1865), 4 N. S. W. S. C. R. 302.—AUS.

**u. —.]**—Where a parol submission refers to arbitrators the cost of the reference, an award which does not expressly or impliedly determine by whom the costs are to be paid is bad for want of finality.—*ROULSTONE v. ALLIANCE INSURANCE CO.* (1879), 13 L. T. 66.—IR.

### PART IV. SECT. 8, SUB-SECT. 3.—C.

**w. Joint submission.]**—Where several parties make a joint submission of their claims the award is final, though it does not distinguish the portion of money each party is to receive.—*McGILL v. PROUDFOOT* (1847), 4 U. C. R. 40.—CAN.

**x. Award of general releases — Grantee not specified.]**—Directions that a party should when requested execute a general release of all claims is not objectionable, for omitting to state to whom the release is to be made.—*Re BARRIE TOWN & NORTHERN RY. CO.* (1862), 22 U. C. R. 25.—CAN.

**y. Payees not specifically named.]**—An award was held bad, for uncertainty, in not stating the respective person to whom money should be paid.—*MITCHELL v. GREAT WESTERN RY. CO.* (1876), 38 U. C. R. 471.—CAN.



**Sect. 8.—Requisites of valid award: Sub-sect. 3, B. C. D. & E.]**

certainty, since it did not say by whom the money was to be paid.—**RAINFORTH v. HAMER** (1855), 25 L. T. O. S. 247.

*C. As to the Payee.*

**1278. Award to pay any of the parties of one part.]**—An arbitrament to pay to any of the parties of the one part is good.—**STONE v. KNIGHT** (1626), Noy, 93; Lat. 207; 74 E. R. 1059.

**1279. Award to pay A. or C., his attorney.]**—An award that debt. should pay pltf., or C., his attorney, such costs as pltf. was liable to pay of an action in the Peverel Ct., & costs of an action at common law, between pltf. & debt. & others:—**Held**: uncertain, & not final.—**FURNIS v. HALLOM** (1749), Barnes, 166; 94 E. R. 859.

**1280. Award not stating to whom costs were to be paid.]**—An arbitrator awarded that pltf. should pay costs, without directing to whom:—**Held**: if an action would lie on this award, no attachment would be granted on it.—**SCOTT v. WILLIAMS** (1835), 3 Dowl. 508; 5 Tyr. 506; *sub nom.* **HOPKINS v. DAVIES**, 1 Cr. M. & R. 846; 4 L. J. Ex. 113; 149 E. R. 1322.

**Annotation:—Refd.** *Re Seaward & Howey* (1838), 1 Will. Woll. & H. 410.

**1281. Award directing that money be accounted for & brought into trust accounts.]**—An arbitrator awarded that a sum which he found due from one party should "be forthwith paid & accounted for by him & brought into the trust accounts":—**Held**: this was too uncertain, & fatal to the award.—**Re TIDSWELL** (1863), 33 Beav. 213; 3 New Rep. 281; 55 E. R. 349.

*D. As to Time and Mode of Performance.*

**1282. No time mentioned.]**—A. & B. bound themselves to stand by the award of C. The award made no statement of any time for payment of the sum awarded. The award was made on May 1, & tender was made on Oct. 6:—**Held**: this was a breach of the award, as, though an arbitrament was good although no time was mentioned, yet payment or tender ought to be a convenient time after the award, & five months was not a convenient time.—**ANON.** (1481), Jenk. 136; 145 E. R. 95.

**1283. — No penalty.]**—An award to deliver up a certain writing obligatory, without specifying the

date or penalty, is void, for uncertainty.—**BEDAM v. CLERKSON** (1696), 1 Ld. Raym. 123; 91 E. R. 970.

**1284. — Or mode of payment.]**—Where an arbitrator only found that debt. was indebted to pltf. in a certain sum, but did not order any time or mode of payment, the ct. refused to proceed summarily against debt. by granting an attachment.—**EDGEELL v. DALLIMORE** (1826), 3 Bing. 634; 11 Moore, C. P. 541; 4 L. J. O. S. C. P. 193; 130 E. R. 658.

**Annotations:—Distd.** *Cartwright v. Blackworth* (1832), 1 Dowl. 489. **Folld.** *Hopkins v. Davies* (1835), 1 Cr. M. & R. 846; *Re Seaward & Howey* (1838), 1 Will. Woll. & H. 410. **Distd.** *Rowen v. Bowen* (1862), 31 L. J. Q. B. 193. **Refd.** *Lindsay v. Direct London & Portsmouth Ry. Co.* (1850), 19 L. J. Q. B. 417.

**1285. Time limited a datu arbitrii—Award not dated.]**—An award which directs the performance of an act within a limited time a *datu arbitrii* is good, though it is not dated.—**ARMITT (ARMOTE, ARNOTE) v. BREAME (BREAM)** (1704), Holt, K. B. 212; 2 Ld. Raym. 1076; 1 Salk. 76; 6 Mod. Rep. 244; 92 E. R. 213.

**Annotation:—Refd.** *Styles v. Wardle* (1825), 4 B. & C. 908.

**Whether direction as to time of payment is within submission.]—See Nos. 1249—1253, ante.**

**1286. Uncertainty as to mode of performance—Kind of security to be given not named.]**—An award that one shall have certain trees, & that the other shall give security for such a sum, without naming the kind of security, is void for uncertainty.—**THINNE v. RIGBY** (1612), Cro. Jac. 314; Jenk. 340; 79 E. R. 269, Ex. Ch.

**Annotations:—Folld.** *Nott v. Long* (1735), Lee temp. Hard. 181. **Distd.** *Simmonds v. Swaine* (1809), 1 Taunt. 549.

**1287. — "As heretofore."]**—When an arbitrator awards damages for an injury caused by debt. to pltf.'s property, by acts done in the adjacent property of the former, & then, having power to direct the mode of enjoying the property for the future, he awards that the parties shall respectively enjoy it as heretofore, the award is not final, & is bad.—**ROSS v. CLIFTON** (1841), 9 Dowl. 357; Woll. 107; 5 Jur. 268.

**Annotation:—Refd.** *Grenfell v. Edgcome* (1845), 7 Q. B.

**1288. — "The ordinary & most approved process."]**—Where an action for polluting the water of a watercourse was referred to an arbitrator, with power to him to regulate the enjoyment of the water:—**Held**: an award directing a verdict to be entered for pltf., & that debt. should at all times take all proper & reasonable precau-

**PART IV. SECT. 8, SUB-SECT. 3.—D.**

**1282 i. No time mentioned.]**—Where an award fixes no day for payment, a party suing on it is not, as of right, entitled to interest.—**BENTLEY v. WEST** (1847), 4 U. C. R. 98.—**CAN.**

**1282 ii. —.]**—Pltf. & debt., having disputed as to the drainage of surface water, referred the question to fence-viewers, who awarded that each should open a ditch as therein specified, "the ditch to be made before Oct. 1, 1865":—**Semle**: the award was not bad, for omitting to specify the time within which each party was to perform his share of the work, for the time mentioned applied to both.—**DAWSON v. MURRAY** (1869), 29 U. C. R. 464.—**CAN.**

**1282 iii. — Payable "quarterly."]**—An amount of £500 awarded to be paid by quarterly instalments is stated with sufficient certainty.—**WATSON v. SUTHERLAND** (1844), 1 U. C. R. 229.—**CAN.**

**1282 iv. — Date clearly inferred.]**—A submission gave the arbitrators or their umpire power to order what they or he should think fit to be done by either of

the parties. By his award the umpire found that A. should lease to B. certain premises. On a motion by A. to set aside the award:—**Held**: the award was not uncertain, for, by reference to the agreement referred to in the award, the proper inference was that the lease was to begin on the day specified in the agreement.—**JOPLING v. JOPLING** (1909), 8 C. L. R. 33.—**AUS.**

**1286 i. Uncertainty as to mode of performance—Kind of conveyances not specified.]**—Where arbitrators had power to award upon conveyances to be made between the parties, etc.:—**Held**: an award directing "all necessary deeds for granting," etc., "& for securing payment of the rent to be executed," without saying what kind of conveyances, was bad.—**BEATTY v. MCINTOSH** (1848), 4 U. C. R. 259.—**CAN.**

**1286 ii. —.]**—A deed of submission gave the arbitrators or their umpire power to order what they or he should think fit to be done by either of the parties. By his award the umpire ordered that A. should specifically perform his part of the agreement & should forthwith execute all deeds & documents

necessary to effectuate certain other matters awarded. On a motion by A. to set aside the award:—**Held**: it was not necessary that the deeds & documents directed to be executed should be further specified.—**JOPLING v. JOPLING** (1909), 8 C. L. R. 33.—**AUS.**

**1286 iii. — "To be secured by such good security as may be requisite."]**—Two partners having dissolved partnership, referred all disputes to three persons named. The award directed a certain sum to be paid by debt. to pltf., & then added that same was "to be secured by such good security as may be requisite to save pltf. harmless":—**Held**:—sufficiently final.—**MCLEAN v. KEZAR** (1853), 3 C. P. 444.—**CAN.**

**1287 i. — "Same use as formerly."]**—An award respecting differences between pltf. & debts., as to the diversion of a watercourse by debts., directed that debts. should turn the stream so that pltf. should have the same use of the water as he formerly had for the period of five years from the award, & that pltf. should pay debts. 5s. a year during that period:—**Held**: uncertain, & not final or conclusive.—**BOWEN v. SAMIS** (1856), 2 P. R. 76.—**CAN.**

tions for preventing the water from being rendered unfit for pltf.'s use, &, in particular, should use a process of filtering mentioned in the award, was bad, for uncertainty.

The direction as to the particular process was that the water passing from deft.'s to pltf.'s premises should be passed through filtering lodges made or to be made by deft., so as to be thereby purified & cleansed for pltf.'s use, "so far as same can be purified & cleansed by the ordinary & most approved process of filtering as aforesaid":—*Held*: the description, by reference only to the "ordinary & most approved process," was uncertain, & the award bad.—*STONEHEWER v. FARRAR* (1845), 6 Q. B. 730; 1 New Pract. Cas. 154; 14 L. J. Q. B. 122; 9 Jur. 203; 115 E. R. 275.

*Annotations*:—*Distd.* *Hobson v. Stewart* (1847), 2 New Pract. Cas. 64. *Apld.* *Baker v. Cotterill* (1849), 18 L. J. Q. B. 345; *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483. *Dbtd.* *Johnson v. Latham* (1851), 20 L. J. Q. B. 236. *Apld.* *Re Tidswell* (1863), 3 New Rep. 281. *Mentd.* *Nicholls v. Jones* (1851), 6 Exch. 373.

**1289. Or thereabouts.**—An action of ejectment was referred to the award of C., who awarded (*inter alia*) that deft. should "pull or take down the wall he had erected upon the land of the lessors, or so much thereof as now stands four inches & a half, or thereabouts, upon the land of the lessors":—*Held*: the above direction was sufficiently certain, deft. not having shown that he was misled by it.—*MAYS v. CANNELL* (1854), 15 C. B. 107; 24 L. J. C. P. 41; 1 Jur. N. S. 183; 3 W. R. 138; 3 C. L. R. 218; 139 E. R. 360.

**1290. "Same form & dimensions which yard had previously."**—An order of reference gave power to the arbitrator to direct how a yard should be used for the future, & the arbitrator, by his award, ordered deft. to pull down certain encroachments, & to restore the area of the yard to the same form & dimensions which it clearly appeared, by the evidence, to have had when deft.'s tenancy began:—*Held*: the award was bad, for uncertainty.—*KENDAL v. SYMONDS* (1855), 3 C. L. R. 322.

**1291. Failure to direct conveyances—Partition.**—Several tenants in common, wishing to make partition of their land, covenanted by deed to pay their respective shares of the survey & allotments, & to abide by the award of certain arbitrators as to the allotments. The arbitrators allotted the whole in severalty, but did not direct any deeds of conveyance to be executed to vest the allotments in the respective owners:—*Held*: for this defect the award was bad, & no action could be maintained on the covenant for not performing the award, though the covenantors were respectively liable on the covenant for non-payment of the expense of the survey, etc.—*JOHNSON v. WILSON* (1740), Willes, 248; 125 E. R. 1156.

*Annotations*:—*Distd.* *Willoughby v. Willoughby* (1843), 4 Q. B. 687; *Walker v. Walker* (1844), 3 L. T. O. S. 126.

**1292. — Release.**—Two causes, & all matters in difference, had been referred to an arbitrator, who had awarded in favour of pltf., & directed certain lands to be released. The ct. refused to set aside the award, on the ground that the arbitrator had not directed a conveyance of the land.—*WALKER v. WALKER* (1844), 3 L. T. O. S. 126.

#### PART IV. SECT. 8, SUB-SECT. 3.—E

**a. Award of sum equal to costs after taxation.**—An action for the recovery of various bills of costs having been referred to arbitrators, they assessed the damages at a certain sum, with a direction that the bills of costs in question should be referred to the proper officer for taxation, & that the damages so assessed by them should be reduced to the amount of the bills of costs when

taxed:—*Held*: this award was sufficient, being both certain & final.—*GOWER v. DONOVAN* (1838), 1 Jebb. & S. 364.—*IR.*

**b. Award subject to deduction of unascertained but ascertainable sum.**—If a sum less by another sum unascertained be awarded, & it appear that this unascertained sum is included among items of a debtor & creditor account, made by the arbitrators in the award, on foot of

**1293. No order for payment.**—Upon reference to a surveyor of a cause & all matters in difference, an award that deft. had overpaid pltf. £34:—*Held*: not sufficient, by reason of uncertainty on its face, to entitle pltf. to enforce the award by attachment.—*THORNTON v. HORNBLY* (1831), Bing. 13; 1 Dowl. 237; 1 Moo. & S. 48; 1 L. J. C. P. 6; 131 E. R. 304.

*Annotations*:—*Distd.* *Re Gillon & Mersey & Clyde Navigation Co.* (1832), 3 B. & Ad. 493. *Refd.* *Paul v. Paul* (1834), 2 Dowl. 340; *Eardley v. Steer* (1835), 4 Dowl. 423.

**1294.—S. P.** *EDGEILL v. DALLIMORE* (1826), 3 Bing. 634; 11 Moore, C. P. 541; 4 L. J. O. S. C. P. 193; 130 E. R. 658.

*Annotations*:—*Distd.* *Cartwright v. Blackworth* (1832), 1 Dowl. 489. *Folld.* *Hopkins v. Davies* (1835), 1 Cr. M. & R. 846; *Re Seaward & Howey* (1838), 1 Will. Woll. & H. 410. *Distd.* *Bowen v. Bowen* (1862), 31 L. J. Q. B. 193. *Refd.* *Lindsay v. Direct London & Portsmouth Ry. Co.* (1850), 19 L. J. Q. B. 417.

**1295. —**—A cause & all matters in difference were referred, by rule of ct., to an arbitrator, who awarded that a particular balance was due from pltf. to deft., but did not order the money to be paid by pltf.:—*Held*: if an action would lie on this award, no attachment could be granted on it as for disobedience of the rule of ct.—*HOPKINS v. DAVIES* (1835), 1 Cr. M. & R. 846; 4 L. J. Ex. 113; 149 E. R. 1322; *sub nom.* *SCOTT v. WILLIAMS*, 3 Dowl. 508; 5 Tyr. 506.

*Annotation*:—*Consd.* *Re Seaward & Howey* (1838), 1 Will. Woll. & H. 410.

**1296. —**—The ct. refused to grant an attachment upon an award, which found a debt, but contained no order to pay it.—*Re SEAWARD & HOWEY* (1838), 1 Will. Woll. & H. 410; *sub nom.* *SEWARD v. HOWEY*, 3 Jur. 9.

**1297. —**—An action of debt, in which, as to £25, deft. had suffered judgment by default, but, as to the residue, had pleaded payment & set-off, was referred to arbn., & the arbitrator found that deft. was indebted to pltf. in £20 beyond the £25. In an action on the award, the award was objected to, on the ground that it contained no order to pay:—*Held*: there was nothing in the objection.—*BURLINGTON v. RICHARDSON* (1852), 19 L. T. O. S. 89.

**1298. Award directing executor to pay out of assets—No finding that he had assets.**—Where, by a judge's order, a cause & all matters in difference between testator of an exor. & deft. were referred to arbn., & the arbitrator awarded that a certain sum was due to deft. upon the balance of accounts, & directed the exor. to pay the money out of assets on a given day, without determining whether in point of fact the exor. had assets to pay the money on the day appointed:—*Held*: the award was not void for uncertainty, for the balance due was fixed with certainty, & the direction to pay out of assets did not necessarily conclude the question of assets.—*LOVE v. HONEYBOURNE* (1824), 4 Dow. & Ry. K. B. 814.

#### E. As to the Amount Payable or Subject-matter.

**1299. Award fixing rule for calculating amount.**—An award fixing the rule for calculating the amount of money to be paid, without stating the result of such calculation, is sufficiently certain.—*HIGGINS v. WILLES* (1828), 3 Man. & Ry. K. B. 382.

which a balance is struck, the award will be held final.—*WILSON v. DOOLAN* (1853), 5 Ir. Jur. 135.—*IR.*

**c. Award of all debts due by partnership.**—An award directing that A. should pay all debts due by a partnership is sufficiently certain without determining the amount.—*MCLEAN v. KEZAR* (1853), 3 C. P. 444.—*CAN.*

**d. Award of sum per acre—Acreage not specified nor in dispute.**—An



**Sect. 8.—Requisites of valid award: Sub-sect. 3, E.]**

**1300. Award directing bond for unnamed sum.]—**An award that debt. shall enter into a bond, without naming what sum, is void, for uncertainty.—**SAMON v. PITT** (1595), Cro. Eliz. 432; 78 E. R. 672; *sub nom.* **SAMON'S CASE**, 5 Co. Rep. 77b.

*Annotations:—***Distd.** **Simmonds v. Swaine** (1809), 1 Taunt. 549. **Refd.** **Thinne v. Rigby** (1612), Cro. Jac. 314, Ex. Ch.; **Grove v. Crane** (1621), Palm. 145; **Candler v. Fuller** (1738), Willes, 62. **Mentd.** **Bird v. Bird** (1703), 1 Salk. 74; **Armitt v. Breame** (1704), 1 Salk. 76.

**1301. Award to pay so much as within party's conscience.]—**By an award it was directed that one of the parties should pay so much money to the other as should be due in conscience:—**Held**: the award was neither certain nor final.—**WATSON v. WATSON** (1648), Sty. 28, 56; 82 E. R. 504, 526.

**1302. Award to pay arrears—No amount or period specified.]—**An award directed that debt. should pay the arrears of rent due after the purchase of lands, but did not show what these arrears were, nor did debt. know when the purchase was made:—**Held**: bad, as uncertain & unreasonable.—**MASSEY v. AUBRY** (1652), Sty. 365; 82 E. R. 781.

**1303. Award of money due for task-work—No amount specified—Award inseverable.]—**An award that A. should be paid by B. money due for task-work, & then A. should pay £25 to B. & that the parties should give each other a general release, is void in the whole, for the uncertainty what sum should be paid for task-work.—**POPE v. BRETT** (1671), 2 Saund. 292; 85 E. R. 1083.

*Annotation:—***Folld.** **Phillips v. Knightly** (1730), Fitz-G. 270.

**1304. Award to pay costs of depending suit.]—**An award that the party shall pay the costs of a suit depending in an inferior ct. is void, for uncertainty.—**WINTER v. GARLICK** (1704), 6 Mod. Rep. 195; 1 Salk. 75; 87 E. R. 951.

*Annotations:—***Expld.** **Nott v. Long** (1735), Lee temp. Hard. 181. **Mentd.** **Phillips v. Knightley** (1731), 1 Barn. K. B. 463.

**1305. Award directing unstated amount of assets to be divided in named proportion when received.]—**On a reference of disputes between parties, the arbitrators awarded that the debts due to the firm, when received, should be divided in moieties between the parties:—**Held**: sufficiently final.—**LINGOOD v. EADE** (1742), 2 Atk. 501; 26 E. R. 702.

**1306. Award to pay such costs as party liable to pay in certain actions.]—**An award that debt. should pay pltf., or C., his attorney, such costs as pltf. was liable to pay of an action in the Peverel Ct., & costs of an action at common law, between pltf. & debt. & others:—**Held**: uncertain, & not final.—**FURNIS v. HALLOM** (1749), Barnes, 166; 94 E. R. 859.

**1307. Award that two persons pay ascertained sum in ascertainable proportions.]—**An award that two persons shall pay a debt in proportion to the shares which they held in a certain ship, the ratio of their shares not being a subject of dispute, is sufficiently certain.—**WOHLENBERG v. LAGEMAN** (1815), 6 Taunt. 251; 128 E. R. 1031.

*Annotations:—***Mentd.** *Re* **Smith & Reeves** (1836), 2 Har. & W. 306; *Re* **Dodgington & Bailward** (1839), 5 Bing. N. C.

award directed that pltf. should pay debts. for a certain amount of wheat in certain specified grounds at a specified rate per acre. It appeared that the land had been leased by pltf. to debts.:—**Held**: the award sufficiently disposed of the matters referred, & it was

unnecessary to specify the number of acres of wheat, the quantity not appearing to have been in dispute, but the price.—*Re* **MONTGOMERY & MOORE** (1856), 2 P. R. 98.—**CAN.**

f. Award not specifying respective

**1308. Award stating deduction to be made from admitted sum.]—**The declaration stated that pltf. & debt., by articles of agreement (reciting that several actions, arising out of the same transactions, had been brought, & defended by pltf., debt., G. & D., & that in one of them the assignees of T., a bkpt., recovered against pltf. £2,500, & that disputes existed between pltf. & debt. respecting the value of the goods & stock which each had received from a certain farm, & also concerning the proportion which each was to pay of the sum of £2,500, according to an agreement entered into between them before the trial, & also concerning the costs of bringing & defending the actions above-mentioned), submitted themselves to the award of three arbitrators respecting the matters; & that the arbitrators, taking the matters into consideration, awarded that debt. should pay pltf. £444, that five-eighth parts of the costs of the several actions before-mentioned should be paid by pltf., & three-eighths by debt., that the sums already expended by either of them should be allowed as part payment of his proportion, & that, when the sum of £444 & the costs were paid, mutual releases should be given:—**Held**: pltf. was entitled to recover, for, as to the first part of the award, nothing appeared on the declaration to show that the arbitrators had not awarded the sum of £444, after taking into consideration the value of the stock & goods, & it was sufficiently certain, for pltf., being originally liable to pay the whole sum of £2,500, must remain liable to pay all but the £444 awarded to him.—**AITCHESON v. CARGEY** (1824), 2 Bing. 199; M'Cle. 367; 13 Price, 639; 9 Moore, C. P. 381; 130 E. R. 282, Ex. Ch.

*Annotations:—***Apld.** **Plummer v. Lee** (1837), 2 M. & W. 495. **Folld.** **Kendrick v. Davies** (1837), 5 Dowl. 693. **Expld.** **Perry v. Mitchell** (1844), 12 M. & W. 792. **Refd.** **Stone v. Phillips** (1837), 4 Bing. N. C. 37; **Harrison v. Lay** (1863), 13 C. B. N. S. 528. **Mentd.** *Re* **Marshall & Dresser** (1842), 3 Q. B. 878; **Mays v. Cannell** (1854), 15 C. B. 107.

**1309. Award of sum subject to variation—Where variation constant.]—**An award by arbitrators named to fix the value of an estate is not uncertain, by reason of its allowing an augmentation or diminution in the sum fixed, even where the submission to arbn. gave minute directions for the course to be pursued by the arbitrator, as the price, according as the land shall, upon admeasurement, exceed or fall short of a given quantity.

But if the augmentation or diminution in the price is to be at the rate of so much per acre, if the error as to quantity shall be in one part of the estate, & at a different rate per acre, if the error shall be in another part of the estate, & the award does not express the estimated quantity of either of these parts taken separately, then the award is void for uncertainty.—**HOPCRAFT v. HICKMAN** (1824), 2 Sim. & St. 130; 3 L. J. O. S. Ch. 43; 57 E. R. 295.

**1310. Award of two named sums to same party—Action on single covenant.]—**To a breach of covenant for non-payment of an instalment due for certain work, debt. pleaded (1) the work had not been completed; (2) the instalments had been paid. An arbitrator, to whom the cause was referred, awarded a verdict to be entered for pltf. on the first issue, damages 1s., & on the second, damages 13s. 4d.:—**Held**: sufficiently certain, & it was not necessary to award a single sum upon

sums payable by each party.]—An award was held bad, for uncertainty, in not stating the respective sums of money which should be paid.—**MITCHELL v. GREAT WESTERN RY. CO.** (1876), 38 U. C. R. 471.—**CAN.**



the entire breach.—*SMITH v. FESTINIOG RY. Co.* (1837), 4 Bing. N. C. 23; 3 Hodg. 305; 5 Scott, 255; 1 Jur. 844; 132 E. R. 697.

**1311. Award of sum certain to be paid by each party to the other.]**—To an action for goods sold & delivered deft. pleaded, as to £30 parcel, etc., payment of £30 in satisfaction. Pltf. replied that the £30 was paid for another & different cause of action, specially traversing the acceptance of it in satisfaction of that sum in the declaration mentioned. The cause was referred, & upon this issue the arbitrator found for deft. for £3, & for pltf. as to the residue:—*Held*: the award was sufficiently certain, & the finding in effect assessed the damages at £27.—*KING v. DUNDONALD (EARL)* (1837), 5 Dowl. 589; Murp. & H. 74.

**1312. Award of interest from date not in dispute.]**—An award directed interest to be paid from the last settlement that took place in the lifetime of T. An action having been brought upon the award, & it appearing that the date of that last settlement was not in dispute, the ct. afterwards refused to disturb a verdict given for pltf., the award not being necessarily uncertain. *Qu.*: whether under a plea that “the arbitrator did not make any award,” deft. could avail himself of the objection of uncertainty to defeat the award.—*PLUMMER v. LEE (LEIGH)* (1837), 2 M. & W. 495; 5 Dowl. 755; 150 E. R. 853; *sub nom.* *MURPHY v. LEIGH*, Murp. & H. 152; 6 L. J. Ex. 141; 1 Jur. 658.

*Annotations*:—*Mentd.* *Gwynne v. Burnell* (1840), 6 Bing. N. C. 453; *Negelen v. Mitchell* (1841), 7 M. & W. 612; *Gregory v. Brunswick* (1846), 3 C. B. 481; *Couling v. Cox* (1848), 6 C. B. 703; *Rutland v. Bagshaw* (1850), 14 Q. B. 869.

**Whether award of interest within submission.]**—*See Nos.* 1171—1177, *ante*.

**1313. Award of sum unascertainable from award itself.]**—By a deed of submission to arbn. between R. & J., it was recited that they had been partners, that J. had deposited with C. & Co., bankers, certain securities for such sums as they had advanced or might advance to J. as surety for R., that, R. being indebted to the bankers in £4,000, J. had mtgd. to them securities for a sum not exceeding £3,000, & that R. & J. had dissolved partnership, & had agreed to refer all matters in difference, etc. There was a proviso that, if the arbitrators should award any money to be paid by J. to R., they should, in their award, if the mtge. were still outstanding, authorise such payment to be made to the bankers in reduction of the mtge. debts, & should further award that R. should, at a time to be named by the arbitrators, pay in to the bankers such a sum as would be sufficient to entitle J. to have the mtge. discharged, & the securities deposited by him released. The arbitrators, by their award, found that £3,121 was due from J. to R., & the mtge. outstanding, & they ordered J. to pay the £3,121 on certain days, with liberty to him to pay it in to the bankers as above stated. They also awarded that, within one month from the payment of the £3,121, R. should pay in to the bankers such a sum as would be sufficient to entitle J. to have the mtge. discharged, & the securities deposited by him released. It did not appear by the award what that sum would be:—*Held*: the award was not final on this point, & was bad.—*HEWITT v. HEWITT* (1841), 1 Q. B. 110; 4 Per. & Dav. 598; 113 E. R. 1071.

**1314. Award for payment of sum based on “present market price” of iron.]**—Debt for goods sold, etc. Pleas, never indebted, payment & set-off. The cause & all matters in difference having

been referred, by order of *Nisi Prius*, the order directed that, if the arbitrator should find that pltf. were not entitled to recover, the verdict taken was to be void, & a verdict entered for deft. It was further agreed by the parties that, if the arbitrator should think that certain iron machinery supplied to deft. ought not to be charged for by pltf., deft. having alleged it to be defective, pltf. were to be allowed the value of it, at the market price of pig iron. The arbitrator awarded that pltf. were not entitled to recover, & that deft. should pay to pltf. for the machinery such sum “as the same amounts to, according to the present market price of pig iron”:—*Held*: the award was not uncertain in omitting to state the time & market at which the price of the iron was to be ascertained.—*WADDLE (WADDELL) v. DOWNMAN* (1844), 12 M. & W. 562; 1 Dow. & L. 560; 13 L. J. Ex. 115; 2 L. T. O. S. 350; 8 Jur. 933; 152 E. R. 1322.

*Annotations*:—*Distd.* *Kilburn v. Kilburn* (1845), 13 M. & W. 671. *Consd.* *Gordon v. Whitehouse* (1856), 18 C. B. 747.

**1315. Award falling to specify amounts not shown to be in dispute.]**—By submission, between pltf. & other persons (who were next of kin, & entitled to distributive shares of an intestate's estate) & deft., the administrator & also one of the next of kin, reciting (*inter alia*) that the estate of deceased consisted of debts due to him at his death, farm-stock, cattle, corn, corn in the ground, implements of husbandry, household goods, & furniture, & other effects, & that differences had arisen as to their value, which the parties had agreed to refer to arbn., the same parties agreed that all & every claim, demand, controversy, difference & dispute between the several parties thereto, concerning the matters & things before mentioned or in relation thereto, should be paid, settled, & adjusted according to the arbitrament of two persons named. By the award, after reciting the submission, the arbitrators found & awarded that deft., as administrator at the date of the submission, had moneys, farm-stock, cattle, corn, corn in the ground, implements of husbandry, household goods & furniture of the intestate, in his hands to be administered, to the value of £929, independently of any debts owing to the intestate, that deft. should retain £140 found to be owing to him from some of the parties, & £65 to pay the rent & taxes of certain tenements which were in the intestate's occupation at his death, that he should be entitled to set off £15 due to him from pltf. against his distributive share, & that he should, at a certain time & place, pay pltf. & the other parties their several distributive shares of the intestate's estate, first retaining his own share & the above-mentioned sums of money, & that they should, if required, execute releases to deft. In an action on the award:—*Held*: it was sufficiently final, although it did not expressly award as to the amount of the debts due to the estate, nor as to the amount of the distributive shares payable to pltf. & the other parties to the submission, it not being shown by plea that the amounts of the debts or distributive shares were matters in difference.—*PERRY v. MITCHELL* (1844), 12 M. & W. 792; 2 Dow. & L. 452; 14 L. J. Ex. 88; 152 E. R. 1419.

*Annotations*:—*Reid.* *Harrison v. Creswick* (1852), 16 Jur. 315, Ex. Ch. *Mentd.* *Simpson v. I. R. Comrs.* (1914), 110 L. T. 909.

**1316. Award of sum certain subject to unnamed amount of payments on account—Matter not in dispute.]**—An award for £3,000, minus certain payments on account, without finding what those payments were:—*Held*: sufficiently certain, unless

**1312 i. Award of interest at rate not fixed.]**—Where one of the matters in dispute is a claim for interest, & the award is bad for umpire in his finding awards interest but does not say at what rate, the award is bad for uncertainty.—*Re RIVERTON BOROUGH & NEW ZEALAND DREADNOUGHT GAS CO., LTD.* (1916), 35 N. Z. L. R. 601.—N.Z.

*Sect. 8.—Requisites of valid award: Sub-sect. 3, E. & F.]*

it were shown that the payments were matter of dispute.—*ABRAHAM & WESTMINSTER IMPROVEMENTS Co.* (1849), 14 L. T. O. S. 203.

**1317. Damages not specified.]—Trespass.** Plea, general issue, & justification; replication *de injuriâ*, & new assignment, upon which judgment by default. An arbitrator awarded a verdict for deft., without giving damages upon the new assignment:—*Held*: the award was not final & conclusive, by reason of no damages being awarded to pltf. on the new assignment.—*WYKES v. SHIPTON* (1834), 8 Ad. & El. 246, n.; 3 Nev. & M. K. B. 240; 3 L. J. K. B. 90; 112 E. R. 831.

**1318. —.]—**A cause in which there were seven issues was referred by order of *Nisi Prius*, the costs of the award & reference to abide the event. The arbitrator found for deft. on two of the issues, neither of which covered the whole cause of action, & for pltf. on the others, but omitted to award damages:—*Held*: the award was insufficient & must be set aside.—*WOOD v. DUNCAN* (1838), 7 Dowl. 91; 1 Horn & H. 338; 2 Jur. 969.

**1319. —.]—**An agreement of reference, between M. & D., recited a dispute relating to a transaction under which five bills of exchange were drawn upon & accepted by P.; & as to the nature & circumstances of, or attending, such transactions & bills, it was agreed that same, & all matters in question touching & concerning or in any wise relating thereto, should be referred to arbn. The arbitrator awarded that the bills, & all moneys thereby secured, were the property of M., & that the bills & moneys, & all proceeds thereof, should be delivered & paid to M., & that, in case D. should have received any part of the money secured by & mentioned in the bills, he should pay it to M. The award was silent as to damages. M. moved to set aside the award for giving no damages, on affidavit that at the hearing it was shown that the bills had been delivered to D., & it was understood that D. had received the whole amount from the acceptor, & no evidence was offered on that head on either side. The affidavits in answer denied such understanding & such receipt of proceeds, & stated that, on the hearing, no allegation of such receipt had been made, nor any claim in respect thereof, & that no question as to such receipt had been made a matter of difference at the arbn., but that M. had there contended that D. was bound to pay the whole amount, whether he had received anything or not:—*Held*: assuming the receipt of proceeds not to have been a matter in difference on the arbn., it appeared that the arbitrator had considered the two questions as mixed up together, & as one part of the award could not be separated from the other, the whole was bad as not being final.—*Re MARSHALL & DRESSER* (1843), 3 Q. B. 878; 3 Gal. & Dav. 253; 12 L. J. Q. B. 104; 114 E. R. 746.

*Annotation*:—*Reid*. Selby v. Whitbread, [1917] 1 K. B. 736.

**1320. —.]—**An award is not necessarily bad for want of finality or for inconsistency, because the arbitrator has found for pltf. on one of the issues, in respect of which he has given no damages.—*COX v. KERSLAKE, KERSLAKE v. COX* (1867), 16 L. T. 396.

**1321. Failure to specify what part each claimant should have—Partition.]—**An award that joint tenants shall make partition by mutual conveyances is good, although it do not point out what part each of the parties is to have.—*KNIGHT v. BURTON* (1704), 6 Mod. Rep. 231; 1 Salk. 75; 87 E. R. 982.

*Annotation*:—*Reid*. Pearce v. Pearce (1829), 9 B. & C. 484.

**1322. Failure to specify goods.]—**A dispute arose between pltf. & deft. upon an execution taken by

deft. of the goods of B. Before execution was made, pltf. took some of the goods to himself, & sold them, but then execution was made of the whole. The dispute was referred to the arbn. of A., who awarded that deft. should pay to pltf. £455, that deft. should keep all the goods which he had taken in execution, except those which pltf. had taken to himself & sold before the execution was made, & that thereupon general releases should be given on both sides:—*Semble*: the award was void, by reason that it was wholly uncertain what goods pltf. had so taken to himself & sold.—*PATHOW v. KING* (1733), 2 Barn. K. B. 386; 94 E. R. 570.

**1323. —.]—**A sheriff having taken goods in execution upon premises belonging to parties who claimed a portion of the goods, a judge at chambers, upon the hearing of an interpleader rule, made an order, with consent of parties, "that the goods not claimed should be pointed out by claimants, & should be forthwith removed & sold, & the proceeds from such sale paid to the execution creditor, that security should be given to the sheriff for the amount of the levy, & that the sheriff should withdraw forthwith, & that all matters in difference between claimants & the execution creditor, & claimants & the sheriff, should be referred to arbn.":—*Held*: an award directing that claimants should retain possession of some of the articles claimed by them as their own property, & that the residue should be returned to the sheriff, was sufficiently final & certain with respect to the goods so directed to be returned, as the arbitrator had no power to give directions as to the subsequent disposal of those goods, but the sheriff must proceed with the execution.—*SMITH v. PINDER* (1837), 6 L. J. Ex. 232.

**1324. Failure to specify value, quality or description of fixtures.]—**On a submission of a cause & all matters in difference between a lessor & lessee, the costs to abide the event, an award that certain fixtures have been wrongfully removed by the lessor to the value of £11, & that the lessee shall set up others in their place, to be left for the lessor at the end of his term, & that the lessor shall pay the lessee £11 on a specified day, is uncertain in not specifying the value, quality, or description of fixtures to be set up by the lessee, & may be set aside by the lessor.—*PRICE v. POPKIN* (1839), 10 Ad. & El. 139; 2 Per. & Dav. 304; 8 L. J. Q. B. 198; 3 Jur. 433; 113 E. R. 53.

*Annotations*:—*Consd.* Mays v. Cannell (1854), 15 C. B. 107. *Reid*. Waddle v. Downman (1844), 12 M. & W. 562. *Mentd.* Miller v. De Burgh (1850), 4 Exch. 809.

**1325. Failure to specify in respect of what demise plaintiff successful.]—**An ejectment, containing two several demises by different persons, was referred before trial, & by the order of reference all matters in difference in the cause were referred, the costs of the suit & of the reference to abide the event of the award, & if the award should be in favour of pltf., he was to be at liberty to sign judgment in the same manner as if the cause had been tried at *Nisi Prius*, & to issue a writ of possession, & to proceed in the usual way for the costs on such judgment. The arbitrator awarded that pltf. was entitled to possession of a certain part of the lands sought to be recovered, which part he described by metes & bounds. The lessor of pltf. signed judgment, & proceeded to tax his costs:—*Held*: the award was bad, because the arbitrator did not state on what demise pltf. ought to recover. *Qu.*: whether he ought to have found nominal damages.—*DOE d. MADKINS v. HORNER* (1838), 8 Ad. & El. 235; 3 Nev. & P. K. B. 344; 1 Will. Woll. & H. 348; 2 Jur. 417; 112 E. R. 827; *sub nom.* *DOE d. MADKINS & LONG v. LAW*; 7 L. J. Q. B. 164.

*Annotations*:—*Folld.* Doe d. Starling v. Hiller (1843), 12 L. J. Q. B. 166. *Consd.* Harrison v. Creswick (1852), 21



L. J. C. P. 113; *Mays v. Cannell* (1854), 15 C. B. 107. *Reid*. *Gisburne v. Hart* (1839), 3 Jur. 536; *Re Beaufort & Swansea Harbour Trustees* (1860), 1 L. T. 370. *Mentd*. *Hobdell v. Miller* (1840), 2 Scott, N. R. 163; *Brooks v. Parsons* (1843), 13 L. J. Q. B. 50.

**1326. Award of sum for unspecified grievances.]—**By an order of reference, a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law & in equity. At the time of this submission, two equity suits were pending, in which the parties to the action were interested, & there were also other matters in difference between them. The arbitrator made an award whereby he ordered that a verdict should be entered for pltf., damages £500, & that defts. should pay that sum to pltf., as well as the further sum of £350, for grievances not included in his declaration. On motion to set aside judgment & execution sued out on the award:—*Held*: the award was sufficiently final, although it did not dispose of the equity suits, & the award of the £350 was sufficiently certain.—*WRIGHTSON v. BYWATER* (1838), 3 M. & W. 199; 6 Dowl. 359; 1 Horn & H. 50; 7 L. J. Ex. 83; 150 E. R. 1114.

*Annotations*:—*Distd*. *Doe d. Madkins v. Horner* (1838), 8 Ad. & El. 235. *Apld*. *Re Wyld, Ex p. Wyld* (1860), 2 De G. F. & J. 642, L.J.J. *Reid*. *Harrison v. Creswick* (1852), 16 Jur. 315, Ex. Ch.

**1327. Award referring to "property."]**—An action of trespass to houses & lands was referred to an arbitrator, who was to settle at what price & on what terms deft. should purchase pltf.'s "property." The order of reference gave the arbitrator no power to determine what the property in question was, nor was there any dispute on the subject. The arbitrator fixed a certain sum as the price at which deft. should "purchase pltf.'s property":—*Held*: the award was not bad, on the ground of its not specifying what the "property" was.—*ROUND v. HATTON* (1842), 10 M. & W. 660; 2 Dowl. N. S. 446; 12 L. J. Ex. 7; 152 E. R. 636.

**1328. Award of enjoyment of office—Submission of right to office.]—**On a submission concerning the right to an office, if the arbitrator award that for divers other considerations one party shall enjoy the office, it is sufficient; for it shall not be intended that there were other matters in difference, & his right to the office is implied in the order that he shall enjoy it.—*LACY v. WHETSTON* (1594), Cro. Eliz. 343; 78 E. R. 592.

**1327 i. Whether lands sufficiently described.]—**An award directing "security to be given on a certain part of the property of A. B.," without stating what part, is void for uncertainty.—*BURGOYNE v. BURGOYNE*, N. B. Dig. 53 (4).—*CAN*.

**1327 ii.** .]—Where an award directed a conveyance of land, the award was not set aside, although it did not set out by metes & bounds the land for which the conveyance was to be given.—*GREAT WESTERN RY. CO. v. ROLPH* (1852), 1 P. R. 50.—*CAN*.

**1327 iii.** .]—The submission recited in the award stated that the co. "had set out & taken for the uses of the road a portion of M.'s land, being all his land lying immediately north of the land theretofore conveyed by him to the co.," & the award determined "that the value of the lands so set out & taken as aforesaid is," etc.:—*Held*: the land to be taken was sufficiently described.—*Re MILLER v. GREAT WESTERN RY. CO.* (1855), 13 U. C. R. 582.—*CAN*.

**1327 iv.** .]—In an award pltf.'s freehold land was described as "the freehold portion of his lands taken":—*Held*: a sufficient description, as it could be identified by the notice served by the co., & also by the plans filed.—*ANGLIN v. NICKLE* (1879), 30 C. P. 72.—*CAN*.

**1327 v.** .]—A notice of expropriation & an award both described the land expropriated as No. 1 on the plan of a railway co. deposited according to law, but in another part of the notice it was described as forming part of a cadastral lot 2345, & in the award as forming part of lots 2344, 2345:—*Held*: there was no uncertainty in the award, as the words of the award & notice were sufficient of themselves to describe the property intended to be expropriated, & which was valued by the arbitrators.—*BEAUFORT v. NORTH SHORE RY. CO.* (1887), 15 S. C. R. 44.—*CAN*.

**1327 vi.** .]—A dispute arose as to the boundary of two estates, & arbitrators were appointed to settle the boundary. The arbitrators stated the boundary by naming places which lay east, west, north & south thereof:—*Held*: the award was not ambiguous.—*RAMRUNJUN CHUCKERBUTTY v. RAN PROSAD DASS*, 13 C. L. R. 26.—*IND*.

**1327 vii.** .]—*Claims not defined.*—Pltf.'s declaration set out an award alone, & to this deft. objected on the ground of its uncertainty, as it directed an annuity to be paid to pltf. out of her claims on the property, without showing what those claims were or on what property they attached:—*Held*: the award was certain.—*McINTYRE v. McINTYRE* (1870), 1 P. E. I. 307.—*CAN*.

*F. Awards Subject to the Opinion of a Stranger.*

**1329. General rule.]—**If an award be that the deft. abide by the arbitrament of S. & F., it is void, for it makes them the judges, which cannot be done (*per CUR.*).

Every award must be complete & certain, & this one is not, for leaving part of the matter to S. & F. (*YELVERTON, J.*).—*ANON.* (1468), Y. B., 8 Edw. 4, fo. 11, pl. 9.

**1330. Award directing valuation by stranger.]—**Matters in difference having been referred to A. & B., they found £9 to be due from deft. to pltf., payment to be made by delivery of bales of woad, but the parties could not agree as to the value of a bale, & it was awarded that a bale should be taken within eight days of the award by deft. to the house of C. for valuation, & the remainder of the money should be paid in bales of woad, taken at the same price as the bale:—*Semble*: a good award.—*ANON.* (1494), Y. B., 9 Hen. 7, fo. 15, pl. 7.

**1331. Award of release ut talis advisaret.]—**An award of a release of all actions *ut talis advisaret* is void.—*EMERY v. EMERY* (1599), Cro. Eliz. 726; 78 E. R. 960.

**1332. Award leaving form of release to be settled by master.]—**Arbitrators left it to the master to settle the form of releases awarded:—*Held*: not a delegation, as the arbitrators awarded releases, & only left the form to be settled by the master.—*LINGOOD v. EADE* (1742), 2 Atk. 501; 26 E. R. 702.

**1333. Award directing premises to be put in repair to satisfaction of stranger.]—**Certain differences as to the terms on which a lease should be renewed by a corpn. to their lessee, & also as to the boundaries of property held under the lease, were referred to two arbitrators, who awarded that the corpn. should put the premises in good tenantable repair, to the satisfaction of S., a builder, & should grant a lease of the premises at a certain rent, which should contain covenants to keep the premises, they having been first repaired by the lessors, in good repair:—*Held*: the award was bad, not being final, in consequence of the reference of the repairs to the judgment of a third person.—*TOMLIN v. FORDWICH CORPN.* (1836), 5 Ad. & El. 147; 2 Har. & W. 172; 6 Nev. & M. K. B. 594; 5 L. J. K. B. 209; 11 E. R. 1121.

*Annotation*:—*Reid*. *Selby v. Whitbread*, [1917] 1 K. B.

#### PART IV. SECT. 8, SUB-SECT. 3.—F.

**g. Matter in dispute left to future arbitration.]—**One of the matters to be decided in an arbn. was the amount due in respect of a certain wheat crop. Instead of valuing the wheat himself the arbitrator left it to a future arbn. In an action for implement of the award:—*Held*: the decree did not exhaust the submission.—*REID v. WALKER* (1826), 5 Sh. (Ct. of Sess.) 140.—*SCOT*.

**h. Award delegating decision to strangers.]—**All differences concerning the renting of a farm by deft. to pltf. were referred to arbitrators, who awarded a division of certain crops & stock specified; & in order that an equal division should be made, they ordered that deft. & pltf. should select two disinterested persons from the neighbouring farmers, whose decision should be final:—*Held*: the award was bad for the delegation to third parties.—*HARRINGTON v. EDISON* (1853), 11 U. C. R. 114.—*CAN*.

**k.** .]—An award is bad where arbitrators attempt to delegate to another person (unascertained) their authority to decide whether part of the amount awarded should or should not be paid.—*BLAKESTON v. WILSON* (1902), 14 Man. L. R. 271.—*CAN*.



*Sect. 8.—Requisites of valid award: Sub-sect. 3, F. G. H. K. & L.]*

**1334. Award that certain marks should be placed on land as directed by stranger.]—**By a rule of reference of a cause & all matters in difference, the arbitrator had power to determine, define & adjust, & for ever set at rest all disputes touching all & all manner of rights of water or depths of weir, & was authorised to order to be erected & put up, & for ever thereafter to be kept in repair, any erections in or about the weir of deft., etc. The award ordered that deft. was entitled to keep & maintain his weir at the depth of fourteen inches & no more. It proceeded to direct that, for the purpose of defining & perpetuating the depth at which deft. might maintain the weir, "such durable marks & directions be placed on the land adjoining the weir as B. may direct," etc. :—*Held* : (1) the direction in the award as to the depth of the weir was sufficiently certain, but the award was not final, since the direction that such durable marks should be placed as B. should direct, was a delegation to B. of the arbitrator's authority, & bad ; (2) the bad part was not separable, as the consideration for the submission was not only the settling existing differences, but the for ever settling at rest of all disputes touching the water rights, which latter object was attempted to be effected by the faulty direction.—*JOHNSON v. LATHAM* (1850), 1 L. M. & P. 348 ; 19 L. J. Q. B. 329 ; 15 L. T. O. S. 211.

**1335. Award of releases in form to be settled by stranger.]—**M. built a ship for G. & others, & also purchased stores for the vessel on his own credit. On a reference of all matters in difference between M. & G., G. took upon himself the payment of the bills, & requested the umpire to fix the liability in respect of them upon him. The umpire directed G. to pay to M. the balance which he found due to the latter after giving G. credit for the amount of the bills ; he then awarded that G. should be solely liable in respect of the bills, & should execute a bond to indemnify M. against them ; & then ordered that, after G. had paid the balance & the bills, the parties should execute mutual releases of all claims & demands whatsoever, & that the form of the releases should be settled by P. in case of dispute :—*Held* : although the delegation to P. of authority to settle the releases was void, it did not affect the validity of the award, even if it vitiated the whole of the direction as to the giving releases.—*Re GODDARD & MANSFIELD* (1850), 1 L. M. & P. 25 ; 19 L. J. Q. B. 305.

**1336. Award that stranger should certify loss.]—**A dispute having arisen as to the merchantable quality of sleepers delivered under a contract for the sale of sound merchantable sleepers, it was referred to arbitrators to decide whether they were of merchantable quality, & if not, what allowance should be made, or in what way the dispute should be settled. By their award they found that the sleepers were of three classes, one merchantable & two not ; & they directed that the vendee should sell all the sleepers, & that the selling broker should certify the loss sustained by the unmerchantable classes as compared with the price then realised for the merchantable class, & that, after deducting the expenses attending the sale,

the balance certified by him should be paid by Jan. 15, 1855 :—*Held* : the award was bad, for want of finality.—*DRESSER v. FINNIS* (1855), 25 L. T. O. S. 81.

**1337. Award "subject to opinion" of stranger.]—**Where an arbitrator made his award "subject to the opinion" of another :—*Held* : this was a substituted judgment, & the award was bad.—*ELLISON v. BRAY* (1864), 9 L. T. 730.

*G. Awards involving Acquiescence of, or Action by Strangers, or affecting their Rights and Interests.*

See Nos. 1189—1214, *ante*.

*H. Awards subject to Discretion reserved to Arbitrator.*

**1338. General rule.]—**Arbitrators cannot reserve to themselves a future authority.—*THINNE v. RIGBY* (1612), Cro. Jac. 314 ; 79 E. R. 269, Ex. Ch.

*Annotations :—Reid.* *Winch v. Sanders* (1620), Cro. Jac. 584 ; *Nolt v. Long* (1735), Lee temp. Hard. 181 ; *Simmonds v. Swaine* (1809), 1 Taunt. 549.

**1339. —.]—**An arbitrator cannot in his award reserve to himself a future power ; for an award must be final at the time it is made.—*WINCH v. SANDERS* (SAUNDERS) (1620), Cro. Jac. 584 ; 2 Roll. Rep. 214 ; 79 E. R. 499.

*Annotations :—Reid.* *Kinge v. Fines* (1661), 1 Sid. 59 ; *Barnardiston v. Fowler* (1713), 10 Mod. Rep. 204. *Mentd.* *Nott v. Long* (1735), Lee temp. Hard. 181 ; *Thorp v. Cole* (1835), 2 Cr. M. & R. 367.

**1340. —.]—**An award should be absolute, without reference to a future examination.—*SELBY v. RUSSELL* (1697), 12 Mod. Rep. 139 ; 88 E. R. 1220.

*Annotation :—Reid.* *Phillips v. Knightley* (1731), 2 Stra. 903.

**1341. Award that in certain events sum to be named by arbitrator should be repaid.]—**Submission to arbn. of all controversies, so that a final agreement be made by a fixed day. Award that deft. should pay a sum of money on three different days with a proviso that, if afterwards it was shown to the arbitrators that plffs. had not released deft. of all debts owing by him to them, then so much of that sum should be repaid by them to deft. as to him should seem fit :—*Held* : not a good award, for uncertainty.—*GROVE v. CRANE* (1621), Palm. 145 ; 81 E. R. 1020.

**1342. Award reserving right to adjudicate on sufficiency of performance.]—**An arbitrator, to whom a cause & all matters in difference were referred, directed a verdict to be entered for plff., & certain works to be done by deft. He then added that, as disputes might arise respecting the performance, plff., if dissatisfied with it, might (on giving notice to deft.) bring evidence before the arbitrator of the insufficiency of the work, & deft. might also give evidence on his part, in order that a final award might be made concerning the matters in difference, but, if no proceedings were taken by plff. within two months after the work was done, the award then made should be final ; & he enlarged the time for making his further & final award, if requested, to six months :—*Held* : the latter part of this award was bad, as

#### PART IV. SECT. 8, SUB-SECT. 3.—H.

*J. Award reserving rights to arbitrators.]—*An award directed that certain sums of money should be paid by one of the parties to the other, & that the former should secure the payment by his bond & warrant of attorney to enter judgment thereon, & further, that the warrant should be lodged with the arbitrators, & that judgment should not

be entered without their consent :—*Held* : inasmuch as it reserved a future power to the arbitrators, it rendered the award uncertain, inconclusive, & void.—*LINDSAY v. LINDSAY* (1860), 11 I. C. L. R. 311.—*IR.*

*m. Award directing administration of partnership assets by partner & umpire.]—*An award directed that the

assets of a partnership should be held & managed by one partner under the inspection of the umpire, & that the sale of the partnership property should be made by him at such times & places as the umpire should approve :—*Held* : there was not such delegation of authority as would invalidate the award.—*Re FRASER v. PAINT* (1873), R. E. D. 68.—*CAN.*

it assumed to reserve a power over future differences, but it might be rejected, & the former part was final, & might stand.—*MANSER v. HEAVER* (1832), 3 B. & Ad. 295 ; 110 E. R. 110.

*Annotations* :—*Distd.* *Toulin v. Fordwich Corpn.* (1836), 5 Ad. & El. 147 ; *Stone v. Phillips* (1837), 4 Bing. N. C. 37 ; *Re Marshall & Dresser* (1842), 3 Gal. & Dav. 253. *Refd.* *Brooks v. Parsons* (1843), 13 L. J. Q. B. 50.

**1343. Award reserving power to appoint counsel or solicitor.**—An arbitrator, by his award, reserved to himself power to appoint a counsel or solr. to settle any disputes which might arise as to the proper form of some conveyances, which he had ordered to be executed between the parties :—*Held* : he had exceeded his authority, & as, in the circumstances of the case, that part of the award could not be separated from the remainder, the whole was bad.—*Re TANDY & TANDY* (1841), 9 Dowl. 1044 ; Woll. 200 ; 5 Jur. 726.

**1344. Award directing something to be done "upon proof."**—After action brought, the cause & subject-matter thereof, & the rights of the parties in relation thereto, as well at law as in equity, were referred to an arbitrator, with power to order what he should think fit to be done by either of the parties respecting the matters in dispute. The arbitrator awarded that plffs. would be entitled to receive from defts. two specified sums of money, so soon as they should have discharged the demands of certain local agents of a certain co., which plffs. had undertaken to satisfy, & upon production by plffs. to defts. of the vouchers of the local agents, & upon proof that the demands had been discharged defts. were to pay the sums to plffs. :—*Held* : the award was final, for either the words "upon proof" might be rejected as surplusage, or it was a part of the matter itself which the parties had agreed should be done, & was correctly stated in the award.—*MILLER v. DE BURGH* (1850), 4 Exch. 809 ; 1 L. M. & P. 177 ; 19 L. J. Ex. 127 ; 14 L. T. O. S. 400 ; 154 E. R. 1413.

#### K. Awards subject to Will of Parties.

**1345. Award with proviso for cancellation—On certain terms.**—An award was that the parties should execute a release of actions, etc., to each other within four days, with a proviso that within twenty days either party might on certain terms avoid his award :—*Held* : (1) the proviso was repugnant to the term as to releases, & hence the award was void ; (2) apart from this, the award was bad, for it was no final end of the controversy, inasmuch as it was not certain, by reason of the condition, whether it should be at an end or not.—*SHERRY v. RICHARDSON* (1593), Poph. 15 ; 79 E. R. 1137 ; *sub nom.* *SHARLEY v. RICHARDSON*, Cro. Eliz. 291.

**1346. — On failure to pay rent.**—An award that one shall enjoy such a house & pay the rent, or else the award for the house to be void, is good.—*FURSER v. PROWD* (1617), Cro. Jac. 423 ; 79 E. R. 361.

**1347. — Dependent on something in future.**—An award was made that one party should pay money & the other make a release, provided that if one of them should be discharged of any arrears due to soldiers by the Act of Indemnity, then the award should be void :—*Held* : an award that it should be void, if something happened in the future, was bad.—*KNIGE v. FINES* (1661), 1 Sid. 59 ; 82 E. R. 968.

PART IV. SECT. 8, SUB-SECT. 3.—L. *WHITE* (1831), N. B. Dig. 55 (1). CAN.

n. *Award directing one of two things to be done.*—An action of trover was referred by order of *Nisi Prius* : the arbitrators awarded that deft. should restore the property to plff., or pay him £152 :—*Held* : the award was good as to the latter alternative.—*HUGHSON v.*

p. *Award providing different results according to court's finding on special case.*—Where an arbitrator finds alternative valuations, according as the opinion of the ct. shall be given upon a special case stated by him in pursuance

**1348. Award that party be bound with sureties to approval of other party.**—An award "that one of the parties shall be bound with such sureties as the other shall approve, & that they shall then sign mutual releases," is not final, & is void, for if the party disapprove of the surety, he need not sign the release.—*THURSBY (THIRSBY) v. HALBURT (HELBERT, HELBOT)* (1689), 1 Show. 82 ; Carth. 159 ; 3 Mod. Rep. 272 ; 89 E. R. 464.

*Annotations* :—*Refd.* *Brown v. Watson* (1839), 8 Scott, 386. *Mentd.* *Dixon v. Hovill* (1828), 4 Bing. 665.

**1349. Award to be performed as party shall appoint.**—An award that A. shall beg B.'s pardon in such manner & place as B. shall appoint is void *quoad hoc*.—*GLOVER v. BARRY (BARRIE)* (1698), 2 Lut. Appendix, 1597 ; 1 Salk. 71 ; 125 E. R. 878.

**1350. Award to pay to stranger to be nominated by one of parties.**—In debt on bond with condition for performing an award, deft. pleaded no award ; plff. replied that a reference was made to arbitrators of certain matters relating to a partnership between plff. & deft., & the arbitrators awarded that deft. should pay into the hands of O., agent for the partners, such a sum of money in trust for plff. & deft., & for the benefit of the partnership, which he had not done :—*Held* : the arbitrators had awarded that deft. should pay a sum of money for the benefit of plff. to such person as plff. should appoint to receive it, & the award was good.—*DALE v. MOTTRAM* (1733), 2 Barn. K. B. 291 ; 94 E. R. 507.

**1351. Award subject to reduction in amount—On party exonerating himself.**—An award that deft. should pay to plff. such a sum of money, unless within twenty-one days (which, in fact, was after the time limited for making the award) deft. should exonerate himself by affidavit from certain payments & receipts, in which case he was only to pay a certain other less sum, is illegal & void, being uncertain & inconclusive.—*PEDLEY v. GODDARD* (1796), 7 Term Rep. 73 ; 101 E. R. 861.

*Annotations* :—*Refd.* *Auriol v. Smith* (1823), Turn. & R. 121. *Mentd.* *Lowndes v. Lowndes* (1801), 1 East, 276.

**1352. Award conditional on one party surrendering shares to other party.**—Directors brought an action against a subscriber for the amount of two calls made on his shares, & the subscriber brought a counter-action against the directors for the value of his shares as at a certain period, on the ground that they had, without his consent, engaged in speculations foreign to the co.'s undertaking, & abandoned that undertaking & united themselves with another co. Both actions were referred to an arbitrator under an order of ct. ; & he found (*inter alia*) the subscriber was entitled to decree for a certain sum as the ascertained price of his shares, which sum, under deduction of what was awarded for the calls, he was entitled to recover from the co. on surrendering or transferring his shares to them, or to any person they might direct :—*Held* : the award was bad, as the finding was not final & conclusive, but held the subscriber entitled to recover the sum awarded to him upon condition only of transferring his shares.—*BAILLIE v. EDINBURGH OIL GAS LIGHT CO.* (1835), 3 Cl. & Fin. 639 ; 6 E. R. 1577, H. L.

#### L. Alternative Awards.

**1353. Award directing that money be paid or secured.**—If an award direct one of two things to

of the submission, the award is sufficiently final.—*CHRYSOLITE HILL CO. v. SANDHURST CHRYSOLITE CO.* (1879), 5 V. L. R. 242.—AUS.

q. *Award directing payment depending on an undetermined event.*—An award in the following form : " & a further & additional sum of \$3,500 to



**Sect. 8.—Requisites of valid award: Sub-sect. 3, L.**

be done in the alternative, & either of the two is uncertain, or impossible, it is incumbent on the party to perform the other of them. If an award direct that money shall be paid, or be secured to be paid, the party must either pay the money or give such security as is satisfactory to the person entitled to receive it.—**SIMMONDS v. SWAINE** (1809), 1 Taunt. 549; 127 E. R. 947.

**Annotation:—Mentd.** *Wrightson v. Bywater* (1838), 3 M. & W. 199.

**1354. One alternative impossible.]—**If an award direct a party to do that which is impossible, or to do another act which is possible, the award is good by reason of the alternative.—**WHARTON v. KING** (1831), 2 B. & Ad. 528; 9 L. J. O. S. K. B. 271; 109 E. R. 1238.

**Annotations:—Distd.** *Re Beaufort v. Swansea Harbour Trustees* (1860), 6 Jur. N. S. 979. **Refd.** *Lievesley v. Gilmore* (1866), L. R. 1 C. P. 570.

**1355. One alternative void.]—**Debt on an obligation indorsed with a condition for the performance of an award, which was to pay £123, or to procure a stranger to be bound in writing to pay £200. Deft. pleaded generally performance of the award:—**Held:** the part of the award in the disjunctive was void.—**WILMER (WILLMER) v. OLDFIELD** (1887), 1 Leon. 304; Sav. 120; 74 E. R. 277.

**1356. Award settling dispute—Alternative if court should decide differently.]—**An arbitrator, to whom a cause & all matters in difference were referred, set out all the facts upon the face of his award, & then awarded that pltf. had no cause of action against deft., & that he had determined the action in favour of deft., & after disposing of a plea of set-off, & awarding by whom the costs of the reference should be paid, concluded thus: "But if the ct. shall be of opinion, upon the facts hereinbefore stated, that pltf. is entitled to recover in the action, then I determine the action in favour of pltf., & order & award that deft. pay damages to pltf., to the amount of 1s., & also pay to pltf. his costs of the reference":—**Held:** the arbitrator having come to a decision of his own, the award was sufficiently final, & the alternative part might be rejected.—**BARTON v. RANSON** (1838), 3 M. & W. 322; 6 Dowl. 384; 7 L. J. Ex. 86; 150 E. R. 1168.

**Annotations:—Mentd.** *Doe d. Clarke v. Stillwell* (1838), 8 Ad. & El. 645; *Bradbee v. Christ's Hospital* (1842), 4 Man. & G. 714; *Scott v. Van Sandau* (1844), 6 Q. B. 237.

**1357. ———.]—**By an award, made under a submission which gave no power to raise questions of law for the opinion of the ct., an arbitrator awarded £82, as compensation for damage, to be paid by one party to the other. He then, "for the purpose of raising the question for the determination of the ct., in case it should be pleased to entertain same," explained the principle on which he had awarded the £82, & added that, if the ct. should think that he ought to have gone on another principle, which he mentioned, he then awarded £102 in lieu of the £82:—**Held:** the award was final, as it awarded £82 positively, & the hypothetical assessment which followed was surplusage.—**Re WRIGHT & CROMFORD CANAL CO.** (1841), 1 Q. B. 98; 4 Per. & Dav. 730; 113 E. R. 1066.

**Annotations:—Refd.** *Bradbee v. Christ's Hospital* (1842),

be paid to J. for loss of river-frontage, if J. is entitled to a river-frontage" is hypothetical & void.—**STARNES & MOILSON** (1885), 29 L. C. J. 278.—**CAN.**

**r. Submission allowing alternative award.]—**An action for penning back water, & preventing the use of pltf.'s mills, was referred, with power to the arbitrators to determine the damages already sustained, & to direct how the channel should be formed by defts., or

fix a sum to be paid in lieu thereof at defts.' option, & a time within which to choose. They awarded £375 for such damages, & directed that within three months from July 1, 1858, defts. should construct a channel of specified size, or in lieu thereof should pay pltf. \$500 on or before Aug. 1, 1858:—**Held:** the award was sufficiently certain & final.—**GLEN v. GRAND TRUNK RY. CO.** (1859), 2 P. R. 377.—**CAN.**

4 Man. & G. 714 *Scott v. Van Sandau* (1844), 6 Q. B. 237.

**1358. Award providing different results according to different interpretations of arbitrator's authority.]**

—By a submission to arbn. between patentees, all matters in difference between the parties relating to gutta percha were referred to the decision of the arbitrator, who was empowered to set aside certain deeds which had been executed by the parties, if he thought fit, & to order assignments to be executed for vesting in trustees all patents & applications for patents relating to gutta percha taken out or made, or to be taken out thereafter by the parties, or any of them. By the award, the arbitrator, "if & so far as he had power & jurisdiction," set aside altogether certain deeds which he specified, but if he had not "power or jurisdiction to set same or any or either of them aside," or to award any other matter in that, his award, contained, he declared that the rest of his award (wherein he dealt with the rights of the parties under the deeds executed by them, & not thereby set aside, the granting of licences & the question of assignments) was yet to stand:—**Held:** the award was bad, for want of finality.—**NICKELS v. HANCOCK** (1855), 7 De G. M. & G. 300; 3 Eq. Rep. 689; 1 Jur. N. S. 1149; 44 E. R. 117, L.J.J.

**Annotation:—Distd.** *Blackett v. Bates* (1865), 2 Hem. & M. 610.

**1359. Award providing different results according to different circumstances.]—**An award declared that a certain sum should be paid in lieu of tithes, provided the whole lands were subject to tithes, but if only subject to tithes according to a specified terrier, then a different sum was awarded:—**Held:** the award, not being final, was void.—**GOODE v. WATERS** (1850), 20 L. J. Ch. 72.

**1360. Award directing delivery of goods or, in default, payment of money.]—**Where a submission was with reference to a breach of contract for the non-delivery of certain goods, an award directing the delivery of goods or, in default thereof, the payment of money:—**Held:** a good award.—**GABRIEL v. LONGTON (LANGTON)** (1856), 26 L. T. O. S. 257; 4 W. R. 249.

**1361. Award in form of special case—Alternative in form of final award.]—**An award of arbitrators was made in an alternative form: (1) in the form of a special case under s. 7 (b) of the Act of 1889, if either party should give to the other fourteen days' written notice of his desire to take the opinion of the ct., & should within fourteen days from the service of such notice set the award down for argument before the ct. as a special case, & (2) in the form of a final award, if the above-mentioned notice was not given & the case was not set down for hearing within the prescribed time:—**Held:** the arbitrators had not exceeded their jurisdiction in making their award in that form, & the award was not bad on its face.—**Re OLYMPIA OIL & CAKE CO., LTD., & MACANDREW, MORELAND & CO., LTD.**, [1918] 2 K. B. 771; 34 T. L. R. 581; 16 L. G. R. 745; 82 J. P. Jo. 351, C. A.

**M. Inconsistent Awards.**

**1362. Award as to future use of pump found to be plaintiff's.]—**An award declared that a yard & pump were the sole & exclusive property of pltf.,

**s. Award in alternative at request of party.]—**Where a party has requested the arbitrator to make his award in the alternative, he is estopped from complaining as to its form.—**BARRY v. MINISTER FOR WORKS** (1906), 8 W. A. L. R. 53.—**AUS**

**PART IV. SECT. 8, SUB-SECT. 3.—M.**

**t. Conflicting directions as to costs.]—**An award that deft. should pay pltf.



except that deft. had a right to take water from the pump, & to have ingress & egress to & from the yard in which it stood for that purpose, & that the pump should thereafter be considered as belonging to pltf. & deft. jointly, & be repaired at their joint expense:—*Held*: there was no objection to the award, on the ground that the direction as to the future enjoyment was inconsistent with the former part of the award.—*BOODLE v. DAVIES* (1835), 3 Ad. & El. 200; 1 Har. & W. 420; 4 Nev. & M. K. B. 788; 111 E. R. 389.

*Annotations*:—*Mentd.* *Allenby v. Proudlock* (1835), 4 Dowl. 54; *Yates v. Knight* (1835), 2 Scott, 470; *Jones v. Powell* (1838), 1 Will. Woll. & H. 60; *Gray v. Leaf* (1840), 8 Dowl. 654; *Dunn v. Warlters* (1842), 9 M. & W. 293; *Staples v. Hay* (1843), 1 Dow. & L. 711; *Potter v. Waller* (1848), 2 De G. & Sm. 410; *Matlock Gas Light Co. v. Peters* (1856), 6 E. & B. 215; *Re Marsack & Webber* (1860), 2 E. & E. 637; *Dunhill v. Moore* (1867), 17 L. T. 148; *Stevens v. Chapman* (1871), L. R. 6 Exch. 213.

**1363. Findings on issues for purposes of costs only.]**—*Assumpsit* on a retainer to project certain works, & to examine certain bills, with care, skill, & diligence. Pleas: (1) *non assumpsit*; (2) no retainer; (3) that deft. did use care, etc., in projecting the works; (4) that he did use care, etc., in examining the bills. The cause & all matters in difference were referred by order of *Nisi Prius*, costs of the cause to abide the event. The award found for deft. on the first, second, & fourth issues, & for pltf. on the third:—*Held*: the award was good, & not repugnant, for the finding on the third & fourth issues must be regarded as hypothetical, & only for the purpose of determining the costs of them, & it could not be inferred, from such finding, that there was matter in difference in respect of work done other than the work included in the action.—*BEAUFORT (DUKE) v. WELCH* (1839), 10 Ad. & El. 527; 3 Jur. 794; 113 E. R. 199.

**1364. Finding against plaintiff on non-assumpsit & for defendant on set-off without awarding amount due.]**—*Assumpsit*. Pleas, *non assumpsit*, payment, & set-off. The cause & all matters in difference were referred to an arbitrator, who ordered the verdict to be entered for deft. & found that no other matters in difference were brought to his notice. The award was set aside, on the ground that it was inconsistent, at all events as regarded the issues on *non assumpsit* & set-off.—*FENTON v. DIMES* (1840), 9 L. J. Q. B. 297; 4 Jur. 554.

*Annotation*:—*Distd.* *Williams v. Mouldsdales* (1840), 7 M. & W. 131.

**1365. Never indebted & set-off—General verdict for defendant.]**—In debt for use & occupation, & on the common counts, with pleas of *nunquam indebitatus* & of set-off, the verdict was entered at *Nisi Prius* for pltf., subject to a reference of the cause to an arbitrator, with power to certify whether the verdict should stand, & for what

amount, or whether it should be vacated. A verdict having been entered for deft.:—*Held*: the certificate of the arbitrator, that a verdict should be entered for deft. on both issues, was not inconsistent.—*WILLIAMS v. MOULSDALE* (1840), 7 M. & W. 134; 10 L. J. Ex. 2; 4 Jur. 1038; 151 E. R. 710.

*Annotation*:—*Reid.* *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483.

**1366. Finding that defendant continued nuisance but did not erect it.]**—Pltf. declared in case that he was entitled to the reversion in a close, that H. had wrongfully & injuriously erected incumbrances thereon, & that deft. wrongfully & injuriously kept & continued the incumbrances so wrongfully erected. Pleas: (1) not guilty; (2) that H. did not erect incumbrances on the close. The cause was referred to an arbitrator, who was to direct how the verdict was to be entered on the issues, & to say what should be done between the parties respecting the land or premises. He awarded that the first issue should be entered for pltf. without damages, & the second issue for deft., & that nothing should be done by the parties respecting the land or premises. On motion to set aside the award, on the ground that the findings were inconsistent:—*Held*: the first plea put in issue only the continuance of the nuisance by deft., & the finding thereon was not inconsistent with that on the second plea.—*GRENELL (GRENFIELD, GRENVILLE) v. EDGCOMBE* (1845), 7 Q. B. 661; 14 L. J. Q. B. 322; 5 L. T. O. S. 215, 216; 9 Jur. 709; 115 E. R. 638.

**1367. Award for compensation for tramway without awarding price of factory.]**—An arbitrator appointed to determine the value of a tramway undertaking framed his award in the form of a special case, finding a great number of alternative values. He also left a question whether a car factory was suitable for the purposes of the undertaking to be determined by the ct. The ct. considering the whole question one of fact, remitted it to the arbitrator, who thereupon found positively as to value, etc., & negatively as to the suitability of the car factory. On a motion to set aside the award:—*Held*: the award was not inconsistent or repugnant in awarding compensation for the tramway without awarding the price of the car factory.—*NORTH METROPOLITAN TRAMWAYS CO. v. LEYTON URBAN DISTRICT COUNCIL* (1908), 98 L. T. 792; 72 J. P. 241; 6 L. G. R. 627, C. A.

*N. Where Verdict taken subject to Reference.*

*See Nos. 1544—1585, post.*

*O. Other Cases.*

**1368. Award of stay of proceedings.]**—An award that the prosecution in any suit depending between the parties should cease & be thenceforth deter-

a certain sum, including the costs of the reference, & afterwards directing that each party should pay half the same costs, is bad, for repugnancy.—*SHAVER v. SCOTT* (1836), 5 O. S. 575.—*CAN.*

*u. Conflicting directions as to promissory note.]*—*Held*: an award (in an action of replevin for a promissory note) that declared deft. to have detained the note illegally, & at the same time awarded that it should be delivered up, upon payment of a certain sum (which amount was due thereon), was not void for inconsistency, as it effected substantial justice between the parties.—*LUND v. SMITH* (1860), 10 C. P. 443.—*CAN.*

*w. Part plea proved.]*—An award of arbitrators cannot be set aside on the ground of its being inconsistent, because the plea of deft. was proved as to part of the case, & not as to the other.—

*DEBRAJ ROY v. KARTICK CHUNDER SIRCAR* (1864), W. R. 153.—*IND.*

*x. Award of damages to each party against other.]*—By consent, all matters in dispute between the parties were referred to arbn., & the arbitrator awarded damages both to pltf. & to deft. in respect of the breaches charged in the statement of claim & counterclaim respectively:—*Held*: the award was good.—*SIM v. SMYTH* (1897), 16 N. Z. L. R. 35.—*N.Z.*

*y. Award showing that party in whose favour granted had no right to recover anything.]*—Parties entered into an agreement to refer "all matters whatsoever in dispute" between them. The arbitrators made their award in pltf.'s favour, & he moved to have the award made a judgment of the ct.:—*Held*: the award showed on its face that pltf. was not entitled to recover

anything at all in the action.—*BLAKE-STONE v. WILSON* (1902), 23 C. L. T. 27; 14 Man. L. R. 271.—*CAN.*

*z. Partnership dissolution — Inconsistency apparent on face of award.]*—In a suit for dissolution of partnership the question of the terms of the dissolution was left to an arbitrator. The arbitrator set out certain items in a deficiency which he found to have been explained, leaving an unexplained deficiency as a balance, having previously found the whole deficit unexplained:—*Held*: the award must be set aside.—*GOODE v. BRCHTEL* (1904), 6 W. A. L. R. 36.—*AUS.*

**PART IV. SECT. 8, SUB-SECT. 3.—O.**

*a. Award that party had no right or title to land.]*—Pltf. brought an action for *mesne* profits against deft., & deft. an action of trespass against pltf. The

**Sect. 8.—Requisites of valid award: Sub-sect. 3, O.]**

mined destroys the right of action, & is sufficiently final.—**SQUIRE v. GREVELL** (GREVETT, GREVIL) (1703), Holt, K. B. 81; 6 Mod. Rep. 33; 2 Ld. Raym. 961; 87 E. R. 797; *sub nom.* **SIMON v. GAVIL**, 1 Salk. 74.

**Annotations:—Distd.** **Bradford v. Brien** (1741), 7 Mod. Rep. 349. **Consd.** **Banfill v. Leigh** (1800), 8 Term Rep. 571. **Refd.** **Pickering v. Watson** (1776), 2 Wm. Bl. 1117.

**1369. —.**—An award that all suits shall cease is final.—**SQUIRE v. GREVELL** (GREVETT, GREVIL) (1703), Holt, K. B. 81; 6 Mod. Rep. 33; 2 Ld. Raym. 961; 87 E. R. 797; *sub nom.* **SIMON v. GAVIL**, 1 Salk. 74.

**Annotations:—Distd.** **Bradford v. Brien** (1741), 7 Mod. Rep. 349. **Consd.** **Banfill v. Leigh** (1800), 8 Term Rep. 571. **Refd.** **Pickering v. Watson** (1776), 2 Wm. Bl. 1117.

**1370. Each party to pay his own costs.]—**An award that certain actions be discontinued, & each party pay his own costs, is final & good, being in effect an award of a *stel processus*.—**BLANCHARD v. LILLEY**, R. v. **BLANCHARD** (1808), 9 East, 497; 103 E. R. 662.

**Annotation:—Refd.** **Wynne v. Edwards** (1844), 12 M. & W. 708.

**1371. Award dismissing suit in Chancery.]—**An award that a suit in Ch. shall be dismissed is good.—**KNIGHT v. BURTON** (1704), 6 Mod. Rep. 231; 1 Salk. 75; 87 E. R. 982.

**Annotation:—Folld.** **Pearse v. Pearse** (1829), 9 B. & C. 484.

**1372. —. Matter in dispute in suit also brought forward as matter in difference.]—**By an order of *Nisi Prius*, an action at law, & all matters in difference between the parties at law & in equity, including a Ch. suit, were referred to an arbitrator, who by his award ordered that a sum of money should be paid to pltf. in the action, that the bill in Ch. should be dismissed, & that all proceedings therein should utterly cease & determine:—**Held**: the suit in equity, & all matters in difference in that suit, & all matters in difference between the parties, were thereby finally determined, although one of the matters in dispute in the Ch. suit was brought before the arbitrator as a matter in difference between the parties, & was not otherwise disposed of than by the ending of the Ch. suit.—**PEARSE v. PEARSE** (1829), 9 B. & C. 484; 109 E. R. 180.

**Annotation:—Refd.** **Day v. Bonnin** (1836), 3 Bing. N. C. 219.

**1373. Award that one of parties shall not proceed in action.]—**An award that one of the parties shall

two suits were submitted to arbn. The award stated that pltf. had not any right or title to the land. Pltf. objected to the award on the ground that it was inconclusive, as it did not determine in whom the title was vested:—**Held**: the award was sufficiently final.—**EVERETT v. WHITEFORD** (1848), 4 U. C. R. 261.—**CAN.**

**b. Award that party not entitled to possession.]—**A dispute as to the possession of certain goods, for which an action of replevin was pending, was, together with certain other matters in difference, referred to arbn. In an action on the bond deft. pleaded (*inter alia*) that the award was not final, because the arbitrators did not declare what was to be done with the property for which the replevin suit was brought:—**Held**: as the matter referred to the arbitrators was the right of possession, & as the arbitrators had awarded that deft. was not entitled to the possession & had awarded one shilling damages to pltf., the finding of the arbitrators disposed fully & clearly of the matter submitted.—**STINSON v. MARTIN** (1862), 22 U. C. R. 154.—**CAN.**

**c. Award taking certain rights for granted.]—**An award, after directing a certain sum to be paid to deft. added:

"We have taken it for granted in making this award, that H. shall have the right to cross the railway track from one part of his property to another":—**Held**: not sufficiently definite or certain.—**GREAT WESTERN RY. CO. v. HUNT** (1851), 12 U. C. R. 124.—**CAN.**

**d. Award that party should stand acquitted & discharged.]—**All matters in difference between pltf. & deft. having been referred, the award was that deft. should stand fully acquitted & discharged of & from all such matters:—**Held**: certain, final, & conclusive.—**RYAN v. POMEROY** (1852), 1 P. R. 59.—**CAN.**

**f. Award that party not guilty of grievances charged.]—**A. brought an action against B. for damages, & all matters in difference were referred to arbn. The arbitrators awarded that B. was not guilty of the grievances charged:—**Held**: the award determined the suit, & it was not necessary to award upon the issues raised by other pleas which thereby became immaterial.—**Re OULTON & ALLEN** (1885), 25 N. B. R. 19.—**CAN.**

**g. Award of compensation for non-performance.]—**A dispute arose between a railway co. & a town as to the con-

struction of a branch line into the town, & was referred to an arbitrator. He awarded that there was a valid agreement to construct the line, that the claim to have the agreement performed subsisted, & if not performed compensation ought to be awarded. He awarded as compensation £5,000. On a motion to set aside:—**Held**: it was not defective for uncertainty as to whether the agreement had been carried out & as to whether the co. had an option to pay the £5,000 or construct the branch line, but sufficiently showed that the agreement had not been performed & that no such option was intended.—**Re BARRIE TOWN & NORTHERN RY. CO.** (1862), 22 U. C. R. 25.—**CAN.**

not proceed in an action is good.—**GRAY v. GRAY** (1619), Cro. Jac. 525; 79 E. R. 449.

**1374. Award that plaintiff had no cause of action.]—**Where an action for breach of covenant was pending &, with all matters in difference, was referred to arbn., the costs of the suit to abide the event:—**Held**: an award that pltf. had no demand on deft. on account of any alleged breaches of covenant, or on any other account whatsoever, was final, although the suit was not, in terms, put an end to.—**JACKSON v. YABSLEY** (1822), 5 B. & Ald. 848; 106 E. R. 1401.

**Annotation:—Refd.** **Re Tribe & Upperton** (1835), 3 Ad. & El. 295.

**1375. —. Costs to be paid by plaintiff.]—**Trespass for filling up a certain ditch & watercourses with earth & soil, & for improperly erecting a wall upon pltf.'s land. The cause, which had not proceeded further than declaration, together with all matters in dispute between the parties, was referred to arbn., the costs of the action to abide the event of the award. The arbitrators, without stating in their award what were the matters in dispute, awarded as follows: "That the costs of the action be paid by pltf., there being, in our opinion, no just cause of action." They also in their award admitted pltf.'s right to the ditch, & decided that the wall was not improperly erected on pltf.'s land:—**Held**: the award was bad for uncertainty.—**WILLIAMS v. PRITCHARD** (1845), 1 New Pract. Cas. 135.

**1376. Award that nothing due to plaintiff.]—**Where a cause & all matters in difference were referred by order of *Nisi Prius*, & the arbitrator by his award found "that nothing is due to pltf.":—**Held**: this must be considered as a finding that pltf. had no right to recover in the action.—**DICKINS v. JARVIS** (SMITH) (1826), 5 B. & C. 528; 8 Dow. & Ry. K. B. 285; 108 E. R. 197.

**Annotations:—Mentd.** **Smith v. Reeves** (1836), 5 Dowl. 513. **Barton v. Ranson** (1838), 3 M. & W. 322.

**1377. Award that each party pay his own charges at law.]—**Award that each party shall pay his own charges at law, & that deft. shall pay pltf. 5s. for his making the first breach in law, is certain & final.—**HAWKINS v. COLCLOUGH** (1757), 2 Keny. 553; 1 Burr. 274; 96 E. R. 1276.

**Annotation:—Expld. & Distd.** **Re Tribe & Upperton** (1835), 3 Ad. & El. 295.

**1378. Award directing as to costs—Action referred —Defendant to deliver up possession.]—**An action

struction of a branch line into the town, & was referred to an arbitrator. He awarded that there was a valid agreement to construct the line, that the claim to have the agreement performed subsisted, & if not performed compensation ought to be awarded. He awarded as compensation £5,000. On a motion to set aside:—**Held**: it was not defective for uncertainty as to whether the agreement had been carried out & as to whether the co. had an option to pay the £5,000 or construct the branch line, but sufficiently showed that the agreement had not been performed & that no such option was intended.—**Re BARRIE TOWN & NORTHERN RY. CO.** (1862), 22 U. C. R. 25.—**CAN.**

**1378 i. Award directing as to costs.]—**Certain matters between A. & B. were referred, & also all costs of suits by either party. The award was that B. should pay a large sum to A., & also all costs of suits:—**Held**: sufficiently final, without stating that the suits should cease.—**DUCAT v. GREEN** (1835), 4 O. S. 110.—**CAN.**

**1378 ii. —.]—**Pltf. declared on a bond of submission, alleging that the arbitrators heard the matters in difference, amongst others, the costs of an action in the Common Pleas between



of ejectment was referred to arbn., & the reference, which was confined to that action, stated that, if the arbitrator should award that pltf. had any cause of action, he should have costs, as in a ct. of law. The arbitrator, by his award, directed deft. to deliver up the premises, & pay the costs of the action & a sum of money to pltf. for the loss of rent during the time deft. held possession. On a motion for an attachment against deft. for the sum awarded to pltf.:—*Held*: the award was in that respect good, although the arbitrator did not find in terms that pltf. had any cause of action.—*DOE v. WILLIAMS v. RICHARDSON* (1819), 8 Taunt. 697; 29 E. R. 555.

*Annotation*:—*Mentd.* Stone v. Phillips (1837), 4 Bing. N. C. 37.

**1379. — Action & all matters referred.]**—A Ch. suit & all matters in difference were referred. As to the Ch. suit, the arbitrator merely decided that each party should pay his own costs:—*Qu.*: whether this was sufficiently final.—*UPPERTON v. TRIBE* (1835), 1 Har. & W. 280; *sub nom.* *Re TRIBE & UPPERTON*, 3 Ad. & El. 295; 111 E. R. 425.

**1380. —**—An agreement of reference recited that a Ch. suit for a dissolution of partnership existed between the parties, & that, in order to put an end to it, they had agreed to refer all matters in dispute arising out of their accounts or otherwise; & power was given to the arbitrators to assess & apportion the costs of the suit as well as the other costs. The arbitrators found a sum of money to be due from one of the parties to the other, & apportioned the costs of the suit & the other costs:—*Held*: the award was final & had sufficiently adjudicated on the Ch. suit, & it was not necessary that the arbitrators should give any specific directions as to the suit itself.—*Re MARSH* (1847), 16 L. J. Q. B. 330; *sub nom.* *HAYWOOD v. MARSH*, 11 Jur. 657.

**1381. Award settling costs on both sides.]**—An award which settles the costs on both sides is final.—*HARTNELL v. HILL* (1801), For. 73; 145 E. R. 1117.

**1382. Award directing verdict to be entered.]**—An arbitrator to whom a cause, before being at issue, was referred by rule of ct., on motion, awarded thus: "I award & direct that a verdict in this cause be finally entered for pltf., with £284 12s. damages":—*Held*: he had exceeded his authority in directing the entry of a verdict, & as the award consisted of only one sentence, that direction could not be rejected & the residue considered as an award that so much was due & to be paid, & the award could not be supported.—*JACKSON v. CLARKE* (1825), M'Cle. & Yo. 200; 148 E. R. 382.

*Annotations*:—*Dbtd. but Distd.* Law v. Blackburn (1853), 14 C. B. 77. *Dbtd.* Everest v. Ritchie (1862), 7 H. & N. 698. *Refd.* Donlan v. Brett (1834), 2 Ad. & El. 344; Bayes v. Hewetson (1836), 2 Scott, 837; Cock v. Gent (1845), 14 M. & W. 680.

**1383. —**—A cause had been referred by a judge's order before trial. The arbitrator awarded a verdict to be entered for pltf., with £55 damages:—*Held*: this was not tantamount to awarding the sum of £55 to be paid by deft. to pltf., & as no sum was ordered to be paid, no attachment could issue for the non-payment.—*DONLAN v. BRETT* (1834), 2 Ad. & El. 344; 4 Nev. & M. K. B. 854; 4 L. J. K. B. 55; 111 E. R. 133.

*Annotations*:—*Consd.* Hayward v. Phillips (1837), 6 Ad. & El. 119. *Consd. & Folld.* Cock v. Gent (1845), 3 Dow. & L. 271. *Expld. & Distd.* Bowen v. Bowen (1862), 31 L. J. Q. B. 193. *Refd.* Law v. Blackburn (1853), 14 C. B. 77.

**1384. —**—*Assumpsit* on an agreement to build a house according to certain drawings, plans, & specifications, & to the satisfaction of pltf. & with

the best materials, alleging as breaches that deft. did not build the house to the satisfaction of pltf., & that he did not perform the work with the best materials. Pleas: (1) *non assumpsit*; (2) that deft. did the work to the satisfaction of pltf.; (3) that before the breach the contract was rescinded; (4) leave & licence; (5) a plea stating an agreement between pltf. & deft. to build a stone wall in lieu of the wall mentioned in the original agreement; (6) that deft., by command of pltf., erected a stone wall instead of a brick wall. Pltf. took issue on the two first pleas, traversed the third, fifth, & sixth, & replied *de injuriâ* to the fourth. The cause was referred to an arbitrator, the costs of the cause & reference to abide the event; & he awarded a general verdict to be entered for deft.:—*Held*: the award was not uncertain, inconsistent, or repugnant.—*COOPER v. LANGDON* (1841), 9 M. & W. 60; 11 L. J. Ex. 222; 152 E. R. 27; *affd.* (1842), 10 M. & W. 785, Ex. Ch.

*Annotations*:—*Consd.* Stonehewer v. Farrar (1845), 6 Q. B. 730. *Refd.* Waddle v. Downman (1844), 12 M. & W. 562; *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483; *Humphreys v. Pearce* (1852), 7 Exch. 696. *Mentd.* Pearson v. Archbold (1843), 11 M. & W. 477; Muir v. Parrott (1845), 4 L. T. O. S. 290.

**1385. —**—An action of ejectment was referred to arbn. by a judge's order after issue joined, the costs of the cause & reference to abide the event. The arbitrator awarded: "I award & determine that the verdict in the cause be entered for the lessors of pltf.":—*Held* (*WILLIAMS, J., diss.*): the arbitrator, having used words which had no technical meaning, must be understood to have finally determined the cause in favour of the lessors of pltf.—*LAW v. BLACKBURROW* (1853), 14 C. B. 77; 23 L. J. C. P. 28; 22 L. T. O. S. 146; 18 Jur. 130; 2 W. R. 101; 2 C. L. R. 28; 139 E. R. 33.

*Annotations*:—*Apld.* Mays v. Cannell (1854), 15 C. B. 107; Everest v. Ritchie (1862), 7 H. & N. 698.

**1386. —**—An action of ejectment was, after issue joined, referred by a judge's order to the award of C., the costs of the action & of the reference & award to abide the event; & it was ordered "that the arbitrator should, in the event of his finding in favour of the lessors of pltf., have power to order immediate possession to be given of the land & premises in question in the action to the lessor of pltf., T., & also how & in what manner such possession should be given, & if not given, how it should be taken." The arbitrator awarded (*inter alia*): "I award in favour of the lessors of pltf., & order that immediate possession be given of the land & premises in question in this action to the lessor of pltf., T.":—*Held*: the award in favour of the lessors of pltf. was sufficiently certain & final.—*MAYS v. CANNELL* (1854), 15 C. B. 107; 24 L. J. C. P. 41; 1 Jur. N. S. 183; 3 W. R. 138; 3 C. L. R. 218; 139 E. R. 360.

*See, also, Nos.* 1215—1224, *ante*.

**1387. Finding on issues without stating result.]**—*Assumpsit* against an attorney, charging that he had undertaken a cause for pltf. & had conducted it negligently. Pleas: (1) *non assumpsit*; (2) a traverse of the negligence; issue thereon. The cause was referred to an arbitrator, who awarded—(1) deft. did promise *modo et formâ*; (2) deft. was not negligent *modo et formâ*. A rule to set aside the award, on the ground that it did not finally determine the cause, inasmuch as the arbitrator by finding in the terms of the issues, without stating the result of the cause, had merely performed the functions of the jury, & had not adjudicated as to the cause of action, was

the parties, & awarded that deft. should convey certain specified land to pltf. in fee, & should pay him all the costs of the reference & of the action, & that they should execute mutual

releases. Deft. pleaded that the award mentioned no suit, but awarded the costs of reference, " & also all costs that may have been incurred by any legal process through which the matter

relating to this arbn. may have passed previous to the award":—*Held*: the award was sufficiently certain & final.—*HIBBERT v. SCOTT* (1865), 24 U. C. R. 581.—*CAN.*



*Sect. 8.—Requisites of valid award: Sub-sect. 3, O. Sub-sects. 4, 5, 6, 7, & 8, A.]*

discharged.—*ALLEN v. LOWE, LOWE v. ALLEN* (1843), 4 Q. B. 66; 3 Gal. & Dav. 395; 12 L. J. Q. B. 115; 7 Jur. 416; 114 E. R. 822.

**1388. Award directing division of partnership assets.]**—An award recited that by an agreement in writing between pltf. & deft., reciting that they had for some years carried on business as builders & excavators in co-partnership, & that they had, in pursuance of the co-partnership, become possessed of certain messuages, buildings, & premises, sum & sums of money, & other chattels & effects, & that disputes had arisen between them touching their accounts, reckonings, & dealings, & as to a division of the co-partnership messuages, etc., & other their estate & effects, & that they had agreed to refer the matter to the decision, etc., of B. & C., & that the arbitrators should have power to direct a division of the messuages, buildings, & premises, & other the partnership effects between them, each party thereby agreed to execute to the other a conveyance of the messuages, etc., according to such division between them, as the arbitrators should award. The award further recited that the partnership between deft. & pltf. had been dissolved by mutual consent. The arbitrators then awarded that deft. should pay to pltf. the sum of £223 4s. 6d. in full of all demands, in respect of his one equal moiety, half part, or share of the co-partnership property, estate, & effects, & that, upon payment thereof, & upon having such conveyances as thereafter mentioned tendered to him for execution, pltf. should, at deft.'s request, execute a proper conveyance unto & to the use of deft. of, in, & to certain messuages, etc., therein mentioned, subject to certain mtge. debts charged thereon. They also awarded that all the debts then due & owing to & from the co-partnership concern should be received & paid by deft. & pltf. in equal proportions, & that, if either party should advance or pay any sum or sums of money over & above his half share or proportion of the co-partnership debts, then the amount so overpaid should, on demand, be made good, & repaid to the party paying same, by the party making default. To an action upon the award, to recover the sum of £223 4s. 6d. from deft., he pleaded, after setting out the award as above, that the several messuages, etc., in the award mentioned, & directed to be conveyed to deft., were the whole of the co-partnership messuages, etc., & that there was not in the award any other provision than those thereinbefore specified concerning the co-partnership property, estate, & effects, or the division thereof, or any part thereof:—*Held*: the award was final, & sufficiently certain, & was not inconsistent. *Qu.*: whether, upon the supposition that there had been no arrangement between the partners, by which the premises were ultimately to become the property of one partner, subject to the mtges., the arbitrators did not exceed their authority in awarding the messuages, etc., to one of the parties, & not dividing them between both.—*WOOD v. WILSON* (1835), 2 Cr. M. & R. 241; 5 Tyr. 813; 4 L. J. Ex. 193; 150 E. R. 105.

*Annotation*:—*Mentd.* *Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482.

*See, further, PARTNERSHIP.*

#### PART IV. SECT. 8, SUB-SECT. 4.

**h. Excessive compensation.]**—The amount of compensation awarded will not justify a reversal unless it shocks one's sense of justice.—*BARIL v. GRAND TRUNK RY. Co.* (1912), 46 Q. R. S. C. 295.—*CAN.*

**k. Findings unreasonable.]**—The findings of an arbitrator will not be reviewed unless he could not, as a reasonable man, arrive at the conclusion objected to.—

*POWELL v. CROW'S NEST PASS COAL CO.* (1915), 32 W. L. R. 218; 23 D. L. R. 57; 34 W. L. R. 32; 10 W. W. R. 107.—*CAN.*

#### PART IV. SECT. 8, SUB-SECT. 5.

**l. Award making property indivisible.]**—An arbitrator has no power to alter the devolution of property in a mode at variance with the ordinary principles of the law governing the parties, in the absence of a special

#### SUB-SECT. 4.—MUST BE REASONABLE.

**1389. Excessive damages.]**—Pltf. called deft., a butcher of Croydon, a bkpt., & deft. was awarded £495 damages by arbitrators. Upon pltf.'s bill, it was ordered that, notwithstanding the award, there should be a trial what deft. was damnified, when he recovered a verdict but for £10, & pltf. was relieved against the award.—*COOPER v. BUTCHER OF CROYDON* (1671), 3 Rep. Ch. 76; 21 E. R. 733.

*Annotation*:—*Refd.* *Turner v. Rose* (1756), 1 Keny. 393.

**1390. —.**—Where an award had been given for excessive damages, equity would relieve.—*YOUNG v. COOKE* (1673), 3 Rep. Ch. 82; 21 E. R. 735.

#### SUB-SECT. 5.—MUST BE LEGAL.

**1391. Award decreeing perpetuity.]**—An award which gives to one party an estate tail, but forbids him to disentail it without the consent of the other party, is, as to such prohibition, bad, & will not be enforced, it being absolutely against the constant course of the ct. to decree a perpetuity.—*BISHOP v. BISHOP* (1639), 1 Rep. Ch. 142; 1 Cas. in Ch. 40; Toth. 17; 21 E. R. 532.

**1392. Award contrary to private Act of Parliament.]**—An Act of Parliament, authorising a co. to raise money, empowered the directors to make calls from time to time, provided one month at least should intervene between the calls. The directors brought an action against one of the subscribers for the amount of two calls made on his shares on the same day, & that subscriber brought a counter-action against the directors for the value of his shares as at a certain period. Both actions were referred to an arbitrator under an order of ct.; & he found (*inter alia*) the directors were entitled to decree for the amount of the two calls, with interest:—*Held*: the award was bad, as the finding for the amount of two calls made in one day was contrary to the Act of incorporation, which required the distance of a month at least between two calls.—*BAILLIE v. EDINBURGH OIL GAS LIGHT CO.* (1835), 3 Cl. & Fin. 639; 6 E. R. 1577, II. L.

**1393. Unstamped documents.]**—An order of reference directed that all documents should be admitted in evidence, although unstamped. The award recited that direction, & alleged that the arbitrator had read all the documents produced before him:—*Held*: the award was not invalid, as it did not appear that the documents produced were not duly stamped.—*PHILLIPS v. HIGGINS* (1851), 2 L. M. & P. 355; 20 L. J. Q. B. 357.

*Annotation*:—*Mentd.* *Humphreys v. Pearce* (1852), 7 Exch. 696.

**Awards disposing of disputes arising out of illegal transactions.]**—*See* Nos. 1826—7, *post*.

#### SUB-SECT. 6.—MUST BE POSSIBLE.

**1394. Award directing payment on date previous to award.]**—An award that A. pay B. on divers dates

custom prevailing. He has no power to make property which is divisible by law indivisible for ever.—*JAFRI BEGUM v. SYED ALI REZA* (1901), 5 C. W. N. 585; 1 L. R. 23 All. 383; L. R. 28 I. A. 111.—*IND.*

**m. Award must conform to law.]**—Where legal rights are referred to arbn. the award must be according to law, otherwise it is not binding.—*BLENNERHASSET v. DAY* (1812), 2 Ball. & B. 120.

delivered after one such date is past is bad, because the award does not take effect until delivery (YELVERTON, J.).—ANON. (1468), Y. B., 8 Edw. 4, fo. 1, pl. 1.

**1395. Award directing delivery of deed in custody of another.]**—An award that one of the parties should do a thing out of his power, as to deliver up a deed which is in custody of S., is void.—LEE v. ELKINS (1701), 12 Mod. Rep. 585; 88 E. R. 1536.

**Awards directing payment to strangers or affecting rights & interests of strangers.]**—See Nos. 1189—1214, *ante*.

#### SUB-SECT. 7.—MUST MUTUAL.

**1396. Presumption in favour of award.]**—An award is to be deemed mutual in the absence of evidence to the contrary.—COOPER v. HIRST (1700), 1 Lut. 539; 125 E. R. 283.

**1397. Award of mutual releases—Reference of action of trespass.]**—On a reference of an action of trespass, an award of mutual releases:—*Held*: good.—ANON. (1476), Y. B., 16 Edw. 4, fo. 8, pl. 5.

**1398. —.]**—An award of mutual releases:—*Held*: bad, because no satisfaction was awarded, & the award in fact only ordered a means to discharge the action.—FREEMAN v. BERNARD (1697), 1 Ld. Raym. 247; 3 Ld. Raym. 245 (pleadings); 1 Salk. 69; 91 E. R. 1061.

*Annotations*:—*Refd.* Bates v. Townley (1848), 2 Exch. 152. *Mentd.* Clapcott v. Davy (1699), 1 Ld. Raym. 611; Abrahams v. Brandon (1714), 10 Mod. Rep. 200.

**1399. —.]**—An award of mutual releases is not good.—ANON. (1700), 12 Mod. Rep. 423; 88 E. R. 1425.

**1400. Award giving benefit to one party only.]**—An award which gives a benefit to one party, without any correlative advantage to the other, is void.—COLSTON v. HARRIS (1602), Cro. Eliz. 904; 78 E. R. 1127.

*Annotation*:—*Mentd.* Ayland v. Nicholls (1679), Freem. K. B. 265.

**1401. Award void as to one part.]**—Arbitrators awarded debt. should pay *super vicesimum primum diem*. *Maij tunc proxime sequentem* £20 to pltf., & that pltf. *super pradicum primum diem* *Maij* should release to debt. all his right in such copyhold immediately upon the payment:—*Held*: as the release was to be made upon the foresaid first day of May, & there was not any such day, the arbitrament thereupon was void, for the recompense in the arbitrament ought to be equal & reciprocal: & if void on the one part, it was void for all.—GENNINGS v. MARKHAM (1607), Cro. Jac. 149; 79 E. R. 130.

*Annotation*:—*Mentd.* Reynoldson v. Blake (1696), 1 Ld. Raym. 192.

#### PART IV. SECT. 8, SUB-SECT. 8.—A.

**1407 i. General rule.]**—When several matters are in dispute & are referred to arbitrators, they must decide upon the whole of them, & for want of these steps the ct. will set aside an award in such case.—FAIRFIELD v. BUTCHARD (1821), 3 R. de L. 357.—CAN.

**1407 ii. —.]**—An award which does not dispose of all the points submitted is void.—CLEAL v. ELLIOTT (1851), 1 C. P. 242.—CAN.

**1407 iii. —.]**—An award was held to be defective for not showing that all the matters submitted had been inquired into.—CAMERON v. PRESBYTERIAN CHURCH MANAGERS (1881), 6 Ntd. L. R. 335.—NFLD.

**1407 iv. —.]**—An award which shows on its face that the arbitrator has not considered matters which were submitted to him will be set aside.—Re

HUSBANDS & HUSBANDS (1884), 10 V. L. R. 208.—AUS.

**1407 v. —.]**—*Held*: an action to enforce an incomplete decree-arbitral was incompetent.—M'CONNELL & REID v. SMITH (1911), 48 Sc. L. R. 564.—SCOT

**1407 vi. — Separate awards on different points insufficient.]**—When an action & a suit were pending, & a submission was made in the action to refer both matters:—*Held*: an award in the suit which did not embrace the matters in the action was bad, & so of another award in the action.—KINNEEN v. PERSSE (1853), 7 I. Ch. R. 438.—IR.

**1407 vii. — Unless in circumstances amounting to two submissions.]**—Parties to a submission agreed to withdraw all but one matter from consideration, & to try to settle the other matters themselves, & if they could not do so then to refer them back to the arbitrators. They failed to agree & there was a reference back accordingly:—

**1402. Award that one shall pay debt.]**—An award that one shall pay a debt is mutual, for the other is thereby discharged from it.—BASPOLE'S CASE, No. 1425, *post*.

**1403. Award of everything to be performed of one part.]**—An award is void where everything is to be performed of the one part & nothing of the other.—VEALE v. WARNER (1669), 1 Saund. 323; 2 Keb. 568; 85 E. R. 463.

*Annotations*:—*Expld.* Scott v. Williams (1835), 5 Tyr. 506; R. v. Grant (1849), 13 Jur. 1026. *Refd.* Sanderson v. Collman (1842), 4 Man. & G. 209; Sadler v. Smith (1869), L. R. 4 Q. B. 214. *Mentd.* Freeman v. Cooke (1848), 18 L. J. Ex. 114; Stainton v. Chadwick (1851), 3 Mac. & G. 575; Harding v. Wickham (1861), 2 John. & H. 676; Thorburn v. Barnes (1867), L. R. 2 C. P. 384; Buccleugh v. Metropolitan Board of Works (1870), 39 L. J. Ex. 130, Ex. Ch.

**1404. Award for payment of money & that each shall release other.]**—An award that one party shall pay the other £10, & each shall release to the other, is good & mutual.—VEZY v. DANIEL (1672), 1 Freem. K. B. 356; 89 E. R. 265.

**1405. Award that one party pay other money.]**—An award that one party shall pay the other a sum of money is bad for want of mutuality, unless it appear on what account the money is paid or something is awarded *e converso*.—BACON v. DUBARRY (1697), 1 Ld. Raym. 246; Holt, K. B. 78; Carth. 412; Comb. 439; 12 Mod. Rep. 129; 1 Salk. 70; Skin. 679; 91 E. R. 1060.

*Annotation*:—*Mentd.* Cayhill v. Fitzgerald (1743), 1 Wils. 28.

**1406. Award directing payment of money by one party.]**—An award directing the payment of money by one party, without awarding anything in his favour, is void for want of mutuality.—DOYLEY v. BURTON (1700), 1 Ld. Raym. 533; 91 E. R. 1256.

#### SUB-SECT. 8.—MUST DISPOSE OF ALL MATTERS.

##### A. Necessity for disposing of all Matters.

**1407. General rule.]**—An award which leaves some of the questions undecided cannot be enforced.—WAKEFIELD v. LLANELLY RY. & DOCK CO. (1865), 3 De G. J. & Sm. 11; 12 L. T. 509; 11 Jur. N. S. 456; 13 W. R. 823; 46 E. R. 542, L.JJ.

**1408. Where submission conditional—General rule.]**—If several things in particular are referred with a condition that the award be made of the premises, etc., the arbitrator must make his award of all, or the award will be void; otherwise where there is no such condition.—BASPOLE'S CASE (1611), 8 Co. Rep. 97 b; 77 E. R. 624; *sub nom.* FREEMAN v. BASPOULE, 2 Brownl. 309.

*Annotations*:—*Apld.* Perry v. Mitchell (1844), 2 Dow. & L. 452. *Refd.* Ormelade v. Coke (1614), Cro. Jac. 354;

*Held*: the first award was clearly good. *Semble*: the second was good also.—BABY v. DEVENPORT (1845), 2 U. C. R. 65.—CAN.

*n. Implied condition that all matters be decided.]*—The ground for holding an award invalid on account of it not disposing of all matter referred appears to be that there is an implied condition in the submission that the award shall dispose of all. This condition may be waived by the parties before the arbitrators.—MAKUND RAM SUKAL v. SALIQ RAM SUKAL (1893), 1 L. R. 21 Calc. 590; L. R. 21 I. A. 47.—IND.

*p. Whole matter not decided.]*—An award, by the law of Scotland, although it does not decide on the whole matter referred, may be good as far as it goes, provided it be unobjectionable in other respects.—MACLELLAN v. MACLEOD (1830), 2 Dow. & Cl. 121; 6 E. R. 675, H. L.—SCOT.



**Sect. 8.—Requisites of valid award: Sub-sect. 8, A. & B.]**

Ingrave v. Web (1620), Palm. 107; Grove v. Crane (1621), Palm. 145; Lee v. Elkins (1701), 12 Mod. Rep. 585; Randall v. Randall (1805), 7 East, 81; Wrightson v. Bywater (1838), 6 Dowl. 359; Harrison v. Creswick (1852), 16 Jur. 315, Ex. Ch. **Mentd.** Young & Taylor's Case (1591), 4 Leon. 94; Sallows v. Girling (1611), Cro. Jac. 277; Berry v. Perry (1615), 3 Bulst. 6 n.; Winch v. Sanders (1620), Cro. Jac. 584; Bacon v. Dubarry (1696), 1 Salk. 70; Athelston v. Moon (1736), 2 Com. 547; Winter v. White (1819), 3 Moore, C. P. 674.

**1409.** —.]—If two persons submit all differences to the award of S. *ita quod*, etc., *de præmissis*, etc., & S. makes an award as to part only, the award is void at law, nor will it avail in a ct. of equity.—ROBINSON v. BISSE (1610), 1 Roll. Abr. 377, pl. 17.

**Submission of dilapidations, actions, & disputes—Award dealing with dilapidations & declining to deal with other matters.]—A. & B. agreed to submit to the arbn. of C. a question of dilapidations & the decision of certain actions & disputes then pending between the parties. C. made an award in respect of the dilapidations, but declined to deal with the other matters:—Held: the submission was conditional, & as the award was not on all the matters submitted, the award was void.—BROWNE v. NEVERELL (1561), 2 Dyer, 216 b; Benl. 107; 73 E. R. 478.**

**Annotations:—Apld.** Lee v. Elkins (1701), 12 Mod. Rep. 585. **Refd.** Middleton v. Weeks (1607), Cro. Jac. 200; Sallows v. Girling (1610), Cro. Jac. 277; Berry v. Perry (1615), 3 Bulst. 62.

**1411. — Submission of all things depending — Award failing to deal with particular matter.]—**Where the submission was of all things depending between them so that the arbitrators made an award of the premises before such a day, & £300 was depending in controversy between the parties for a certain thing, of which no arbitrament was made:—**Held:** the submission being conditional, the award ought to be of all things submitted, or else it was void; otherwise if there were no condition.—YOUNG & TAYLOR'S CASE (1591), 4 Leon. 94; 74 E. R. 753.

**1412. — Distinguished from submission in general.]—**If a submission be general, performance is necessary though the award be partial, but where the submission is conditional, if the award be not made of all the things, the obligor need not perform any part.—RISDEN v. INGLET (1601), Cro. Eliz. 838; 78 E. R. 1065.

**Annotations:—Refd.** Randall v. Randall (1805), 3 Smith, K. B. 90. **Mentd.** Bradford v. Bryan (1741), Willes, 268.

**1413. — — —.]—**Where a submission to arbn. is general, the arbitrators are not obliged to determine all matters disclosed, but their award of some will be good though they leave others unnoticed. But when the submission is special, viz. so that an

**1415 i. — Omission to decide one of several matters.]—Held:** upon a reference of all matters in dispute, an award directing the delivery of a certain promissory note, & upon such delivery ordering releases & thereby leaving the note unsettled, was not void.—LUND v. SMITH (1861), 10 C. P. 443.—CAN.

**1415 ii. — Admitted debt.]—**An agreement between A. & B. recited that A. was entitled to certain rent from B., & that A. had claims against B., & that the claims should be referred to arbitrators. The award did not ascertain the amount of rent:—**Held:** the rent was not a subject of controversy, & the award was not defective in point of finality because it did not ascertain such amount.—GREENE v. BRACKEN (1851), 2 L. C. L. R. 176.—IR.

**1415 iii. — Equity**  
Where by a submission it was agreed that

all matters in issue in a Ch. cause should be referred, & the award recited that all matters in dispute between the parties were referred to arbitrators & found that debt. was indebted to pltf., & awarded that he should pay the amount of his indebtedness, & that each party should bear his own costs of the arbn., & that the award should be turned into a decree of the Ct. of Ch.:—**Held:** the award could not be objected to for want of finality, in not disposing of the equity suit, such not being within the scope of the arbitrator's duty.—M'CAHANE v. GREY (1819), 13 L. L. R. 343.—IR.

**q. Award deciding all necessary matters.]—**Where a cause was referred at *Nisi Prius*, under a rule of reference providing "that the costs of the cause shall be disposed of as follows: the costs on demurrer to be subject to the judgment of the ct. on the issues in law, upon which the arbitrators are

award be made of all controversies, etc., they must determine all matters disclosed to them.—ORME v. COKE (1614), Cro. Jac. 354; 79 E. R. 303.

**Annotations:—Apld.** Bradford v. Bryan (1741), Willes, 268. **Refd.** Lee v. Elkins (1701), 12 Mod. Rep. 585; Randall v. Randall (1805), 3 Smith, K. B. 90; Wrightson v. Bywater (1838), 3 M. & W. 199. **Mentd.** Bacon v. Dubarry (1696), 1 Salk. 70.

**1414. — — —.]—**If a submission to an award be made conditional, *ita quod* the award be made *de præmissis*, if the award be not made of the whole, it is void. But if the submission be not conditional, then the award, though made but of part of the premises submitted, is good *pro tanto*.—HIDE v. COOTH (1689), 2 Vern. 109; 23 E. R. 680.

**Annotation:—Dbtd.** Price v. Williams (1790), 3 Bro. C. C. 163.

**1415. — Omission to decide one of several matters.]—**Upon a reference of all actions, controversies, etc., & also of two distinct matters of difference, if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award, which cannot be enforced by attachment.—RANDALL v. RANDALL (1805), 7 East, 81; 3 Smith, K. B. 90; 103 E. R. 32.

**Annotations:—Distd.** Re Gillon & Mersey & Clyde Navigation Co. (1832), 3 B. & Ad. 493; Re Whitworth & Hulse (1866), 14 W. R. 736. **Refd.** Aitcheson v. Cargey (1824), 2 Bing. 199.

**1416. Where submission without condition — General rule.]—**Where the submission is simply without condition, award of part is good.—LEE v. ELKINS (1701), 12 Mod. Rep. 585; 1 Lut. 545; 88 E. R. 1536.

**1417. — — —.]—**When there is no clause in the submission providing that an award shall be made on all points submitted, if the matters omitted are not necessarily dependent on, & connected with, the other points, the award shall be sustained.—PAYNE v. COOK (undated), cited 1 Taunt. at p. 554; 127 E. R. 949.

**Annotations:—Apld.** Simmonds v. Swaine (1809), 1 Taunt. 549; Wrightson v. Bywater (1838), 3 M. & W. 199.

**1418. — — —.]—**If it be not a condition of the submission, that the award shall be made on all the points submitted, an award determining some of the points only is good, provided that the omission of the others do not destroy the equipoise of consideration.—SIMMONDS v. SWAINE (1809), 1 Taunt. 549; 127 E. R. 947.

**Annotation:—Consd.** Wrightson v. Bywater (1838), 3 M. & W. 199.

**1419. — — — In law & equity.]—**Though at law an award may be good, though but for part of the matters referred, unless the submission be conditional to make an award on the premises, yet equity ought not to decree such an award, unless it be of all matters referred, for it is not a

to assess the damages sustained by pltf., & the costs on the issues of fact & the costs on the reference shall be in the discretion of the arbitrators," etc.; & the award said nothing respecting the issues in law, & no damages were assessed thereupon:—**Held:** good.—MASECAR v. CHAMBERS (1847), 3 U. C. R. 186.—CAN.

**r. Matters referred to in submission to secure consideration of whole dispute.]—**Where the object of a submission was to ascertain what amount a contractor was to receive from the Govt., & the specification of the several matters referred to in the submission was merely to secure that, in determining the amount, the mediators should fully consider all these matters, & all matters were so considered:—**Held:** the award was valid.—MCGREEVY v. R. (1891), 19 S. C. R. 180.—CAN.



determination pursuant to the reference.—*HIDE v. PETIT* (1670), 1 Cas. in Ch. 185 ; 2 Freem. Ch. 133 ; 22 E. R. 754.

**1420. Submission reserving leave to leave items undecided.]**—If an award be pursuant to the terms of the submission, it will be good, although not final upon all matters referred. Thus, where, by the submission to arbn., the decision of the arbitrators was to be final, "except as to such items as the referees should reserve for the decision of any ct. of law or equity," & the arbitrators, reciting the submission, decided some points, but reserved others:—*Held*: the award was good, as the latter must have been considered to have been reserved for the decision of a ct. of law or equity, according to the terms of the submission.—*CROKER v. PUGH* (1832), 1 L. J. K. B. 72.

**1421. Submission giving power to make one or more awards.]**—By an order of reference, a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law & in equity, & to order & determine what he should think fit to be done by either party respecting the matters in dispute, so as he should make & publish his award by a day specified (with power to enlarge the time for making it), ready to be delivered to the parties, or, if either of them should be dead, to their respective personal representatives, & the arbitrator was to be at liberty to make one or more awards, at his discretion. At the time of this submission, two equity suits were pending, in which the parties to the action were interested, & in which certain infants were also concerned ; & there were also other matters in difference between them. The arbitrator made an award within the time limited by enlargement, whereby he ordered that a verdict should be entered for pltf., damages £500, & that defts. should pay that sum to pltf., as well as the further sum of £350, for grievances not included in his declaration. On motion to set aside a judgment & execution sued out on the award (the enlarged time having expired):—*Held*: the award was sufficiently final, although it did not dispose of the equity suits, & the award of the £350 was sufficiently certain.—*WRIGHTSON v. BYWATER* (1838), 3 M. & W. 199 ; 6 Dowl. 359 ; 1 Horn & H. 50 ; 7 L. J. Ex. 83 ; 150 E. R. 1114.

*Annotations*:—*Refd.* Doe d. Madkins v. Horner (1838), 8 Ad. & El. 235 ; Harrison v. Creswick (1852), 16 Jur. 315, Ex. Ch. ; *Ex p.* Wyld (1860), 2 De G. F. & J. 642.

**1422. Where claim not accrued due.]**—An action for certain commission on the purchase of land, & all matters in difference between the parties, were referred to arbn., the costs of the suit & of the reference & award, & all other costs, to abide the

event, final judgment to be entered up for pltf. or deft., according to the award, for any damages or costs awarded to either of them, & execution to issue. The arbitrator awarded that pltf. had no cause of action against deft., & that pltf. should pay to deft. the sum of £36 13s. 4d., which he found to be due & owing from pltf. to deft. The arbitrator then declared that his award was not intended to exclude pltf. from the receipt of his commission on certain land purchased, to which he would be entitled under a certain agreement:—*Held*: the award was sufficiently final.—*HARDING v. FORSHAW* (1836), 1 M. & W. 415 ; 4 Dowl. 761 ; Tyr. & Gr. 472 ; 150 E. R. 496.

*Annotations*:—*Apld.* Cockburn v. Newton (1841), 9 Dowl. 676. *Distd.* Kilburn v. Kilburn (1845), 14 L. J. Ex. 160. *Apld.* Hobson v. Stewart (1847), 2 New Pract. Cas. 61.

**1423. Matters not in dispute at date of submission.]**—All matters between the parties in a certain cause were, under a judge's order, referred to an arbitrator, the costs of the cause to abide the event of the award, & the costs of the reference & the award to be in the discretion of the arbitrator. The arbitrator, by his award, found that, at the date of the order of reference, a balance was due from deft. to pltf. on the account between them, consisting of the several claims & demands in the particulars of demand & set-off respectively mentioned, except & excluding from such account a claim on the part of pltf. for a loss alleged to have been sustained by them on certain hats, & that "ptfs. were then entitled to recover from deft. for the balance, together with interest thereon, £184 2s. 1d., & no more" ; & as to the claim in respect of the loss on the hats, he found that no sufficient evidence had been laid before him by pltf. to show that, at the date of the order of reference, they had sustained any loss on the hats, & upon that ground, & for want of sufficient evidence of such loss, he found that pltf. were not entitled under this reference to recover anything in respect thereof:—*Held*: the award was sufficiently final with respect to the matters referred.—*COCKBURN v. NEWTON* (1841), 2 Man. & G. 899 ; 9 Dowl. 676 ; Drinkwater, 216 ; 3 Scott, N. R. 261 ; Woll. 205 ; 10 L. J. C. P. 207 ; 133 E. R. 1007.

*B. What must be disposed of.*

**1424. Matters brought to notice of arbitrator.]**—If a submission be so that the award, etc., it is sufficient if it contain all matters notified, though there are other matters between the parties not noticed.—*MIDDLETON v. WEEKS* (1607), Cro. Jac. 200 ; 79 E. R. 175.

*Annotations*:—*Distd.* Bradford v. Bryan (1741), Willes, 268. *Refd.* Randall v. Randall (1805), 3 Smith, K. B. 90.

#### PART IV. SECT. 8, SUB-SECT. 8.—B.

**1424 i. Matters brought to notice of arbitrator.]**—Where a submission is in the usual general terms, & it can be shown that notwithstanding these general terms there were matters in dispute, of which the arbitrators had notice & which they were requested to determine but left undisposed of, then the award will for that reason be void as not being final.—*BABY v. DAVENPORT* (1845), 2 U. C. R. 65.—*CAN.*

**1424 ii. —.]**—*Held*: an award was not final, in that certain matters relating to property were matters in difference, & were submitted to the arbitrators, but they did not award thereon, & in that they did not dispose of the difference respecting the value of other property.—*STEWART v. WEBSTER* (1861), 20 U. C. R. 469.—*CAN.*

**1424 iii. — Before making award.]**—An award will not be set aside on account of the omission of the arbitrators to decide on matters not sub-

mitted to them previous to the making of the award.—*HAYDON v. DUNN* (1854), James, 256.—*CAN.*

**1424 iv. — Submission general.]**—Where the submission is of all matters in difference or of all disputes without specifying them, the arbitrators need only make their award of those things of which they had notice.—*FAGAN v. F.* (1849), 12 L. Eq. R. 483.—*IR.*

**1424 v. — Damages in respect of certain lands.]**—Arbitrators appointed to determine the value of certain land required for a railway co., & the damages the owner might sustain thereby, awarded that the co. should pay £50 per acre for the land, £31 5s. for damages to the land, & £13 15s. for other damages. It was admitted that damages to other land were claimed at the arbn.:—*Held*: the award was bad, not being final on the matters submitted.—*GREAT WESTERN RY. CO. v. LADERONTE* (1853), 1 P. R. 243.—*CAN.*

**1424 vi. Suit not brought before**

*arbitrator.]*—C. sued B. on a contract. Afterwards they entered into an agreement, reciting that differences had arisen between them in reference to this contract, & referring the same:—*Held*: omission to dispose of the suit by the award was no objection, as it was not mentioned in the reference nor shown to have been brought before the arbitrators.—*Re CAMPBELL v. BROWN* (1857), 2 P. R. 291.—*CAN.*

**1424 vii. — Promissory note.]**—Where all matters in difference were referred, & it appeared that the arbitrators had made no decision regarding a promissory note in difference, which had been brought under their notice, the award was set aside.—*KEMP v. HENDERSON* (1863), 10 Gr. 54.—*CAN.*

**1424 viii. — "All matters whatsoever in dispute."]**—Where arbitrators had not taken into consideration "matters whatsoever in dispute," while the award was set aside.—*Attention, etc.*—*BLAKESTONE*

**Sect. 8.—Requisites of valid award: Sub-sect. 8, B. & C. (a) & (b).]**

**1425. —.**]—Although there are many things in controversy, yet, if only one is notified to the arbitrator, he may make his award of that.—**BASPOLE'S CASE** (1611), 8 Co. Rep. 97 b; 77 E. R. 624; *sub nom.* **FREEMAN v. BASPOULE**, 2 Brownl. 309; *sub nom.* **BASPOOLE v. FREEMAN**, Cro. Jac. 285.

**Annotations:—****Apld.** **Berry v. Perry** (1615), 3 Bulst. 62. **Expld. & Distd.** **Randall v. Randall** (1805), 7 East, 81. **Apld.** **Wrightson v. Bywater** (1838), 3 M. & W. 199; **Perry v. Mitchell** (1844), 12 M. & W. 792. **Refd.** **Young & Taylor's Case** (1591), 4 Leon. 94; **Sallows v. Girling** (1611), Cro. Jac. 277; **Ormelade v. Coke** (1614), Cro. Jac. 354; **Lee v. Elkins** (1701), 12 Mod. Rep. 585; **Athelston v. Moon** (1736), 2 Com. 547; **Winter v. White** (1819), 3 Moore, C. P. 674; **Harrison v. Creswick** (1852), 16 Jur. 315, Ex. Ch. **Mentd.** **Ingrave v. Web** (1620), Palm. 107; **Winch v. Sanders** (1620), Cro. Jac. 584; **Grove v. Crane** (1621), Palm. 145; **Bacon v. Dubarry** (1696), 1 Salk. 70.

**1426. —.**]—Where a submission was of all matters in difference to certain arbitrators:—**Held:** (1) the arbitrators were bound to make their award upon all matters between the parties, which had been laid before them, though there was not the general conclusion of it *ita quod fiat de omnibus præmissis*; (2) the arbitrators having overlooked some matters that were laid before them, the award was void.—**KING v. HAMMERTON** (1729), 1 Barn. K. B. 316; 94 E. R. 214.

**1427. —.**]—Debt on an arbn. bond of all matters in difference, averring that the arbitrators took upon themselves the arbn., & awarded, etc. Deft. pleaded that all matters were submitted, etc., that there were disputes as to moneys claimed by him of the other party, & that the arbitrators took upon themselves to arbitrate of & concerning, etc., & that they made no award of those sums. Pltf. replied that the arbitrators made their award of & concerning, etc., as in the declaration, to which there was a demurrer:—**Held:** the plea was bad for want of averring that the arbitrators had notice of the claims of deft. & refused to arbitrate concerning them.—**ELSON v. ROLFE** (1805), 2 Smith, K. B. 459.

**1428. —.**]—An order of *Nisi Prius*, referring an action of debt on a money bond (where the issue was payment by a co-obligor) & all matters in difference to arbn., does not require the arbitrator to direct for what sum the verdict shall be entered; & the ct. refused to set aside an award directing the verdict to be entered generally for pltf., on a suggestion that the arbitrator ought to have directed for what sum judgment & execution should have been taken out, without proof that there were other matters in difference between the parties.—**CAYME v. WATTS** (1823), 3 Dow. & Ry. K. B. 224.

**1429. —.**]—Where an agreement provides that various things shall be done by the respective parties, & that, if any disputes shall arise with respect to them, such disputes shall be settled by particular persons as arbitrators, the award of the arbitrators need not embrace any more of the matters provided for by the agreement than are brought before them by the parties.—**HAWKS-WORTH v. BRAMMALL** (1840), 5 My. & Cr. 281; 41 E. R. 377.

**Annotation:—****Mentd.** **Blackett v. Bates** (1865), 2 Hem. & M. 610.

**v. WILSON** (1902), 23 C. L. T. 27; 14 Man. L. R. 271.—**CAN.**

**s. All matters—Not merely matters devolved on oversman.]—**Where arbiters devolved points of difference upon an oversman, who pronounced a decree limited to those points which were only part of the matter referred to by

the submission:—**Held:** the decree pronounced by the oversman could not stand.—**RUNCIMAN v. CRAIGIE** (1831), 9 Sh. (Cl. of Sess.) 629.—**SCOT.**

#### **PART IV. SECT. 8, SUB-SECT. 8.—C (a).**

**t. When general words will not cover matter omitted.]—**If an award recites several specific matters in dif-

**1430. —.**]—Where a cause & matters in dispute are referred to an arbitrator, it is sufficient for him, in his award, to state that he finds pltf. "has no cause of action," without making any reference to matters in dispute independent of the action, it not being shown that any matters in dispute beyond the action are brought before him.—**WYATT v. CURNELL** (1841), 1 Dowl. N. S. 327.

**Annotation:—****Refd.** **Harrison v. Creswick** (1853), 13 C. B. 399.

**1431. —.**]—**PERRY v. MITCHELL**, No. 1315, *ante*.

**1432. —.**]—If, upon a reference of "all matters in difference," the parties omit to call the attention of the arbitrator to a matter not necessarily before him, they cannot object to the award, on the ground that he has not adjudicated upon it.—**REES v. WATERS** (1847), 16 M. & W. 263; 4 Dow. & L. 567; 8 L. T. O. S. 123; 153 E. R. 1187.

**1433. What matters brought to notice of arbitrators—Matter of proof.]—**Where matters have been referred to arbn., it is matter of evidence whether a particular matter of complaint has been subjected to the arbitrators' consideration.—**MARTIN v. THORNTON** (1802), 4 Esp. 180.

**Annotation:—****Refd.** **Buccleuch v. Metropolitan Board of Works** (1872), L. R. 5 H. L. 418, H. L.

**Admissibility of evidence of arbitrator to show what was brought to his notice.]—***See* Sect. 15, Sub-sect. 1, *post*.

**C. Whether all Matters have been disposed of.**

**(a) In general.**

**1434. Presumption in favour of award.]—**Where there is a general submission of all matters in difference between two parties to arbn., & the award directs particular securities to be delivered up by one of them, without taking notice of two bonds, or ordering mutual releases to be executed, it shall yet be presumed that these bonds were under the consideration of the arbitrators at the time of making their award, & if they are afterwards put in suit, pltf. shall pay the costs of such proceedings.—**CROFTON v. CONNOR** (1770), 1 Bro. Parl. Cas. 530; 1 E. R. 736.

**1435. —.**]—The submission being of all matters in difference between the parties, an award of so much to be paid by defts. to pltf. on their banking account, & for which sum pltf. were to give defts. a release, is binding between them, for no other matter in difference between them shall be intended, unless it be shown.—**INGRAM v. MILNES** (1807), 8 East, 445; 103 E. R. 414.

**Annotation:—****Folld.** **Gisborne v. Hart** (1839), 5 M. & W. 50.

**(b) Awards "of and concerning."**

**1436. Submission of all controversies—Only one brought before arbitrator.]—**When the submission is of all controversies, & the award is made of the said premises in the said condition specified, & only one matter is adjudged upon, the award is good, & it shall be intended that the award was made of all that was referred to the arbitrator.—**BASPOLE'S CASE** (1611), 8 Co. Rep. 97 b; 77 E. R. 624; *sub nom.* **FREEMAN v. BASPOULE**, 2 Brownl. 309; *sub nom.* **BASPOOLE v. FREEMAN**, Cro. Jac. 285.

**Annotations:—****Folld.** **Perry v. Mitchell** (1844), 12 M. & W. 792. **Refd.** **Ormelade v. Coke** (1614), Cro. Jac. 354; **Ingrave v. Web** (1620), Palm. 107; **Lee v. Elkins** (1701), 12 Mod. Rep. 585; **Randall v. Randall** (1805), 7 East,

reference & makes no specific adjudication in regard to one of these, & the general words of the deciding part cannot be construed so as to bring a decision on the points specifically omitted, the award will be as if expressly professed not to decide it.—**Re AMOS & AMOS** (1893), 14 N. S. L. R. 295.—**AUS.**



81; *Wrightson v. Bywater* (1838), 3 M. & W. 199; *Harrison v. Creswick* (1852), 16 Jur. 315, Ex. Ch. **Mentd.** *Young & Taylor's Case* (1591), 4 Leon. 94; *Sallovs v. Girling* (1611), Cro. Jac. 277; *Berry v. Perry* (1615), 3 Bulst. 62; *Winch v. Sanders* (1620), Cro. Jac. 584; *Grove v. Crane* (1621), Palm. 145; *Bacon v. Dubarry* (1696), 1 Salk. 70; *Athelston v. Moon* (1736), 2 Com. 547; *Winter v. White* (1819), 3 Moore, C. P. 674.

**1437. Submission of particular matters—Award in general terms.]—**An award finding £15 due, & awarding payment of £7 10s. & assignment of a wine licence, without stating that the latter was in satisfaction of the balance of £7 10s.:—*Held*: good.—*ROSE v. SPARK* (1648), Aleyn. 51; 82 E. R. 911.

*Annotation*:—**Refd.** *Thorp v. Cole* (1835), 2 Cr. M. & R. 367.

**1438. Submission in general terms—Award in particular terms.]—**When the submission is general of all actions, etc., a particular award that deft. should pay pltf. £100 in respect of the costs of one suit is bad.—*SPIGURNELL v. JENE* (1660), 1 Sid. 12; 82 E. R. 940.

**1439. Submission of all matters in dispute.]—**On a reference of all matters in dispute to B., deft. pleaded in bar to an action on the award that pltf. was indebted to him, being an attorney, in £4 for fees, & before the making of the award he gave notice thereof to the arbitrator & offered to prove it, but that the arbitrator made his award without any consideration of the £4:—*Held*: the arbitrator was the judge of whether the debt was a just one & he ought to allow for it, & he had given his judgment that pltf. should be released by deft., & he had made his award thereof & of all matters in difference.—*BIRKS (BERKS) v. TRIPPET* (1666), 1 Saund. 28; 2 Keb. 126; 1 Sid. 303; 85 E. R. 32.

*Annotations*:—**Apld.** *Wharton v. King* (1831), 2 B. & Ad. 528; *Harrison v. Creswick* (1853), 13 C. B. 399, Ex. Ch.; *Jewell v. Christie* (1867), L. R. 2 C. P. 296. **Refd.** *Re Dilworth, Ex p. Lancaster Canal Co.* (1831), Mont. 27; *Re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833, C. A. **Mentd.** *Rowe v. Young* (1820), 2 Bli. 391, H. L.; *Simpson v. Routh* (1824), 2 B. & C. 682; *Maylam v. Norris* (1845), 1 C. B. 244; *Creswick v. Harrison* (1850), 10 C. B. 441; *Hooper v. Woolner* (1850), 10 C. B. 370.

**1440. Submission touching all matters in difference.]—**Debt on bond, the condition being that A., acting as attorney for & on behalf of B., became bound to C. to submit to the award of certain arbitrators, to be made within such a time, touching all matters in difference between C. & B. A. after oyer pleaded no award. C. in reply set forth an award published & declared by the arbitrators, which was of & concerning the premises in the condition of the bond specified, & that they thereby awarded that A. should pay or cause to be paid to C. a sum of money & that C. should take the same in full of all demands, & that each of the parties should execute a general release, & then assigned a breach:—*Held*: this was a good award.—*CAYHILL v. FITZGERALD* (1744), 1 Wils. 58; 95 E. R. 491.

**1441. Submission of all matters in difference—No express adjudication upon every matter.]—**On a submission of all matters in difference to the award of an arbitrator, it is no objection to the award that it does not contain an express adjudication upon

every matter contended for: it is sufficient if the award profess to be "of & concerning the matters in difference."—*HAYLLAR v. ELLIS* (1829), 6 Bing. 225; 3 Moo. & P. 553; 8 L. J. O. S. C. P. 1; 130 E. R. 1266.

*Annotations*:—**Apld.** *Dunn v. Warlters* (1842), 9 M. & W. 293; *Harrison v. Creswick* (1853), 13 C. B. 399, Ex. Ch.

**1442. — No adjudication on admitted claim.]—**On a reference of all matters in difference, a demand on one side was laid before the arbitrators, & immediately admitted by the other party, & no evidence was given concerning it, nor any adjudication upon it requested. The arbitrators published their award of & concerning the matters referred to them, directing payment of a sum of money (without saying on what account) to the party against whom the above claim had been made, with costs, & it was proved that they left that claim out of consideration in making their award, as a matter not in dispute:—*Held*: the award was bad, as the arbitrators ought to have taken notice of the admitted demand.—*Re ROBSON & RAILSTON* (1831), 1 B. & Ad. 723; 109 E. R. 955.

*Annotations*:—**Distd.** *Cooper v. Langdon* (1841), 9 M. & W. 60. **Apld.** *Mills v. Bowyers Soc., Bowyers Soc. v. Mills* (1856), 3 K. & J. 66; *Flynn v. Robertson* (1869), 38 L. J. C. P. 240. **Consd.** *Re Whiteley & Roberts*, [1891] 1 Ch. 558. **Refd.** *Bird v. Cooper* (1835), 4 Dowl. 148.

**1443. Submission of cause & of all matters in difference—Award reciting hearing, proof, etc., touching matters in difference.]—**A cause, & all matters in dispute between the parties, being referred to arbn., the arbitrators, "having heard the proofs & allegations of the parties touching the matters in difference between them," awarded "concerning the same" that deft. should pay pltf. £11 5s. in full of all demands in the cause:—*Held*: sufficiently final.—*DAY v. BONNIN* (1836), 3 Bing. N. C. 219; 2 Hodg. 207; 3 Scott, 597; 6 L. J. C. P. 1; 132 E. R. 394.

*Annotations*:—**Consd.** *Wynne v. Edwards* (1844), 1 Dow. & L. 976. **Refd.** *Lund v. Hudson* (1843), 7 Jur. 992; *Creswick v. Harrison* (1850), 10 C. B. 441; *Harrison v. Creswick* (1853), 13 C. B. 399, Ex. Ch.

**1444. — Award reciting hearing of evidence touching matters in difference.]—**A declaration on an agreement to supply timber & slates to pltf. for the building of a house alleged as a breach the non-supply of timber only. Deft. pleaded (1) *non assumpsit*, (2) that he did supply timber, (3) part payment. The cause & all matters in difference were referred, & the arbitrator, by his award, after reciting that he had heard the evidence produced "touching the matters in difference," stated that he made his award "of & concerning the premises," & then proceeded to find specially on each of the issues in the action:—*Held*: the award was sufficient, although it appeared that there was a matter in difference submitted to the arbitrator as to the non-supply of slates.—*DUNN v. WARLTTERS* (1842), 9 M. & W. 293; 1 Dowl. N. S. 626; 11 L. J. Ex. 188; 152 E. R. 124.

*Annotations*:—**Expld.** *Creswick v. Harrison* (1850), 1 L. M. & P. 721. **Consd.** *Re Beaufort v. Swansea Harbour Trustees*

#### PART IV. SECT. 8, SUB-SECT. 8.—C (b).

**1438 i. Submission in general terms—Award in particular terms.]—**By a submission the parties covenanted to abide by the award of S. "of & concerning the premises aforesaid, or anything in any manner relating thereto." The arbitrator found that certain funds in P.'s hands were collected by him for a particular purpose, & awarded that he should retain for himself five per cent. on the sums collected, & should out of the balance repay himself two-thirds of the purchase money paid by him:—*Held*: the award embraced all matters

submitted.—*Re CAMPBELL* (1879), 44 U. C. R. 218.—**CAN.**

**u. Award reciting submission.]—**An award recited a submission of "all claims, etc., in dispute in this action & of all matters in difference between the parties," & stated that the umpire, "having heard, examined & considered the allegations, witnesses, & evidence of pltf. & defts. concerning the premises," made his award "of & concerning the premises," that defts. should pay pltf. the sum of £100 "in full of all demands in the cause":—*Held*: it sufficiently appeared on the face of the

award that the umpire had disposed of all matters referred.—*MANNION v. HARRISON* (1876), 11 C. L. 102.—**IR.**

**w. Submission of all matters referred in cause.]—**An award professed to be made of & concerning all the matters referred in the cause, & the arbitrator awarded that pltf. had no good cause of action against deft., & that there was nothing due from deft. to pltf.:—*Held*: it was no objection to the award that no specific reference was made to a set-off claimed in the cause by deft.—*RUSSEL v. COOK* (1884), 5 R. & G. 133.—**CAN.**



**Sect. 8.—Requisites of valid award: Sub-sect. 8, C. (b), (c) & (d).]**

(1860), 8 C. B. N. S. 146. **Refd.** *Harrison v. Creswick* (1853), 13 C. B. 399. **Mentd.** *Staples v. Hay* (1843), 1 Dow. & L. 711.

**1445. — Silence as to further demands negating right of party making same.]**—If an action & all matters in difference between pltf. & deft. be referred to arbn., & the award made *de præmissis* be silent respecting any further claim beyond the action put forward by pltf., or any cross-demand urged by deft., the award is nevertheless final, as it will be intended that the arbitrator has by his silence negated the right of the party to maintain such claim or cross-demand.—**HARRISON v. CRESWICK** (1853), 13 C. B. 399; 21 L. J. C. P. 113; 16 Jur. 315; 138 E. R. 1254, Ex. Ch.

**Annotations:—Apld.** *Re Beaufort & Swansea Harbour Trustees* (1860), 8 C. B. N. S. 146. **Foll.** *Jewell v. Christie* (1867), L. R. 2 C. P. 296. **Refd.** *Mays v. Cannell* (1854), 24 L. J. C. P. 41.

**1446. — Including goods alleged to have been supplied & cross-claims.]**—In an action of trespass & trover, all matters in dispute, including goods alleged to have been supplied, & cross-claims for money, were referred to an arbitrator. After reciting the submission, the award was stated to be “of & concerning all matters referred”; there was, however, no specific allusion to the alleged supply of goods nor to the cross-claims, although they had been discussed during the reference. On an application to set aside the award, on the ground that it was not final:—**Held**: as the omissions were matters of minor consequence, the silence of the arbitrator was no proof that these matters had not been considered, & the award was good.—**JEWELL v. CHRISTIE** (1867), L. R. 2 C. P. 296; 36 L. J. C. P. 168; 15 L. T. 580.

**1447. Expression “de præmissis” — Not necessary.]**—By a submission to arbn., under Lands Clauses Consolidation Act, 1845 (c. 18), of a question of disputed compensation, the arbitrator was to determine what sum should be paid for the purchase of certain lands & what “other, if any,” sum for severance damage. The arbitrator, by his award, after reciting the submission, & that he had considered the matters so referred to him, awarded a sum to be paid for the purchase of the land, without saying anything as to any severance damage:—**Held**: the award was final & good, & the arbitrator, by his silence, had negated any right to compensation in respect of severance damage.

The award must be read as having been made on all matters in difference, just as much as if the expression *de præmissis* had been inserted in it. It is now quite unnecessary to use that expression, for the ct. assumes that the award was made on all matters submitted to the arbitrator, unless it appears on the face of it that it was not so made (**WILLES, J.**).—**Re BEAUFORT (DUKE) & SWANSEA HARBOUR TRUSTEES** (1860), 8 C. B. N. S. 146; 20 L. J. C. P. 241; 1 L. T. 370; 6 Jur. N. S. 979; 8 W. R. 188; 141 E. R. 1121.

**Annotations:—Refd.** *Jewell v. Christie* (1867), 15 L. T. 580; *R. v. Met. Ry. Co.* (1883), 48 L. T. 367.

(c) *Where Verdict taken subject to Reference. See Nos. 1544—1585, post.*

(d) *Other Cases.*

**1448. Award for one person or on one thing only.]**—If two refer to arbn. all actions real & personal, whether of possession or right, & the arbitrators

give their award for one party or on one thing only, this is a void arbitrament.—**ANON.** (1562), Ben. & D. 43 (27); 123 E. R. 259.

**1449. Right reserved to some parties to prosecute claims.]**—In a suit instituted to enforce a pecuniary demand against the real & personal estate of a testator, an order was made, by consent, referring all matters in difference between the parties in the cause to arbn. The arbitrators made an award ordering the exor. to pay a certain sum to complainants, in full satisfaction of all their demands on him & his testator, but directing that certain other debts., who, under testator’s will, took interests in his real estate, should be at liberty to prosecute their claims against testator’s estate in like manner as if no order of reference had been made:—**Held**: the award was not final, & must be set aside.—**TURNER v. TURNER** (1827), 3 Russ. 494; 38 E. R. 661.

**Annotations:—Mentd.** *Haggett v. Welsh* (1826), 1 Coop. temp. Cott. 420; *Wood v. Taunton* (1849), 11 Beav. 449.

**1450. Award not including all parties.]**—By an order of reference, all matters in difference in a cause between A. & B. were referred to an arbitrator. By a subsequent order, C. was made a party thereto, & it was directed that all matters in difference between A., B. & C. should be referred to the same arbitrator, & that the costs of the suits should abide the event of the award. The arbitrator made two awards, in the one of which he awarded that A. at the date thereof was indebted to B., without mentioning C., & in the other that A. was indebted to C., without mentioning B.:—**Held**: both these awards were bad, as he had not decided all the matters in difference between all the parties.—**WINTER v. MUNTUN, WINTER v. WHITE** (1818), 2 Moore, C. P. 723.

**Annotation:—Consd.** *Rees v. Waters* (1847), 16 M. & W. 263.

**1451. Award excepting bond which is to stand.]**—An award of all matters, “except such a bond which shall stand in force,” is final.—**BERRY v. PENRING** (1616), Cro. Jac. 399; 79 E. R. 341; *sub nom.* **PERRY v. BERRY**, 3 Bulst. 69.

**Annotation:—Mentd.** *Phillips v. Knightly* (1730), Fitz-G. 53, 270.

**1452. Award reserving certain items.]**—Parties having submitted all matters in difference to arbn., the arbitrator determined all matters except one & gave liberty to one of the parties to prosecute that matter if he chose:—**Held**: the award was bad *in toto*.—**BRADFORD v. BRYAN (BRIEN)** (1741), Willes, 268; 7 Mod. Rep. 349; 87 E. R. 1285.

**Annotations:—Consd.** *Wrightson v. Bywater* (1837), 3 M. & W. 199. **Refd.** *Randall v. Randall* (1805), 3 Smith, K. B. 90.

**1453. —.]**—Upon a reference to arbn. of certain matters in difference between pltf. & deft., one question was as to their respective liability upon a promissory note made by deft., & indorsed by pltf., to a third party, & against the payment of which, when it should become due, deft. claimed indemnity from pltf. The arbitrator having awarded (*inter alia*) that deft.’s liability on the promissory note, as between him & pltf., should remain unaffected by his award:—**Held**: the award was bad, not being final.—**WILKINSON v. PAGE** (1842), 6 Jur. 567.

**Annotations:—Mentd.** *Heming v. Swinnerton* (1847), 5 Hare, 350; *Lipscomb v. Palmer* (1860), 6 Jur. N. S. 1282.

**1454. Award finding certain matters not in dispute.]**—A cause, & all matters in difference therein

**PART IV. SECT. 8, SUB-SECT. 8.—C (d).**

**1450 i Award not including all parties.]**—A submission referred a controversy between A. W., J. W., & M. The arbi-

trators made an award but omitted to mention J. W.:—**Held**: the award was not bad on account of the omission, but was equivalent to an award that there was nothing due by him.—**WHITELY**

*v. McMAHON* (1882), 32 C. P. 453.—**CAN.**

**1454 i. Award finding certain matters not in dispute.]**—An award, submitted

between plffs. & defts., were referred to a barrister, who stated, in his award, that plffs. had claimed certain sums before him as matters in difference in the cause, but that he, by his award, declared & determined them not to be so, & he then awarded as to other matters, in respect of which he gave a verdict to plffs. Upon the above sums being claimed, on the reference, by plffs., who had specified them in their particulars of demand, defts. had objected that they were not matters in difference, nor within the arbitrator's authority, part of them being recoverable, if at all, in equity, & not at law, & part being claimable against one only of defts., whereupon plffs. had abandoned their demand as to them:—*Held*: the award was bad, for not deciding upon all the matters in difference referred.—*SAMUEL v. COOPER* (1835), 2 Ad. & El. 752; 1 Har. & W. 86; 4 Nev. & M. K. B. 520; 111 E. R. 290.

**1455. Refusal to determine some matters.]**—Arbitrators having declined to arbitrate upon certain matters included in the reference:—*Held*: the award was bad & should be set aside.—*BOWES v. FERNIE* (1838), 4 My. & Cr. 150; 41 E. R. 59.

**1456. Omission to decide on some matters—Misrecital—Defence to action on bond.]**—To debt on bond, conditioned to perform an award, under a reference of all matters in difference between the parties, it is a good plea in bar that at the time of the submission certain negotiable bills of exchange, drawn by deft. & accepted by plff., were then outstanding, & that an indemnity of deft. against such bills was a matter in difference between the

parties, which was notified to the arbitrators before the award made, & that they made no award concerning it, & that some of the bills had not been paid by plff., & deft. was still liable to the holders, though it appeared by the award set forth that the arbitrators stated therein that they had heard the allegations of the parties, & examined all the accounts, bills of exchange, etc., & all other evidence & proofs produced to them touching the matters in difference, & awarded of & concerning same that deft. should pay to plff. £1,500 in full of all claims & demands upon him, etc., & so proceeded to award concerning other specific matters, but without mentioning such outstanding bills, or any indemnity concerning same.—*MITCHELL v. STAVELEY* (1812), 16 East, 58; 104 E. R. 1011.

*Annotations*:—**Expld.** *Dowse v. Coxo* (1825), 3 Bing. 20. **Distd.** *Drosser v. Stansfield* (1845), 14 M. & W. 822. **Consd.** *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221. **Refd.** *Riddell v. Sutton* (1828), 2 Moo. & P. 345; *Wharton v. King* (1831), 2 B. & Ad. 528; *Beckett v. Mid. Ry. Co.* (1866), Har. & Ruth. 189; *Jewell v. Christie* (1867), 15 L. T. 580.

**1457. Omission to deal with matter specifically referred.]**—By the terms of a submission, a Ch. suit & all matters in difference between the parties were referred, & it was made an express matter of reference whether an agreement between the parties should be rescinded or not. The arbitrator gave no directions upon the subject of rescinding the agreement, but awarded specifically on every subject matter of the agreement:—*Held*: the award was not sufficient.—*UPPERTON v. TRIBE*

by arbitrators, to whom all matters in dispute had been referred, stated that "deft. has not produced any witness in support of his contention raised in certain issues, hence we have only to deal with the remaining issues," & dealt with those issues:—*Held*: there was a decision on the whole matter in issue between the parties.—*GEORGE v. VASTIAN SOURY* (1898), 1 L. R. 22 Mad. 202.—**IND.**

**1455 i. Refusal to determine some matters.]**—When a reference had been made setting out that differences had arisen relative to the sale & delivery of a cargo, & an award was made deciding that question, but stating that the arbitrators could not entertain certain statements, as these statements were entirely conflicting & opposed to each other:—*Held*: the main point as to the delivery of the cargo having been decided, the award was good.—*SALTER v. FULL* (1859), 2 Thom. 356.—**CAN.**

**1457 i. Omission to deal with matter specifically referred.]**—Where arbitrators are appointed to determine upon & concerning the possession of land, an award which does not decide upon that matter is void.—*BENEDICT v. PARKS* (1850), 1 C. P. 370.—**CAN.**

**1457 ii. —.]**—An action was brought for certain sums. Differences had also arisen concerning a bill of exchange. The action & all other matters in difference were referred. The arbitrators awarded £55 to plff. as a sum due upon a balance of accounts. There was nothing in the award expressly relating to the action nor anything that disposed of it by necessary inference:—*Held*: the award was bad.—*RODDY v. LESTER* (1856), 14 U. C. R. 259.—**CAN.**

**1457 iii. —.]**—Where the principal, but not the only, matter of difference between the parties was the terms of their copartnership agreement, an award not clearly deciding that was held bad for uncertainty.—*JEKYLL v. WADE* (1860), 8 Gr. 363.—**CAN.**

**1457 iv. —.]**—A testator devised lands to trustees in trust for P. & T., or such one of them as the trustees should at any time appoint. The bill prayed that the trusts of the will should be

carried into execution, & the right of plff. ascertained. Arbitrators awarded mutual releases, but did not determine the rights of the parties:—*Held*: the arbitrators should have decided the rights of the parties, subject to the power of appointment, & the award was bad as they had not done so.—*FAGAN v. F.* (1818), 12 L. Eq. R. 483.—**IR.**

**1457 v. —.]**—Arbitrators were to award as to the division of partnership property, & all matters in dispute relative to dissolution. They merely awarded that deft. should pay plff. money:—*Held*: bad because it did not decide as to division of partnership property.—*ATKINSON v. PORTS* (1862), 5 All. 262.—**CAN.**

**1457 vi. —.]**—L. contracted with J. for the sale & purchase of two thousand head of cattle, more or less. L. delivered one thousand & fifty-four cattle & demanded payment. J. refused payment & claimed damages for short delivery. On a reference of all matters in dispute relating to the matters at issue between the parties under the contract, the arbitrator awarded that J. should pay £250 in cash, & give his promissory note for £1,152 18s. The award added: "the above payments by cash & note shall be accepted by L. in full satisfaction of all claims by him against J." :—*Held*: the award was bad, for not deciding how much compensation J. was entitled to for short delivery, & must be set aside.—*Ex p. JOSEPHSON* (1866), 6 N. S. W. S. C. R. 126.—**AUS.**

**1457 vii. —.]**—In a submission as to the balance due on a factor's accounts, the latter consigned in bank £15 as the balance admitted by him to be due, "to be subject to the orders of J. M., sole arbiter. The arbiter in his decree-arbitral found that the factor was due an additional sum of £7, for which he gave decree, reserving right to the factor to retain the sum against his claim for expenses, amounting to £58, for which decree was given in his favour. The decree-arbitral bore that the sum consigned would be paid by the arbiter, & to the party legally entitled to same." In a reduction of this decree, on the

ground that it did not exhaust the reference, because it did not determine the application of the consigned money:—*Held*: the disposal of the consigned money was a question which arose more in the execution of the decree, & the declaration thereon did not destroy the decree.—*PAUL v. HENDERSON* (1867), 5 Macph. (Ct. of Sess.) 613.—**SCOT.**

**1457 viii. —.]**—Amongst other matters, the arbitrators were asked to make a division of certain fields. The arbitrators decided the other matters, but, as regards the fields, said that it was inconvenient to do so in consequence of the rains:—*Held*: the award left undetermined one of the principal subjects of dispute & must be set aside.—*DANDEKAR v. DANDEKARS* (1882), 1 L. R. 6 Bom. 663.—**IND.**

**1457 ix. —.]**—Two partners desired to dissolve partnership, but being unable to agree upon terms, submitted all matters in difference between them to arbn. The arbitrators awarded that one of the partners should pay the other a certain sum in full payment, discharge & satisfaction of all moneys, debts & demands due or owing by him to his co-partner upon any account whatsoever:—*Held*: the award was bad, for uncertainty, there being no decision respecting the partnership property.—*Re FAIRLEY & WILSON* (1886), 25 N. B. R. 568.—**CAN.**

**1457 x. —.]**—In pursuance of a provision contained in a deed of copartnership for the reference of disputes between the partners, four questions were referred to arbitrators. The award found on two questions, but it was silent as to the others:—*Held*: the award was bad, for want of finality.—*DIVE v. PICKERING*, 4 N. Z. Jur. 45.—**N.Z.**

**x. Omission to award on part of submission.]**—An award stated that certain yarn had been dyed with other material than indigo:—*Held*: the award was reducible, as it did not state what substances had been used, or whether indigo had been employed, & had, therefore, only decided part of what was submitted.—*HEGGIE & Co. v. STARK & SELKRIG* (1825), 3 Sh. (Ct. of Sess.) 488.—**SCOT.**



*Sect. 8.—Requisites of valid award: Sub-sect. 8,*

(1835), 1 Har. & W. 280; *sub nom. Re TRIBE & UPPERTON*, 3 Ad. & El. 295; 111 E. R. 425.

**1458. Omission to decide on fifth action.—Four actions & all matters referred.]**—Four several actions between distinct parties, & all matters in difference between the parties, were referred to an arbitrator. One of the matters in difference, & to which the attention of the arbitrator was called at the hearing, was an action of ejectment not included in the above, which, by reason of some defect in the proceedings, had not been taken down for trial. The arbitrator having omitted to notice this action in his award:—*Held*: the award was altogether bad.—*STONE v. PHILLIPPS, DOE d. STONE v. STONE, STONE v. STONE* (1837), 4 Bing. N. C. 37; 6 Dowl. 247; 3 Hodg. 302; 5 Scott, 275; 7 L. J. C. P. 54; 1 Jur. 985; 132 E. R. 702.

**1459. Omission to deal with question of title.]**—A. agreed to purchase land of B., the title to be made out to the satisfaction of B.'s attorney. The agreement being uncompleted, & disputes arising, all matters in difference between the parties, & the settlement of all questions on the agreement, were referred to arbn. The arbitrator awarded that B. should convey to A. the title to the above land, contained in two abstracts given in evidence on the arbn.; he also prescribed the boundary of the land so to be conveyed, & ordered that B. should execute an indemnity bond to A., to be forfeited if A. should be evicted by reason of defect in the title, & that, on execution of the premises, A. should pay the purchase-money. Nothing further was awarded as to the validity of the title. The goodness of the title had been a matter of dispute before the arbitrator:—*Held*: the award was bad, as not finally determining the questions referred.—*ROSS v. BOARDS* (1838), 8 Ad. & El. 290; 3 Nev. & P. K. B. 382; 1 Will. Woll. & H. 376; 7 L. J. Q. B. 209; 2 Jur. 567; 112 E. R. 847.

*Annotations*:—*Distd. Cockburn v. Newton* (1841), 10 L. J. C. P. 207; *Murphy v. Glass* (1869), L. R. 2 P. C. 408, P. C. *Mentd. Re Green & Balfour, Williamson* (1890), 63 L. T. 325, C. A.

**1460. Award as to part of lands only.—Ejectment.]**—An ejectment, containing two several demises by different persons, was referred before trial, & by the order of reference all matters in difference in the cause were referred, the costs of the suit & of the reference to abide the event of the award, & if the award should be in favour of pltf., he was to be at liberty to sign judgment in the same manner as if the cause had been tried at *Nisi Prius*, & to issue a writ of possession, & to proceed in the usual way for the costs on such judgment. The arbitrator awarded that pltf. was entitled to possession of a certain part of the lands sought to be recovered, which part he described by metes & bounds. The lessor of pltf. signed judgment, & proceeded to tax his costs:—*Held*: the award was bad, because the arbitrator did not award as to the residue of the lands.—*DOE d. MADKINS v. HORNER* (1838), 8 Ad. & El. 235; 3 Nev. & P. K. B. 344; 1 Will. Woll. & H. 348; 2 Jur. 417; 112 E. R. 827; *sub nom. DOE d. MADKINS & LONG v. LAW*, 7 L. J. Q. B. 164.

*Annotations*:—*Folld. Doe d. Starling v. Hiller* (1843), 12 L. J. Q. B. 166. *Refd. Brooks v. Parsons* (1843), 13 L. J. Q. B. 50; *Harrison v. Creswick* (1852), 21 L. J. C. P. 113; *Mays v. Cannell* (1854), 15 C. B. 107; *Re Beaufort & Swansea Harbour Trustees* (1860), 1 L. T. 370. *Mentd. Hobdell v. Miller* (1840), 2 Scott, N. R. 163.

**1461. Omission to deal with claim on account stated.]**—Where an action of *assumpsit*, the declaration in which contained a count upon a promissory note for £22 11s. 9d. & a count upon an account stated for £30, was referred to arbn., & the arbitrator found that pltf. had good cause of

action for, & was legally entitled to have, claim, & recover of & from deft., the sum of £22 11s. 9d., being the amount of the promissory note mentioned in the pleadings in the cause:—*Held*: the award was bad, as it did not dispose of the issue upon the account stated.—*GISBURNE (GISBORNE) v. HART* (1839), 5 M. & W. 50; 7 Dowl. 402; 8 L. J. Ex. 197; 3 Jur. 536; 151 E. R. 23.

*Annotations*:—*Apld. Dresser v. Stansfield* (1845), 14 M. & W. 822. *Refd. England v. Davison* (1841), 6 Jur. 261; *Brooks v. Parsons* (1843), 13 L. J. Q. B. 50; *Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482.

**1462. Omission to deal with claim for nuisance.]**—An action of trespass was referred to an arbitrator, who awarded that deft. should amend a water-course upon his own land, but omitted to decide upon a certain alleged nuisance:—*Held*: since the arbitrator had not decided upon all the matters referred to him, the whole award was bad, & the latter part could not be rejected as surplusage.—*PEARCE v. GROSSE* (1843), 2 L. T. O. S. 170.

**1463. Omission to decide on matter referred—Partnership.]**—A reference to arbn. between A. & the exors. of his deceased partner recited that A. averred that partnership dealings had subsisted between deceased & himself previous to 1837, that an agreement of partnership, to commence from Jan., 1837, was entered into, & that differences had ensued respecting the settlement of accounts. All matters & accounts were subsequently referred. The arbitrator found that a partnership had existed from Dec., 1835, till the death of testatrix, & that a balance was due to the estate:—*Held*: the award was neither uncertain nor defective, in omitting to award specifically on the partnership mentioned under the agreement.—*Re WARNER & FARNELL & NORRIS* (1844), 2 Dow. & L. 148; 13 L. J. Q. B. 370; 8 Jur. 1097.

**1464. Omission to decide whether partnership existed.]**—One of the matters in difference between A. & B., at the time of a submission to arbn. by them, was whether the two parties had been in partnership together upon a day named, & whether, if there had been a partnership between them, same had been put an end to. The arbitrator found by his award that no deed of partnership ever existed between the parties, & that, if any partnership ever existed, same was dissolved on a day subsequent to that mentioned, & that nothing was due from A. to B. in respect of the profits or otherwise:—*Held*: the award was bad, because it did not decide the question as to a partnership having once existed.—*BHEAR v. HARRADINE* (1852), 7 Exch. 269; 21 L. J. Ex. 127; 18 L. T. O. S. 228, 261; 155 E. R. 947.

*Annotation*:—*Mentd. Malvern U. D. C. v. Malvern Link Gas Co.* (1900), 83 L. T. 326, C. A.

**1465. Omission to award interest.—Claim admitted.]**—A cause & all matters in difference between pltf. & deft. were referred to arbn. Pltf. admitted before the arbitrator that deft. was entitled to interest on a sum admitted to be due by one of pltf. to deft., but this was not adjudicated upon by the award, which deft. sought to set aside, on the ground that it was not made upon all matters in difference. The ct. refused to set aside the award, but referred the matters back to the arbitrator so far as related to the non-allowance of interest.—*BENNETT & HARVEY v. BOWNESS* (1858), 32 L. T. O. S. 108, 130.

**1466. Omission to award on one point.—Settled & withdrawn.]**—By an agreement of reference, the parties covenanted & agreed to abide by the award of the arbitrator upon all points in difference between them, & eleven points were specifically referred, but the parties at the reference effected a settlement as to one of the eleven points, & withdrew it from the arbitrator's consideration:—



**Held**: the award was not bad, for want of finality, because it did not find in favour of either party on that point, inasmuch as the conduct of the parties amounted to an admission that it was no longer a point in difference.—**LAWRENCE v. BRISTOL & NORTH SOMERSET RY. CO.** (1867), 16 L. T. 326.

**SUB-SECT. 9.—WHETHER NECESSARY TO FIND ON EACH CLAIM SPECIFICALLY.**

**A. Where an Action only is referred and Costs are to abide Event.**

See, also, Sect. 20, post.

**1467. General rule—Distinguished from case where costs of reference only are to abide event.]**—Where, in an order of reference, the costs of the cause are to abide the event of the award, the arbitrator is bound to find specifically upon each issue. But where the costs of the reference & award only are to abide the event, he is not bound so to find, unless required by the terms of the rule of reference.—**BOURKE v. LLOYD** (1842), 10 M. & W. 550; 12 L. J. Ex. 4; 152 E. R. 589.

**Annotations**:—**Expld.** Brooks v. Parsons (1843), 13 L. J. Q. B. 50. **Apld.** Brown v. Hudson (1844), 2 L. T. O. S. 334. **Consd.** Muir v. Parrott (1845), 4 L. T. O. S. 290; Stonehewer v. Farrar (1845), 6 Q. B. 730. **Distd.** Phillips v. Higgins (1851), 2 L. M. & P. 355. **Refd.** Kilburn v. Kilburn (1845), 13 M. & W. 671.

**1468. — Each issue must be found—Even though no request.]**—If an action, in which there are several issues, is referred to arbn., & the costs are to abide the event, the arbitrator must decide as to each issue, though not requested so to do, even in a case where there is but one special count in the declaration, & the award found that pltf. had no cause of action, so that several of the issues become immaterial. In such a case, however, the ct. will not set aside the award, but will discharge a rule for that purpose on deft. consenting that the costs of the immaterial issues should be taxed for pltf.—**ENGLAND v. DAVISON** (1841), 9 Dowl. 1052; 6 Jur. 261.

**Annotations**:—**Distd.** Cooper v. Langdon (1841), 9 M. & W. 60; Maloney v. Stockley (1842), 12 L. J. C. P. 92. **Folld.** Bourke v. Lloyd (1842), 10 M. & W. 550; Brooks v. Parsons (1843), 13 L. J. Q. B. 50. **Mentd.** Re Lloyd & Spittle, Re Addison & Spittle (1848), 18 L. J. Q. B. 151; Re Smith v. Reece, Re Reece v. Smith (1850), 14 Jur. 483.

**1469. — Power to enter verdict.]**—In an action of debt, which was referred, deft. had pleaded, except as to 19s. 4d. paid into ct., distinct pleas of *nunquam indebitatus*, payment & set-off to the whole declaration. The costs of the cause were to abide the event of the award, & the arbitrator was empowered to direct a verdict to be entered for such sum as he should find to be due. The arbitrator having directed a verdict for £14 16s. 8d. debt, & 1s. damages, to be entered for pltf., without finding each of the issues:—**Held**: the award was bad.—**BROOKS v. PARSONS** (1843), 1 Dow. & L. 691; 13 L. J. Q. B. 50; 2 L. T. O. S. 126; 8 Jur. 81.

**Annotations**:—**Distd.** Smith v. Reece (1850), 14 Jur. 483. **Overd.** Humphreys v. Pearce (1852), 7 Exch. 696. Brooks v. Parsons may now be considered as overruled by no less than three cases; there is Wilcox v. Wilcox (1849), 4 Exch. 501, in this ct., which adopts the principle of the decision in Hobson v. Stewart (1847), 4 Dowl. & L. 589; & there is the case of Phillips v. Higgins (1851), 2 L. M. & P. 355 (MARTIN, B.). **Refd.** Stonehewer v. Farrar (1845), 6 Q. B. 730.

**1470. — Even where clear how each issue found.]**—Where an action involving several issues is referred to arbn., & the costs of the action are to abide the event, & the arbitrator omits to find on each issue, the ct. will set aside the award, notwithstanding it clearly appears, from the amount awarded to pltf., that the arbitrator has virtually negatived all deft.'s pleas.—**BROWN v. HUDSON** (1844), 2 L. T. O. S. 334.

**In express terms.]**—Arbitrators must always find on each issue separately.

I sincerely hope that arbitrators will learn henceforth to enter a verdict in express terms upon each issue (**LORD DENMAN, C.J.**).—**MUIR v. PARROTT** (1845), 4 L. T. O. S. 290.

**1472. — Clearly on face of award.]**—An award in an action where several issues are joined, & the costs are to abide the event of the award, ought to contain a distinct finding on each issue. For want of such finding the award will be bad for uncertainty, unless (*semble per LORD DENMAN, C.J.*) it be clear, on the face of the award, that the arbitrator has in effect found on every issue.—**STONEHEWER v. FARRAR** (1845), 6 Q. B. 730; 1 New Pract. Cas. 151; 14 L. J. Q. B. 122; 9 Jur. 203; 115 E. R. 275.

**Annotations**:—**Refd.** Baker v. Cotterill (1849), 18 L. J. Q. B. 345; Re Smith v. Reece, Re Reece v. Smith (1850), 14 Jur. 483; Nicholls v. Jones (1851), 6 Exch. 373. **Mentd.** Hobson v. Stewart (1847), 16 L. J. Q. B. 145; Johnson v. Latham (1851), 20 L. J. Q. B. 236; Re Tidswell (1863), 3 New Rep. 281.

**1473. — Unless each issue clear by necessary inference.]**—Where several issues are referred to an arbitrator, the arbitrator need not in terms adjudicate on each issue; it is sufficient if he so express himself that it is plain how he means the decision to be; but if he does not, either specifically or by necessary implication, adjudicate on each issue, the award is bad.—**HUNT v. HUNT** (1836), 5 Dowl. 442; Will. Woll. & Dav. 62; 1 Jur. 135.

**Annotations**:—**Consd.** Rennie v. Mills (1839), 7 Scott. 276. **Refd.** Fenton v. Dines (1840), 4 Jur. 554; Arthur v. Owen (1841), 5 Jur. 340; Re Smith v. Reece, Re Reece v. Smith (1850), 14 Jur. 483.

**1474. — Where matters in difference in a cause involving several issues are referred to arbn., the costs of the cause to abide the event, the award is good, notwithstanding there is no specific finding on each issue, if it appear by necessary intendment that the arbitrator has disposed of all the issues.]**—**HUMPHREYS (HUMPHREY) v. PEARCE** (1852), 7 Exch. 696; 22 L. J. Ex. 120; 155 E. R. 1128.

**Annotations**:—Nicholson v. Sykes (1854), 2 C. L. R. 992; Hellaby v. Brown, Brown v. Hellaby (1857), 1 H. & N. 729.

**1475. — Several pleas—Award of verdict for defendant on all issues insufficient.]**—Debt for money had & received, & upon an account stated. Pleas, *nunquam indebitatus*, payment & set-off:—**Held**: an award that a verdict be entered for deft. on all the issues was insufficient, as not deciding the set-off.—**MALONEY v. STOCKLEY** (1842), 4 Man. & G. 647; 12 L. J. C. P. 92; 134 E. R. 266.

**Annotation**:—**Mentd.** Brooks v. Parsons (1843), 13 L. J. Q. B. 50.

**1476. No further proceedings in cause—Specific findings on certain issues only.]**—A cause (the declaration in which contained eight counts) & all matters in difference between pltf. & deft. were

**PART IV. SECT. 8, SUB-SECT. 9.—A.**

**1468 i. General rule—Each issue must be found.]**—Where a cause with several issues joined is referred, with costs to abide the event, & the arbitrators award

a certain sum to pltf., without saying anything about the issues, which are not necessarily from their nature determined by the award in favour of pltf., the award is bad.—**BERNARD v. STRACHAN** (1846), 2 U. C. R. 128.—**CAN.**

**1476 i. All proceedings in cause to cease, etc.]**—All differences in a suit were referred, costs of the suit, reference, & award to abide the event of the award. The arbitrators, reciting in their award that they had heard the proofs concern-

**Sect. 8.—Requisites of valid award: Sub-sect. 9, A. & B.]**

referred, the costs of the cause, & of the reference & award relating thereto, to abide the event. The arbitrators found that pltf. had good cause of action in respect of the matters charged in five of the counts, & awarded £5 damages, & directed that no further proceedings should be had in the cause, but made no specific award as to the three remaining counts:—*Held*: the award was not final, there being no determination as to the three last-mentioned counts, & consequently, no legal event as to them to authorise the taxation of costs thereon.—*NORRIS v. DANIEL* (1834), 10 Bing. 507; 2 Dowl. 798; 4 Moo. & S. 383; 3 L. J. C. P. 160; 131 E. R. 991.

*Annotations*:—*Distd.* *Harding v. Forshaw* (1836), 1 M. & W. 415. *Appld.* *Hunt v. Hunt* (1836), 5 Dowl. 442. *Distd.* *Rennie v. Mills* (1839), 8 L. J. C. P. 148. *Refd.* *Eardley v. Steer* (1835), 2 Cr. M. & R. 327. *Mentd.* *Farley v. Briant* (1835), 3 Ad. & El. 839.

**1477. Issues & justifications ignored.]—Trespass.** Pleas, general issue & sundry justifications. The cause was referred to an arbitrator, costs to abide event, & the arbitrator awarded for defts. on the general issue, & disposed of the rights contested in the pleas of justification, but did not in his award decide on or notice the issues upon those justifications. The ct. refused to set aside the award.—*DIBBEN v. ANGLESEY (MARQUESS), ANGLESEY (MARQUESS) v. DIBBEN, ANGLESEA (MARQUESS) v. PEYTON* (1834), 10 Bing. 568; 2 Cr. & M. 722; 4 Tyr. 926; 4 L. J. Ex. 278; 131 E. R. 1015.

*Annotations*:—*Expld.* *Eardley v. Steer* (1835), 5 Tyr. 1071; *Hunt v. Hunt* (1836), 5 Dowl. 442. *Folld.* *Clarke v. Owen* (1836), 2 Har. & W. 324. *Expld.* *Empson v. Fairfax & Weaver* (1838), 8 Ad. & El. 296. *Dbtd.* *Gisborne v. Hart* (1839), 5 M. & W. 50; *England v. Davison* (1841), 9 Dowl. 1052. *Mentd.* *Farley v. Briant* (1835), 3 Ad. & El. 839; *Duckworth v. Harrison* (1838), 4 M. & W. 432; *Bourke v. Lloyd* (1842), 10 M. & W. 550.

**1478. Award on plea covering whole cause of action.]—If, upon a reference of a cause to arbn., the costs to abide the event, there is a finding in favour of deft. upon a plea which covers the whole cause of action, it is no objection to the award that on other issues the arbitrator has found for pltf., without damages.**—*SAVAGE v. ASHWIN* (1838), 4 M. & W. 530; 8 L. J. Ex. 43; 150 E. R. 1539.

**1479. —.]—In an action, in which two issues were raised, each of which went to the whole cause of action, all matters in difference were referred, the costs of the cause to abide the event. The arbitrators awarded generally that the action should be no further prosecuted, & that a sum should be paid by deft. to pltf.:**—*Held*: the award sufficiently ascertained the event, & was final.—*HOBSON v. STEWART* (1847), 4 Dow. & L. 589; 2 New Pract. Cas. 64; 1 Saund. & C. 288; 16 L. J. Q. B. 145; 1 Bail. Ct. Rep. 288.

*Annotations*:—*Folld.* *Wilcox v. Wilcox* (1849), 4 Exch. 500. *Refd.* *Humphreys v. Pearce* (1852), 7 Exch. 696.

**1480. Party to pay sum in full of all demands in actions—Actions referred before plea.]—Two causes, brought by same pltf. against same deft., in one of which a declaration had been delivered, & in the other a writ only had been issued, were referred to arbn., the costs of the causes, reference & award, to abide the event. The arbitrator, after stating that he made his award concerning the premises, adjudged & determined that all further proceedings should cease, & that deft. should pay to pltf. a certain sum in full of all demands in the said causes:**—*Held*: the award was good, & was

final in favour of pltf. in both causes of action.—*WYNNE v. EDWARDS* (1844), 12 M. & W. 708; 1 Dow. & L. 976; 13 L. J. Ex. 222; 3 L. T. O. S. 38; 152 E. R. 1383.

*Annotations*:—*Refd.* *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483; *Creswick v. Harrison* (1850), 10 C. B. 441.

**1481. General verdict insufficient.]—Where a cause is referred to an arbitrator to certify for whom, & for what amount, if any, the verdict shall be entered, he may not enter a general verdict, but must enter it on the several issues, according to the evidence before him.**—*WOOF v. HOOPER* (1838), 4 Bing. N. C. 449; 1 Arn. 199; 6 Scott, 281; 132 E. R. 860; *sub nom.* *WOOLFE v. COOPER*, 6 Dowl. 617.

*Annotation*:—*Expld. & Distd.* *Williams v. Mouldsdale* (1840) 7 M. & W. 134.

**1482. Finding sufficient to entitle plaintiff to hold costs on all issues.]—Pltf. declared upon a special contract made by S., as agent for deft., for the sale of a large quantity of sleepers, assigning for breaches, (1) certain sleepers were delivered to & received by deft., but not paid for; (2) a certain other quantity was shipped & conveyed to London for deft., but he refused acceptance; (3) deft. declined to accept the residue. There was also a count for goods sold & delivered. Deft. pleaded, (1) as to all but £39 7s. 11d. in the last count, *non assumpsit*, paying that sum into ct., which pltf. accepted in satisfaction of his demand upon that count; (2) to the special count, that S. was not his agent; (3) to the same count, that pltf. did not deliver, nor did he accept, the sleepers that were the subject of the first breach; (4) that pltf. did not offer to deliver the residue. The cause was referred, the costs to abide the event of the award. The arbitrator found (1) at the time of the commencement of the action, deft. was liable to pay pltf. £75, which sum he directed him to pay, minus the sum paid into ct.; (2) the sleepers shipped were the property of pltf. & at his disposal:—*Held*: this was a sufficient finding upon both counts to entitle pltf. to the costs of all the issues.—*RENNIE v. MILLS* (1839), 5 Bing. N. C. 249; 7 Dowl. 295; 1 Arn. 534; 7 Scott, 276; 8 L. J. C. P. 148; 132 E. R. 1101.**

*Annotation*: *Expld.* *Gisborne v. Hart* (1839), 8 L. J. Ex. 197.

**1483. Plaintiff had good cause of action—All pleas if true complete answer to count.]—To one count in a declaration there were five pleas, each of which, if true, was a complete answer to the count, & the cause was referred to arbn., the costs of the action & of the award to abide the event of the award. The arbitrator having found that pltf. had a good cause of action on that count:—*Qu.*: whether such a finding did not, in fact, amount to a distinct finding upon each of the issues.—*WILLIAMSON v. LOCK* (1845), 14 L. J. Q. B. 93; 9 Jur. 349.**

**1484. Plea of non assumpsit on each of several counts.]—To a declaration consisting of three *indebitatus* counts, there were pleas of *non assumpsit*, tender, set-off & payment, upon which issues were joined. The cause having been referred at *Nisi Prius*, the costs of the cause to abide the event of the award, the arbitrator found on the first, third, & last issues for pltf., & on the second issue for deft.:—*Held*: this was a sufficient finding, & it was not necessary that there should be distinct findings on the issues raised by the plea of *non assumpsit* upon each separate count of the declaration.—*ADAM v. ROE (ROWE)* (1846), 1**

ing the premises, awarded thereupon concerning same that all proceedings in the cause should cease, & that deft

should pay to pltf. £33 12s. 1d., in full of all demands in the cause:—*Held*: there was a sufficient determination in

the cause, & a reasonable inference of a finding on each issue.—*MULLEN v. MARTIN* (1853), 1 P. R. 191.—*CAN.*



Saund. & C. 81; 15 L. J. Q. B. 223; 7 L. T. O. S. 93; 10 Jur. 665.

**1485. Action referred before plea.]**—A. commenced a special action on the case against B., & delivered his declaration, which consisted of two counts. Before plea pleaded all matters in difference between the parties to the cause were referred, by a judge's order, to the award of an arbitrator, the costs of the cause to abide the event of the award, & the costs of the reference & award to be in the discretion of the arbitrator. The award, which did not purport to have been made "of & concerning the premises," merely directed that B. should pay to A. the sum of £167 6s. 2d., without saying upon what account:—*Held*: the award was bad, for uncertainty, as it did not show in respect of what matters in difference the money was to be paid, & did not contain any finding upon which the master could tax the costs.—*CROSBIE (CROSBY) v. HOLMES* (1846), 3 Dow. & L. 566; 1 Saund. & C. 20; 15 L. J. Q. B. 125; 6 L. T. O. S. 352; 16 Jur. 139.

*Annotation*:—*Reid*. *Bradley v. Phelps* (1851), 6 Exch. 897.

**1486. "That final judgment be signed for defendants in this cause"—Uncertain that issues had been joined.]**—A judge's order, made by consent of the parties, in a cause in which it was not clear that issues had been joined, authorised "final judgment, or judgment as in case of nonsuit, to be signed by pltf. or defts. as the case may be, or in such manner, upon such terms, as may be decided by the award or certificate of the arbitrator." The ct. refused to set aside a certificate of the arbitrator "that final judgment should be signed for defts. in this cause," as being uncertain & not specifically disposing of the issues.—*Re SMITH & REECE. Re REECE & SMITH* (1849), 6 Dow. & L. 520; 14 Jur. 483.

**1487. Plaintiff had good cause of action as stated in declaration.]**—An action of *assumpsit* was referred, the costs to abide the event of the award. The declaration contained two counts. There were several pleas to the first count, one of which set up that a new agreement was substituted for the agreement in the declaration. There were also pleas to the second count. The award was that "ptf. had a good cause of action against deft., as stated in the declaration," & then assessed damages to ptf.:—*Held*: the award sufficiently decided all the issues in favour of ptf.—*PHILLIPS v. HIGGINS* (1851), 2 L. M. & P. 355; 20 L. J. Q. B. 357.

*Annotation*:—*Apld.* *Humphreys v. Pearce* (1852), 7 Exch. 696.

**1488. One award for two actions referred.]**—An action brought by A. against B., & a cross-action by B. against A., were referred by separate orders of reference, under C. L. P. Act, 1854, s. 3. The action by B. against A. contained counts for not using a farm in a tenant-like manner, & for goods sold; & deft. pleaded, to the first count, a denial of the tenancy upon the terms alleged & performance of the agreement, & to the last count, never indebted, payment & set-off. The arbitrator made his award on one piece of paper, awarding for ptf. in the first action, & that, in the second action, there was nothing due or payable from deft. to ptf.; & he ordered that the costs of the award should be paid by B. The ct. remitted the award to the arbitrator, that he might make two awards & find the issues specifically.—*HELLABY v. BROWN*,

*BROWN v. HELLABY* (1857), 1 H. & N. 729; 156 E. R. 1394.

**1489. Defendant not indebted to plaintiff—General verdict for defendant—Directions as to costs of reference.]**—A cause in which deft. had pleaded never indebted, Stat. Limitations, payment, set-off & accord & satisfaction, was referred to a county ct. judge, under C. L. P. Act, 1854, the costs of the cause to abide the event of the cause, & the costs of the reference to be in the discretion of the arbitrator. The county ct. judge having certified "that deft. was not at the time of the commencement of the action indebted to ptf.," & having found a general verdict for deft., & directed that ptf. should pay the costs of the reference, the ct. sent the certificate back to be amended by stating the manner in which the several issues were found.—*HOLLAND v. JUDD* (1858), 3 C. B. N. S. 826; 30 L. T. O. S. 275; 6 W. R. 248; 140 E. R. 968.

*B. Where an Action and other Matters are referred and Costs of Action are to abide Event.*

*See, also*, Sect. 20, *post*.

**1490. General rule.]**—Where, in an agreement to refer an action & all matters in difference, the parties agreed to abide by the award "of & concerning the action, & of & concerning the other matters in difference," the costs of the action to abide the event:—*Held*: the arbitrator ought to have made an award concerning the action & the other matters separately, & the award having been made generally, the ct. would refuse to enforce it by attachment.—*RULE v. BRYDE* (1847), 1 Exch. 151; 16 L. J. Ex. 256; 9 L. T. O. S. 249; 154 E. R. 63.

**1491. Distinguished from case where matters in difference in cause are referred.]**—*Semble*: the principle that, where matters in difference in a cause involving several issues are referred to arbn., the costs of the cause to abide the event, the award is good, notwithstanding there is no specific finding on each issue, if it appear by necessary intendment that the arbitrator has disposed of all the issues, does not apply where the reference is of the cause & also of matters in difference.—*HUMPHREYS (HUMPHREY) v. PEARCE* (1852), 7 Exch. 696; 22 L. J. Ex. 120; 155 E. R. 1128.

*Annotations*:—*Expld.* *Nicholson v. Sykes* (1854), 9 Exch. 357; *Hellaby v. Brown*, *Brown v. Hellaby* (1857), 1 H. & N. 729.

**1492. Award failing to show who ought to pay costs.]**—A *replevin* suit, & all matters in difference touching the distress, were referred to arbn., the costs of the suit to abide the event. The arbitrator awarded that the rent was £14, & that £6 were due for the rent at the time of the distress, that ptf. in *replevin* should pay deft. £6, & that the action should be no further prosecuted. It did not appear for what rent deft. had avowed:—*Held*: the award did not show who ought to pay the costs, which were to abide the event of the suit, & it was not final.—*Re LEEMING & FEARNLEY* (1833), 5 B. & Ad. 403; 2 Nev. & M. K. B. 232; 110 E. R. 839.

*Annotations*:—*Distd.* *Eardley v. Steer* (1835), 2 Cr. M. & R. 327; *Yates v. Knight* (1835), 2 Scott, 470. *Expld.* *Harding v. Forshaw* (1836), 1 M. & W. 415. *Apld.* *Hunt v. Hunt* (1836), 5 Dowl. 442. *Folld.* *Re Lloyd & Spittle, Re Addison & Spittle* (1849), 18 L. J. Q. B. 151; *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483. *Apld.* *Re Marsack & Webber* (1860), 2 E. & E. 637. *Reid.* *England v. Davison* (1841), 9 Dowl. 1052.

#### PART IV. SECT. 8, SUB-SECT. 9.—B.

**1492 i. Award failing to show who ought to pay costs.]**—A reference was not only of a cause, but of all matters in difference between the parties, costs of the cause to abide the event. The award was in

the following terms: "After a careful investigation of the particulars relating to the above case I find to be justly due to ptf. the sum of £28 18s. 6d., which is accordingly directed to be paid":—*Held*: a bad award, on the ground that,

assuming it decided all matters referred, the sum found due might not be due in the cause, & consequently the question of costs was left undecided.—*MATTHEWS v. M'PHEE* (1845), Res. & Eq. Jud. 21.—**AUS.**



**Sect. 8. Requisites of valid award: Sub-sect. 9, B. & C.]**

**1493. Award of balance—& that action should cease.]**—The submission was of a cause & all matters in difference between the parties, the costs of the action, of the reference & award, to abide the event. The arbitrators awarded that the action should cease & be no further prosecuted, & that, on the balance of accounts, a sum of money was due from pltf. to deft., which the former was directed to pay:—*Held*: the award was sufficiently final.—**EARDLEY v. STEER** (1835), 2 Cr. M. & R. 327; 4 Dowl. 423; 5 Tyr. 1071; 4 L. J. Ex. 293; 150 E. R. 141.

*Annotations*:—**Consd.** *Allen v. Lowe, Lowe v. Allen* (1843), 4 Q. B. 66. **Mentd.** *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483.

**1494. — & that plaintiff entitled to judgment.]**—Pltf. declared in *assumpsit*, & the damages laid in the declaration amounted to £700; deft. pleaded several pleas, & before issue joined, the cause & all matters in difference were referred, by submission, to arbn., the costs of the cause to abide the event of the suit. The arbitrator awarded: "I do award that pltf. is entitled to judgment on the whole declaration in the cause, & that judgment be entered up accordingly for him; & I do award that deft. shall pay to pltf., etc., the sum of £5 2s. 6d., which I find to be due & owing to pltf. on the balance of all accounts & transactions between them":—*Held*: the award was bad, for uncertainty, for not awarding to what amount pltf. was entitled to recover in respect of the action, so that it might be ascertained whether the costs should be taxed on the higher or lower scale.—**LUND v. HUDSON** (1843), 1 Dow. & L. 236; 7 Jur. 992.

*Annotation*:—**Refd.** *Nicholson v. Sykes* (1854), 9 Exch. 357.

**1495. — & directing as to costs.]**—Deft. having pleaded, to an action of *assumpsit*, *non assumpsit*, payment, & set-off, & issues having been joined thereon, the cause & all matters in difference were referred to arbn. by a judge's order, which directed the costs of the cause to abide the event, & the costs of the reference & award to be in the discretion of the arbitrator. The award was that pltf. should pay to deft. "the sum of £16 10s. 2d., being the balance which I find to be due from pltf. to deft.," & that each party should pay his own costs of the reference, & a moiety of the costs of the award:—*Held*: the award was bad, on the ground of uncertainty as to the finding of the issues, & there being no adjudication at all upon the cause.—**PEARSON v. ARCHIBOLD** (1843), 11 M. & W. 477; 2 Dowl. N. S. 1018; 12 L. J. Ex. 308; 1 L. T. O. S. 148; 7 Jur. 447; 152 E. R. 893.

*Annotation*:—**Distd.** *Phillips v. Higgins* (1851), 2 L. M. & P. 355.

**1496. — & that all of same was recoverable in action.]**—An action for goods sold, etc., & all matters in difference were referred, the costs of the cause to abide the event, & the arbitrator ordered & determined that there was due from deft. to pltf., on balancing the accounts between them, & after giving credit for all sums of money paid by deft. to pltf., & every item of set-off, the sum of £228 8s., clear balance, & the whole thereof was recoverable in the action, & the arbitrator ordered the payment of that sum & the costs of the reference & award. Deft., in an action for non-

performance of the award, pleaded (*inter alia*) that the award was not final:—*Held*: the award sufficiently disposed of the issues in the cause.—**ARMITAGE v. COATES** (1849), 4 Exch. 641; 19 L. J. Ex. 95; 14 L. T. O. S. 256; 154 E. R. 1371.

**1497. Award of gross sum.]**—In *assumpsit*, the declaration contained counts for goods sold, money paid, had & received, & on an account stated, to which deft. pleaded *non assumpsit*, payment & a set-off. After issue joined, the cause & all matters in difference between the parties were referred to arbitrators, the costs of the action to abide the event of their award. The arbitrators awarded that deft. was indebted to pltf. in the sum of £68 11s. 5d., & that final judgment should be entered for pltf. for that sum, besides his costs of suit, to be taxed by the master, & that the sum of £68 11s. 5d., with such costs as aforesaid, should be paid by deft. to pltf.:—*Held*: the award was bad, as it did not necessarily determine the issues raised on each of the counts in the declaration by the plea of *non assumpsit*, but only that deft. was liable on some one or more counts, not on all.—**KILBURN v. KILBURN** (1845), 13 M. & W. 671; 2 Dow. & L. 633; 1 New Pract. Cas. 226; 14 L. J. Ex. 160; 4 L. T. O. S. 375; 153 E. R. 281.

*Annotations*:—**Distd.** *Adam v. Roe* (1846), 1 Saund. & C. 81. **Consd.** *Clements v. Fuller* (1847), 11 Jur. 242. **Distd.** *Baker v. Cotterill* (1849), 18 L. J. Q. B. 345; *Clarke v. Pickering* (1849), 14 L. T. O. S. 130. **Consd.** *Wilcox v. Wilcox* (1849), 4 Exch. 500. **Distd.** *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483; *Humphreys v. Pearce* (1852), 7 Exch. 696. **Mentd.** *Nicholson v. Sykes* (1854), 9 Exch. 357.

**1498. —.]**—Where a cause & all matters in difference were referred to arbn., the costs of the cause to abide the event of the award, & the award found a specific sum to be due "in respect of all the matters in difference so referred," etc.:—*Held*: a sufficiently certain finding, although the declaration contained several *indebitatus* counts, to all of which deft. had pleaded *non assumpsit* & payment.—**BAKER v. COTTERILL** (1849), 7 Dow. & L. 20; 18 L. J. Q. B. 345; 14 Jur. 1120.

*Annotation*:—**Folld.** *Bowen v. Bowen* (1862), 31 L. J. Q. B. 193.

**1499. —.]**—Covenant on a mtge. deed. Pleas, *non est factum* & payment. After issue, the cause & all matters in difference were referred to arbn., the costs of the cause, of the reference & award, & all other costs, to abide the event. The arbitrator awarded of & concerning the matters referred, "that on a settlement of all matters in difference, accounts, claims & demands between the parties, up to the date hereof, there is due from deft. to pltf. £300 15s. 9d.," & he ordered same to be forthwith paid:—*Held*: the award was good on the face of it, as the arbitrator had awarded upon every matter in difference.—**BRADLEY v. PHELPS** (1851), 6 Exch. 897; 21 L. J. Ex. 310; 155 E. R. 810.

**1500. —.]**—Pltfs. entered into four separate written contracts with defts. for the completion of four separate portions of defts.' railway, & subsequently into three verbal contracts for the making of three extensions of the line. In pltfs.' bill of charges, the several portions were kept distinct & charged for separately. Defts. not paying the full amount claimed, pltfs. brought an action of debt against them, which, before plea, was referred to arbn. with all matters in difference relating to the railway works, the costs of the cause, reference, & award to abide the event of the

**1497 i. Award of gross sum.]**—All matters in difference in a cause, & on a building agreement, were referred, costs of the cause & of the reference to abide the event. The award, after disposing of the different issues,

damages on "account of the non-performance of the promises in the declaration, & on account of the matters in difference on the building agreement, over & above pltf.'s costs & charges, to the sum of £52 16s. 7½d.":—*Held*:

it was unnecessary to determine what damages deft. was entitled to on the building agreement, or the amount of extra work.—**JONES v. REID** (1853) 1 P. R. 247.—**CAN.**

award. Before the arbitrator, the case was opened separately & proved separately in respect of the claim under each contract. Pltfs. made further claims for damage done to an engine by defts., & for their not delivering certain waggons. The arbitrator awarded that pltfs. had good cause of action, & that, in respect of such cause of action & the other matters in difference, defts. should pay to pltfs. a specified sum. It was objected that the award was bad & uncertain, as it did not find separately in respect of the claims under the separate contracts, the costs as to each contract being, as was contended, to abide the event of the award on each:—*Held*: the award was sufficient, & it was not necessary for the arbitrator to award specifically as to each contract.—*CRAWSHAW v. YORK & NORTH MIDLAND RY. Co.* (1852), Bail. Ct. Cas. 45; 21 L. J. Q. B. 274; 16 Jur. 668.

**1501. Verdict directed for one entire sum.]**—Where a cause & all matters in difference are referred to an arbitrator, the costs of the cause to abide the event, & by his award he merely directs a verdict to be entered in favour of pltf. for one entire sum, the award is not final, & is bad.—*GYDE v. BOUCHER* (1836), 5 Dowl. 127; 2 Har. & W. 127.

*Annotations*:—*Distd.* *Creswick v. Harrison* (1850), 10 C. B. 441. With the single exception of that case (*Gyde v. Boucher*), the whole current of authorities is opposed to the objection (*Jervis, C.J.*); *Re Beaufort & Swansea Harbour Trustees* (1860), 8 C. B. N. S. 146. *Gyde v. Boucher* is not now considered to be law (*Williams, J.*). *Refd.* *Day v. Bonnin* (1836), 3 Bing. N. C. 219.

**1502. Action referred before plea.]**—After writ issued, & before any pleadings, the cause & all matters in difference were referred, the costs of the cause to abide the event, the costs of the reference & award to be in the discretion of the arbitrator. The award directed that all further proceedings in the cause should cease, that deft. should pay to pltfs. £190 in satisfaction & discharge of all claims & demands in the cause & matters in difference, & then disposed of the costs of the reference & award:—*Held*: the award was sufficiently final & certain, for it was to be inferred that something was due to pltfs. in the cause, & the amount was immaterial, as the rule as to costs upon the lower scale did not apply to awards.—*NICHOLSON v. SYKES* (1854), 9 Exch. 357; 23 L. J. Ex. 193; 2 C. L. R. 992; 156 E. R. 152.

*C. Where an Action or an Action and other Matters are referred and no Provision that Costs of Action are to abide Event.*

*See, also, Sect. 20, post.*

**1503. General rule.]**—An arbitrator is not bound to do more than find on the whole for one party.—*CLEMENTS v. FULLER* (1847), 11 Jur. 242.

#### PART IV. SECT. 8, SUB-SECT. 9.—C.

**1503 i. General rule.]**—Upon a general reference to arbitrators of all matters in dispute between two parties:—*Held*: not necessary that the award should distinguish between the matters in dispute in the cause, upon which the reference was made, & general matters between the parties referring.—*LUND v. SMITH* (1861), 10 C. P. 443.—*CAN.*

**1503 ii. —.**—The ct. set aside an award where the arbitrators found a bulk sum instead of finding on the particular counts.—*BYRNE v. BYRNE* (1873), 7 L. L. T. Jo. 568.—*IR.*

**1503 iii. —.**—“All matters in difference in the suit, including all dealings & transactions between the parties,” having been referred to arbn., the arbitrators should ascertain upon what points the parties are at issue, & upon each of these points come to a finding.—*LUCHMEER NARAIN v. PYLE* (1870), 2 N. W. 150.—*IND.*

**a. Award putting end to action.]**—Where the reference was of all matters in difference & actions between the parties, costs of the reference & award & of the actions to be in the discretion of the arbitrators, & power was given to the arbitrators to order & determine what they should think fit to be done by either of the parties respecting the matters referred, & the referees ordered, among other things, that a certain sum should be paid & accepted “in full satisfaction & discharge of all the actions & matters in difference,” also directing that no further proceedings should be taken in the suits:—*Held*: good, for it put an end to the actions, so that it was unnecessary to award upon the several issues, or find specifically upon the subject of costs.—*Re BROWN & OVERHOLT* (1855), 2 P. R. 9.—*CAN.*

**b. — Arbitrators having power to assess costs.]**—A. brought an action against B. for damages. The suit & all

**1504. Clause agreeing to dispense with specific findings valid.]**—Where a cause in which several issues are joined is referred, a clause may be introduced into the order that it shall be sufficient for the arbitrator to award in favour of pltf. or deft. generally, unless either party request him to find some particular issue.—*MORGAN v. THOMAS* (1845), 9 Jur. 92.

**1505. Actions consolidated—Individual liability of each defendant not found.]**—Where several underwriters to a policy had entered into a consolidation rule, by which they undertook to abide the event of the verdict, & the cause was referred by consent before trial, & the arbitrator awarded the aggregate sum due to the assured from the underwriters at large, the ct. would not order it to be referred back to the arbitrator to insert the amount of the sum due & payable from each underwriter individually without the consent of such underwriters.—*KYNASTON v. LIDDELL* (1823), 8 Moore, C. P. 223.

**1506. Necessity for demanding specific findings.]**—A cause was referred to arbn. by agreement, & the costs of the reference were to abide the event of the award, but there was no provision as to the costs of the action. There were issues in the cause upon pleas of the general issue & set-off. The arbitrator found that pltf. was “not entitled to recover, & that he had not any cause of action”:—*Held*: (1) the agreement of reference meant that the costs of the reference should abide the general event of the award, & not the event as to the particular issues, & if either party required a distinct finding upon those issues, it should have been so stated to the arbitrator; (2) the award was final.—*DUCKWORTH v. HARRISON* (1838), 4 M. & W. 432; 7 Dowl. 71; 1 Horn & H. 349; 8 L. J. Ex. 41; 2 Jur. 1090; 150 E. R. 1498; subsequent proceedings (1839), 5 M. & W. 427.

*Annotations*:—*Distd.* *England v. Davison* (1841), 9 Dowl. 1052; *Maloney v. Stockley* (1842), 12 L. J. C. P. 92. *Expld.* *Bourke v. Lloyd* (1842), 10 M. & W. 550. *Distd.* *Dresser v. Stansfield* (1845), 14 M. & W. 822. *Refd.* *Gisburne v. Hart* (1839), 3 Jur. 536.

**1507. — “Damages on all the issues.”]**—An arbitrator, to whom a cause had been referred, found all the issues, one of which was an issue on a set-off, in favour of pltf., & assessed “damages on all the issues”:—*Held*: no ground for setting aside the award.—*HOBDELL v. MILLER* (1840), 6 Bing. N. C. 292; 2 Scott, N. R. 163; 133 E. R. 115.

*Annotations*:—*Mentd.* *Little v. Newton* (1840), 1 Man. & G. 976; *Jones v. Ives* (1850), 10 C. B. 429; *Hare v. Fleay* (1851), 11 C. B. 472; *O’Toole v. Pott* (1857), 7 E. & B. 102.

**1508. — Several demands included in one issue.]** A declaration in *assumpsit* contained a count in

matters in difference were referred, the costs of the action & of arbn. to be assessed & allowed by the arbitrators for the party in whose favour they should award. The arbitrators directed that A. should pay B. a certain sum as costs of the action & of the arbn., which, when paid, should be a final end of all matters in difference:—*Held*: the arbitrators having power to assess the costs, it was not necessary for them to award specifically upon the several issues raised by the pleas.—*Re OULTON & ALLEN* (1885), 25 N. B. R. 19.—*CAN.*

**c. Separate awards should be made.]**—Arbitrators should give separate awards in a case referred to them by the judge, & on other matters referred to them by the parties, instead of mixing them all up & giving a general award.—*ROGHOO NUNDUN LALL SAHOO v. BUNWAREE LALL SAHOO* (1865), 3 W. R. 27.—*IND.*



*Sect. 8. — Requisites of valid award: Sub-sect. 9,*

the sum of £200 for horse keep, & work & labour, & another count in the like sum upon an account stated. Deft. pleaded as to all except £150 *non assumpsit*, & as to that sum payment. The cause was referred to arbn., & the arbitrator awarded, as to the first issue, that the verdict should be entered for pltf., & as to the second issue, so far as it related to £150, he directed a verdict to be entered for deft., & as to the residue of that issue, for pltf., & he assessed the damages at £14 4s. 9d., that being the balance which he adjudged to be due to pltf.:—*Held*: the arbitrator was not bound to find the first issue distributively, so as to find for pltf. as far as related to £14 4s. 9d., & for deft. as to the residue.—*BIRD v. PENRICE* (1840), 6 M. & W. 754; 8 Dowl. 775; 9 L. J. Ex. 257; 4 Jur. 970; 151 E. R. 617.

*Annotation*:—*Reid. Traherne v. Gardner* (1857), 8 E. & B. 161.

**1509. Several issues.]**—In an action of debt containing several common counts deft. pleaded the general issue & several special pleas. An arbitrator, to whom the cause was referred, awarded that there was justly due & owing to pltf. from deft. the sum of £60 9s. 7d.:—*Held*: the award was bad, for not disposing of the issues.—*MORGAN v. THORN (THOMAS)* (1845), 1 New Pract. Cas. 134; 4 L. T. O. S. 339; 9 Jur. 92.

**1510. Cause referred before plea.]**—Where a declaration contains several counts, & the cause is referred before plea, the arbitrator is not bound to find upon each count.—*BEARUP v. PEACOCK* (1845), 14 M. & W. 149; 2 Dow. & L. 850; 14 L. J. Ex. 232; 153 E. R. 427.

**1511. All matters substantially disposed of.]**—Where an arbitrator, to whom all matters in difference in a cause are referred, professes by his award to deal with the whole of the matters, it is no objection that he omits specifically to dispose of one of the matters in difference, if it necessarily appears from the whole of the award that that matter was substantially disposed of.—*BIGGS v. HANSELL* (1855), 16 C. B. 562; 25 L. T. O. S. 130; 139 E. R. 879.

*Annotation*:—*Distd. Wakefield v. Llanelly Ry. & Dock Co.* (1865), 3 De G. J. & Sm. 11, L.JJ.

**1512. No request for specific findings.]**—In an order of reference power was given to the arbitrator

to find generally, or to find specific issues in favour of either party if required. Deft. succeeded in disproving pltf.'s right to recover in respect of one of the matters in difference, but the arbitrator was not asked, either expressly or impliedly, to find the specific issues. He found generally for pltf., thus fixing deft. with the whole of the costs, including his own costs of disproving one issue, & the costs incurred by pltf. in unsuccessfully endeavouring to establish it:—*Held*: (1) this was no ground for sending back the award; (2) the arbitrator might properly be asked by the ct. whether he was or was not required to find specifically, & being asked, might, but was not compelled to, answer.—*WILSON v. HINCKLEY* (1868), 18 L. T. 695.

**1513. Reference of cause & all matters in difference—Award of single sum.]**—When a cause, & all matters in difference between the parties, are referred to arbn., it is not necessary in the award to specify what part of the sum awarded is given for the differences, independent of the cause of action.—*WATERS v. PEDLEY* (1824), 2 L. J. O. S. K. B. 152.

*D. Where no Action is referred.*

**1514. Compensation claim—Single sum awarded to two claimants.]**—Where a submission required the arbitrator to award compensation to two claimants separately, but the arbitrator awarded only one sum to them, the ct. set aside the award.—*Re MIDLAND RY. CO. & HEMMING* (1848), 11 L. T. O. S. 152.

**1515. Award of single sum to same party in different capacities.]**—A submission referred all matters in difference between pltf. & deft., either in deft.'s own right, or as administrator of H., & the arbitrator awarded one entire sum as due to deft. in his own right, & as administrator of H., without specifying how much was due to him in his own right, & how much in his representative capacity. The ct. refused to set aside the award, as the parties had consented to the award being made in that form, & it was natural that one lump sum should be awarded.—*DUNNETT v. HOWARD* (1853), 20 L. T. O. S. 238.

**1516. Award of balance—Agreement as to costs of reference.]**—The ct. refused to set aside an award, on the ground that the arbitrator had awarded a balance due to one party instead of awarding specifically upon the counterclaims on

**PART IV. SECT. 8, SUB-SECT. 9.—D.**

**d. General rule.]**—An award will not be set aside or sent back for neglect on the part of the arbitrators to decide separately each of several matters, when it is not clearly expressed in the reference that matters referred are to be so decided.—*RICKARDS v. RICKARDS* (1873), 3 N. S. D. 227.—**CAN.**

**e. —.]**—When particular questions of value are submitted to arbn., the award should find those matters specifically, & not a sum in gross; & therefore, when the matters submitted were the full yearly rent & price of certain lands, for the purpose of ascertaining the price to be paid for such lands, & the yearly rent by one of the parties to the deed of submission, & the award merely found that one of the parties should pay to the other the sum of £1,050:—*Held*: the award was insufficient.—*RICHARDS v. BROWNE* (1859), 9 I. C. L. R. 199.—**IR.**

**1515 i. Award of single sum payable by person in different capacities.]**—Pltf. & deft. agreed to refer all matters touching all claims of pltf. against the estate of the late T. P. (except as to a specific devise), & all accounts, etc., then existing between pltf. & deft. as exor. of T. P., or otherwise. The arbitrator awarded that \$4,485 was due from deft.

as exor. of T. P., & otherwise, to pltf.:—*Held*: no objection to the award, that it did not find separately the amount awarded against deft. as exor., & in his own right.—*PERRIN v. PERRIN* (1872), 32 U. C. R. 606.—**CAN.**

**f. Award of lump sum.]**—Where there was an agreement to submit to arbn. all controversies between the parties, & the submission provided that (*inter alia*) a number of specific claims were to be dealt with, & also all things connected with the matter:—*Held*: a general award of a sum due, accompanied by an affidavit that all the claims had been inquired into, was sufficient.—*MCGREEVY v. R.* (1891), 19 S. C. R. 180.—**CAN.**

**g. —.]**—*PATERSON & SON v. GLASGOW CORPN.* (1901), 3 F. (Ct. of Sess.) 34; 38 Sc. L. R. 855.—**SCOT.**

**h. —.]**—Disputes having arisen between the parties, they went to arbn., & A. claimed for moneys alleged to be due for (1) value of goodwill; (2) salary; (3) commission on profits; (4) price of plant; & (5) damages for breach of contract. The arbiter by his award found A. entitled to a lump sum:—*Held*: the award fell to be set aside, it being impossible to discover from the award as issued which of A.'s claims had been sustained, & to what extent.

*MILLER & SON v. OLIVER & BOYD* (1903), 41 Sc. L. R. 26.—**SCOT.**

**j. — Railway Act of Canada, s. 161.]**—On an award of arbitrators under the above Act, the award of a block sum is valid, the law not requiring arbitrators to distinguish between the amount awarded for value of land taken & that awarded for damages to other lands.—*PONTIAC PACIFIC JUNCTION RY. CO. & OTTAWA & GATINEAU RY. CO. v. COMMUNITY GENERAL HOSPITAL ALMSHOUSE & SEMINARY OF LEARNING OF THE SISTERS OF CHARITY AT OTTAWA* (1901), Q. R. 20 S. C. 567.—**CAN.**

**k. Reference of several matters—No express demand for specific adjudication.]**—In an action by contractors for reduction of a decree-arbitral, upon the ground that it did not distinguish between the amount allowed for the use of air-pressure & that for other disputed items:—*Held*: defenders were entitled to absolvitor, as no request had been made to divide the amount of the award into separate items.—*PATERSON & SON v. GLASGOW CORPN.* (1901), 3 F. (Ct. of Sess.) 34; 38 Sc. L. R. 855.—**SCOT.**

**1516 i. Different claims by different parties—Award of general balance.]**—Where, on a submission to arbn. between A. & B. & others, several



each side, as the parties had agreed that the losing party should pay all the costs of the reference, & it was unnecessary for the arbitrator to award separately on the specific claims made on each side.—*Re KENWORTHY & ROBERTS* (1856), 28 L. T. O. S. 65.

**1517. Reference of two separate matters — No express provision for specific adjudication.]**—A submission to arbn., after reciting that disputes had existed between W. & H., & that it had been agreed that W. should purchase H.'s shares in an incorporated co., & that an arbitrator should determine what sum W. should pay to H. upon the balance of accounts between them for the transfer of the shares, & should decide & determine all matters in difference between them, submitted to the arbitrator "the claims of H. against W. in respect of the differences & matters aforesaid, & all other matters in dispute between them, & the amount to be paid for the shares." The arbitrator in his award directed that a lump sum should be paid by W. to H. in respect of all the matters in difference, including the amount to be paid for the purchase of the shares:—*Held*: the arbitrator was not bound to find the sum to be paid in respect of the shares separately from that to be paid in respect of other matters in difference.—*WHITWORTH v. HULSE* (1866), L. R. 1 Exch. 251; 35 L. J. Ex. 149; 14 L. T. 445; 12 Jur. N. S. 652; 14 W. R. 736.

**1518. Building dispute—Counterclaim—Award of net balance.]**—In a dispute upon a building contract arbitrators were to award on alleged defects in the building, on claims for extra work, & deductions for omissions, & to ascertain what balance, if any, might be due to the builder. An award ordering a gross sum to be paid to the builder, without any decision on the alleged defects:—*Held*: ill.—*Re RIDER & FISHER* (1837), 3 Bing. N. C. 874; 3 Hodg. 222; 5 Scott, 86; 1 Jur. 406; 132 E. R. 647.

*Annotation*:—*Distd. Re Whitworth & Hulse* (1866), 14 W. R. 736.

**1519. ———.]**—A building contract between P. & W. provided (*inter alia*) for the payment of penalties, if the work were not completed by a certain date, & that payments were to be made on the architect's certificate & not otherwise. During the progress of the work W. paid two sums of £216 & £94 for materials, for which P., who was unable to obtain credit, ought to have paid. Owing to delay in completion W. claimed £549 under the penalties clause. The architect having given a final certificate that nothing was due to P., but that there was a sum due from P. to W., all matters in dispute were referred to an arbitrator, who made an award, after reciting (*inter alia*) that disputes had arisen touching the construction of the contract & the rights, duties, & liabilities of the parties to it after the conclusion of the works, that W. should pay to P. the sum of £596 12s. 7d. On an

different claims by the different persons, parties to the submission, all resolved themselves into money demands:—*Held*: an award of a general balance due to A. by B. & others was valid, without any specific finding as to a claim by B. against the other parties to the submission.—*MIXNER v. BLAIR* (1875), 1 V. L. R. 191.—*AUS.*

**1518 i. Building dispute—Award of lump sum—Categorical answers to questions refused.]**—Certain disputes having arisen in regard to a building contract were referred to an arbiter, in the form of questions. The arbiter awarded a certain sum, but refused to answer the questions categorically:—*Held*: the arbiter was not bound to answer the questions categorically & the award should be upheld.—*ALSTON &*

application to set aside the award, on the ground that it was incomplete, because the arbitrator had given no decision on the claim for penalties or as to the sums paid by W. on behalf of P., & because he had no jurisdiction to alter the architect's certificate, the ct. refused the application.—*Re CROW, PLEDGE & WATERHOUSE* (1895), 39 Sol. Jo. 233.

*See, further, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS.*

*E. Where Verdict taken subject to Reference.*

*See Nos. 1544—1585, post.*

## SECT. 9.—AWARD IN FORM OF SPECIAL CASE.

ss. 1061—1083, *ante*.

## SECT. 10.—AWARD BAD IN PART.

**1520. Whether award severable.]**—Submission to arbn. of all disputes concerning tithes in a certain place up to a certain time. Award that one party pay a sum of money, & that the other, in consideration thereof, release all actions:—*Held*: a good award.

Actions up to the time of submission & afterwards are severable, & actions which concern tithes & other things are severable: but where the award is of an entire matter it cannot be severed (*per CUR.*).—*INGRAVE v. WEB* (1623), Palm. 107; 81 E. R. 1001; *sub nom. INGRAM v. WEBB*, 1 Roll. Rep. 362; *sub nom. WEBB v. INGRAM*, Cro. Jac. 663.

*Annotation*:—*Refd. Pickering v. Watson* (1776), 2 Wm. Bl. 1117.

**1521. ———.]**—When the justice of award will not be affected by it, the void part shall be rejected, but where the whole will be made unjust by rejecting the void part, the whole must be avoided by it (*PARKER, C.J.*).—*ABRATHUT v. BRANDON* (1713), Gilb. 118; 93 E. R. 279.

**1522. ———.]**—An award may be good in part & bad in part.—*FURNIS v. HALLOM* (1749), Barnes, 166; 94 E. R. 859.

**1523. ———.]**—An award may be good in part & bad in part, where the subject is clearly capable of being separated; but not where all the matters are within the submission & the award is, upon the face of it, entire.—*AURIOL v. SMITH* (1823), Turn. & R. 121; 37 E. R. 1041.

*Annotations*:—*Consd. Stone v. Philipps* (1837), 4 Bing. N. C. 37. *Refd. Murphy v. Keller* (1851), 17 L. T. O. S. 297; *Blackett v. Bates* (1865), 2 Hem. & M. 610. *Mentd. Hawkesworth v. Brammall* (1840), 5 My. & Cr. 281; *Re Huddersfield Corpn. v. Jacomb* (1874), L. R. 17 Eq. 476.

*ORR v. ALLAN*, [1910] S. C. 304.—*SCOT.*

**1. Submission requiring specific finding.]**—A submission directed a specific finding on a particular issue, & the arbitrator gave only a general award for debts. A summons to set aside on this ground was discharged, on condition that debts should allow costs of this issue to be taxed to pltf.—*CREIGHTON v. BROWN* (1854), 1 P. R. 331.—*CAN.*

### PART IV. SECT. 10.

**1520 i. Whether award severable.]**—Where an award is bad in part, the bad part may be separated from the rest.—*Re MIDDLESEX COUNTY & LONDON CITY* (1857), 14 U. C. R. 334.—*CAN.*

**1520 ii. ———.]**—Where the bad part of an award cannot be separated from the

good, the whole award is bad.—*EMMS v. NEILL* (1857), 3 All. 438.—*CAN.*

**1520 iii. ———.]**—Where an award in respect of matters referred is clearly separable from that portion of it which goes beyond the strict terms of the reference, the former will be upheld & the latter rejected.—*BUTA v. MUNICIPAL COMMITTEE OF LAHORE* (1902), L. R. 29 I. A. 168.—*IND.*

**1520 iv. ———.]**—In endeavouring to uphold an award, the ct. will sometimes reject parts as surplusage, when a complete award can be found in the remainder, but it will not reject a part which plainly qualifies the operative part of the award.—*Re GRAVES & TENTLER* (1911), 19 W. L. R. 361; 21 Man. L. R. 417.—*CAN.*

**Sect. 10.—Award bad in part. Sect. 11: Sub-sect. 1**

**1524. Power to waive invalid part.]**—If an award order two things in favour of one party, one of which is uncertain, or for other reasons cannot be enforced, he may waive this, & sue upon the breach of the other.—**SIMMONDS v. SWAINE** (1809), 1 Taunt. 549; 127 E. R. 947.

**Annotation:—Refd.** **Wrightson v. Bywater** (1838), 3 M. & W. 199.

**1525. — Bad part of award contingent.]**—If an arbitrator, after regulating on the subject-matter referred to him in its present state, goes on & regulates prospectively on the same subject-matter reduced to a different state, & thereby in some degree altered, though the award be bad in that respect, yet that does not vitiate those parts which are otherwise unobjectionable; & it may stand *in toto* until the particular contingency arise to which the prospective regulation applies.—**WINTER v. LETHBRIDGE** (1824), M'Cle. 253; 13 Price, 533; 148 E. R. 107.

**Annotation:—Refd.** **Stonehewer v. Farrer** (1845), 6 Q. B. 730.

**1526. Severable.]**—Where an award is in part void, if it consists of two matters which are distinct & may be severed, it is good as to the other part.—**PITS & WARDAL'S CASE** (1610), Godb. 164; 78 E. R. 100.

**1527. S. P. BARGRAVE v. ATKINS** (1695), 3 Lev. 413; 83 E. R. 757.

**1528. S. P. MARKS v. MARRIOT** (1696), 1 Lut. 520; 1 Ld. Raym. 114; 91 E. R. 972.

**1529. S. P. LEE v. ELKINS** (1701), 12 Mod. Rep. 585; 1 Lut. 545; 88 E. R. 1536.

**1530. S. P. ADDISON v. GREY** (1766), 2 Wils. 293; 95 E. R. 818.

**Annotations:—Refd.** **Stone v. Phillips** (1837), 5 Scott, 275; **Simpson v. I. R. Comrs.** (1914), 110 L. T. 909.

**1531. Excess of jurisdiction as to part.]**—An award, good in part & bad in part, shall be performed as far as it is good.—**NUBY v. SABB** (1601), Cro. Eliz. 809; 78 E. R. 1036.

**Annotations:—Refd.** **Ayland v. Nicholls** (1676), Freem. K. B. 265; **Markes v. Marryott** (1696), 1 Lut. 520.

**1532. — — —.]**—If a submission be made of suits for tithes, & the award orders a surcease of all suits when there are suits for other things depending, it is void only for so much as is out of the submission.—**WEBB v. INGRAM** (1623), Cro. Jac. 663; 79 E. R. 574; *sub nom.* **INGRAVE v. WEBB**,

**Palm. 107; sub nom. INGRAM v. WEBB**, 1 Roll. Rep. 362.

**Annotation:—Refd.** **Pickering v. Watson** (1776), 2 Wm. Bl. 1117.

**1533. — — —.]**—If the arbitrament was made for some things within the submission, & some things without, it is good for those things that are within, & void for the residue (**RICHARDSON, C.J.**).—**MADY v. OSAN** (1628), Het. 4; 124 E. R. 296.

**1534. S. P. MORSE v. SURY** (1724), 8 Mod. Rep. 212; 88 E. R. 152.

**1535. — — —.]**—If an arbitrator directs mutual releases on payments of a sum of money over which he has jurisdiction, as well as of a sum over which he has none, the award is good as to the former.—**KENDRICK v. DAVIES** (1837), 5 Dowl. 693; Will. Woll. & Dav. 376; 1 Jur. 673.

**1536. — — —.]**—**DOE d. BODY v. COX**, No. 1241, *ante*.

**1537. — — —.]**—An arbitrator, to whom a cause in which several issues were joined was referred, the costs to abide the event, disposed of each issue, & then, although no power for that purpose was given to him, awarded a *stel processus*:—**Held**: although this was an excess of authority, the award was only bad as to that part, & was good as to the rest.—**WARD v. HALL** (1841), 9 Dowl. 610; Woll. 181; 5 Jur. 800.

**1538. — — —.]**—Where the amount of compensation for lands alleged to be injuriously affected was referred to arbn. under Lands Clauses Consolidation Act, 1845 (c. 18), s. 68, & the umpire ascertained the amount, & awarded that the co. "do pay" that sum:—**Held**: (1) the latter part of the award was merely an error in form, & must be read as though it contained the additional words "assuming the co. is liable to pay," it not being within the jurisdiction of the umpire to decide the question of liability; (2) the omission to set out such words did not make the award bad.—**Re HARPER & GREAT EASTERN RY. CO.** (1875), L. R. 20 Eq. 39; 32 L. T. 214; 23 W. R. 371.

**Annotation:—Refd.** **Rhodes v. Airedale Drainage Comrs.** (1876), 1 C. P. D. 402, C. A.

*See, also*, Nos. 1120, 1121, 1137, 1138, 1145, 1148, 1150—1152, 1154, 1157—1159, 1164, 1170, 1172, 1177, 1195, 1200—1202, 1204, 1217, 1220—1225, 1228, 1236, 1240, 1241, 1243, 1245, 1247, 1250, 1254, *ante*.

**1539. — Want of finality as to part.]**—On demurrer to a plea of want of finality:—**Held**: the

**1524 i. — Power to waive invalid part.]**—A rule of reference contained the following clause: "That the arbitrators, etc., shall have power to order judgment to be entered in this cause either for pltf. or deft. with or without costs, or to order judgment to be entered both for pltf. & deft., with or without costs, as they shall find the several issues either for or against either party." Award, "that judgment be entered for pltf. for the sum of one dollar, & that deft. pay all the costs of the reference & award":—**Held**: the directing payment of costs of the reference & award was bad, but might be abandoned.—**ST. GEORGE'S PARISH v. KING** (1878), 2 S. C. R. 143.—**CAN.**

**1531 i. Severable—Excess of jurisdiction as to part.]**—Where an arbitrator goes beyond the limits of the submission, the whole award is not vitiated, but the excess is *pro non scripto* & the award good to the extent of the power.—**JOHNSTON v. CHEAPE** (1817), 5 Dow, 247; 3 E. R. 1318, H. L.—**SCOT.**

**1531 ii. S. P. KIDD v. PATERSON** (1810), June 19, Fac. Coll.—**SCOT.**

**1531 iii. S. P. MURPHY v. BELLEW** (1841), Long & T. 250; 4 I. L. R. 313.—**IR.**

**1531 iv. S. P. FERRIER v. ALISON** (1843), 5 Dunl. (Cl. of Sess.) 456.—**SCOT.**

**1531 v. S. P. JONES v. REID** (1853), 1 P. R. 247.—**CAN.**

**1531 vi. S. P. N. B. RY. CO. v. BARR & CO.** (1855), 18 Dunl. (Cl. of Sess.) 102.—**SCOT.**

**1531 vii. S. P. FAULKNER v. SAULTER** (1855), 1 P. R. 48.—**CAN.**

**1531 viii. S. P. Re TORONTO CITY v. LEAK** (1864), 23 U. C. R. 223.—**CAN.**

**1531 ix. S. P. Re FRASER & ESCOTT** (1865), 1 C. L. J. O. S. 324.—**CAN.**

**1531 x. S. P. COX BROTHERS v. BINNING & SON** (1867), 6 Macph. (Cl. of Sess.) 161.—**SCOT.**

**1531 xi. S. P. Re WEIR & CUMMINGER** (1876), 2 R. & C. 173.—**CAN.**

**1531 xii. S. P. SAVAGE v. STEVENSON** (1878), 2 P. & B. 150.—**CAN.**

**1531 xiii. S. P. WOLFE v. TUTHILL** (1873), 7 I. L. T. Jo. 584.—**IR.**

**1531 xiv. S. P. MANA VIKRAMA, MAHARAJA OF CALICUT v. MALLICHERY KRISTNAN NAMUDURI** (1880), I. L. R. 3 Mad. 68.—**IND.**

**1531 xv. S. P. WHITELEY v. McMAMON** (1882), 32 C. P. 453.—**CAN.**

**1531 xvi. S. P. Re HARDING & WREN** (1884), 4 O. R. 605.—**CAN.**

**1531 xvii. S. P. BARRY v. MINISTER FOR WORKS** (1906), 8 W. A. L. R. 53.—**AUS.**

**1531 xviii. S. P. AMIR BEGAM v. BADRUD-DIN MURAIN** (1914), I. L. R. 36 All. 336.—**IND.**

**1531 xix. S. P. RODDY v. LESTER** (1855), 14 U. C. R. 259.—**CAN.**

**1531 xx — — — Procedure.]—Re EGLISTON & TAYLOR** (1881), 45 U. C. R. 479.—**CAN.**

**1531 xxi. — — — Award in alternative.]**—Where an alternative direction in an award was in excess of the arbitrators' powers, but the other alternative was an express direction to pay by a certain time & in a certain way:—**Held**: the latter alternative might be upheld & enforced, being separable from the rest.—**BOND v. BOND** (1865), 15 C. P. 613.—**CAN.**

**1539 i. — Want of finality as to part.]**—An arbitrator reserved to himself a judicial duty to be performed after the publication of the award:—**Held**: as the matter reserved could be separated from the rest of the award without calling for readjustment of the position of the parties thereunder, the award was



good part of the award was separable from the bad, which did not vitiate the rest, & the award was sufficiently final.—*LEWIS v. ROSSITER* (1875), 44 L. J. Ex. 136; 33 L. T. 280; 23 W. R. 832.

*Annotations*:—*Mentd.* Met. Dist. Ry. Co. v. Sharpe (1880), 5 App. Cas. 425, H. L.; *Selby v. Whitbread*, [1917] 1 K. B. 736.

**1540.** —.—.]—In former days it was considered that an award void in part was void *in toto*. That doctrine has been modified, & the modern rule is that an award although void as to part may be good as to the remainder, provided the part which is bad can be separated with reasonable clearness from the part which is good. If, however, the void part is inextricably connected with the other part, then the award will be void *in toto*; & it is not seldom a matter of difficulty to sever the good from the bad. The ct. should approach an award with a desire to support rather than to destroy it (*McCARDIE, J.*).—*SELBY v. WHITBREAD & Co.*, [1917] 1 K. B. 736; 86 L. J. K. B. 974; 116 L. T. 690; 81 J. P. 165; 33 T. L. R. 214.

*See, also*, Nos. 1272, 1288, 1291, 1342, 1343, 1348, 1356, 1382, 1427, 1442, 1458, *ante*.

**1541. Inseverable.**—An award may be good in part & bad in part, provided the latter be independent of & unconnected with the former; but if the arbitrators award A. to pay B. £100, & award A. & B. to give general releases to each other, & then award B. to pay A. £20, at a subsequent time, the whole award is bad. So if the arbitrators award A. to pay B. £30 on Jan. 1, & B. to pay A. £10 on Feb. 1, the whole is bad.—*STORKE v. DE SMETH* (1737), Willes, 66; 125 E. R. 1059.

**1542.** —.—.]—Arbitrators, to whom all matters in difference on the record in the cause were referred, the costs of the action, & also of the reference & award to be in their discretion, awarded "that the action should cease, & no further proceeding be taken therein, that deft. should pay to pltf. £50 towards costs of cause & reference, that pltf. should pay his own costs of cause & reference & pay deft.'s costs in cause & reference, the costs to be taxed as between attorney & client, & that pltf. should pay the arbitrators £25":—*Held*: the arbitrators had exceeded their power in awarding costs as between attorney & client, & as that part was not separable from the rest, the whole was vitiated.—*SECCOMBE (SECKHAM) v. BABB* (1840), 6 M. & W. 129; 8 Dowl. 167; 9 L. J. Ex. 65; 4 Jur. 90; 151 E. R. 351

*Annotations*:—*Reid.* *Re Fearon & Flinn* (1869), L. R. 5 C. P. 34. *Mentd.* *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Selby v. Whitbread*, [1917] 1 K. B. 736.

**1543.** —.—.]—Decrees arbitral are void, if the

not wholly vitiated.—*Re GRAVES & TENTLER* (1911), 19 W. L. R. 361; 21 Man. L. R. 417.—*CAN.*

**1539 ii.** *S. P. MOONZOORAD DOWLAH v. MEDIDI BEGUM*, 7 C. L. R. 206.—*IND.*

**1540 i.** —.—.]—An award may be good in part & bad in part, but only where the subject appears clearly capable of being separated.—*GRAY v. FRADER* (1879), 5 Q. L. R. 226.—*CAN.*

**p.** — *Matters not referable dealt with.*—Where both criminal & civil proceedings are referred & dealt with in one award, the award is good as to civil, & bad as to criminal, proceedings.—*Re MEAKER & BROWN* (1878), 1 N. S. W. S. C. R. N. S. 59.—*AUS.*

**1541 i. Inseverable.**—Although the general principle is that an award may be good in part & bad in part, still, where arbitrators found a sum due to a creditor, & directed debtor to pay & the creditor to receive it in a certain specified manner, the creditor was not allowed to adopt the award in so far as it found

arbitrator therein awards beyond his authority anything to the prejudice of one of the parties, which cannot be severed from what he has lawfully awarded within the scope of his authority (*LORD CAMPBELL, C.*).—*CALEDONIAN RY. CO. v. LOCKHART* (1860), 3 Macq. 808; 3 L. T. 65; 6 Jur. N. S. 1311; 8 W. R. 373, H. L.

*Annotations*:—*Mentd.* *Bagnall v. L. & N. W. Ry. Co.* (1862), 1 H. & C. 544, Ex. Ch.; *Palmer v. Met. Ry. Co.* (1862), 31 L. J. Q. B. 259; *Ringland v. Lowndes* (1864), 17 C. B. N. S. 514; *Stone v. Yeovil Corpn.* (1876), 1 C. P. D. 691; *Bottomley v. Ambler* (1877), 38 L. T. 545; *R. v. Poulter* (1887), 20 Q. B. D. 132; *Holliday v. Wakefield Corpn.*, [1891] A. C. 81, H. L.; *R. v. Master Manley-Smith* (1893), 63 L. J. Q. B. 171.

## SECT. 11.—WHERE VERDICT TAKEN SUBJECT TO REFERENCE.

*See, also*, Nos. 1215—1224, *ante*.

### SUB-SECT. 1.—POWERS OF ARBITRATOR.

**1544. Cannot set aside verdict when amount only referred.**—An action on covenants in a lease (which had many years to run) was brought by the landlord against the tenant for non-repair, & for waste by alteration of the premises. There was also a count in trover. Many issues were raised. At the trial an order of reference was made, which directed "that the jury do find a verdict for pltf. for the claim in the declaration, subject to a reference to a valuer, who is to decide whether there is any damage to pltf. by reason of the premises not being in a sufficient state of repair under the terms of the lease, in which case the valuer is to award the amount of damage to the reversion. It is also ordered that the valuer is to say what compensation (if any) pltf. is entitled to in consequence of the alterations which have taken place in the premises, & that the valuer should be attended by two witnesses only on each side, to explain the past & present state of the premises." The appointed valuer found as follows: "I hereby certify that beyond the sum of £17 paid into ct., there is no damage to pltf. by reason of the premises not being in a sufficient state of repair under the terms of the lease, nor is pltf. entitled to any compensation in consequence of the alterations which have taken place in the premises":—*Held*: the arbitrator had no power over the verdict, but his duty was limited to deciding on the two specified matters of damage, viz., by reason of non-repair, & by reason of the alterations.—*SOWDON (SOUDON) v. MILLS* (1861), 30 L. J. Q. B. 175; 3 L. T. 754.

**1545. Cannot award more than verdict.**—Where a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in

the sum due, & reject that portion of it directing the mode of payment.—*DALTON v. MCNIDER* (1856), 5 Gr. 501.—*CAN.*

### PART IV. SECT. 11, SUB-SECT. 1.

**r. Submission of "all matters in the cause."**—When a verdict was taken subject to an award, & a rule of reference was subsequently drawn up which directed that the award should be entered on the *postea* as a verdict of the jury:—*Held*: as the submission was "all matters in the cause," the arbitrators could not give deft. credit for an item which could not come under the head of payment or set-off in the cause.—*CAMPBELL v. WILSON* (1836), Ber. 104.—*CAN.*

**s. Award directing bond of indemnity.**—A verdict was taken subject to a reference of the cause & all matters in difference. The arbitrators made an award reducing the verdict, & directing pltf. on request to execute a bond conditioned to indemnify deft. against two specified suits:—*Held*: the award of indemnity was authorised.—*ANDERSON v. COTTON* (1856), 2 P. R. 109.—*CAN.*

**t. Power to enter verdict for defendant.**—A verdict was taken for pltf. subject to be reduced, increased, or set aside, & a verdict or nonsuit to be entered for deft. under C. L. P. Act. The award directed that pltf.'s verdict should be set aside & a verdict entered for deft. & further awarded money on a set-off:—*Held*: the award did not in terms direct a verdict for deft. for any money, & even if it did, such award would be proper under the reference.—*MARTYN v. DICKSON* (1866), 2 C. L. J. O. S. 209.—*CAN.*

**v.** —.—.]—A verdict was taken subject to be increased, reduced, or a verdict entered for deft., by the award of an arbitrator, who directed a verdict in deft.'s favour for \$750, under a plea of set-off:—*Held*: he had power to do so.—*JOHNSTON v. ANGLIN* (1869), 29 U. C. R. 372.—*CAN.*

**w. Interest not allowable.**—When a verdict is given subject to an award, 29 & 30 Vict. c. 42 (O.), s. 2, does not authorise the charging of interest on the sum awarded from the time of taking the verdict.—*HOPE v. BEATTY* (1876), 7 P. R. 39.—*CAN.*



**Sect. 11.—Where verdict taken subject to reference:  
Sub-sects. 1 & 2.]**

difference are referred by a rule of *Nisi Prius*, he cannot award a greater sum than that for which the verdict was taken, & if he do, no *assumpsit* by implication will arise to pay even to the extent of the verdict so taken.—**BONNER v. CHARLTON** (1804), 5 East, 139; 1 Smith, K. B. 368; 102 E. R. 1022; subsequent proceedings, 2 Smith, K. B. 7.

**Annotations** :—**Folld.** *Prentice v. Reed* (1808), 1 Taunt. 151. **Consd.** *Hayward v. Phillips* (1837), 6 Ad. & El. 119. **Mentd.** *Lievesley v. Gilmore* (1866), Har. & Ruth. 849.

**1546. Amendment of judgment as to excess.]**—Upon a reference at *Nisi Prius*, an arbitrator cannot award a greater sum than that for which the verdict is taken. But if he awards a greater sum than the amount of the verdict, & judgment is entered for the whole, & it appears that a part of the sum is covered by a countervailing demand which never was a subject of dispute, so that only a balance, less than the amount of the verdict, is ultimately to be paid over, the ct. will reduce the judgment to the amount of the verdict & grant execution for the sum really due.—**PRENTICE v. REED** (1808), 1 Taunt. 151; 127 E. R. 790.

**Annotations** :—**Apld.** *Re Badger* (1819), 2 B. & Ald. 690. **Mentd.** *Hayward v. Phillips* (1837), 1 Nev. & P. K. B. 288.

**1547. — Unless where all matters referred.]**—**Semble** : under a reference of all matters in difference the arbitrator will not of necessity be confined to the amount of the damages for which the verdict is taken (**LORD ELLENBOROUGH, C.J.**).—**PEARSE v. CAMERON** (1813), 1 M. & W. 675; 150 E. R. 252.

**Annotation** :—**Expld.** *Hayward v. Phillips* (1837), 1 Nev. & P. K. B. 288.

**1548. Action of debt.]**—In an action of debt, referred to an arbitrator after a verdict by consent, he may award higher damages than those inserted in the verdict.—**ANNAN v. JOB** (1846), 8 L. T. O. S. 146; 10 Jur. 1083.

**1549. — What amounts to waiver.]**—A declaration in covenant upon an indenture alleged one breach by non-payment of rent & three by not repairing, etc. Pleas, that the indenture was obtained by fraud, & performance as to the several breaches. Pltf. traversed the fraud & joined issue on the pleas of performance, except that there was an omission to perfect the issue on the fourth plea. By order of *Nisi Prius* it was directed that the jury should give a verdict for pltf. on the first issue & damages assessed on the first breach at £10 & costs 40s., subject to the award of an arbitrator, to whom the cause & all matters in difference were referred, to order & determine what he should think fit to be done by the parties, respecting the matters in dispute, with liberty for him to amend the record, & to direct what should be done between the parties, the costs of the cause to abide the event of the award, & the costs of the reference & award to be in the arbitrator's discretion. The award recited that the only matter in difference, besides the cause, was a claim of £20 rent; & the arbitrator awarded that the verdict on the first issue & the assessment of £10 on the first breach should stand, & found for pltf. on the three other issues, & assessed damages upon each, directing the verdict to be entered for the aggregate of the damages on the four breaches; he also directed that deft. should pay £20 for rent & that pltf. should expend £193 6s. in repairs, for which purpose he should have power to enter on the premises, & that deft. should pay the costs of the reference & award :—**Held** : (1) the award was

entirely bad, the arbitrator having no power to increase the verdict; (2) deft. did not waive the objection to the award by permitting pltf. to enter & perform the repairs, nor by attending the taxation of costs in Hilary vacation, nor by applying to pltf. in Hilary vacation for delay of execution, which application was acceded to by pltf. on terms which deft. did not accept.—**HAYWARD v. PHILLIPS** (1837), 6 Ad. & El. 119; 1 Nev. & P. K. B. 288; Will. Woll. & Dav. 1; 6 L. J. K. B. 110; 1 Jur. 102; 112 E. R. 46.

**Annotations** :—**Folld.** *Gapp v. Elwes* (1852), 20 L. T. O. S. 70. **Distd.** *Law v. Blackburn* (1853), 14 C. B. 77. **Refd.** *Jones v. Powell* (1838), 1 Will. Woll. & H. 60; *Wood v. Wylde* (1847), 8 L. T. O. S. 394. **Mentd.** *Hobdell v. Miller* (1840), 2 Scott, N. R. 163; *Land v. Hudson* (1843), 12 L. J. Q. B. 365; *Jones v. Ives* (1850), 15 Jur. 107; *R. v. Hardey* (1850), 19 L. J. Q. B. 196.

**1550. Where arbitrator has power to order what should be done.]**—Where an arbitrator had power to order what he should think fit to be done by either of the parties respecting the matters in dispute :—**Qu.** : whether he might not direct them to consent to an application to the ct. for enlarging the damages given by the verdict.—**PRENTICE v. REED** (1808), 1 Taunt. 151; 127 E. R. 790

**Annotations** :—**Apld.** *Re Badger* (1819), 2 B. & Ald. 690. **Expld.** *Hayward v. Phillips* (1837), 1 Nev. & P. K. B. 288.

**1551. No power to direct proof on bankrupt estate.]**—An arbitrator awarded that the verdict in an action in debt by the assignees of a bkpt. should stand for pltf. on all the issues, with damages; he also found that bkpt. was indebted to deft. in £100, & directed proof of that amount on bkpt.'s estate :—**Held** : the award was not final, because it directed a proof on bkpt.'s estate, which the arbitrator had no power to compel.—**PERCH v. HOPKINS** (1843), 1 L. T. O. S. 145

**1552. Powers not limited by particulars unless brought before arbitrator.]**—A verdict was entered, by consent, for a sum greater than that claimed by the particulars of demand, & the amount of damages in the cause was referred to arbn. The arbitrator having awarded to pltf. the amount of the verdict :—**Semble** : the particulars of demand were not necessarily before the arbitrator, & deft., if he meant to limit pltf.'s demand, ought to have brought the particulars before the arbitrator.—**KENRICK v. PHILLIPS** (1841), 7 M. & W. 415; 9 Dowl. 308; 10 L. J. Ex. 226; 151 E. R. 827.

**Generally as to powers of arbitrator.]**—*See* Nos. 1161—1266, *ante*.

**SUB-SECT. 2.—SUFFICIENCY OF AWARD.**

**1553. Must be certain & final—Verdict for plaintiff without naming amount—Direction to pay named sum.]**—On the trial of a cause a verdict was taken for £3,000. subject to a reference, the arbitrator to direct a verdict for pltf. or deft. as he should think proper, & to determine all matters in difference, except as to costs, the settlement of which was provided for by the order of reference. The arbitrator directed a verdict to be entered for pltf. (not saying for how much), & that deft. should, at a time & place named, pay pltf. or his attorney £260 :—**Held** : an uncertain award. — **MORTIN (MARTIN) v. BURGE** (1836), 4 Ad. & El. 973; 6 Nev. & M. K. B. 201; 111 E. R. 1049.

**Annotation** :—**Distd.** *Taylor v. Shuttleworth* (1840), 6 Bing. N. C. 277.

**1554. Plaintiff entitled to demand certain sum—Defendant entitled to specified set-off.]**—Where a verdict was taken for pltf., subject to a reference of the cause & all matters in difference, the arbi-

trator having power to vacate the verdict or reduce the damages, & he awarded that pltf. was entitled to demand of deft. £90 in respect of the causes of action, & that deft. was entitled to set off £35 in respect of his journeys, etc., mentioned in the plea & notice of set-off, & that deft. should deliver up certain securities to pltf. :—*Held*: the award sufficiently ascertained the amount for which the verdict was to be entered.—*PLATT v. HALL* (1837), 2 M. & W. 391; 5 Dowl. 583; Murp. & H. 91; 6 L. J. Ex. 144; 1 Jur. 358; 150 E. R. 809.

*Annotation*:—*Reid. Re Brown & Croydon Canal Co.* (1839), 9 Ad. & El. 522.

**1555. — Award directing verdict to stand for reduced amount—No express findings on merits.]**—In an action for waste a verdict was taken for pltf. for the damages in the declaration, subject to a reference. The arbitrator directed the verdict to stand for a reduced amount:—*Held*: he was not bound to find expressly that the premises were out of repair.—*BACON v. SMITH* (1840), 5 Jur. 549.

**1556. — Award that verdict for plaintiff should be vacated & nonsuit entered.]**—A cause & all matters in difference between the parties (there being no matters in difference except in the cause) were referred by order of *Nisi Prius* to the award, order, arbitrament, final end, & determination of A., the order providing that the verdict should be entered for pltf. for the damages in the declaration, subject to be reduced or vacated, or instead thereof a verdict for deft. or a nonsuit entered, according to his award. The arbitrator, by his award, directed that the verdict entered for pltf. should be vacated, & a nonsuit entered:—*Held* (PARKE, B. *diss.*): the award was bad, as not finally determining the matters in difference in the cause.—*WILD v. HOLT* (1841), 9 M. & W. 161; 11 L. J. Ex. 263; 152 E. R. 68.

*Annotations*:—*Reid. Tunnicliffe v. Tedd* (1848), 5 C. B. 553; *Vanderbyl v. M'Kenna* (1868), L. R. 3 C. P. 252.

**1557. — Award that defendant had not proved his plea & that verdict should stand.]**—In an action a verdict was taken for pltf., subject to a reference. Deft. pleaded (1) not guilty, (2) justification. The arbitrator awarded “that, as deft. had not proved his plea, the verdict for pltf. ought to stand,” & then stated a number of reasons for his opinion which could not be considered as satisfactory:—*Held*: the adjudication was sufficient, & the ct. would not consider the sufficiency of the reasons assigned by the arbitrator.—*ARCHER v. OWEN* (1841), 9 Dowl. 341.

**1558. — Award substantially disposing of all matters.]**—At the trial of an action a verdict was taken for pltf. by consent, subject to the award of a barrister, who was by the order of *Nisi Prius* empowered to direct that a nonsuit should be entered, or that a verdict should be entered for pltf. or defts., as he should think proper, & who was, at the request of either party, to state any point of law upon the face of his award for the opinion of the ct.:—*Held*: it was not incumbent on the arbitrator to decide finally as to the amount of damages to be recovered & to direct how the judgment should be entered up, but having by his award disposed of all the issues joined on the record, & assessed damages separately in respect of each subject-matter of complaint stated in the declaration, & having referred to the ct., at the request of defts., the question as to the right of pltf. to recover damages in respect of some of the grievances stated in the declaration, & at the request of pltf., as to the validity of a custom set out, & also as to pltf.'s right to judgment *non obstante veredicto* on a plea should the issue thereon be found for defts., he had properly discharged his

duty, & he was not bound definitively to determine as to the validity or invalidity of the custom.—*BRADBEE v. CHRIST'S HOSPITAL GOVERNORS* (1842), 4 Man. & G. 714; 2 Dowl. N. S. 164; 134 E. R. 294; *sub nom.* *BRADBEE v. LONDON CORPN.*, 5 Scott, N. R. 79; 11 L. J. C. P. 209.

*Annotation*:—*Mentd. R. v. Longton Gas Co.* (1860), 29 L. J. M. C. 118.

**1559. — Verdict for plaintiff on all issues—Amount not stated.]**—An arbitrator awarded (*inter alia*) that the verdict in an action in debt by the assignees of a bkpt. should stand for pltf. on all the issues, with damages £4 10s. 4½d.; he also found that bkpt. was indebted to deft. in £100, & directed proof of that amount on bkpt.'s estate:—*Held*: the award was uncertain, because it did not find the amount of debt for which the verdict was to stand.—*PERCH v. HOPKINS* (1843), 1 L. T. O. S. 145.

**1560. — Award of discontinuance.]**—C., who held a power of attorney authorising him to sue in the names of W. & M., brought two actions of debt against R., one in his own name, the other in the names of W. & M., to recover the balance due for covering wires with gutta percha. Deft. pleaded in each action the general issue, payment, & set-off. Issue was not joined in the second action. On the trial of the first action, an order of reference, by consent of C. & R., was made in the cause C. v. R., & professed to refer “this cause, & all matters in difference in this cause, & in the cause of W. & M. v. R., & all matters in difference between the parties, & all matters in difference in the cause of W. & M. v. R. between those parties.” After the reference, a rule for a discontinuance having been obtained in the action of W. & M. v. R., the order of reference was amended by consent, & it was ordered “that the rule for a discontinuance should be suspended, & left to the decision of the arbitrator.” The award (*inter alia*) awarded a discontinuance in the action of W. & M. v. R.:—*Held*: the award of a discontinuance was a sufficient decision of the action.—*HANCOCK v. REID* (REIDE) (1851), 2 L. M. & P. 584; 21 L. J. Q. B. 78; 15 Jur. 1036.

**1561. — Award not disposing of all issues raised—Ordering verdict for nominal damages.]**—At the trial of an action on covenants in a lease (which had many years to run) for non-repair, & for waste by alteration of the premises, raising many issues, an order of reference was made, which directed “that the jury do find a verdict for pltf. for the claim in the declaration, subject to a reference to a valuer, who is to decide whether there is any damage to pltf. by reason of the premises not being in a sufficient state of repair under the terms of the lease, in which case the valuer is to award the amount of damage to the reversion. It is also ordered that the valuer is to say what compensation (if any) pltf. is entitled to in consequence of the alterations which have taken place in the premises, & that the valuer shall be attended by two witnesses only on each side, to explain the past & present state of the premises.” The appointed valuer found as follows: “I hereby certify that beyond the sum of £17 paid into ct., there is no damage to pltf. by reason of the premises not being in a sufficient state of repair under the terms of the lease, nor is pltf. entitled to any compensation in consequence of the alterations which have taken place in the premises”:—*Held*: the certificate was good & valid though it did not dispose of the issues raised, & it authorised an entry of a verdict for pltf., with nominal damages.—*SOWDON* (SOUDON) *v. MILLS* (1861), 30 L. J. Q. B. 175; 3 L. T. 754.

—**Generally.]**—See Nos. 1267—1361, 1368—1388, *ante*.



*Sect. 11.—Where verdict taken subject to reference: Sub-sects. 2 & 3.]*

**1562. Must settle all matters—Award not “of & concerning.”**—Upon the trial of an action of tort a verdict was found for pltf., subject to a reference of all matters in difference. Deft. claimed before the arbitrator a sum of money due to him upon the balance of an account, which was admitted by pltf. to be due. The award, without stating that it was made of & concerning the premises, directed a verdict to be entered for pltf., with damages:—*Held*: the award was sufficient.—*GRAY v. GWEN-NAP* (1817), 1 B. & Ald. 106; 106 E. R. 40.

*Annotations*:—*Appld. Re Brown & Croydon Canal Co.* (1839), 9 Ad. & El. 522. *Follid. Dunn v. Warlters* (1842), 9 M. & W. 293. *Appld. Re Beaufort & Swansea Harbour Trustees* (1860), 8 C. B. N. S. 146. *Refd. Perry v. Mitchell* (1844), 12 M. & W. 792; *Crosbie v. Holmes* (1846), 3 Dow. & L. 566; *Harrison v. Creswick* (1853), 13 C. B. 399.

**1563. — Verdict to stand for reduced amount—No award as to other matters.**—An action for trespass for taking goods was referred, principally with the view of determining the right of property in the goods, defts. contending that pltf. had no property in them, but that they belonged to a third person. Another complaint in the declaration was that defts. had committed an assault upon pltf.'s wife, *per quod consortium amisit*, & all other matters in difference were also referred. No evidence was given before the arbitrator to prove the *per quod*, but there was only one assault proved to have been committed on the wife, & pltf. abandoned his claim to part of the goods. The arbitrator made his award, merely ordering the verdict which had been entered for pltf. to stand & the damages to be reduced to £35, but made no award respecting the right of property in the goods:—*Held*: the award was sufficiently final.—*BIRD v. COOPER* (1835), 4 Dowl. 148.

**1564. — — —**—In an action of trover, to which deft. pleaded, except as to a certain sum, not guilty & not possessed, & as to that sum payment thereof into ct., a verdict was taken for pltf. for the amount of damages claimed, subject to an arbn., & the arbitrator found generally that the verdict for pltf. was to stand, & that the damages were to be reduced to a certain sum:—*Held*: the award was good, as the arbitrator had sufficiently disposed of all the issues.—*WILCOX v. WILCOX* (1849), 4 Exch. 500; 19 L. J. Ex. 27; 14 L. T. O. S. 134; 154 E. R. 1311.

*Annotation*:—*Refd. Humphreys v. Pearce* (1852), 7 Exch. 696.

**1565. — Award not ordering verdict—But settling cause.**—By an order of *Nisi Prius* at the trial of a cause a verdict was entered for pltf., with the consent of the parties, damages £10,000, costs 40s., subject to the award of an arbitrator, who was to settle the cause & all matters in difference between the parties:—*Held*: although the arbitrator in his award had not ordered a verdict to be entered & had found no damages, yet he had settled the cause by the terms of his award, & there was nothing to prevent taxation of the costs.—*TAYLER v. MARLING* (1840), 2 Man. & G.

**1562 i. Must settle all matters—Award confined to matters in suit.**—Pltf. sued for specific injuries, & a verdict was taken, subject to an award. By the reference, the arbitrators had power to settle & dispose of all matters in difference, awarding, if they should think fit, payment of an entire sum in full satisfaction of all past & future demands. The arbitrators increased the verdict & concluded: “The sums so to be paid as aforesaid we do award, etc.” Defts. moved to set aside the award, objecting that the arbitrators did not make their award of all matters in

difference, but confined it to the subject-matter issuing out of the cause:—*Held*: award good under the submission.—*WATSON v. TORONTO GAS LIGHT & WATER CO.* (1849), 5 U. C. R. 523.—*CAN.*

**1568 i. Must settle each claim specifically—General verdict.**—A verdict was taken for pltf., subject to a reference; & the arbitrators awarded, “that at the time of the commencement of the action, or at any time afterwards, pltf. had not any cause of action whatever against deft.,” & directed a verdict for deft. for

55; 2 Scott, N. R. 374; Drinkwater, 121; 10 L. J. C. P. 26; 133 E. R. 661.

**Award of verdict without damages.**—Debt, in £200, for work & labour, for goods sold, & on an account stated. Pleas: (1) except as to £35, parcel, never indebted; (2) except as to the £35, parcel, payment before action brought; (3) as to the £35, payment into ct. of £37, in satisfaction of the sum of £35, & all damages for the detention thereof; (4) a set-off to the whole declaration. The cause & all matters in difference between the parties were referred, by order of *Nisi Prius*, to an arbitrator, who, by his award, directed a verdict for pltf. on the first issue, without damages, & for deft. on the other issues:—*Held*: the award was good, as the arbitrator was right in not awarding any damages on the first issue, & the finding as to the several issues was not repugnant.—*WARWICK v. COX* (1844), 12 M. & W. 774; 1 Dow. & L. 987; 13 L. J. Ex. 314; 3 L. T. O. S. 78; 8 Jur. 713; 152 E. R. 1411.

**1567. — So far as brought before arbitrator.**—An action of trespass brought in the Ct. of Exch. by pltf. against three defts., & all matters in difference between the parties, were referred by order of *Nisi Prius* to an arbitrator, a verdict having been taken for pltf., & by another order, made at the same time, an action of replevin brought in the Ct. of Queen's Bench by same pltf. against one only of defts. was also referred to the same arbitrator. The main question was whether or not pltf. had, in 1842, become tenant to that party who was deft. in both actions. No other tenancy was ever set up, or brought into question before the arbitrator. The reference of the replevin suit was the first proceeded in & the evidence taken in it was, by consent, read over as evidence in the action of trespass. The arbitrator awarded in the action of replevin that pltf. had good cause of action against deft., & was entitled to a verdict. In the action of trespass he awarded nothing as to the costs of the action of replevin, or whether, at the date of the order of reference of either action, a tenancy of pltf. to the party who was deft. in both actions existed:—*Held*: the award was good, these matters, if in difference, not having been brought before the arbitrator at the hearings.—*REES v. WATERS* (1847), 16 M. & W. 263; 4 Dow. & L. 567; 153 E. R. 1187.

—**Generally.**—*See* Nos. 1407—1466, *ante*.

**1568. Must settle each claim specifically—Failure to state in regard to what matters plaintiff successful.**—A declaration in ejectment contained three demises. At the trial of the action a general verdict was taken, subject to a reference of the cause, & all matters in difference, the costs of the cause to abide the event. The arbitrator having directed the general verdict to stand:—*Held*: the award was bad, for he was bound to state on which of the demises pltf. was entitled to succeed.—*DOE d. STARLING v. HILLEN* (1843), 2 Dowl. N. S. 694; 12 L. J. Q. B. 166; 7 Jur. 375.

*Annotations*:—*Expld. & Dstd. Mays v. Cannell* (1854), 3 C. L. R. 218. *Refd. Brooks v. Parsons* (1843), 13 L. J. Q. B. 50.

£20:—*Held*: both the issues were sufficiently disposed of.—*TOWNSEND v. MORTON* (1845), 2 U. C. R. 100.—*CAN.*

**1568 ii. — Award of lump sum—Several issues.**—Where in trespass, several pleas being pleaded, a verdict was taken, subject to a reference, & the award determined the cause in favour of pltf., & reduced the verdict to £7 10s., the ct. refused to set aside the award, on the ground that it did not dispose of the issues.—*WOOD v. MOODIE* (1846), 3 U. C. R. 79.—*CAN.*



**1569. — Award generally for plaintiff.]—**Pltf. & deft. were both dyers & bleachers, having their works at the same stream, & the question was as to pltf.'s right to the stream unpolluted by deft.'s works, deft. having put lime into the stream, which obstructed its course & polluted its purity. Deft. had pleaded not guilty, & a denial of pltf.'s right. The jury found for pltf., damages £2,000, subject to be reduced. The terms of the reference were that the arbitrator should determine the right, & should regulate the proper mode of enjoying the stream. The arbitrator awarded generally for pltf., damages £40, that pltf. had a right to the stream, subject to deft.'s right of first using it for his dyeing business; he then went on to say that deft. should use all reasonable means of purifying the water, & that it should be passed, after it had been used by deft. for his dyeing processes, through filtering lodges according to the most approved method, so that it might be always used by pltf. in his business as bleacher without injury thereto. It was sought to set the award aside, because there was no distinct finding on the issues severally:—*Held*: the award was uncertain & not final.—*MUIR v. PARROTT* (1845), 4 L. T. O. S. 290.

**1570. — Direction that verdict stand & damages be reduced.]—**By an order of reference at *Nisi Prius* a general verdict was found for pltf. in a cause in which there were several issues, subject to the award or certificate of an arbitrator, "the costs of the cause to abide the event," & the arbitrator, by his certificate, directed that the verdict found should stand, & the damages be reduced to a certain sum:—*Held*: a specific finding on each issue was not necessary.—*Re SMITH & REECE, Re REECE & SMITH* (1849), 6 Dow. & L. 520; 14 Jur. 483.

**1571. — Award that defendant pay named sum & costs—Clause exempting arbitrator from finding specifically.]—**On the trial of a cause containing counts in trespass & in case, on which several issues were raised, a verdict was taken for pltf., subject to a reference, with power to the arbitrator to order for whom the verdict should be entered, & the order contained a clause exempting the arbitrator from finding specific issues, unless required to do so. The arbitrator having simply ordered deft. to pay to pltf. £50 & all costs of the action, which, by the order, were to abide the event, & of the view & award, which were left in his discretion:—*Seem*: the award was good, as disposing of the action, even without calling in aid the exemption clause, which clearly sustained it.—*KENDAL v. SYMONDS* (1855), 3 C. L. R. 323.

**1572. — Other matters referred as well as action.]—**Deft. having agreed to buy of pltf. certain property for which he was to pay an annuity & a large sum by instalments, a verdict for £10,000 was taken in an action for default of payment, subject to a reference of the cause & all matters in difference, £3,500 to be paid by deft. to the arbitrator, to be by him paid to pltf. if found due in the action,

**1572 i. — Other matters referred as well as action.]—**A verdict was taken for pltf., subject to an award "upon all matters in difference between them, as well in this suit as all other matters up to the commencement of this suit," costs to abide the event. The arbitrator awarded that pltf. had good cause of action against deft. in the cause, & on the matter so submitted, & was entitled to a verdict therein, & assessed the damages to be paid by deft. to pltf. in the cause at £43 8s.:—*Held*: the award was good, as it disposed by necessary inference of all the issues in the cause, & was not uncertain.—*CHARLES v. CARROLL* (1852), 9 U. C. R. 357.—CAN.

**1572 ii. — Power to award entire sum.]—**A verdict was taken subject to an award. The arbitrators had power

to dispose of all the matters in difference, awarding if they should think fit an entire sum in full satisfaction of all past & future demands. The arbitrators ordered the verdict to be increased with costs, such amount to be in full satisfaction of all past & future demands of pltf.:—*Held*: the award could not be impeached, because it did not distinguish the sum allowed in the cause from the sum allowed for the other matters in difference.—*WATSON v. TORONTO GAS CO.* (1849), 5 U. C. R. 523.—CAN.

#### PART IV. SECT. 11, SUB-SECT. 3.

**a. When clause against filing bill in equity.]—**A verdict was taken subject to a reference, & the rule of reference contained the usual clause against filing any bill in equity; deft., against whom the

& the arbitrator to order what should be done by the parties. The arbitrator directed that deft. should pay, in addition to the £3,500, a gross sum, including the value of the annuity, without distinguishing how much was in respect of the matters in difference & how much in respect of the cause, but ordered a verdict on all the issues to be entered for pltf.:—*Held*: a valid award as against deft.—*TAYLOR (TAYLER) v. SHUTTLEWORTH* (1840), 6 Bing. N. C. 277; 8 Dowl. 281; 8 Scott, 565; 9 L. J. C. P. 138; 133 E. R. 109.

**1573. — Debt for goods sold, etc. Pleas, never indebted, payment, & set-off. The cause & all matters in difference having been referred by order of *Nisi Prius*, the order directed that, if the arbitrator should find that pltf. were not entitled to recover, the verdict taken was to be void & a verdict entered for deft. It was further agreed by the parties that, if the arbitrator should think that certain iron machinery supplied to deft. ought not to be charged for by pltf., deft. having alleged it to be defective, pltf. were to be allowed the value of it at the market price of pig iron. The arbitrator awarded that pltf. were not entitled to recover, & that deft. should pay pltf. for the machinery:—*Held*: under the order of reference the arbitrator was not bound to award on each issue.—*WADDLE (WADDELL) v. DOWNMAN* (1844), 12 M. & W. 562; 1 Dow. & L. 560; 13 L. J. Ex. 115; 2 L. T. O. S. 350; 8 Jur. 933; 152 E. R. 1322.**

*Annotations*:—*Expld.* *Kilburn v. Kilburn* (1845), 13 M. & W. 671. *Consd.* *Gordon v. Whitehouse* (1856), 18 C. B. 747.

— *Generally.*—*See* Nos. 1467—1519, *ante*.

**Award must be consistent.]—***See* Nos. 1362—1637, *ante*.

**Generally as to the sufficiency of the award.]—***See* Nos. 1267—1388, *ante*.

#### SUB-SECT. 3.—EFFECT OF AWARD.

**Generally.]—***See* Sect. 15, Sub-sect. 2, *post*.

**1574. Award equivalent to verdict—Power to enter judgment.]—**Where a verdict is taken *pro forma* at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury, & pltf. is entitled to enter up judgment for the amount without first applying to the ct. for leave so to do.—*LEE v. LINGARD* (1801), 1 East, 401; 102 E. R. 155.

*Annotations*:—*Refd.* *Allenby v. Proudlock* (1835), 1 Har. & W. 357. *Mentd.* *Re Burgess* (1818), 2 Moore, C. P. 745.

*See, also*, Sect. 19, Sub-sect. 3, *post*.

**1575. Court will not interfere.]—**By order of *Nisi Prius* a verdict was taken for £100 damages, subject to the award of a barrister, to whom the cause & all matters in difference were referred, with power to direct for whom & for what sum the ver-

award was made, did not make any motion in proper time, but filed his bill in equity, for which the ct. granted attachments against him & his solr., upon which writs of *habeas corpus* were subsequently issued. The ct. refused to entertain a motion to set aside those writs or suspend proceedings upon them.—*R. v. MADDOCK, Re MANNERS & CLARK* (1845), 1 U. C. R. 322.—CAN.

**1575 i. Court will not interfere.]—**A verdict was taken for the penalty in a bond, subject to a reference. An award having been made in favour of pltf., deft. moved to arrest judgment, on the ground that the condition was void, being in restraint of trade. The application was refused.—*DAWES v. WILKINSON* (1860), 19 U. C. R. 604.—CAN.

**Sect. 11.**—Where verdict taken subject to reference: Sub-sects. 3 & 4. **Sect. 12:** Sub-sects. 1, 2 & 3. **Sect. 13:** Sub-sect. 1.]

dict should be entered. He directed a verdict for pltf. on two issues & for deft. on the third, adding that, if there had not been the third issue, he should have awarded 1s. to pltf. on the other issues:—*Held*: it was not competent to pltf. to move for judgment *non obstante veredicto* on the third issue.

The arbitrator's power was complete & final. He had power to do what the ct. could do, & his award puts an end to the proceedings (LORD DENMAN, C.J.).—**STEEPLE v. BONSALE** (1836), 4 Ad. & El. 950; 2 Har. & W. 11; 5 L. J. K. B. 188; 111 E. R. 1041.

**Annotations:**—**Folld.** *Britt v. Pashley* (1847), 1 Exch. 64. **Consd.** *Linegar v. Pearce* (1854), 9 Exch. 417. **Mentd.** *Doe d. Madkins v. Horner* (1838), 8 Ad. & El. 235.

**1576.** —.]—Where a case is referred by consent to an arbitrator to certify for the amount for which a verdict ought to be given, the ct. will not interfere with his finding even though on the merits he ought to have come to a different conclusion.—**PRICE v. PRICE** (1841), 9 Dowl. 334; Woll. 96; 5 Jur. 6.

**1577. Relates back to time of verdict.**—When a verdict is taken at *Nisi Prius* by consent, subject to the certificate of an arbitrator, the certificate relates back to the time when the verdict was pronounced by the jury.—**CROMER (CREMER) v. CHURT (CHUCK)** (1846), 15 M. & W. 310; 10 Jur. 671; 153 E. R. 868.

**1578. Intervention of bankruptcy.**—In an action to recover the balance upon an account current, a verdict for pltf. was taken by consent, subject to a reference to an arbitrator, who was empowered to direct that a verdict should be entered for pltf. or deft., the costs to abide the result of the award. After the award, which was in favour of pltf., & before judgment, deft. committed an act of bkpcy., of which notice was given to pltf. in the action, but judgment was nevertheless entered up upon the award. On deft. being adjudicated a bkpt.:—*Held*: the amount for which judgment was entered up, with interest & costs, constituted a provable debt.—*Re PICKERING, Ex p. HARDING*; *Re PICKERING, Ex p. THORNTWHAITE* (1854), 5 De G. M. & G. 367; 23 L. J. Bcy. 22; 2 W. R. 386; 43 E. R. 912, L.JJ.

**Annotations:**—**Consd.** *Re Routledge, Ex p. Bateman* (1855), 25 L. J. Bcy. 19. **Distd.** *Re Williamson, Ex p. Todd* (1855), 6 De G. M. & G. 744; *Re Weller, Ex p. Weller* (1867), 17 L. T. 125, C. A.

See, further, BANKRUPTCY & INSOLVENCY.

**1579. Where no damages awarded—Nominal damages.**—A dispute arose between pltf. & defts. as to whether a certain carriage archway had been constructed in conformity with an agreement entered into between them. An action having been brought, by an order of *Nisi Prius* the cause was referred to an arbitrator, who was empowered to direct, if he found for pltf., what should be done to make the carriage archway in conformity with the agreement. The arbitrator found for pltf., without awarding any damages, & directed certain alterations to be made in the archway. Pltf. signed judgment for the amount of the damages claimed in the declaration:—*Held*: pltf. was entitled only to nominal damages.—**BROWN (BROWNE) v. SOMERSET & DORSET RY. CO.** (1865), 34 L. J. Ex. 152; 13 L. T. 146.

Generally as to the effect of the award.]—See Sect. 15, Sub-sect. 2, *post*.

#### SUB-SECT. 4.—OTHER CASES.

**1580. Entry of verdict on award.**—If the damages given by a verdict be reduced by an award under

an order of *Nisi Prius* which has been made a rule of ct., the party is entitled to have the *postea* delivered to him without any application to the ct. —**GRIMES v. NAISH** (1796), 1 Bos. & P. 480; 126 E. R. 1021.

**Annotation:**—**Refd.** *Allenby v. Proudlock* (1835), 4 Dowl. 54.

**1581.** —.]—Verdict for pltf., for security. Reference, by rule, to three of the jurors, & award in pltf.'s favour. A rule having been obtained for deft. to show cause why the *postea* should not be delivered to pltf. to take out execution for the money awarded, deft. objected that no affidavit was produced of the due execution of the award, or of a demand of the money:—*Held*: that was as necessary as if the motion had been for an attachment for non-payment of money, & the rule must be discharged.—**READ v. GARNETT** (1744), Barnes, 58; 94 E. R. 805.

**Annotation:**—**Dbtd.** *Borrowdale v. Hitchener* (1802), 3 Bos. & P. 244. The reason upon which the decision in *Read v. Garnett* is founded proves it to be a case of no authority; for a demand of the money is there said to be as necessary before execution is taken out as it would be in moving for an attachment. Now the former is civil, the latter criminal process (ROOKE, J.).

**1582.** —.]—If a verdict for pltf. be taken at *Nisi Prius*, subject to the award of an arbitrator, & the rule of reference be made a rule of ct., the verdict may be entered according to the award of the arbitrator, without any application to the ct. for that purpose. Personal service of the award is not necessary to warrant the issuing of execution in such case, if deft.'s attorney has been served with the award.—**BORROWDALE v. HITCHENER** (1802), 3 Bos. & P. 244; 127 E. R. 134.

**Annotations:**—**Apld.** *Thompson v. Jennings* (1825), 10 Moore, C. P. 110. **Consd.** *Allenby v. Proudlock* (1835), 4 Dowl. 54.

**1583. Entry of verdict on certificate.**—Where a cause is referred at the assizes, with power to the arbitrator merely to declare the amount of the verdict, no order of *Nisi Prius* is necessary; & where, in such a case, a verdict has been entered, with the damages in the declaration, subject to the certificate of the arbitrator, his certificate made after the assizes is sufficient authority to the associate to alter the damages to the amount therein stated.—**TOMES (THOMS) v. HAWKES** (1839), 10 Ad. & El. 32; 2 Per. & Dav. 248; 8 L. J. Q. B. 214; 3 Jur. 315; 113 E. R. 13.

**1584.** —.]—Trespass *quare clausum fregit*. Pleas: (1) not guilty; (2) there was a public highway running by & lying close to & adjoining the *locus in quo*, & same having been obstructed by pltf., deft. was compelled to commit the trespass complained of in order to pass. A verdict for £50 damages having been taken at *Nisi Prius*, subject to a reference, the arbitrator certified that a verdict ought to be entered for pltf. on the first & for deft. on the second issue:—*Semble*: it was unnecessary for him to give any further directions as to vacating the verdict for these damages.—**NALDER v. BATTS** (1843), 13 L. J. Q. B. 10; 2 L. T. O. S. 105; 7 Jur. 1039.

**1585. Effect of death.**—In a replevin suit a verdict was taken for deft., & in an action of *assumpsit* a verdict for pltf., in £300, subject to a reference, with power to the arbitrator to direct whether the verdict should be entered for pltf. or deft. After the evidence was partly heard, but before it was ended, or award made, deft. died. The arbitrator afterwards made his award, directing £62 16s. rent to be paid by pltf. to deft., beyond pltf.'s demand in *assumpsit*, & a verdict for deft. in the replevin suit. Pltf. having entered up judgment in the actions as of Hilary term, with a suggestion of deft.'s death, the ct. refused to set aside the award, as the fact of pltf.'s right to take out execution without a previous application to the ct. showed



**Annotations :—***Consd.* *Toussaint v. Hartop* (1817), 1 Moore, C. P. 287; *Rhodes v. Haigh* (1823), 2 B. & C. 345. *Mentd.* *Bowker v. Evans* (1885), 15 Q. B. D. 565, C. A.

**SUB-SECT. 1.—POWER TO GIVE DIRECTIONS.**

**Annotations:—***Consd.* Grenfield v. Edgecombe (1845), 14 L. J. Q. B. 322; *Nicholls v. Jones* (1851), 6 Exch. 373. **Refd.** *Toby v. Lovibond* (1848), 5 C. B. 770; *Richardson v. Worsley* (1850), 5 Exch. 613. **Mentd.** *Miller v. De Burgh* (1850), 4 Exch. 809.

**1588. — Award bad in part.]**—Where a submission to arbn. contains a clause empowering the arbitrator to direct what, if anything, shall be done by the parties, an invalid execution of such power does not vitiate the whole award. *Semble*: it is otherwise where the terms of the submission are obligatory.—**NICHOLLS v. JONES** (1851), 6 Exch. 373; 2 L. M. & P. 335; 20 L. J. Ex. 275; 155 E. R. 587.

**SUB-SECT. 2.—SUFFICIENCY OF DIRECTIONS.**

### SUB-SECT. 3.—EFFECT OF DIRECTIONS.

**SUB-SECT. 1.—MISTAKES APPARENT ON FACE OF  
AWARD.**

**PART IV. SECT. 13, SUB-SECT. 1.**

**1589 i. General rule.]**—An award, defective & illegal on the face of it, should be at once remitted.—**LUCHMEE NARAIN v. PYLE** (1870), 2 N. W. 150.—**IND.**

1589 ii. —.]—The alleged mistake in law & fact must appear on the face of the award, or be disclosed by some contemporaneous writing.

In this respect there is no difference between awards made on compulsory reference under C. L. P. Act & other awards. — McDONALD *v.* McDONALD (1861), 7 U. C. L. J. 297. — CAN.

1589 iii. —.]—The cases in which a

ct. will interfere with an award are confined to those where a palpable error appears on the face of the award, or where the arbitrators making the award admit a mistake.—*Re GRANT & EASTWOOD* (1875), 22 Gr. 563.—**CAN.**

**1589 iv.** — *Railway Act of Canada.* — Error of law or fact on the part of an arbitrator, or excess of jurisdiction, must appear on the face of the award or from the evidence or documents of record on an appeal from an award of arbitrators under Railway Act of Canada. — **PONTIAC PACIFIC JUNCTION RY. CO. & OTTAWA & GATINEAU RY. CO. v. COM.**

*Annotation* :—**Consd.** *Nichols v. Roe* (1834), 5 Sim. 156.

**Annotations:—Mentd.** *Hogan v. Jackson* (1775), 1 Cowp. 299; *Campbell v. Twemlon* (1814), 1 Price, 81; *Sherratt v. Bentley* (1834), 2 My. & K. 149; *Doe d. Booley v. Roberts* (1840), 11 Ad. & El. 1000.

**1592.** ———.]—An award made by a barrister, to whom all matters in difference are referred by an order of *Nisi Prius*, is final between the parties, unless for some objection apparent on the face of the award, or something amounting to misconduct be imputable to the arbitrator.—**SHARMAN v. BELL** (1816), 5 M. & S. 504 ; 105 E. R. 1135.

*Annotations*:—**Expld.** *Ford v. Gartside* (1792), 2 Cox, Eq. Cas. 368. **Consd.** *Crawshay v. Collins* (1818), 3 Swan. 90. **Refd.** *Mackintosh v. G. W. Ry. Co.* (1865), 4 Giff. 683.

**1594. Error in law—Principles appearing on face of award.]—**A general reference to arbn. by parties in a suit, then depending in Ch., was made an order of a ct. of law :—*Qu.* : whether that was an order within the Act of 1698, excluding the equitable jurisdiction to affect the award for mistake of the law apparent, & to restrain an application to the ct. of law to enforce it.

Notwithstanding the second clause of the Act, &c. of law have always considered themselves at liberty to determine whether there was a mistake on the part of the arbitrator, though that clause specifies only corruption or undue means (LORD ELDON, C.).—NICHOLS *v.* CHALIE (1807). 1 Coop. temp. Cott. 419; 14 Ves. 265; 33 E. R. 523.

**Annotations :—***Consd.* *Nichols v. Roe* (1834), 3 My. & K. 431; *Chuck v. Cremer* (1848), 2 Ph. 477. **Refd.** *Heming v. Swinnerton* (1845), 14 Sim. 588; *Harding v. Wickham* (1861), 2 John. & H. 676. **Mentd.** *Auriol v. Smith* (1823), Turn. & R. 121.

**1595.** — — —.]—The ct. will not set aside an award, on the ground that the arbitrator was mistaken in law, unless the principles of law upon which he has decided appear upon the face of the award.—ANON. (1819), 1 Chit. 674.

**1596.** ———.—]—The ct. will not set aside an award, on the ground of a mistake by the arbitrator on a point of law, unless the illegality be apparent on the face of the award.—PAYNE (PAIN) *v.* MASSEY (1824), 9 Moore, C. P. 666 ; 3 L. J. O. S. C. P. 34.

**MUNITY GENERAL HOSPITAL, ALMSHOUSE  
& SEMINARY OF LEARNING OF THE  
SISTERS OF CLARITY AT OTTAWA (1901),  
Q. R. 20 S. C. 567.—CAN.**

**1594 i. Error in law—Apparent on face of award.]—**Where an award is based upon an error in law which appears on its face, the party prejudiced is entitled to have the award remitted to the arbitrator for reconsideration, with a declaration as to the true interpretation of the point which he has wrongly decided.—**TUCKER v. SOUTH BRITISH INSURANCE CO., LTD.** (1916), 35 N. Z. L. R. 1142.—**N.Z.**



*Sect. 13.—Mistakes in & amendment of award: c. 2, A.]*

**1597.** —.]—An award cannot be set aside, on the ground that the arbitrator is mistaken in point of law, unless the principles on which he decided appear upon the face of the award.—*DELVES v. FRY* (1826), 5 L. J. O. S. C. P. 17.

**1598.** —.]—An award will be set aside where the arbitrator has gone wrong on a point of law & the error in law appears on the face of the award.—*LANDAUER v. ASSER*, [1905] 2 K. B. 184; 74 L. J. K. B. 659; 93 L. T. 20; 53 W. R. 534; 21 T. L. R. 429; 10 Com. Cas. 265.

*Annotation:—Mentd.* *Strass v. Spillers & Bakers*, [1911] 2 K. B. 759.

**1599.** — In special case submitted to High Court.]—Although the opinion of the High Ct. upon a special case stated by an arbitrator under the Act of 1889, with regard to a question of law arising in the course of the reference, cannot be the subject of an appeal, yet, if that opinion is erroneous, an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award.—*BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING CO. v. UNDERGROUND ELECTRIC RYS. CO. OF LONDON*, [1912] A. C. 673; 81 L. J. K. B. 1132; 107 L. T. 325; 56 Sol. Jo. 734, H. L.

*Annotations:—Refd.* *Re King & Duveen*, [1913] 2 K. B. 32; *Re Wulff & Dreyfus* (1917), 117 L. T. 583, C. A.; *Re Parsons & Brixham Fishing Smack Insee.* (1918), 62 Sol. Jo. 384; *Westacott v. Hahn* (1918), 87 L. J. K. B. 555, C. A.; *Re Olympia Oil & Cake Co. & MacAndrew Morland*, [1918] 2 K. B. 771, C. A. *Mentd.* *Hill v. Showell* (Edwin) (1918), 87 L. J. K. B. 1106, H. L.

*See, generally*, Nos. 1034—1083, *ante*.

**1600.** — In special case submitted to counsel by agreement.]—Where arbitrators, instead of stating their award in the form of a special case for the opinion of the ct. under the Act of 1889, s. 7, by agreement state their award in the form of a special case for the opinion of counsel, who is substituted for the ct. under that sect., the decision of counsel cannot be questioned on the ground of an alleged error of law on the face of it, nor is there any right of appeal.—*Re WULFF & DREYFUS & CO.* (1917), 86 L. J. K. B. 1368; 117 L. T. 583; 61 Sol. Jo. 693, C. A.

**1601.** — Apparent on paper delivered with award.]—If an arbitrator profess to decide upon the law, & he mistake it, the ct. will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith. *Semble*: it would be so if such reasons appeared in any other authentic manner to the ct.—*KENT v. ELSTOB* (1802), 3 East, 18; 102 E. R. 502.

*Annotations:—Distd.* *Young v. Walter* (1804), 9 Ves. 364. *Expld.* *Sharman v. Bell* (1816), 5 M. & S. 504. *Distd.* *Price v. Jones* (1828), 2 Y. & J. 114; *Leggo v. Young* (1855), 16 C. B. 626. *Consd.* *Hogge v. Burgess* (1858), 3 H. & N. 293; *Holgate v. Killick* (1861), 7 H. & N. 418. *Apld.* *London Dock Co. v. Shadwell Parish* (1862), 1 New Rep. 91. *Refd.* *Steff v. Andrews* (1816), 2 Madd. 6; *Payne v. Massey* (1824), 9 Moore, C. P. 666; *Nichols v. Roe* (1834), 3 My. & K. 431.

**1602.** —.]—No objection can be taken to an award, upon the ground of a mistake in point of law, unless the grounds of the objection appear upon the award, or in some authentic shape before

**1601 i.** — Apparent on paper delivered with award.]—When the grounds of the arbitrator's decision appear in some contemporaneous document delivered with the award, the ct. can look at it, & will entertain an application to set aside the award as founded upon an erroneous view of the law.—*DOIG v. HOLLEY* (1884), 1 Man. L. R. 61.—CAN.

**1604 i.** Error in fact — Apparent in

minutes.]—An arbitrator, as appeared from his minutes taken on the arbn., having misconceived certain acts & misunderstood some admissions by counsel, the award was referred back for re-consideration.—*CLANCY v. CLANCY* (1869), 5 P. R. 108.—CAN.

**1606 i.** Clerical error—Wrong initials—Wrong amount.]—*Held*: a mistake in the initial letters of the name of one of the parties was not fatal, & an award

the ct. The expression by the arbitrator of his opinion upon the law of the case, before he makes his award, is insufficient cause for setting aside the award; but if the reasons are delivered by the arbitrator contemporaneously with the award, the ct. will be able to perceive the exact grounds upon which he proceeded.—*PRICE v. JONES* (1828), 2 Y. & J. 114; 148 E. R. 855.

**1603.** — But not forming part of award.]—An arbitrator made his award, & at the same time drew up a statement of his reasons, which he forwarded, on the day of publication, to one party, & ten days later to the other party. He wrote also to the former that he was dissatisfied with his award, & that a case ought at once to be laid before the ct. He stated on oath that the statement of grounds was given for the purposes of the special case to be stated, & not as a part of the award he had made:—*Held*: the statement of grounds could not be looked to as a ground for impeaching the award, the whole circumstances bearing out the arbitrator's explanation that they were not intended to be part of the award.—*SOUTH EASTERN RY. CO. v. ABINGER OVERSEERS* (1852), 16 J. P. 774.

**1604.** Error in fact—Apparent on face of award.]—An arbitrator, to whom an action for a fraudulent representation of the circumstances of A. was referred, found that deft., knowing the object of plffs.' inquiries, had omitted to state the material facts of the existence of debts due by A. to him, & of his holding A.'s warrant of attorney, & that he did not give a fair representation of what he knew concerning A.'s credit, & that deft., although he did not mean to hold out any inducement to plffs. to trust A., thereby misled plffs. & created in them a false confidence in the circumstances of A. The arbitrator acquitted deft. of all collusion with A., & of all fraud at the time of making the representation, but feeling himself compelled by adjudged cases, which he mentioned, to decide that the knowledge of the falsehood of the thing asserted was in itself fraud & deceit, he awarded in favour of plffs. The ct. set aside the award, on the ground that the arbitrator had, on the face of it, acquitted deft. of fraud & deceit.—*AMES v. MILWARD* (1818), 2 Moore, C. P. 713; 8 Taunt. 637; 129 E. R. 532.

**1605.** — Contained in paper delivered with award.]—An arbitrator having delivered a written paper with his award, in order to raise a point of law for the opinion of the ct., the ct. set aside the award upon the facts stated in that paper.—*HOLMES v. HIGGINS* (1822), 1 B. & C. 74; 2 Dow. & Ry. K. B. 196; 1 L. J. O. S. K. B. 47; 107 E. R. 28.

*Annotations:—N.F.* *Wilson v. King* (1834), 2 Cr. & M. 689; *Mentd.* *Money Penny v. Hartland* (1824), 1 C. & P. 352; *Lucas v. Beach* (1840), 1 Man. & G. 417; *Chadwick v. Clarke* (1845), 1 C. B. 700; *Day v. Sharp* (1846), 7 L. T. O. S. 62; *Reynell v. Lewis*, *Wyld v. Hopkins* (1846), 4 Ry. & Can. Cas. 351; *Walstab v. Spottiswoode* (1846), 10 Jur. 498; *Wilson v. Curzon* (1847), 15 M. & W. 532; *Smith v. Archibald* (1849), 14 L. T. O. S. 174; *Boulter v. Peplow*, *Boulter v. Brooke* (1850), 9 C. B. 493.

**1606.** Clerical error—Wrong Christian name.]—Where an arbitrator made an award describing plff. by a wrong Christian name, the ct. sent it back to him for correction, under a clause contained in the order of reference, empowering the ct. to refer the award back for amendment.—*HOWETT* (HEW-

for a certain sum, & that a verdict should be entered for the sum, naming a larger sum, was good for the smaller one.—*CHARLES v. HICKSON* (1841), 1 Ont. Dig. 144.—CAN.

**1606 ii.** — Wrong Christian name.]—Where a verdict was taken for plff., subject to a reference, & the arbitrator awarded for deft., but everywhere styled plff. "John," instead of "Patrick,"—the ct. set aside the award, &

ITT) v. CLEMENTS (1844), 7 Man. & G. 1044; 8 Scott, N. R. 851; 9 Jur. 17; 135 E. R. 424.

*Annotation*:—*Folld. Davies v. Pratt* (1855), 16 C. B. 586.

**1607. — Sum stated as if in account.**—A direction by an arbitrator to enter a verdict for a given amount may be disregarded, if it be plainly shown that this sum is stated by him as if in an account between the parties, independently of allowances, which elsewhere appear & reduce the sum actually due to a balance also appearing upon his certificate & stated to be all that is due.—*STROUD v. COOPER* (1845), 4 L. T. O. S. 296.

**1608. — In stating date of mortgage.**—By an indenture of submission it was left to the arbitrator to find (*inter alia*) whether pltf. was liable to discharge a sum of money secured by a mtge. executed by him on or about Sept. 29, 1818. The arbitrator found that pltf. “was not liable to discharge a sum of money secured by mtge. executed by him on Sept. 26, 1817, which was by deft. produced to me as the mtge. in the indenture mentioned as, & by pltf. admitted to be, the mtge. executed by pltf. on or about Dec. 26, 1818.” One deed only was mentioned in the indenture of submission. Upon a plea of *nul tiel agard*:—*Held*: the arbitrator had substantially decided the matter referred to him.—*SPOONER v. PAYNE* (1847), 4 C. B. 328; 16 L. J. C. P. 225; 9 L. T. O. S. 52; 136 E. R. 533.

*Annotation*:—*Refd. Blakeney v. Regan* (1852), 1 W. R. 21.

**1609. Walver of sum erroneously awarded.**—Upon the face of an award the arbitrator appeared to have improperly disallowed a sum of £818. On an application to a ct. of equity to set aside the award, resp. offered to allow it:—*Held*: the award must be set aside.—*SKIPWORTH v. SKIPWORTH* (1846), 9 Beav. 135; 50 E. R. 291.

## SUB-SECT. 2.—MISTAKES NOT APPARENT ON FACE OF AWARD.

### A. Admitted Mistakes.

**1610. Where no affidavit by arbitrators — Misunderstanding about costs.**—Motion to set aside an award, made by three arbitrators, whereby £50 was only awarded for damages & costs, upon an affidavit that two of the arbitrators declared, since the making the award, that they understood that the attorneys of both sides were each of them to

granted a new trial.—*McMAMMON v. McELDERRY* (1842), 1 Ont. Dig. 144.—CAN.

**1606 iii. —**—When an arbitrator makes a mistake in the heading of an award in the Christian name of one of the parties, the award will be referred back to him for amendment.—*ANNIS v. COOK* (1866), 2 Old. 163.—CAN.

**1606 iv. — Mistake in arbitrator's names.**—A variance in the names of arbitrators:—*Held*: no ground of nonsuit.—*BENTLEY v. WEST* (1847), 4 U. C. R. 98.—CAN.

**1606 v. — Cause wrongly described.**—An award will not be set aside because the cause in which it is intitled is not set out correctly, provided it can be sufficiently identified by reference to the body of the award as being in the cause referred.—*CREIGHTON v. BROWN* (1854), 1 P. R. 331.—CAN.

**1606 vi. — In giving effect to arbitrator's intention.**—An award was varied where a mistake had been made by the umpire in the expression of his intention, such mistake being regarded as

clerical.—*Re HENDRY & ROGERS* (1877), 5 Q. S. C. R. 199.—AUS.

**d. — Dominion Railway Act.**—Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under Dominion Railway Act:—*Held*: except under power conferred by stat., or by the parties, the cts. would not correct errors in awards, either directly or through the arbitrators, & the above Act did not authorise the reopening of a reference.—*Re McALPINE & LAKE ERIE & DETROIT RIVER RY. CO.* (1902), 22 C. L. T. 98; 3 O. L. R. 230; 1 O. W. R. 100, 484.—CAN.

**e. How objection may be taken.**—Objections to an award as bad upon its face cannot be raised as giving a right to proceed with an action referred.—*McCOLLUM v. MCKINNON* (1862), 22 U. C. R. 175.—CAN.

## PART IV. SECT. 13, SUB-SECT. 2.—A.

**1610 i. Where no affidavit by arbitrators — What must be shown.**—To set aside an award on the ground of mistake on the part of an arbitrator, the mistake must be admitted by the arbitrator; & it must also be shown that the judgment of

agree about the costs attending the suit, & that they only meant such costs as the party was at otherwise:—*Held*: it would be a matter of dangerous consequence if an award were overturned for something which part of the arbitrators had declared about it, but if all the arbitrators came before the ct. & declared their meaning was mistaken in the drawing up the award, that might be some reason for the ct.'s interposing.—*HARDING v. PITCROFT* (1730), 1 Barn. K. B. 364; 94 E. R. 245.

**1611. — Necessity for distinct evidence.**—A declaration of one of the arbitrators that, had he seen a letter of which, being mislaid at the time, the contents were proved, he would have acted otherwise:—*Held*: not sufficient against an award on the ground of mistake admitted by the arbitrators, of which there ought to be clear, distinct evidence, & an affidavit by the arbitrators, to induce a ct. of equity to set aside the award or a ct. of law to refuse to make it a rule of ct.—*ANDERSON v. DARCY* (1812), 18 Ves. 447; 34 E. R. 386.

**1612. — Mistake as to effect of former reference.**—An award made by a barrister cannot be questioned on the ground of any statement not appearing on the face of the award, or annexed to it, & a letter written by him to one of the parties to the effect that he felt himself bound to make an award in favour of the other party, on the ground that the measure in dispute had arisen before a former reference, & that, although he thought the first arbitrator mistaken, he considered himself concluded by the award, is no ground for setting aside the award made by the latter, unless it appear on the face of the award, or of some paper annexed, that the arbitrator wished to raise such question.—*WILLIAMS v. JONES* (1829), 5 Man. & Ry. K. B. 3.

**1613. Misconstruction of rule of reference.**—An arbitrator, with a view of enabling one of the parties litigant to make an application to the ct. after the publication of his award, stated matters which showed he had put a mistaken construction on the rule of reference, & had misdecided accordingly; the ct. received affidavits of these facts, & set aside the award, notwithstanding on the face of it there was no objection.—*JONES v. CORRY* (1839), 5 Bing. N. C. 187; 7 Dowl. 299; 1 Arn. 459; 7 Scott, 106; 8 L. J. C. P. 80; 3 Jur. 149; 132 E. R. 1076.

*Annotations*:—*Consd. Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189. *Dtd. London Dock Co. v. Shadwell Parish* (1862), 1 New Rep. 91. *Refd. Doe d. Oxenden v. Cropper* (1839), 2 Per. & Dav. 490. *Mentd. Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221.

the arbitrator was influenced by it, & that if it had not happened he would have made a different award.—*LYONS v. DONOVAN* (1866), 2 Old. 180.—CAN.

**1610 ii. — Mistake of clerk.**—An arbitrator intended to award that the costs of the reference & award, as well as of the cause, should be paid by deft., but by the mistake of a clerk the costs of the reference & award were omitted. The award was remitted back for correction.—*STEWART v. BEATTIE* (1876), 37 U. C. R. 538.—CAN.

**1610 iii. — Desire to alter erroneous judgment.**—The ct. cannot set aside an award, valid on its face, on the ground of erroneous judgment on a matter within his jurisdiction, even where the arbitrator having discovered the error desires to rectify the award; but on the ground of mistake properly so called, or inadvertence, the ct. will remit the award.—*PROUDFOOT v. TURNBULL* (1882), 1 N. Z. L. R. 247.—N.Z.

**1613 i. — Misconstruction of order of reference.**—The fact that one of the arbitrators states that he put a mistaken construction on the order of reference is not a ground for setting aside an award good on its face.—*CONNOLLY v. C.* (1846), 10 L. Eq. R. 104.—IR.



**Sect. 13.—Mistakes in & amendment of award:**  
**Sub-sect. 2, A.]**

**1614. — Omission of admitted claim.]**—An action for goods sold, etc., to which deft. pleaded a set-off, having been referred to arbn., deft. admitted that pltf. had a claim against him for £119 7s. 4d., the produce of pltf.'s goods sold by him under a distress for rent, & that the further sum of £82 3s. 8d. was due for goods sold, which sums together exceeded the entire set-off claimed by deft. The arbitrator, omitting by mistake the sum of £119 7s. 4d. admitted to be due to pltf., awarded that deft.'s set-off amounted to £100 0s. 6d. & thereby exceeded pltf.'s damages, which he assessed at £94 13s. 4d. It appeared on affidavit that, on the error being pointed out to him, he admitted it & requested deft. to allow him to reconsider his award upon the evidence before him, which the latter refused. The error did not appear upon the face of the award, nor did the arbitrator make any affidavit. The ct., in the above circumstances, refused to set aside the award, adhering to the general rule that the mistake of an arbitrator was no rule for setting aside an award.—**PHILLIPS (PHILLIP) v. EVANS** (1843), 12 M. & W. 309; 13 L. J. Ex. 80; 2 L. T. O. S. 171; 152 E. R. 1216; *sub nom.* **PHILLIPS v. EDWARDS**, 1 Dow. & L. 463.

**Annotations:—****Consd.** *Hutchinson v. Shepperton* (1849), 13 Q. B. 955; *Hogge v. Burgess* (1858), 3 H. & N. 293. **Refd.** *Hagger v. Baker* (1845), 2 Dow. & L. 856; *Brown v. Hellaby* (1857), 26 L. J. Ex. 217; *Hodgkinson v. Fernie* (1857), 27 L. J. C. P. 66; *Worsdell v. Holden* (1859), 1 L. T. 14; *Flynn v. Robertson* (1869), L. R. 4 C. P. 324. **Mentd.** *Wynn v. Nicholson* (1849), 18 L. J. C. P. 231; *Imperial Royal Chartered Azienda Assicuratrice of Trieste v. Funder* (1872), 21 W. R. 67.

**1615. — Failure to calculate exactly amount of set-off.]**—Declaration for money payable for board & lodging, & upon several other claims. Pleas to the whole action, (1) never indebted, (2) set-off for use & occupation & other alleged debts. Issues on the pleas. The cause being referred, with power to the ct. to remit it to the arbitrator in case of the award being objected to, the arbitrator directed a verdict for pltf. on the first issue & for deft. on the second. Dft. applied to the arbitrator to know how much he had allowed pltf. to deduct from the rent in arrear; the arbitrator, in answer, stated that he had made only a rough estimate, finding that the rent in arrear far exceeded the board & lodging, which, he said, was the only claim which pltf. had made out. On taxation the master allowed all pltf.'s costs incurred in support of any part of his claim as costs of the first issue. The ct., on motion by deft., referred the case back to the arbitrator in order that he might, if he thought fit, find separately as to the different items contained in the declaration.—**GORE v. BAKER** (1855), 4 E. & B. 470; 24 L. J. Q. B. 94; 1 Jur. N. S. 425; 119 E. R. 172.

**Annotations:—****Expld.** *Dinn v. Blake* (1875), L. R. 10 C. P. 388. **Mentd.** *Potter v. Chambers* (1878), 4 C. P. D. 69.

**Mistake as to power.]**—A paper delivered by an arbitrator to one of the parties to a reference, along with his award, in which the arbitrator stated that he would have given that

**1616. — Mistake as to power.]**—On evidence, partly supplied by the arbitrators, that they had, under a mistake as to their power omitted to insert a condition in their award, the ct. remoulded a rule by which the ct. below had remitted the award for a different purpose, so as to enable the arbitrators, in their amended award, to supply the supposed omission.—**MCKELLAR v. WHITE** (1869), 1 N. Z. L. R. 38.—**N.Z.**

**h. — — — & mortgage.]**—The parties & the arbitrators admitted that a mistake had been made in requiring one of defts. to pay off a mtge.:—**Held:** (1)

the evidence of the arbitrators was receivable as to such point, as well as on the point of their having taken into consideration matters not within their jurisdiction; (2) the award should be sent back to them to be corrected.—**TREMAIN v. MACKINTOSH** (1873), R. E. D. 447.—**CAN.**

**1618 i. Where affidavit by arbitrators—Mistake in stating in what capacity money receivable.]**—Where pltf., having two actions pending, one in a representative character & the other in his own right, referred both to arbitrators, who awarded a sum of money to pltf. in his

party the costs if he had power, cannot be taken into consideration by the ct. on an application to send back the case to the arbitrator upon the question of costs.—**LEGGO v. YOUNG** (1855), 16 C. B. 626; 24 L. J. C. P. 200; 139 E. R. 904; subsequent proceedings (1856), 17 C. B. 549.

**Annotations:—****Consd.** *Bell v. Postlethwaite* (1855), 5 E. & B. 695; *Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189; *Holgate v. Killick* (1861), 7 H. & N. 418. **Folld.** *Wimshurst v. Barrow Shipbuilding Co.* (1877), 2 Q. B. D. 335. **Refd.** *West London Ry. Co. v. Fulham Union* (1870), L. R. 5 Q. B. 361. **Mentd.** *London Dock Co. v. Shadwell Parish* (1862), 1 New Rep. 91.

**1617. Wrongful deduction of expenses.]**—An arbitrator, to whom a question of the legality of a distress was submitted, made his award in favour of appct., but deducted the expenses of the distress, which he decided was illegal, from the sum awarded. Appct.'s attorney subsequently saw him & told him he ought not to have made that deduction, & he said he had done so by a mistake from inadvertence. Upon an application to set aside the award or refer it back, on the ground of mistake, the former branch of the rule was refused.—**Re SHAW & PITT** (1856), 4 W. R. 616.

**1618. Where affidavit by arbitrators—Sums subtracted instead of added—Amount made payable by wrong party.]**—Where it appeared upon the affidavit of two of three arbitrators, who had made their award, that they had made a mistake in their award by deducting £75 from £143 instead of adding those sums together, & that they had made a further mistake by awarding that A. should pay the balance to B. instead of awarding B. to pay the balance to A., the ct. set aside the award.—**Re HALL & HINDS** (1841), 2 Man. & G. 847; 3 Scott. N. R. 250; *Drinkwater*, 214; 10 L. J. C. P. 210; 133 E. R. 987.

**Annotations:—****Expld. & Distd.** *Phillips v. Edwards* (1843), 1 Dow. & L. 463; *Hagger v. Baker* (1845), 2 Dow. & L. 856. **Consd. & Folld.** *Hutchinson v. Shepperton* (1849), 13 Q. B. 955. **Consd.** *Hogge v. Burgess* (1858), 3 H. & N. 293. **Distd.** *Sadler v. Smith* (1869), L. R. 4 Q. B. 214. **Dbtd.** *Imperial Royal Chartered Azienda Assicuratrice of Trieste v. Funder* (1872), 27 L. T. 438. **Refd.** *Re Stroud* (1849), 8 C. B. 502; *Winn v. Nicholson* (1849), 7 C. B. 819; *Saunders v. Damer* (1850), 16 L. T. O. S. 153; *Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189; *Flynn v. Robertson* (1869), L. R. 4 C. P. 324.

**1619. Common Law Procedure Act, 1854, s. 8.]**—The above sect. did not authorise the ct. to send back an award for reconsideration by the arbitrators on any ground except such as before the above Act would have induced it to set aside the award or to treat it as a nullity in an action brought upon it. The object of the sect. was, where any error, formal or otherwise, had occurred which would vitiate the award, to enable the ct. to send it back, if they thought fit, to the arbitrators to correct such error instead of setting the award wholly aside.

If a mistake has been made in the award, not apparent on the face of it, & such mistake is admitted in an affidavit by the arbitrators, such an admission is sufficient to authorise the ct. to set aside the award under the former practice, or to refer it back under the Act. So also, if the arbi-

representative character, the ct., on affidavits of the arbitrators that the money was intended for pltf. in his own right, set the award aside on account of the mistake.—**DENNISON v. SANDFORD** (1833), 30 S. 379.—**CAN.**

**1618 ii. — Denying mistake but certifying case should be reopened.]**—An application to refer back on account of a mistake was refused, the mistake being denied on affidavit, though the arbitrator certified that in his opinion the case should be reopened.—**LATTA v. WALL-BRIDGE** (1861), 3 P. R. 157.—**CAN.**



trators insist that they have made no mistake, but state the principle upon which they made the award, & the ct. is of opinion that such principle is not consistent with the reference.—*MILLS v. BOWYERS' SOCIETY, BOWYERS' SOCIETY v. MILLS* (1856), 3 K. & J. 66; 69 E. R. 1024.

*Annotations*:—*Appld.* *Flynn v. Robertson* (1869), L. R. 4 C. P. 324. *Consd.* *Dinn v. Blake* (1875), L. R. 10 C. P. 388. *Expld.* *Re Keighley, Maxsted & Durant*, [1893] 1 Q. B. 405, C. A. *Refd.* *Re Aitken's Arbitration* (1857), 3 Jur. N. S. 1296. *Mentd.* *Clayton v. Westminster Brymbo Coal & Coke Co.* (1864), 11 L. T. 366; *Re Walton Shore Road, Essex, Re Warner & Powell* (1866), 15 W. R. 303; *Re Whiteley & Roberts*, [1891] 1 Ch. 558.

**1620. Admissibility in evidence to explain award.]**—The ct. will admit evidence of an arbitrator in explanation of his award, & when it appears from such evidence that there has been a mistake on his part, either as to the subject-matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside or referred back again to the arbitrator.—*Re DARE VALLEY RY. CO.* (1868), L. R. 6 Eq. 429; *sub nom. Re RHYS & RICHARDS & DARE VALLEY RY. CO.*, 37 L. J. Ch. 719.

*Annotations*:—*Apprvd.* *Buccleuch v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418, H. L. *Refd.* *Grafham v. Turnbull* (1875), 44 L. J. Ch. 538. *Mentd.* *Dinn v. Blake* (1875), L. R. 10 C. P. 388; *Rhodes v. Airedale Drainage Comr.* (1876), 1 C. P. D. 380.

See, also, Sect. 15, Sub-sect. 1, *post*.

**Necessity for affidavit.]**—The general rule that the ct. has power to send back an award to an arbitrator for reconsideration only in case of fraud or corruption, & where an error appears necessarily on the face of the award, is subject to the further exception upheld in *Flynn v. Robertson* (No. 1625, *post*), viz., where there is a mistake admitted by the parties & by the arbitrator himself. It is not, however, enough to bring a case within this last exception that the arbitrator should have admitted the grounds of his decision & that those grounds should be manifestly erroneous. It is only where the arbitrator himself comes to crave the assistance of the ct. to enable him to rectify his own mistake that the ct. has power to send back the award to him for that purpose.—*DINN v. BLAKE* (1875), L. R. 10 C. P. 388; 44 L. J. C. P. 276; 32 L. T. 489.

*Annotations*:—*Consd.* *Re Keighley, Maxsted & Durant*, [1893] 1 Q. B. 405, C. A.; *Re Palmer & Hosken*, [1898] 1 Q. B. 131, C. A. *Refd.* *Re Baxters & Mid. Ry. Co.* (1906), 95 L. T. 20, C. A.

**1622. — Ineffectual where mistake is as to effect of award.]**—An action for the balance of an account was referred to two local engineers. The arbitrators, believing that they had power over

**1622 i. — Ineffectual where mistake is as to effect of award.]**—An affidavit of the arbitrators was held inadmissible to show that, if they had known they had no power over the costs, they would have awarded a different amount to pltf.—*HUSSEY v. FERGUSON* (1864), 6 All. 57.—CAN.

**1622 ii. — —.]**—The ct. will not remit an award although the arbitrator has used, in its popular sense, a phrase which, when construed technically, inflicts costs upon the wrong party, notwithstanding his subsequent certificate of the sense in which he used the phrase.—*GODFREY v. BRODERICK* (1864), 14 L. C. L. R. Ap. xxxiii.—IR.

**j. — After award given.]**—An action was referred by a compulsory reference. On motion to set aside the award, the evidence & proceedings, with the exhibits, were annexed, with a certificate signed by the arbitrator, stating that he certified same to enable defts. to move against his award if so advised:—

*Semble*: the certificate could not be looked at, as it was written after the award.—*NEWMAN v. NIAGARA DISTRICT MUTUAL FIRE INSURANCE CO.* (1866), 25 U. C. R. 435.—CAN.

**k. — Arbitrators misled by marks on goods.]**—The goodwill of a business was sold, together with the stock-in-trade, to be taken at cost price. In pursuance of the contract, the prices were fixed by three arbitrators, who made their award. Some months afterwards, an application was made to refer back the award, upon the affidavit of two of the arbitrators that they had been misled by certain cipher marks on some of the stock. The ct. made absolute a rule to refer back the award.—*Re ARMSTRONG & CULLEY* (1878), 4 V. L. R. 178.—AUS.

**l. — Evidence misunderstood.]**—When one of two arbitrators made an affidavit that, on reconsideration & on reperusal of the minutes of evidence, he felt persuaded that in making the award he misunderstood the evidence:—*Held*:

costs, awarded pltf. the full amount claimed, & adjudged that each party should pay his own costs. When they discovered that costs followed the event, they concurred in an affidavit to the effect that they would have awarded pltf. a less sum, if they had thought the whole costs would fall upon deft.:—*Held*: the mistake of the arbitrators was no ground for sending back the award, & a rule for setting it aside should be discharged.—*ALLEN v. GREENSLADE* (1875), 33 L. T. 567.

*Annotations*:—*Apprvd.* *Greenwood v. Brownhill* (1881), 44 L. T. 47, C. A. *Distd.* *Re Baxters & Mid. Ry. Co.* (1906), 95 L. T. 20, C. A.

**1623. — —.]**—An action was referred, the costs of the cause to abide the event. The award gave damages to pltf., but directed that defts. should retain certain goods, & as to defts.' counter-claim the finding was for pltf. Defts. applied to refer back the award on an affidavit by the arbitrator that it did not carry out his instructions or effect his intentions, that when he signed it he thought the effect of defts. retaining the goods would be to give them the costs of their counter-claim, & that he wished the award referred back to him:—*Held*: no grounds were disclosed for disturbing the award.—*GREENWOOD & CO. v. BROWNHILL & CO.* (1881), 44 L. T. 47, C. A.

*Annotation*:—*Distd.* *Re Baxters & Mid. Ry. Co.* (1906), 95 L. T. 20, C. A.

**1624. — Error of omission.]**—In an arbn. under Light Railways Act, 1896 (c. 48), in which under the stat. the costs were in the discretion of the arbitrator, the arbitrator made & published an award in which he said nothing as to costs. Upon an affidavit by the arbitrator that the reason why he had made no award as to costs was that he had been under the misapprehension that the arbn. was subject to the provisions of Lands Clauses Consolidation Act, 1845 (c. 18), under which costs followed the event, & that if he had known that he had power to award costs he would have awarded them to claimants:—*Held*: as the mistake made by the arbitrator was merely one of omission, & he did not seek in any way to impeach the award that he had made, the matter ought to be remitted to him for his reconsideration.—*Re BAXTERS & MIDLAND RY. CO.* (1906), 95 L. T. 20; 70 J. P. 445; 22 T. L. R. 616, C. A.

**1625. Statement by arbitrator to court—Mistake admitted by both parties.]**—An action & all matters in difference having been referred to the master, he made, by mistake, an award in favour of deft. The mistake arose from his omitting to take account of an advance by pltf. to deft., which had been duly proved before him, but which, at the time of making the award, he overlooked. The mistake was admitted by both parties, & the

the award must be set aside, but without costs.—*DES BARRES v. LANDRY* (1876), 2 R. & C. 145.—CAN.

**m. — Misconstruction of submission.]**—One of the arbitrators made an affidavit that he was under the impression the submission obliged him to take a certain account & award interest:—*Held*: the ct. was justified in looking at the affidavit, as it appeared the arbitrators had misconstrued the submission.—*CONNOLLY v. C.* (1847), 10 I. Eq. R. 272.—IR.

**n. — Affidavit must be by all arbitrators.]**—Where there are three arbitrators & two of them award, both must concur in certifying a mistake not apparent upon the award: no relief can be granted where one of them denies any mistake & the other asserts there was one.—*Re LAIDLAW & CAMPBELLFORD, LAKE ONTARIO & WESTERN RY. CO.* (1914), 25 O. W. R. 431; 5 O. W. N. 534; 31 O. L. R. 209; 19 D. L. R. 481; 6 O. W. N. 196.—CAN.

**Sect. 13.—Mistakes in & amendment of award:**  
**Sub-sect. 2, A. & B. (a).]**

master stated to the ct. the circumstances in which it arose. On a motion by pltf. :—*Held*: the ct. had power to refer the award back to the master.—*FLYNN v. ROBERTSON* (1869), L. R. 4 C. P. 324; 38 L. J. C. P. 240; 17 W. R. 767.

*Annotations* :—*Expld.* *Allen v. Greenslade* (1875), 33 L. T. 567. *Consd.* *Dinn v. Blake* (1875), L. R. 10 C. P. 388. *Refd.* *Greenwood v. Brownhill* (1881), 44 L. T. 47, C. A.

**B. Mistakes not admitted.**

**(a) Of Law.**

**1626. General reference of all matters in dispute.]**—Under a general reference of all matters in dispute the arbitrator made an award, deciding all the questions :—*Held*: the award could not be disturbed for mistake upon a question of law referred.—*CHING v. CHING* (1801), 6 Ves. 282; 31 E. R. 1052.

*Annotations* :—*Consd.* *Young v. Walter* (1804), 9 Ves. 364. *Folld.* *Steff v. Andrews* (1816), 2 Madd. 6; *Ashton v. Poynter* (1834), 3 Dowl. 201. *Refd.* *Campbell v. Twemlow* (1814), 1 Price, 81. *Mentd.* *Kirk & Randall v. East & West India Dock Co.* (1886), 55 L. T. 245, C. A.

**1627.** .]—Though, if an arbitrator, under a general reference, meaning to decide according to law, mistakes, the ct. will set that right, yet, if the parties choose to refer matters of law, meaning to have the judgment of the arbitrator upon them, instead of that of the ct., the award, though not agreeable to law, cannot be impeached.—*YOUNG v. WALTER* (1804), 9 Ves. 364; 32 E. R. 642.

*Annotations* :—*Refd.* *Kirk & Randall v. East & West India Dock Co.* (1886), 55 L. T. 245, C. A. *Mentd.* *Sharman v. Bell* (1816), 5 M. & S. 504; *Steff v. Andrews* (1816), 2 Madd. 6; *Huntig v. Ralling* (1840), 8 Dowl. 879.

**1628. Law ignored by arbitrator.]—Semble**: if an arbitrator chooses to put the law out of the question, & to award the payment of a conscientious demand arising out of a transaction which he knows to be illegal, he may do so.—*DEIVER v. BARNES* (1807), 1 Taunt. 48; 127 E. R. 748.

*Annotation* :—*Refd.* *Wohlenberg v. Lageman* (1815), 6 Taunt. 251.

**1629. Cause involving question of law.]**—Where a cause involving a question of law was referred to a barrister under a rule of ct. to settle all matters in difference between the parties, & he made his award thereupon, but the question of law did not appear upon the face of the award, the ct., considering that it was the intention of the parties to refer the decision of the merits, as well upon the matter of law as of fact, to the arbitrator, refused to open the award again, upon a suggestion of the arbitrator's mistake in point of law upon the construction of a contract between the parties.—

*CHACE v. WESTMORE, WESTMORE v. FORBES* (1811), 13 East, 357; 104 E. R. 408.

*Annotations* :—*Extd.* *Sharman v. Bell* (1816), 5 M. & S. 504. *Folld.* *Boutillier v. Thick* (1822), 1 Dow. & Ry. K. B. 366. *Extd.* *Cramp v. Symons* (1822), 1 Bing. 104; *Payne v. Massey* (1824), 9 Moore, C. P. 666.

**1630. Reference of point of law.]**—An award made on a reference of a point of law is binding, though the arbitrator mistakes the law.

If parties choose to refer a point of law to the decision of the porter of Lincoln's Inn they might, & his decision would be binding, unless fraud or corruption were imputable (*PLUMER, V.-C.*).—*STEFF v. ANDREWS* (1816), 2 Madd. 6; 56 E. R. 237.

*Annotations* :—*Refd.* *Kirk & Randall v. East & West India Dock Co.* (1886), 55 L. T. 245, C. A. *Mentd.* *Nichols v. Roe* (1834), 5 Sim. 156.

**1631. Where law on point submitted doubtful.]**—The ct. will not set aside an award on the ground that the arbitrators have decided contrary to law, unless the law be clear upon the subject; & where the captain of a ship, at an intermediate port, in order to pay for repairs, had necessarily sold part of the cargo, at a price higher than it would have fetched at the port of destination, & upon a reference to settle the average loss between the shipowner & charterers, the arbitrators (who were mercantile men) allowed for the actual value of the goods when sold, & not for the price they would have fetched at the port of destination, the ct. refused to set aside the award.—*RICHARDSON v. NOURSE* (1819), 3 B. & Ald. 237; 106 E. R. 648.

*Annotations* :—*Mentd.* *Duncan v. Benson* (1847), 1 Exch. 537; *Atkinson v. Stephens* (1852), 7 Exch. 567; *Hopper v. Burness* (1876), 34 L. T. 528.

**1632. Matter of law & no matter of fact.]**—Even where matter of law alone, & no matter of fact, is referred to a barrister, the ct. will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear on the face of the award.—*CRAMP v. SYMONS* (1822), 1 Bing. 104; 7 Moore, C. P. 434; 130 E. R. 43; *sub nom.* *GRANT v. SIMMONS*, 1 L. J. O. S. C. P. 4.

*Annotations* :—*Extd.* *Payne v. Massey* (1824), 9 Moore, C. P. 666. *Refd.* *Anon.* (1825), 3 L. J. O. S. K. B. 174.

**1633. Facts as well as law submitted.]**—The ct. will not open an award on a suggestion that the arbitrator is mistaken in his law, facts as well as law having been referred to him, & his award being silent as to the grounds of his decision.—*BOUTILLIER v. THICK* (1822), 1 Dow. & Ry. K. B.

*Annotation* :—*Apld.* *Payne v. Massey* (1824), 9 Moore, C. P. 666.

**1634. Award of charges not recoverable at law.]**—The ct. will not direct an award to be referred back to the arbitrator, on the ground that he had allowed an apothecary his charges for attendances, which

**PART IV. SECT. 13, SUB-SECT. 2.—B (a).** | the award.—*KINGSTON TOWN v. DAY* (1852), 1 P. R. 142.—CAN.

**1628 i. Law ignored by arbitrators.]**—Where the legal rights are not harsh, but the award disregards them entirely, it is void for inequality & partiality.—*JEKYLL v. WADE* (1860), 8 Gr. 363.—CAN.

**1628 ii.** .]—Under a submission of all matters & disputes between the parties "either at law or in equity," a finding of a sum due by one "of the parties" upon grounds "of right, justice, & fair dealing, any rule of law or equity to the contrary notwithstanding," renders the award bad, & a separate finding to the same effect "upon grounds which appear to us to be sufficient" will not sustain the award.—*Itc WALKER* (1886), 5 N. Z. L. R. 169.—N.Z.

**1630 i. Reference of point of law.]**—An award will not be set aside for a mistake in law not apparent on the face of

**1630 ii.** .]—An award cannot be impeached, on the ground that the arbitrator has wrongly decided a point of law which was within the reference.—*BARRY v. MINISTER FOR WORKS* (1906), 8 W. A. L. R. 53.—AUS.

**1630 iii.** .]—Arbitrators, to whom a dispute was referred by parties, took *bona fide* an erroneous view of law & ordered an unequal division of property in dispute :—*Held*: the award was valid.—*SAKRAPPA BIN LINGAPPA v. SHIVAPPA* (1910), 1 L. R. 35 Bom. 153.—IND.

**1630 iv.** .]—An award, being good on its face, cannot be set aside on the ground that the arbitrators have made a mistake in law.—*Itc LAURSEN & SOUTH VANCOUVER CORPN.* (No. 2) 1912, 18 B. C. R. 532.—CAN.

**1630 v.** .]—A mistake of law on a legal point specifically referred to arbitrators will not vitiate their award; but a decision on a point not referred & patently contrary to law cannot be accepted.—*DINABANDHU JANA v. CHINTAMONI JANA* (1914), 19 C. W. N. 476.—IND.

**1633 i. Facts as well as law submitted.]**—The rules as to setting aside awards are the same with respect to compulsory references as to others. The ct., therefore, refused to interfere on affidavits tending to show that the arbitrator was mistaken as to the law & fact.—*SAULTER v. CARRUTHERS* (1861), 20 U. C. R. 560.—CAN.

**1633 ii.** .]—As a general rule an arbitrator is a judge of law as well as of fact, & his decision cannot be objected to on the ground that he misconceived the law.—*GOODE v. BECHETEL* (1904), 2 C. L. R. 121.—AUS.



could not be recovered at law.—*GENSHAM v. GERMAIN* (1825), 11 Moore, C. P. 1; 4 L. J. O. S. C. P. 37.

**1635. Mistake in interpretation of terms of submission.]**—It is a general rule that, wherever a matter in dispute has once been submitted to arbn. & decided, the decision is conclusive.

By order at *Nisi Prius*, by consent of parties, it was referred to arbitrators whether pltf. was entitled to recover from deft. the sum of £246 3s., & whether, against such sum, deft. was entitled to set off the sum of £246 3s. for a bale of silk, & the arbitrators found the affirmative of the first & the negative of the second proposition, following the words of the submission. In an action upon the award deft. was not allowed to set off a smaller sum, as the price due to him for the bale of silk, & pltf. obtained a verdict for the whole sum awarded. On an application to set aside that verdict, on the ground that the arbitrators felt themselves bound, by the terms of the submission, to confine their attention to the particular sum mentioned in it, without taking into their consideration whether the smaller sum was due, it appearing also upon the affidavits to have been possible that the arbitrators might have decided the matter upon a question of credit, in which case the question, as regarded both the larger & smaller sum, would be the same, the ct. refused to interfere.—*JOHNSON v. DURANT* (1831), 2 B. & Ad. 925; 1 L. J. K. B. 47; 109 E. R. 1386.

*Annotation* :—*Mentd. Armitage v. Walker* (1855), 2 Jur. N. S. 13.

**1636. Question of law arising incidentally in hearing.]**—Where a cause is referred to a layman, & he assumes to decide upon a point of law & errs, the ct. will set aside his award; but where the arbitrator is a barrister, both the law & the fact are left to his discretion, even though a question of law arise incidentally on the hearing, which could not have been in the contemplation of the parties at the time of referring.—*PERRYMAN (PERYMAN) v. STEGGALL* (1833), 2 Dowl. 726; 3 Moo. & S. 93; 2 L. J. C. P. 151.

**1637. Incorrect view of authority.]**—Upon reference to, & decision by, an arbitrator (a barrister), the ct. will not, upon the complaint of a dissatisfied party, set aside the award, although the affidavits have a tendency to show that the arbitrator entered upon the investigation with an incorrect view of his authority, there being no corrupt or improper motive attributed to the arbitrator in the discharge of the duty, the performance of which, at the desire & by the selection of the parties, he undertook.—*WILSON v. MARTIN* (1834), 3 L. J. C. P. 180.

**1638. Award founded on misapprehension of law.]**—The decision of an arbitrator (though not a barrister) is final, though it can be clearly shown that his award is founded on a misapprehension of law.—*ASHTON v. POYNTER (POINTON)* (1834), 3 Dowl. 201; 4 L. J. Ex. 71.

*Annotation* :—*Folld. Henty v. Rally* (1840), 4 Jur. 1091.

**1639. Certificate granted owing to mistake in law.]**—On a reference to a barrister of a cause & all matters in difference, with power to certify, it is no objection to the certificate that he has mistaken the law.—*WILSON v. KING* (1834), 2 Cr. & M. 689; 4 Tyr. 997; 3 L. J. Ex. 202; 149 E. R. 938.

**1640. Award contrary to law.]**—An award made by a barrister cannot be impeached on the ground

of his having decided contrary to law.—*WADE v. MALPAS* (1834), 2 Dowl. 638.

**1641. — Whether layman or professional arbitrator.]**—If the parties to a suit refer all disputes & matters in difference whatsoever to the decision of an arbitrator, who makes an award, the ct. will not set it aside on the ground that part of that award was founded on a mistake of law. This rule holds whether the arbitrator be a professional person or not.—*HAYDOCK v. BEARD, BEARD v. HAYDOCK* (1838), 2 Jur. 1069.

**1642. — —.]**—On a motion to set aside an award, on the ground that the arbitrators, who were unlearned persons, had made an error on a point of law :—*Held* : when parties consent to refer matters to an arbitrator, they must abide by his decision, whether he be a professional man or not, & having selected their judge they cannot afterwards appeal from the very tribunal they have themselves chosen.—*HUNTIG v. RALLING* (1840), 8 Dowl. 879.

**1643. — —.]**—The ct. will not set aside, or refer back, an award for an objection in point of law not apparent on the face of it, as, upon a suggestion that the arbitrator improperly treated as a penalty that which was, by the express contract of the parties, stipulated & ascertained damages, & this is so whether it is the award of a professional or of a lay arbitrator.—*FULLER v. FENWICK* (1846), 3 C. B. 705; 16 L. J. C. P. 79; 8 L. T. O. S. 162; 10 Jur. 1057; 136 E. R. 282.

*Annotations* :—*Mentd. Mills v. Bowyers' Soc., Bowyers' Soc. v. Mills* (1856), 3 K. & J. 66; *Re London Dock Co. & Shadwell Parish* (1862), 32 L. J. Q. B. 30.

**1644. Matter referred involving point of law.]**—Where parties refer a matter, involving a point of law, to the decision of an arbitrator, they must be bound by his decision no less than they would be upon a question of fact.—*DOE d. STIMPSON v. EMMERSON* (1847), 2 New Pract. Cas. 283; 9 L. T. O. S. 199.

*Annotations* :—*Apprvd. Adams v. G. N. of Scotland Ry. Co., [1891] A. G. 31, H. L. Folld. Re King & Duveen, [1913] 2 K. B. 32. Rejd. Hall v. Manchester Corpn. (1915), 84 L. J. Ch. 732, H. L.*

**1645. Award of damages in excess of what plaintiff entitled to.]**—The decision of an arbitrator, whether a lawyer or a layman, is binding on the parties both in matters of law & in matters of fact, unless there has been fraud or corruption on his part, or there be some mistake of law apparent on the face of the award, or of some paper accompanying & forming part of the award.

A verdict was taken for pltf., subject to the award of an arbitrator, as to the amount of damages, & his award included an amount of damages which (it was assumed) pltf. was not legally entitled to in the action :—*Held* : (1) the ct. would not interfere; (2) it was not a case for remitting the matter back to the arbitrator for reconsideration by virtue of C. L. P. Act, 1854, s. 8, that clause being intended only to apply to cases where before the Act such a course might have been adopted under the provision in the submission or order of reference usually known as "Mr. Richards' clause."—*HODGKINSON v. FERNIE* (1857), 3 C. B. N. S. 189; 27 L. J. C. P. 66; 6 W. R. 181; 140 E. R. 712.

*Annotations* :—*Consd. Dinn v. Blake* (1875), L. R. 10 C. P. 388. *Appld. Landauer v. Asser, [1905] 2 K. B. 184. Distd.*

**1638 l. Award founded on misapprehension of law.]**—An award made under 9 Vict. c. 37, & 10 & 11 Vict. c. 24, awarded a certain sum to A. "for the damage done to his property in the village of Milles Roches by the construction of the Cornwall canal," stating no further particulars of damage. Affidavits were filed to show that the sum awarded must

have been given for consequential, & not direct, damage :—*Held* : the award being silent on the subject as it might be, the ct. could not assume the fact to be so, & upon that ground (if a valid one) set aside the award.—*PUBLIC WORKS COMRS. v. DALY* (1849), 6 U. R. C. 33.—*CAN.*

**p. Reference of all matters in law & equity.]**—Where all matters in difference in law & equity have been referred, & the award is legal on its face, it will not be set aside, although it may seem that the arbitrators have mistaken the law.—*HALL v. FERGUSON* (1834), 4 O. S. 392.—*CAN.*



**Sect. 13.—Mistakes in & amendment of award:**  
**Sub-sect. 2, B.**

*British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. Co. of London*, [1912] 3 K. B. 128, C. A. **Apprvd.** *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. Co. of London*, [1912] A. C. 686, H. L. The doctrine of *Hodgkinson v. Fernie* to the effect that, where an error of law appears on the face of the award, the error can be reviewed, is a well established part of the law of the land (VISCOUNT HALDANE, C.). **Mentd.** *Hogg v. Burgess* (1858), 4 Jur. N. S. 668; *London Dock Co. v. Shadwell Parish* (1862), 1 New Rep. 91; *Beckett v. Mid. Ry. Co.* (1866), Har. & Ruth. 189; *The Tasmania* (1888), 13 P. D. 110; *May v. Mills* (1914), 30 T. L. R. 287.

**1646. Award on point of law beyond powers of lay arbitrators.]—**The ct. will not interfere with the decision of lay arbitrators on a point of law, dependent upon a question of fact, when such fact has been left for their determination.

On a motion to make a submission a rule of ct. & to set aside an award, it was contended that the arbitrators had decided a point of law beyond the powers of lay arbitrators. It appeared they had treated as an equitable assignment an assignment which had never been communicated to the assignee:—**Held:** by the terms of the submission the arbitrators had power to find as a fact what was due, & had jurisdiction to determine whether the sums alleged to have been guaranteed should be paid or not.—*Re SIMPSON & HORNSBY* (1868), 17 L. T. 617.

**1647. Award answering specific question involving erroneous decision in law.]—**If a specific question is submitted to an arbitrator & he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face, so as to permit of its being set aside.

**KING & DUVEEN**, [1913] 2 K. B. 32; 82 L. J. K. B. 733; 108 L. T. 844.

**Annotation:—***Distd Parsons v. Brixham Fishing Smack Insee*. (1918), 118 L. T. 600.

**(b) Of Fact.**

**1648. Award not allowing for work done between date of submission & award.]—**In pursuance of a rule of ct. made at a trial in an action of waste against a tenant for life for not repairing, an award was made awarding £380, though the party had made good the repairs within 40s. before the award made. The ct. nevertheless dismissed a bill for relief against the award.—*BROWN v. BROWN* (1683), 1 Vern. 157; 2 Cas. in Ch. 140; 23 E. R. 384.

**Annotation:—***Mentd. Nichols v. Roe* (1834), 5 Sim. 156.

**1649. Wrong conclusions from evidence.]—**The ct. will not set aside an award, on the ground that the arbitrator has come to a wrong conclusion on the facts, if there be any evidence to support his finding, though they may not think the arbitrator right in his conclusion from such evidence.—*BARRETT v. WILSON* (1834), 1 Cr. M. & R. 586; 3 Dowl. 220; 5 Tyr. 218; 149 E. R. 1214.

**1650. —.]—**The ct. will not set aside an award, on the ground that the arbitrator has made a

mistake, where all the facts were placed before him & he was competent from his occupation to judge of them, unless the ct. can see clearly it was a mistake.—*HARDY v. RINGROSE* (1835), 1 Har. & W. 185.

**.]—**An action against an attorney for negligently preparing a conveyance of land to pltf. was referred to an arbitrator with all matters in difference. Pltf.'s case on the reference was that many words in the deed were written on erasures, which were not noticed in the attestation, that the deed was in other respects incorrect & improperly prepared, & that, by reason thereof, pltf. was prevented from mtgng. The arbitrator ordered a verdict to be entered for deft., & awarded that it was proved before him that the erasures in the conveyance mentioned in the pleadings were made before the deed was executed. On motion to set aside the award, on the ground that the facts therein stated did not warrant a finding for deft.:—**Held:** the above statement of fact by the arbitrator did not show that his decision proceeded on that fact, & no ground appeared for reviewing his award.—*LANCASTER v. HEMINGTON* (1835), 4 Ad. & El. 345; 5 Nev. & M. K. B. 538; 111 E. R. 816.

**1652. —.]—**The ct. will not set aside an award where the arbitrator has adjudicated upon the evidence, even though the evidence may not be such as to warrant his finding.—*ARTHUR v. OWEN* (1841), Woll. 116; 5 Jur. 340.

**1653. —.]—**When an award has been made in an arbn. based upon figures & evidence laid before the ct., the question of the amount of the award cannot be re-opened, on the ground that some of the evidence has been misapprehended or misunderstood.—*Re GREAT WESTERN RY. CO. & POSTMASTER-GENERAL* (1903), 19 T. L. R. 636.

**1654. Gross mistake.]—**Gross negligence & even a blunder on the part of the arbitrator is not sufficient to justify a jury in treating the award as void.

In an action on an award deft. offered, in answer to part of the claim, to prove that the arbitrator had made a gross mistake as to certain amounts, the subject of the award. The judge rejected the evidence:—**Held:** the evidence was properly rejected.—*SAUNDERS v. DAMER* (1850), 16 L. T. O. S. 153.

**1655. Omission of sum for which party given credit.]—**At the commencement of the proceedings before an arbitrator deft. admitted pltf. to be entitled to a certain sum; the arbitrator, misconceiving what was said, thought the sum was stated to be no matter in difference & omitted to give pltf. credit for it:—**Held:** an exception to the general rule that the mistake of an arbitrator was no ground for setting aside an award.—

**PART IV. SECT. 13, SUB-SECT. 2.—**  
**B (b).**

**1649 i. Wrong conclusions from evidence.]—**Certain issues having been referred to an arbitrer, with full power to determine the matters therein contained, "in the same manner & as fully & freely" as could have been done by a judge & jury:—**Held:** although the arbitrer, in his findings, should have given a wrong construction to the issues, this would only amount to an error in judgment, & was no ground for suspending a charge on the decree.—*ANDERSON, ETC. v. KINLOCH* (1836), 14 Sh. (Ct. of Sess.) 447.—**SCOT.**

**1649 ii. —.]—**An objection to the arbitrator's finding on the evidence is untenable, unless misconduct can be inferred.—*NEWMAN v. NIAGARA MUTUAL FIRE INSURANCE CO.* (1866), 25 U. C. R. 435.—**CAN.**

**1649 iii. —.]—**Where the evidence is conflicting the ct. will not interfere with an award merely because it may think the weight of evidence to be against the view taken by the arbitrators.—*Re COLQUHOUN & BERLIN TOWN* (1879), 44 U. C. R. 631.—**CAN.**

**1649 iv. —.]—**The award of arbitrators will not be set aside on account of an error of judgment on the part of such arbitrators in their proceedings, when the law, the facts & the justice of the case are not affected by such error.—*ROLLAND v. CASSIDY* (1888), 32 L. C. J. 169.—**CAN.**

**1649 v. —.]—**If, intending to decide rightly, an arbitrator comes to a wrong decision, the ct. will not review his decision or set aside the award for mistake.—*SIMPSON v. NEWFOUNDLAND GOVT.* (1892), 7 Nfld. L. R. 637.—**NFLD.**

**1649 vi. —.]—**An award will not be set aside on account of a mistaken conclusion of fact from evidence which cannot be said to be irrelevant.—*McRAE v. RHODES, CURRY & Co., LTD.* (1896), 28 N. S. L. R. 343.—**CAN.**

**1654 i. (Gross mistake.)—**The finding of a referee upon questions of fact depending upon evidence taken *viva voce* before him will not be disregarded, except in case of manifest error.—*THIBIDEAU v. LE BLANC* (1907), 2 E. J. R. 422; 3 N. B. Eq. 436.—**CAN.**

**1654 ii. —.]—**It is not a valid objection to an award that the arbitrator has made a mistake of fact, unless the mistake is so gross & manifest that it could not have been made without some degree of misconduct.—*LANDESHUT v. KOENIG* (1903), 20 S. C. 33; 13 C. T. R. 23.—**S. AF.**

*v. SHEPPERTON (SHEPPERSON) (1849), 13 Q. B. 955; 14 L. T. O. S. 127; 13 Jur. 1098; 116 E. R. 1528.*

*Annotations:—Folld. Mills v. Bowyers' Soc., Bowyers' Soc. v. Mills (1856), 3 K. & J. 66; Flynn v. Robertson (1869), L. R. 4 C. P. 324. Refd. Whiteley & Roberts, [1891] 1 Ch. 558. Mentd. Re Stroud (1849), 8 C. B. 502; Hodgkinson v. Fernie (1857), 3 C. B. N. S. 189.*

**1656.** —.—.]—Deft. sought to set aside an award, on the ground that the arbitrator had omitted to allow deft. £200, for which pltf. had given him credit in his particulars of demand, & that the award did not show how the result had been arrived at, or what was done with the £200. The award being good on the face of it, & pltf. being entitled to recover from deft. £900, after deducting certain sums, the ct. refused to set aside the award.—*HAMMOND v. HAMMOND (1854), 23 L. T. O. S. 161.*

**1657. Error trivial in amount.]—**Where an error of the arbitrator has been extremely trivial in amount, as compared with the total amount adjudicated upon by the arbitrator, the ct. will in any case of arbn. be reluctant to re-open the case, & will probably not do so, unless there has been intentional injustice.—*HELLABY v. BROWN, BROWN v. HELLABY (1857), 26 L. J. Ex. 217; 29 L. T. O. S. 82; 5 W. R. 490.*

*Annotations:—Consd. Flynn v. Robertson (1869), 38 L. J. C. P. 240. Mentd. Hogge v. Burgess (1858), 3 H. & N. 293.*

**1658. Error in regard to accounts.]—**At the hearing before an arbitrator deft. set up Stat. Limitations, but the arbitrator decided that the account was a running account, to which the stat. did not apply. On an application that the award should be referred back, on the ground that the above finding was an error:—*Held: no ground for referring back the award.*

Where an arbitrator appears to decide according to law, but does not do so, if the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, the ct. will set aside the award: so, also, with regard to a mistake in fact. To that extent the law has gone, but no further (*WATSON, B.*).—*HOGGE v. BURGESS (1858), 3 H. & N. 293; 27 L. J. Ex. 318; 31 L. T. O. S. 119; 4 Jur. N. S. 668; 6 W. R. 504; 157 E. R. 482.*

*Annotations:—Mentd. Holloway v. Francis (1861), 9 C. B. N. S. 559; Bagdallay v. Borthwick (1861), 10 C. B. N. S. 61; Baguley v. Markwith (1861), 30 L. J. C. P. 342; Holgate v. Killick (1861), 7 H. & N. 418.*

**1659. Erroneous principle of valuation.]—**Upon a reference to arbitrators or an umpire to ascertain the amount due for fire-damage upon a policy of assurance, the ct. will not interfere to set aside or to send back the award on a mere suggestion that the umpire has adopted an erroneous principle of valuation.—*OLDFIELD v. PRICE (1859), 6 C. B. N. S. 539; 141 E. R. 568.*

**1660. Misconstruction of letters.]—**Where it was alleged that an arbitrator had misconstrued certain

letters in evidence, the ct. refused to send back the award for further consideration.—*WORSDELL v. HOLDEN (1859), 1 L. T. 14.*

**1661. Disallowance of two minor items of claim.]—**An award will not be set aside, nor even sent back to the arbitrator, for an alleged mistake, not manifest nor apparent on the face of it, nor admitted by any affidavit or statement of the arbitrator.

In cross-actions arising out of a sale of the goodwill of a public-house by L. to S., in the first action L. sued S. on a promissory note for £100, the balance of the purchase-money, & also to recover £38 for stock taken, & £14 for money lent. S., deft. in that action, pleaded fraud to the count on the note & never indebted to the residue. The action by S. against L. was for fraud in the sale. Both actions were referred to arbn., & the arbitrator found for S. on the note, on the ground that there had been fraud in the contract of sale, & on which £450 had been paid, leaving £100, the balance for which the note had been given. The two smaller items of L.'s claim were admitted. The arbitrator found in L.'s action that there was no cause of action against S. & directed the verdict to be entered for S. On an application to remit the award back to the arbitrator, on the ground that he had made a mistake in disallowing the two minor items of pltf.'s claim for the stock sold & the money lent, which it was contended were quite separate & distinct from the main cause of action, found to be tainted with fraud:—*Held: there was no ground for supposing there had been a mistake, & the application must be refused.*—*LOCKWOOD v. SMITH, SMITH v. LOCKWOOD (1862), 10 W. R. 628.*

*Annotation:—Distd. Dinn v. Blake (1875), L. R. 10 C. P.*

**1662. Adjudication on matter not within original submission.]—**The ct. will not send an award back to the arbitrator to correct an alleged mistake, which, when applied to, he does not admit, even although it be in a matter not within the original submission, but included in the award by virtue of some new agreement between the parties, pending the reference.—*WALTON v. SWANAGE PIER CO. (1862), 10 W. R. 629.*

*Annotation:—Apld. Dinn v. Blake, (1875), 44 L. J. C. P. 276.*

**1663. Mistake as to foreign law.]—**Deft. having brought several actions against pltf.s., they filed a bill for an account & to restrain the actions. The ct. made an order referring the matters, which involved questions of foreign law, to arbn. An award was made in deft.'s favour, & pltf.s. objected to it, on the ground that the arbitrator had made a mistake as to foreign law:—*Held: the mistake as to the foreign law was a mistake of fact, & was no ground for setting aside the award.*—*IMPERIAL ROYAL CHARTERED AZIENDA ASSICURATRICE OF TRIESTE v. FUNDER (1872), 27 L. T. 637; 21 W. R. 116, C. A.*

**1659 i. Erroneous principle of valuation.]—**An award will not be set aside, on the ground that a memorandum furnished by the arbitrator showed that the accounts between the parties were adjusted upon a wrong principle.—*MORAE v. LEMAY (1889), 18 S. C. R. 280; 16 A. R. 348.—CAN.*

**1659 ii. —.**—.]—An appeal from an award was dismissed, the ct. not being able to say that the arbitrator was wrong in not providing for the reimbursement in whole or in part of the lessee for the buildings on the lease.—*Re DENISON & FOSTER (1908), 12 O. W. R. 1066, 1106; 18 O. L. R. 478.—CAN.*

**1659 iii. —.**—.]—A landlord & tenant  
J.—VOL. II.

entered into a submission, which, on the narrative that the tenant had become "bound to accept the buildings, etc. . . . as in good repair when same had been put into good order," referred to arbn. *inter alia* the sum payable by the landlord in respect of any of the same not being in repair at the entry of the tenant. The arbiters awarded a sum which they reached on the principle of giving the amount which an outgoing tenant would have had to expend in putting the subjects into tenantable condition & repair. In an action of reduction at the instance of the tenant:—*Held: (1) the question referred to arbn. was the amount of defender's obligation qua landlord, & not the amount*

for which an outgoing tenant would have been liable; (2) the arbiters not having determined the question submitted to them, their award fell to be reduced.—*DAVIDSON v. LOGAN, [1908] S. C. 350.—SCOT.*

**w. Error in calculation.]—**Where, upon the face of an award, arbiters have not stated anything which conclusively shows that the sum awarded is wrong, it is not open to deft., in an action upon a bill given for the sum awarded, to impeach the award, on the ground of an error in calculation.—*ANDERSON v. STEWART (1876), 2 V. L. R. 75.—AUS.*



13.—*Mistakes in & amendment of award:*

## SUB-SECT. 3.—ALTERATION AND AMENDMENT OF AWARD.

Arbitration Act, 1889, s. 7 (c).

**1664. Arbitrators cannot alter.]**—Arbitrators cannot alter their arbitrament after it is once made.—ANON. (1468), Y. B., 8 Edw. 4, fo. 1, pl. 1; Jenk. 128; 145 E. R. 90.

**1665. — After delivery but before time limit.]**—After the delivery of an award the arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures by making another award corresponding to the admitted proportions of a partnership fund.—IRVINE v. ELNON (1806), 8 East, 54; 103 E. R. 264.

*Annotation:*—**Reid.** Ward v. Dean (1832), 3 B. & Ad. 234.

**After execution.]**—An arbitrator awarded that pltf. had no cause of action, & that a verdict should be entered for deft., & then, by mistake, directed that the costs of the reference & award should be paid by deft., meaning pltf.:—**Held:** the arbitrator, having executed his award in that form, could not rectify it.—WARD v. DEAN (1832), 3 B. & Ad. 234; 110 E. R. 87.

*Annotations:*—**Folld.** Moore v. Butlin (1837), 7 Ad. & El. 595. **Apprvd.** Mordue v. Palmer (1870), 6 Ch. App. 22, L.JJ.

**1667. — Second award a nullity.]**—An arbitrator having signed his award is *functus officio* & cannot alter the slightest error in it, even though such error has arisen from the mistake of the clerk in copying the draft. The proper course in such a case is to obtain an order to refer the award back to the arbitrator.

An arbitrator made his award on Nov. 12. His attention having been called by pltf.'s solr. to an accidental omission in it, he signed a fresh award on Dec. 2, which was sent by pltf.'s solr. to deft.,

with a letter of explanation. Deft. took no notice of it till June 10, when pltf. sought to enforce the award, & he then objected to its validity:—**Held:** deft. was entitled to treat the second award as a nullity, & his delay did not amount to acquiescence in its validity.—MORDUE v. PALMER (1870), 6 Ch. App. 22; 40 L. J. Ch. 8; 23 L. T. 752; 35 J. P. 196; 19 W. R. 86, L.JJ.

*Annotations:*—**Folld.** Andrews v. Barnes (1888), 39 Ch. D. 133, C. A.; **Re** Stringer & Riley, [1901] 1 K. B. 105.

**1668. — Unless under express terms of submission.]**—An arbitrator appointed by certain Acts of Parliament made an award, which was resisted by one of the parties interested as being, & was in fact, without any fraud in the arbitrator, invalid:—**Held:** having regard to the language of the above Acts, this circumstance did not affect the validity of a subsequent award made in the same manner between the same parties.—GREAT NORTH OF ENGLAND, CLARENCE & HARTLEPOOL JUNCTION RY. CO. v. CLARENCE RY. CO. (1845), 1 Coll. 507; 3 Ry. & Can. Cas. 605; 4 L. T. O. S. 229; 63 E. R. 520; *sub nom.* CLARENCE RY. CO. v. GREAT NORTH OF ENGLAND, CLARENCE & HARTLEPOOL JUNCTION RY. CO. (1845), 13 M. & W. 706; 14 L. J. Ex. 137; 153 E. R. 295.

**1669. Umpire cannot alter—Even before delivery—Award for original sum good.]**—After an award made under the hand of an umpire, & ready for delivery, pursuant to the terms of reference, of which notice was given to the parties, an alteration by the umpire of the sum awarded, though made on the same day & before delivery of the award, is void; but the award is good for the original sum awarded, which was still legible, the same as if such alteration had been made by a mere stranger without the privity or consent of the party interested.—HENFREE v. BROMLEY (1805), 6 East, 309; 2 Smith, K. B. 400; 102 E. R. 1305.

*Annotations:*—**Folld.** Irvine v. Elton (1806), 8 East, 54. **Distd.** French v. Patton (1808), 9 East, 351. **Apld.** Brooke v. Mitchell (1840), 6 M. & W. 473. **Refd.** Suffell v.

J.—GRAY v. M'CABE (1844), 7 I. Eq. R. 206.

**1667 iii. —**—An award was signed by all the arbitrators. Thereafter one wished to have his name struck off, & this was allowed to be done & the award was destroyed:—**Held:** on executing this award the arbitrators became *functi officio*, & an award made subsequently was void.—KELLY v. MACDONALD (1877), 2 P. E. I. 173.—CAN.

**1667 iv. —**—An arbitrator having gone into the matter submitted to him made out a statement, & some time afterwards made out a second statement, showing a different amount to be due:—**Held:** a valid award for the first amount, & the arbitrator was *functus officio*, & the second award was a nullity.—SNETSINGER v. PETERSON (1894), 1 Cout. Dig. 146, 147.—CAN.

**1667 v. — New arbitrators.]**—Where new arbitrators, without petition on the part of the proprietor, revise the award as to a property, their decision will be set aside, & the former award restored.—COURNOYER v. RICHELIEU (1915), 21 R. de J. 212.—CAN.

**1667 vi. — Unless where first award not intended to be final.]**—In an action to set aside it was argued that the arbitrator made two awards & that he became *functus officio* on publishing the first, thus rendering the second award void:—**Held:** the so-called first award, though beginning "I adjudge & award," was not in fact intended to be an award, but simply a direction made, at the parties' suggestion, to clear the ground for the arbn. proper, it did not purport to dispose of anything on which the arbn. could bear.—**Re** GRAVES & TENTLER (1911), 19 W. L. R. 361; 21 Man. L. R. 417.—CAN.

## PART IV. SECT. 13, SUB-SECT. 3.

**1665 i. Arbitrators cannot alter—After delivery.]**—After an award has been made & handed to the parties, the functions of the arbitrators cease. They have no power afterwards to deal with an application for review of their decision.—**Re** DUTTO SINGH'S PETITION, DUTTO SINGH v. DOSAD BAHADUR SINGH (1883), 1 L. R. 9 Calc. 575.—IND.

**1665 ii. — After publication.]**—An arbitrator has no power to amend an award after publication.—**Re** BENNETT BROTHERS (1910), V. L. R. 51.—AUS.

**1665 iii. — After award ready for delivery.]**—Arbitrators acting under a submission requiring the award to be made in writing, ready to be delivered to the parties at a certain day, cannot, after having made an award, set it aside & make a new one. After it is ready to be delivered the arbitrators are *functi officio*.—SANDFORD v. SANDFORD (1857), 2 Thom. 266.—CAN.

**1665 iv. — After award made.]**—An arbitrator is *functus officio* as soon as he has made an award.—BENNETTO v. WINNIPEG (1908), 18 Man. L. R. 100.—CAN.

**1665 v. — After award made & published.]**—Arbitrators having once made & published their award cannot subsequently alter it.—HAYDON v. DUNN (1854), James, 256.—CAN.

**1665 vi. — Even though award bad.]**—Arbitrators made an award which failed to comply with one of the material terms of the submission:—**Held:** when the award was signed the authority of the arbitrators ceased, & it was not within their power to re-open it.—HALL v. QUEEN INSURANCE CO. (1906), 39 N. S. L. R. 295.—CAN.

**1665 vii. — Unless award reduced.]**—**Held:** an arbiter, who issued a decree-arbitral which had been reduced, was not *functus officio* or disqualified from again taking up the reference.—MILLER & SON v. OLIVER & BOYD (1906), 8 F. (Ct. of Sess.) 390.—SCOT.

**1665 viii. — Unless before award made.]**—Arbitrators are not *functi officio* till the award is made.—ARMSTRONG v. ST. EUGENE MINING CO. (1908), 13 B. C. R. 385.—CAN.

**1666 i. — After execution.]**—An arbitrator's authority ceases after he has executed an award, & he has no power to alter or amend such award.—HELPS v. ROBBIN (1856), 6 C. P. 42.—CAN.

**1666 ii. —**—Under a submission to the award of A., B. & C., or any two of them, the arbitrators agreed upon an award, & it was drawn up, signed by A. & B. & delivered to C. to be signed by him & handed to the parties. C. discovered a mistake, & with A.'s & B.'s consent the award was corrected & signed by all three. The ct. refused to give effect thereto.—WILSON v. KERR & CAMPBELL (1838), Ber. 437.—CAN.

**1667 i. — Second award a nullity.]**—Arbitrators, having discovered a mistake in the amount awarded, destroyed their award & executed another. The ct. set the second award aside.—BENSON v. LOVE (1842), 1 U. C. R. 398.—CAN.

**1667 ii. —**—There were two submissions; one in an action at law, & another in an equity suit. First an award was made in the action & suit, & then two awards, one in each, were made:—**Held:** when the first award was signed the arbitrators were *functi*



**Bank of England (1882), 9 Q. B. D. 555, C. A. Mentd. Re Hall & Hinds (1841), 2 Man. & G. 847.**

**1670. After execution.]—**Where an instrument is complete as an award of an umpire, he can make no alteration in it after execution; he is then *functus officio*, having declared his final mind.—**BROOKE v. MITCHELL (1840), 6 M. & W. 473; 8 Dowl. 392; 4 Jur. 656; 151 E. R. 498.**

**1671. Court cannot alter—To make terms agree with submission.]—**The ct. cannot interfere to alter the terms of an award in order to make them consist with the submission, even where the submission to arbn. gives minute directions for the course to be pursued by the arbitrator.—**HALL v. ALDERSON (1825), 2 Bing. 476; 130 E. R. 390.**

**1672. — To make award agree with arbitrator's intention—Affidavits of intention inadmissible.]—**Actions, one of trespass, the other of ejectment, were referred to an arbitrator. In the ejectment action he ordered a general verdict to be entered for the lessor of pltf. & delivered, together with his award, a paper, stating the reasons for the conclusion in his award, which manifested an intention at variance with the award. The ct. refused to amend the award by the paper for the purpose of entitling deft. to costs.—**DOE d. OXENDEN v. CROPPER (1839), 10 Ad. & El. 197; 2 Per. & Dav. 490; 8 L. J. Q. B. 241; 3 Jur. 578; 113 E. R. 76.**

**1673. — Unless for error on face of award—Or for corruption.]—Held:** (1) a ct. of equity had no jurisdiction to alter an award, unless there was error upon the face of it or it was shown to have been corruptly obtained; (2) where a principal sum & interest only were awarded, the ct. would not calculate whether the amounts were correct according to the rules, or whether the principal sum included profits or not.—**ARMITAGE v. WALKER (1855), 2 K. & J. 211; 26 L. T. O. S. 182; 20 J. P. 53; 2 Jur. N. S. 13; 69 E. R. 756.**

**Annotations:—Mentd. Callaghan v. Dolwin (1869), L. R. 4 C. P. 288; Walker v. General Mutual Bldg. Soc. (1887), 36 Ch. D. 777, C. A.; Davies v. Second Chatham Permanent Bldg. Soc., Mackenzie v. Everton & West Derby Permanent Bldg. Soc. (1889), 61 L. T. 680.**

**1674. — Name altered after publication.]—**Where an award by an umpire contains a misrecital of the Christian name of one of the original arbitrators, by whom he was duly appointed, the award is not vitiated by the substitution of the right name after publication.—**TREW v. BURTON (1833), 1 Cr. & M. 533; 3 Tyr. 559; 2 L. J. Ex. 236; 149 E. R. 511.**

**Where error apparent on face of award.]—See Nos. 1589—1600, ante.**

**Where error not apparent on face of award but admitted by affidavit of arbitrators.]—See Nos. 1618—1624, ante.**

**1671 i. Court cannot alter.]—**An award cannot be altered by a judge on an application to set it aside.—**HUMPHREYS v. VICTORIA (CITY) (1912), 17 B. C. R. 258.—CAN.**

**1671 ii. —.]—**An award cannot be modified by the ct., nor could the decree, which must be in accordance with the award.—**AHMED BIN ESSA KHALIFFA v. ESSA BIN KHALIFFA (1892), L. L. R. 17 Bom. 657.—IND.**

**1671 iii. — So as to make new award.]—**A bill was to rectify an award because the arbitrators had considered matters not included in the submission. The bill prayed that the award might be amended & deft. decreed to pay the amount due pltf. on the award being rectified, & that, in other respects, the award should stand & be binding on the parties:—**Held:** to grant the decree prayed for would be to make a new award, which the ct. had no jurisdiction to do.—**VERNON v. OLIVER (1884), 11 S. C. R. 156; 23 N. B. R. 392.—CAN.**

**1671 iv. — But may ask explanation.]—**When an award fixing the indemnity to be made upon an expropriation is obscure & does not indicate sufficiently whether the real estate for which the indemnity is granted is the same as that designated upon the plan made by the party claiming the expropriation, the ct. may ask for explanations upon the award, but cannot change the conclusions of the arbitrators.—**LA CIE. DU CHEMIN DE FER DU NORD & L'HOPITAL DU SACRÉ-CŒUR (1885), 15 R. L. Q. B. 599.—CAN.**

**1671 v. — Right to appeal reserved.—R. S. O., 1877 (c. 50), s. 189.]—**By consent of the parties an action was referred to a county ct. judge, with a provision that the proceedings should be the same as on a reference by order, & that there should be a right of appeal as under the above Act. The arbitrator gave an award in favour of pltf.; a Divisional Ct. held that there was no appeal from the award on the merits; the Ct. of

**1675. Sufficiency of amendment.]—**An arbitrator, in making an award in favour of deft., by mistake called him David instead of Daniel. The award having been sent back to him for amendment, he wrote at the bottom the following certificate: "In pursuance of a rule, etc., I do hereby certify that this my award ought to be amended by substituting the name of Daniel P. for the name of David P., the name David P. having been inserted therein by mistake instead of Daniel P." :—**Held:** a sufficient amendment.—**DAVIES v. PRATT (1855), 17 C. B. 183; 25 L. J. C. P. 71; 4 W. R. 97; 139 E. R. 1039.**

#### SECT. 14.—STAMP ON AWARD.

*See, also, Nos. 46, 47, ante.*

**1676. Effect of improper stamping.]—**If an award be made on an improper stamp, & no application be made to enforce the award, the ct. will not set it aside.—**PRESTON v. EASTWOOD (1797), 7 Term Rep. 95; 101 E. R. 873.**

**1677. Award under seal.]—**An award in writing & under seal need not have a deed stamp unless delivered as a deed; but being only delivered as an award it is sufficient if it have the award stamp of 10s.—**BROWN v. VAWSER (1804), 4 East, 584; 102 E. R. 954.**

**Annotation:—Mentd. Brooke v. Mitchell (1840), 8 Dowl. 392.**

**1678. Agreement to settle on accounts prepared by stranger—Whether accounts require stamp.]—**A bond, conditioned for the due discharge by A. of the duties of clerk, provided that such discharge should be ascertained by the inspection of A.'s accounts by S., & that the amount so ascertained should be liquidated damages:—**Held:** a paper, by which S. had ascertained such amount, required to be stamped as an award.—**JEFF v. MCKIERNAN (1829), Mood. & M. 340.**

**Annotations:—Folld. Carr v. Smith (1843), 5 Q. B. 128. Distd. Goodyear v. Simpson (1846), 15 M. & W. 16. Reftd. Northampton Gaslight Co. v. Parnell (1855), 1 Jur. N. S. 211.**

**1679. —.]—**Proprietors of a stage coach arranged among themselves that each should horse the coach for certain stages & receive the payments & make the requisite disbursements on such stages, & it was the practice that one or more of the partners every month made up & sent round to the other partners a written account from the way-bills, showing the receipts & disbursements of each proprietor, the share of net profits (if any) due to each & the proprietors by & to whom the ascertained shares should be paid; & the payments

Appeal held that there was an appeal on the merits, but upheld the award.—**BICKFORD v. CANADA SOUTHERN RY. Co. (1888), 14 S. C. R. 743.—CAN.**

**1671 vi. — Consolidated Municipal Act (c. 42), ss. 401, 402.]—**In an arbn. within the above Act, a judge to whom an appeal is taken against the award can deal with the award on the merits, & can increase or reduce the amount or vary the decision as to costs.—**Re CHRISTIE & TORONTO JUNCTION (1895), 24 O. R. 443; 22 A. R. 21; 25 S. C. R. 551.—CAN.**

#### PART IV. SECT. 14.

**x. 5 & 6 Will. 4, c. 61, s. 1.]—**The provisions of the above Act exempting awards from stamp duty applied as well to awards previous to the passing of the Act, as to those subsequent.—**HOOD v. HOOD (1840), 1 Craw. & D. 413.—IR.**

**Sect. 14.—Stamp on award. Sect. 15: Sub-sect. 1.]**

were made accordingly. In *assumpsit* by one partner against another for a balance so adjusted, & not paid (the partnership still continuing), *pltf.*'s case rested upon a written account made out as above, but not stamped:—*Held*: if an action at law would lie at all on a settlement of partnership accounts which was not a final close of all the partnership transactions, still the settlement in question, not appearing to have been agreed to by the partners generally, or by *pltf.* & *deft.*, could be binding only as an award, & it could not so operate for want of a stamp.—*CARR v. SMITH* (1843), 5 Q. B. 128; 1 *Dav. & Mer.* 192; 1 L. T. O. S. 337; 7 *Jur.* 600; 114 E. R. 1197.

**Annotations** :—**Consd.** *Goodyear v. Simpson* (1846), 15 M. & W. 16. **Distd.** *Northampton Gaslight Co. v. Parnell* (1855), 1 *Jur. N. S.* 211.

**1680.** ———.]—A number of coach proprietors, who horsed a coach, were in the habit of having monthly accounts made out, containing the names of the proprietors, the amount of the receipts & disbursements, the number of miles worked by each, & the proportion of the earnings to which each was entitled. These accounts were made out by the clerk of one of the proprietors, partly from materials furnished by them & partly from the way-bills; & the practice was for the clerk to send to each proprietor a copy of the monthly account showing the amount which each had to receive or pay & the proprietor or proprietors from or to whom he was to receive or pay such amount:—*Held*: this account was not an award & was admissible in evidence without a stamp.—*GOODYEAR v. SIMPSON* (1845), 15 M. & W. 16; 15 L. J. Ex. 191; 153 E. R. 742.

**Annotation** :—**Consd.** *Matheson v. Ross* (1849), 2 H. L. Cas. 286, H. L.

**1681. Several underwriters—Community of interest—One stamp.**]—The several underwriters on the same policy have such a community of interest in the subject insured that, if they all agree to refer the demand of the assured on that policy, one stamp for the award is sufficient.—*GOODSON v. FORBES*, *GOODSON v. —* (1815), 6 *Taunt.* 171; 1 *Marsh.* 525; 128 E. R. 999.

**Annotation** :—**Refd.** *Ramsbottom v. Davis*, *Ramsbottom v. Gosden* (1839), 1 *Horn & H.* 464.

**1682. Whether finding of miner's jury requires award stamp.**]—A finding in writing of a miner's jury, not appearing on the face of it to be an award, need not be stamped as an award.—*SYBRAY v. WHITE* (1836), 1 M. & W. 435; 2 *Gale.* 68; *Tyr. & Gr.* 746; 5 L. J. Ex. 173; 150 E. R. 504.

**Annotations** :—**Refd.** *Carr v. Smith* (1843), 5 Q. B. 128. **Mentd.** *Barnes v. Ward* (1850), 9 C. B. 392; *Williams v. Groucott* (1863), 4 B. & S. 149.

**1683. Time for stamping.**]—*Semble*: a stamp cannot be affixed (without a fine) more than six weeks after the making of the award.—*RAYNOR v. CHILDS* (1862), 2 F. & F. 775.

**1684. When & by whom objection may be taken.**]—Where it is sought to draw up a rule for an attachment for non-performance of an award, it is competent for the officer of the ct. to object to the absence of a stamp on the award & to refuse to draw up the rule.—*HILL v. SLOCOMBE* (1841), 9 *Dowl.* 339; 5 *Jur.* 220.

**PART IV. SECT. 15, SUB-SECT. 1.**

**1685. General rule.**]—An award drawn by an unprofessional arbitrator is not to be construed according to the same principles as an award settled by counsel or a solr. in England, but in accordance

with what may reasonably be supposed in the circumstances to have been the intentions of the arbitrator.—*ABDUL MAJID KHAN v. KADIR BEGAM* (1898), 1 L. R. 20 All. 245.—**IND.**

*y. Construed as at time of granting.]*

**SECT. 15.—CONSTRUCTION AND EFFECT OF AWARD.****SUB-SECT. 1.—CONSTRUCTION OF AWARD.**

**1685. General rule.**]—Awards should be interpreted according to the intent of the arbitrators.—*INGRAVE (INGRAM) v. WEB* (1623), *Palm.* 107; 1 *Roll. Rep.* 362; 81 E. R. 1001; *sub nom.* *WEBB v. INGRAM*, *Cro. Jac.* 663.

**Annotation** :—**Mentd.** *Pickering v. Watson* (1776), 2 *Wm. Bl.* 1117.

**1686.** ———.]—A defective award will be made good in equity where the intention of the arbitrators is clear, *e.g.*, if, intending to award land to a man in fee simple, they omit words of limitation, the appropriate words will be supplied.—*SCOTT v. WRAY* (1634), 1 *Rep. Ch.* 84; 21 E. R. 514.

**1687.** ——— **Reasonably & favourably.**]—An application to set aside an award, on the ground that the arbitrator had awarded in the present tense, & must, therefore, have included matters arising subsequent to the date of submission, & that he had used the general words "claims & demands," not confining them to pecuniary claims, which were alone referred, was refused, as the award must be reasonably understood as applying only to the matters referred to the arbitrator.—*Re KENWORTHY & ROBERTS* (1856), 28 L. T. O. S. 65.

**1688.** ——— **Liberal & favourably.**]—Awards are now considered with greater latitude & less strictness than they were formerly; & it is right that they should be liberally construed, because they are made by judges of the parties' own choosing. Indeed, they must have these two properties, to be certain & final, but the certainty may be judged of according to a common intent, & consistent with fair & probable presumption. I declare against critical niceties in scanning awards (*LORD MANSFIELD, C.J.*).

Awards ought to be construed liberally & favourably (*DENNISON, J.*).—*HAWKINS v. COLCLOUGH* (1757), 1 *Burr.* 274; 2 *Keny.* 553; 97 E. R. 311.

**Annotation** :—**Mentd.** *Re Tribe & Upperton* (1835), 3 *Ad. & El.* 295.

**1689. Whether award absolute or conditional—"Paying."**]—An award was made that A. should enjoy a house, paying rent to B. In an action for non-payment of such rent *deft.* alleged, in arresting judgment, that payment of the rent was merely a condition annexed to the award & that on non-payment the estate ceased:—*Held*: the direction to pay rent was part of the award, & for non-payment debt might be brought upon the obligation.—*PARSONS (FROWDE) v. PARSONS (FROWDE)* (1591), *Cro. Eliz.* 211; 78 E. R. 467.

**1690. Award of all matters "except obligations."**]—If an award be of all matters except obligations, it is good, for the exception is an award that the bonds shall remain in force.—*SALLOWS v. GIRLING* (1611), *Cro. Jac.* 277; 79 E. R. 238.

**Annotations** :—**Distd.** *Wilkinson v. Page* (1842), 1 *Hare.* 276. **Mentd.** *Berry v. Penring* (1616), *Cro. Jac.* 399.

**1691. Award for performance of certain matters & "then" other matters.**]—In an award that the one party should on a particular day pay the other a sum of money & deliver up a certain writing obligatory, & that then they should execute mutual general releases, the word "then" refers to the day.—*BEDAM v. CLERKSON* (1696), 1 *Ld. Raym.* 123; 91 E. R. 979.

—An award must be determined according to circumstances existing at its date, & not by what transpired some years afterwards.—*SAKRAPPA RIN LINGAPPA v. SHIVAPPA* (1910), 1 L. R. 35 *Bom.* 153.—**IND.**



## PART IV.—THE AWARD.

**1692. Award that note be given.]—**Awarding the giving a note is the same as awarding payment at a future day.—*BOOTH v. GARNETT* (1737), Andr. 28; 2 Stra. 1082; 95 E. R. 283.

**1693. Award that all actions cease.]—**An award directing all actions to cease is an effectual release.—*STEPHENSON v. BROWNING* (1739), Barnes, 56; 94 E. R. 804.

**1694. Award that each of two parties pay third party—Joint & several promise to perform award.]—**Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbn., & jointly & severally promised to perform the award; the arbitrator awarded each of the two to pay a certain sum to the third:—*Held*: they were jointly responsible for the sum awarded to be paid by each.—*MANSELL v. BURRIDGE & ROBERTS* (1797), 7 Term Rep. 352; 101 E. R. 1015.

**1695. Award directing assignment to named person.]—***Qu.*: whether an award directing the assignment of an interest to A. will warrant an assignment to A., his exors., administrators, & assigns.—*RUSSEL v. HEADINGTON* (1815), 1 Stark. 13.

**1696. Award directing entry of verdict for named sum.]—**In an award the direction to enter a verdict in favour of plff. for a certain sum is equivalent to an order to pay that sum.—*CARTWRIGHT v. BLACKWORTH* (1832), 1 Dowl. 489.

*Annotations:—***Expld.** *& N.F. Donlan v. Brett* (1834), 2 Ad. & El. 344. We have conferred with my brother Littledale, & he informs us that he should not have decided as he did in *Cartwright v. Blackworth* if he had been aware of the case in the Exchequer (*Jackson v. Clarke* (1824), 13 Price, 208) (LORD DENMAN, C.J.). **Refd.** *Cock v. Gent* (1844), 13 M. & W. 364. **Mentd.** *Ex p. Alcock* (1875), 1 C. P. D. 68; *Re Solicitor* (1875), 45 L. J. Q. B. 86.

*See, generally, Nos. 1215—1224, ante.*

**1697. Award for payment “on 28th October next” —Award dated October 13.]—**By an award dated Oct. 13, 1840, it was ordered that a sum of money be paid on the “28th day of Oct. next”:—*Held*: the money was payable on the 28th day of that present month of Oct.—*BROWN v. SMITH* (1840), 8 Dowl. 867.

**1698. Admissibility of arbitrator's evidence—To show what was submitted—Not to show reasons for award.]—**In an action upon an award the arbitrator's evidence is admissible to show in respect of what matters he allowed or refused compensation, but not to explain his reasons for awarding a particular sum in respect of any particular matter.—*BUCCLEUCH (DUKE) v. METROPOLITAN BOARD OF WORKS* (1872), L. R. 5 H. L. 418; 41 L. J. Ex. 137; 27 L. T. 1; 36 J. P. 724, H. L.

*Annotations:—***Folld.** *O'Rourke v. Railways Comr.* (1890), 15 App. Cas. 371, P. C. **Consd.** *Re Whiteley & Roberts*, [1891] 1 Ch. 558; *Rocher v. North British & Mercantile Insee.*, [1915] 3 K. B. 277. **Refd.** *Ripley v. G. N. Ry. Co.* (1875), 23 W. R. 685, C. A. **Mentd.** *Glasgow City Union Ry.*

**1700 i. Admissibility of arbitrator's evidence—Not to explain award.]—**An award should be construed, not by oral evidence given by the arbitrators, but by looking at the language of the award itself.—*GUNESSEE v. CHOTAY LALL* (1871), 3 N. W. 117.—IND.

**1700 ii. —Unless where fraud alleged.]—**The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case of *Buccleuch (Duke) v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418, but where charges of dishonesty are made the ct. will reject no evidence of an arbitrator which can be of assistance in informing itself whether such charges are established.—*AMIR BEGAM v. BADRUD-DIN HUSAIN* (1914), 11 L. R. 36 All. 336.—IND.

**1700 iii. — — —.] — — —** *CARVETH v. FORTUNE* (1862), 12 C. P. 360.—CAN.

**1700 iv. — — —.] — — —** *CAMPBELL v. HOWLAND* (1859), 19 U. C. R. 18.—CAN.

**1700 v. — — —.] — — —** *Re CHRISTIE & TORONTO JUNCTION RY.* (1895), 22 A. R. 21.—CAN.

**1700 vi. — — —.] — — —** *MASSON v. ROBERTSON* (1879), 41 U. C. R. 323.—CAN.

**1702 i. Admissibility of extraneous evidence—To determine what was decided.]—**It is competent to refer to notes of an arbiter in a submission, who has only decided part of the claims submitted to him, to ascertain what points he has actually determined.—*BELL v. HALLIDAY* (1825), 4 Sh. (Ct. of Sess.) 286.—SCOT.

**1702 ii. — — —.] — — —** *Not to show what was submitted.]—*The arbitrators awarded “that plff. do pay to deft. the sum of £195, under his agreement, & the matters submitted to us.” Plff. had, previous to the submission, paid deft. £184 on account &

*Co. v. Hunter* (1870), L. R. 2 Sc. & Div. 78, H. L.; *McCarthy v. Metropolitan Board of Works* (1872), L. R. 8 C. P. 191, Ex. Ch.; *Holt v. Gas Light & Coke Co.* (1872), L. R. 7 Q. B. 728; *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662, H. L.; *Rhodes v. Aire Dale Drainage Comrs.* (1876), 1 C. P. D. 402, C. A.; *R. v. Sheward* (1882), 9 Q. B. D. 741, C. A.; *Cale. Ry. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259, H. L.; *R. v. Essex* (1886), 17 Q. B. D. 447, C. A.; *Cowper-Essex v. Acton L. B.* (1889), 14 App. Cas. 153, H. L.; *Re London, Tilbury & Southend Ry. Co. v. Gower's Walk School Trustees* (1889), 24 Q. B. D. 326, C. A.; *R. v. Seard* (1894), 10 T. L. R. 545; *Falkingham v. Victorian Railways Comrs.*, [1900] A. C. 452, P. C. *Re Tynemouth Corp'n. & Northumberland, Tynemouth Corp'n. & Trevelyan, Tynemouth Corp'n. & Orde* (1900), 67 J. P. 425; *London & India Docks Co. v. North London Ry. Co.* (1903), *Times*, Feb. 6; L. & N. W. Ry. Co. v. Walker (1903), 72 L. J. K. B. 578, H. L.; *R. v. Mountford, Ex p. London United Tramways*, [1906] 2 K. B. 814; L. & N. W. Ry. Co. v. Reddaway (1907), 23 T. L. R. 279; *A.-G. of Southern Nigeria v. Holt*, [1915] A. C. 599, P. C.; *Odium v. City of Vancouver* (1915), 85 L. J. P. C. 95, P. C.; *Selby v. Whitbread*, [1917] 1 K. B. 736.

**1699. — — —.] — — —** Where matters have been referred to arbn. it is matter of evidence whether a particular matter of complaint has been subjected to the arbitrator's consideration; & an arbitrator may be called to prove what matters were claimed before him on a reference.—*MARTIN v. THORNTON* (1802), 4 Esp. 180.

*Annotation:—***Refd.** *Buccleuch v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418, H. L.

**1700. — — —.] — — —** Not to explain award.]—If the terms of an award be clear upon the face of it, the ct. will not admit an affidavit of one of the arbitrators to explain their intention.—*GORDON v. MITCHELL* (1819), 3 Moore, C. P. 211.

*Annotation:—***Expld.** *Re Hall & Hinds* (1841), Drinkwater, 214.

**1701. — — —.] — — —** Where by a consent decree arbitrators were directed to return a general award on the whole declaration for a sum certain, & such award was thereby directed to be entered as a verdict whereon final judgment might be signed, & costs of the action, reference, & award were directed to follow the verdict so entered:—*Held*: applts. having thereunder obtained a verdict for a portion of the sum claimed by them, which verdict carried costs as above directed, the ct. could not give resp. a verdict for the residue of the sum claimed & then delegate to the taxing master the duty of ascertaining, by the evidence of the arbitrators & others, as to what parts of applts.' claim resp. had succeeded, with a view to the apportionment of costs, as such evidence would be inadmissible as tending to explain or contradict the award.—*O'ROURKE v. RAILWAYS COMR.* (1890), 15 App. Cas. 371; 59 L. J. P. C. 72; 63 L. T. 66, P. C.

*Annotation:—***Mentd.** *Railway Comrs. v. O'Rourke* (1896), 75 L. T. 81, P. C.

**1702. Admissibility of extraneous evidence.]—**On a rule for an attachment for non-performance of an

subsequent to the award he paid him a further sum of £5:—*Held*: parol evidence was inadmissible to show what was the only matter submitted to & considered by the arbitrators.—*BENNETT v. MURRAY* (1865), 1 Old. 614.—CAN.

**1702 iii. — — —.] — — —** Not to construe award.]—Where certain matters were referred to arbn. & subsequently the parties, by an agreement in writing, withdrew some of the matters, but this agreement was not referred to in the award, in an action to set aside the award:—*Held*: the agreement was of no value as an aid to the construction of the award, in which it could not be incorporated.—*Re AMOS & AMOS* (1893), 11 N. S. W. L. R. 295.—AUS.

**1702 iv. — — —.] — — —** The meaning of arbitrators, when an award is made, is not to be gathered from affidavits, or from any other source than the award itself.—



**Sect. 15.—Construction & effect of award: Sub-sects. 1 & 2, A. (a).]**

award made under a submission, neither the submission which has been made a rule of ct., nor anything *dehors* the face of the award, can be looked at.—**MACEY v. MACEY** (1837), Will. Woll. & Dav. 371.

**Necessity for reciting reasons for decision.]—See** Nos. 1140—1152, *ante*.

**Liability of arbitrator to discovery, etc.]—See** Nos. 790—806, *ante*.

**SUB-SECT. 2.—EFFECT OF AWARD.**

*See* Arbitration Act, 1889, s. 2, Sched. I. (h).

**A. Final and Binding.**

**(a) In general.**

**1703. Equivalent to decree.]—**The result of a reference under an order of the ct. is viewed by the ct. as a decree, & even stronger, since it supersedes all errors but corruption or partiality.

Where there is a reference to a judge of the parties' own choosing it supersedes all errors but corruption or partiality; & it is fit it should be so, otherwise there would never be an end of things (**LORD HARDWICKE, C.**).—**TRAVERS v. STAFFORD (LORD)** (1750), 2 Ves. Sen. 19; 28 E. R. 13.

**Annotation:—Mentd.** **Edwards v. Edwards** (1792), Dick. 756.

**1704. .]**—Where there had already been an order made by the Ct. of Ch., on an application to cancel a mtge., referring it, by consent, to a barrister, to take an account of what was due on it for money advanced & interest, who was authorised by the ct. to award payment of the amount, & an award made:—**Held**: a bill filed in another ct. for foreclosure of such mtge. was demurrable, on the ground that the award was tantamount to a decree of the Ct. of Ch., & could not be impugned in any other ct., for that would be constituting the ct. so applied to a ct. of appeal.—**PITCHER v. RIGBY** (1821), 9 Price, 79; 147 E. R. 27.

**Annotations:—Mentd.** **Williams v. Piggott** (1825), Jac. 598; **Booth v. Creswicke** (1844), 13 L. J. Ch. 217.

**KEEP v. HAMMOND** (1863), 9 U. C. L. J. 157.—**CAN.**

**1702 v. .]**—An award under Railway Act of Canada cannot be explained by extrinsic evidence of the intention of the party making it.—**PONTIAC PACIFIC JUNCTION RY. CO. & OTTAWA & GATINEAU RY. CO. v. COMMUNITY GENERAL HOSPITAL, ALMSHOUSE & SEMINARY OF LEARNING OF THE SISTERS OF CHARITY AT OTTAWA** (1901), Q. R. 20 S. C. 567.—**CAN.**

**1702 vi. — .]**—**GUTHRIE v. G. & S. W. RY. CO.** (1858), 30 Sc. Jur. 481.—**SCOT.**

**1702 vii. .]**—**HENDERSON v. MCGOWN** (1915), 2 S. L. T. 316.—**SCOT.**

**1702 viii. — .]**—**Unless forming part of award itself.]—**The ct. will refer to papers delivered by the arbitrators simultaneously with the award, & intended to be explanatory of it, as a part of the award itself.—**HALL v. FERGUSON** (1834), 4 O. S. 392.—**CAN.**

**1702 ix. — Subsequent agreement.]—**G. & S., the managers of certain steamboats running in opposition, submitted to arbn. to determine the terms & conditions on which the opposition should be settled & made to cease. The arbitrators awarded (*inter alia*) that S. should pay

G. £150. Afterwards G., & some of the owners of the steamer for which S. was agent, entered into an agreement respecting the two boats, but it was expressly declared that this agreement was without prejudice to any demand which G. might have upon S.:—**Held**: G.'s right to the £150 awarded was not affected by such agreement.—**GILDER-SLEEVE v. STEWART** (1857), 2 P. R. 114.

**1702 x. — How introduced.]—**In a question on the relevancy of objections to the award of a judicial referee:—**Held**: the party objecting was not entitled to produce the notes which had been issued by the referee prior to pronouncing his award, but the matter alleged to be contained in the notes might be verbally referred to.—**BRAKINRIG v. MENZIES** (1841), 4 Dunl. (Ct. of Sess.) 274.—**SCOT.**

**PART IV. SECT. 15, SUB-SECT. 2.—**

**A. (a).**

**1703 i. Equivalent to judgment.]—**Where a submission to arbn. has been made a rule of ct., the award has the effect of a judgment, & execution may issue as a matter of course without leave.—**Re NEW ZEALAND NATIVE LAND SETTLEMENT CO., LTD.** (1888), 6 N. Z. L. R. 395.—**N.Z.**

**1703 ii. — .]**—An award is equiva-

**1705. Equivalent to verdict—Validity of patent.]—**A patentee brought an action for damages for the infringement of his alleged patent, & at the trial an arbn. was agreed to, upon which the arbitrator by his award established the validity of the patent. The patent was again invaded by a process only colourably different from the mode in which it had been invaded in the case upon which the action was brought. Upon a bill filed for an injunction to restrain the infringement:—**Held**: the award of the arbitrator must be considered as equivalent to a verdict establishing the validity of the patent, against which there had been no motion for a new trial.—**LISTER v. EASTWOOD** (1855), 26 L. T. O. S. 4.

**1706. — Establishing legal right.]—**If pltf. applies for an injunction in respect of a violation of a common law right, & the existence of that right, or the fact of its violation, is denied, he must establish his right at law, but having done that he is, except in special circumstances, entitled to an injunction to prevent a recurrence of that violation. For such a purpose the award of an arbitrator is equivalent to a verdict.—**IMPERIAL GAS LIGHT & COKE CO. v. BROADBENT** (1859), 7 H. L. Cas. 600; 29 L. J. Ch. 377; 34 L. T. O. S. 1; 23 J. P. 675; 5 Jur. N. S. 1319; 11 E. R. 239, H. L.

**Annotations:—Mentd.** **Southampton & Itchin Floating Bridge Co. v. Southampton L. B. of Health** (1858), 4 Jur. N. S. 1298; **Ware v. Regent's Canal Co.** (1858), 3 De G. & J. 212; **Re Brogden & Llynvi v. Valley Ry. Co.** (1860), 9 C. B. N. S. 229; **New River Co. v. Johnson** (1860), 2 E. & E. 435; **Bagnall v. L. & N. W. Ry. Co.** (1861), 7 H. & N. 423; **R. v. Cheshire Clerk of the Peace** (1864), 4 New Rep. 167; **Re Stockport, Timperley & Altringham Ry. Co.** (1864), 33 L. J. Q. B. 251; **Coe v. Wise** (1866), 7 B. & S. 831; **Brand v. Hammersmith & City Ry. Co.** (1867), L. R. 2 Q. B. 246; **Crump v. Lambert** (1867), 17 L. T. 133; **A.-G. v. Cambridge Consumers' Gas Co.** (1868), 4 Ch. App. 71, L.J.J.; **Dungey v. London Corpn.** (1869), 38 L. J. C. P. 298; **Ferrar v. City of London Sewers Comrs.** (1869), L. R. 4 Exch. 227; **Hammersmith & City Ry. Co. v. Brand** (1869), L. R. 4 H. L. 171, H. L.; **Clowes v. Staffordshire Potteries Waterworks Co.** (1872), 8 Ch. App. 129, n.; **Shelfer v. London Electric Lighting Co., Meux's Brewery Co. v. London Electric Lighting Co.**, [1895] 1 Ch. 287, C. A.; **Jordeson v. Sutton, Southcoates & Drypool Gas Co.**, [1898] 2 Ch. 614; **Cowper v. Laidler**, [1903] 2 Ch. 337; **Saunby v. London (Ontario) Water Comrs.**, [1906] A. C. 110, P. C.; **Price's Patent Candle Co. v. L. C. C.** (1908), 78 L. J. Ch. 1, C. A.; **A.-G. v. Birmingham, Tame, & Rea Drainage Board**, [1910] 1 Ch. 48, C. A.; **Wood v. Conway Corpn.**, [1914] 2 Ch. 47, C. A.

**1707. Right to interest.]—**In a case where the jury allowed a claim of interest on a sum awarded

lent to a judgment whether it was passed into decree or not.—**BHAURAO v. RADHABAI** (1909), 1 L. R. 33 Bom. 401.—**IND.**

**z. Judgment not extinguished by award.]—**To an action for trespass, deft. pleaded that the alleged trespasses were committed in executing a civil-bill decree. Replication, that deft. had obtained a civil-bill decree against pltf. for £23, & the subject-matter of the decree was, with other matters in dispute, referred to arbn., that the arbitrator awarded that pltf. should pay deft. the sum of £15, & that thereupon all claims & demands on both sides should be satisfied, & that deft., notwithstanding the award, renewed the original decree for the full sum, & caused it to be executed against pltf.:—**Held**: the award did not extinguish the judgment.—**BARRY v. GROGAN** (1868) 2 I. R. C. L. 390.—**IR.**

**1707 i. Right to interest.]—**Where the amount fixed by an award became *eo instanti* the purchase-price of the land, i.e., the principal sum:—**Held**: interest from the taking of possession attached thereto in favour of pltf. as of right.—**GAUTHIER v. CANADIAN NORTHERN RY. CO.** (1913), 25 W. L. R. 955.—**CAN.**

**a. Validity unaffected by failure to**

& found a verdict for pltf. :—*Qu.* : whether interest on a sum awarded was claimable as a matter of right.—*SWINFORD v. BURN* (1818), *Gow.* 5.

*Annotations* :—*Mentd.* *Hoggins v. Gordon* (1842), 3 Q. B. 466; *Crampton & Holt v. Ridley* (1887), 20 Q. B. D. 48.

**1708.** —[An arbitrator made his award on Sept. 1, 1841, directing payment on Jan. 25, 1842, of a certain sum "with interest":—*Held*: under that award, upon a rule under Judgments Act, 1838 (c. 110), s. 18, pltf. could recover no interest accruing subsequent to Jan. 25.—*DOE d. MOODY v. SQUIRE* (1842), 2 Dowl. N. S. 327; 7 Jur. 236.

*Annotation* :—*Mentd.* *Wilson v. Foster* (1843), 6 Man. & G.

*See, generally, Nos. 1171—1177, ante.*

**1709. Where decree on which award founded is reversed.**—[A decree having ascertained the right of pltf. to relief, accounts were directed to ascertain the amount due to him; afterwards pltf. referred all matters in difference to the decision of an arbitrator, who, without taking into consideration the question of law decided by the decree, made an award ascertaining the amount due from deft. to pltf. Afterwards, on an appeal against the decree, it was reversed & the bill was dismissed:—*Held*: the award was not binding.—*ORMOND v. KYN- NERSLEY, BUTLER v. KYNERSLEY* (1829), 7 L. J. O. S. Ch. 150.

*Annotation* :—*Mentd.* *Honywood v. Honwood* (1874), L. R. 18 Eq. 306.

**1710. Award of annuity—Additional sum till secured—Penalty or damages.**—[An arbitrator awarded an annuity of £1,200 to be paid by A. to B., & to be secured by the purchase of a govt. annuity, & in case it should not be secured within two months, a further sum of £100 to be paid monthly till it was secured as a penalty. A. paid the annuity & penalty for two years until his death. He died insolvent, & a creditors' suit was instituted for the administration of his estate:—*Held*: the annuitant could prove for the annuity & the penalty until the annuity should be secured.—*PARFITT v. CHAMBRE, Ex p. D'ALTEYRAC* (1872), L. R. 15 Eq. 36; 42 L. J. Ch. 6; 27 L. T. 750; 21 W. R. 50.

**1711. Award determining title.**—[A rule *nisi* for a *mandamus* to admit the heir as tenant to certain copyholds was discharged, the ct. deeming it to be an attempt to revive litigation which had previously been settled by arbn., the validity of the will under which he claimed having been established by an arbitrator, & it not being necessary for him to be admitted to maintain ejectment.—*R. v. CAIUS COLLEGE, CAMBRIDGE* (1845), 9 Jur. 411; 9 J. P. Jo. 67.

**1712. On suit for specific performance.**—[Effect of an agreement for a reference to arbn. of a dispute between a vendor & purchaser as to certain terms, or alleged terms, of the contract, & of an award thereupon, in a suit subsequently instituted for the specific performance of the contract.—*CLAY v. RUFFORD* (1849), 8 Hare, 281; 19 L. J. Ch. 295; 14 Jur. 803; 68 E. R. 367.

**1713. Does not create specialty debt.**—[In 1862 A. agreed to lease a mine to B. Disputes arose between the parties, & A. brought an action against B. under the agreement, & B. filed a bill against A. to have the agreement set aside. The parties then

referred all the matters in dispute between them to arbn., & the arbitrator awarded that the agreement for a lease was valid, that it should be cancelled, & that B. should pay to A. the sum of £5,513. B. died, & a suit was instituted to administer his estate, under which A. carried in a claim to rank as a specialty creditor in respect of the sum awarded:—*Held*: the sum was awarded by way of damages & not for rent, & was not entitled to rank as a specialty debt.—*TALBOT v. SHREWSBURY (EARL)* (1873), L. R. 16 Eq. 26; 42 L. J. Ch. 877; 21 W. R. 473.

*Annotation* :—*Consd.* *Re Hastings, Shirreff v. Hastings* (1877), 6 Ch. D. 610. In *Talbot v. Shrewsbury (Earl)* I fully admitted that rent was a specialty debt, & I founded my judgment upon the fact that the debt in that case could not be said to be for rent (*MALINS, V.-C.*).

**1714. — Unless award under seal.**—[An award under the hands & seals of arbitrators is not within Limitation Act, 1623 (c. 16).—*AMBROSE v. BROOKS* (1738), West, temp. Hard. 567; 25 E. R. 1088.

**1715. S. P. HODGSON (HOBSDEN, HOSDELL) v. HARRIS (HARRIDGE, HARWICH)** (1669), 1 Lev. 273; 2 Keb. 462, 497, 533, 536; 1 Sid. 415; 2 Wms. Saund. 64; 83 E. R. 403.

*Annotations* :—*Folld.* *Ambrose v. Brooks* (1738), West, temp. Hard. 567. *Refd.* *Paget v. Foley* (1836), 3 Scott, 120; *Curlewes v. Mornington* (1858), 32 L. T. O. S. 29, Ex. Ch. *Mentd.* *Gwynne v. Burnell* (1840), 1 Scott, N. R. 711; *Tobacco Pipe Makers v. Loder* (1851), 16 Q. B. 765; *Lee v. Wilmot* (1866), L. R. 1 Exch. 364.

**1716. Statutory reference.**—[A railway co. were entitled by a sect. in their special Act, notwithstanding Lands Clauses Consolidation (Scotland) Act, 1845 (c. 19), s. 90, to take a portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The co. gave notice to treat for 232 square yards, a portion of the scheduled property which formed an access used jointly by resps. & another firm. Resps. required the railway co. to take the whole of their property. A statutory submission to arbn. containing the question whether or not the portion of land containing the 232 square yards could be severed from the remainder of the property of resps. without material detriment, reserving only the question whether Lands Clauses Consolidation (Scotland) Act, 1845, s. 90, applied, was entered into. Before the arbitrator the railway co. offered to allow access to the remainder of resps.' property under a bridge over the portion taken. The arbitrator found that the portion containing 232 square yards could not be severed without material detriment to the remainder of resps.' property & awarded compensation upon the assumption that the co. were bound to take the whole premises. In an action to recover the amount awarded:—*Held*: the arbitrator's award, until set aside by a proper process, was binding on the ct. & could not be reviewed.—*CALEDONIAN RY. CO. v. TURCAN*. [1898] A. C. 256; 67 L. J. P. C. 69, H. L.

*Annotation* :—*Mentd.* *Allhusen v. Ealing & South Harrow Ry. Co.* (1898), 78 L. T. 285.

*See, generally, COMPULSORY PURCHASE OF LAND & COMPENSATION.*

*enforce.*—[An award of arbn. may be valid without being enforced by the cts., as, for instance, where possession under the award is shown.—*MOHESH CHUNDER MOITER v. BULORAM MOITER* (1866), 6 W. R. 94.—*IND.*

**b.** —[A valid award is operative, even though neither party has sought to enforce it.—*BHAJAHARI BANI-*

*KYA v. BEHARY LAL BASAK* (1906), L. L. R. 33 Calc. 881.—*IND.*

**c. Creates debt within small debt procedure.**—[An award creates a debt within the small debt procedure.—*ERBACH v. BINDER* (1910), 14 W. L. R. 720.—*CAN.*

**1716 i. Statutory reference.**—[Where

the original proceedings were by arbn. under a stat. providing that the ct., on appeal from the award, shall pronounce such judgment as the arbitrators should have given, the stat. is sufficient notice to applt. of what the ct. may do, & a cross-appeal is not necessary.—*TORONTO JUNCTION TOWN v. CHRISTIE* (1895), 25 S. C. R. 551.—*CAN.*



**Sect. 15. Construction & effect of award: Sub-**

**1717. Cause referred — Court cannot disregard award.]**—Where a cause has been referred to arbn. the ct. cannot interfere to enter a nonsuit against the arbitrator's direction, but the party objecting to the award must move to set it aside.—**PETERS v. ANDERSON** (1814), 5 Taunt. 596; 1 Marsh. 238; 128 E. R. 823.

**Annotations:—Mentd.** Devaynes v. Noble (1816), 1 Mer. 529; Mills v. Fowkes (1839), 5 Bing. N. C. 455; Seymour v. Pickett, [1905] 1 K. B. 715, C. A.

**1718. Conclusive & binding on parties.]**—Errors in an account had been allowed by the master to a great amount, but upon a reference to arbn. it was determined by the arbitrators that the account was perfectly free from error & overcharge in every particular. Upon proceedings to set aside the award:—**Held**: however strange the result of the reference might seem, there was no imputation of anything wrong to the arbitrators, & the parties having chosen private judges had placed the matter beyond the reach of any principle of law.—**PRICE v. WILLIAMS** (1791), 1 Ves. 365; 30 E. R. 388.

**Annotations:—Reid.** Street v. Rigby (1802), 6 Ves. 815. **Mentd.** South Wales Ry. Co. v. Wythes (1854), 5 De G. M. & G. 880.

**1719. —.]**—Where a party has agreed to refer all matters in difference to arbn., & the arbitrator has decided on them, such determination shall be conclusive & binding on the party, & he will not be allowed to go into the original case at the trial, unless there was some misconduct on the arbn.—**BAILEY v. LECHMERE** (1795), 1 Esp. 377.

**1720. —.]**—An award will not be set aside upon any ground, which in truth is a question

**1718 i. Conclusive & binding on parties.]**—The ct. will not inquire into an award, even although it be suggested that the arbitrators have opened a final judgment of a competent ct. under a submission in the common form, if it does not clearly appear that they have reversed the judgment or gone into its merits.—**MCLEVEY v. VANDECAR** (1843), 6 O. S. 481.—**CAN.**

**1718 ii. —.]**—Where no case had been made out for stopping the operation of a decree-arbitral:—**Held**: it was valid & binding on the parties until set aside by reduction.—**ANDERSON v. ABERDEEN RY. CO.** (1850), 22 Sc. Jur. 335.—**SCOT.**

**1718 iii. —.]**—An award by arbitrators, on whose part no misconduct or mistake appears, concludes the parties who have submitted to the reference.—**BHAGOTI v. CHANDAN** (1885), 1 L. R. 11 Calc. 386; L. R. 12 I. A. 67.—**IND.**

**d. — Unless award waived—What amounts to waiver.]**—Pltf. was sued by creditors, who issued garnishee orders attaching certain insurance moneys which were also claimed by other parties. Defts. (the insurance co.) applied under Garnishment Act, R. S. M. c. 64, s. 13, to pay into ct. the amount which had been awarded to pltf. by an arbn. fixing the loss. Pltf. appeared & disputed the award had been made & claimed the full amount of the policies. Issues were then directed to be tried between pltf. & defts., the question for decision being whether there was any further debt due or owing from defts. to pltf. over & above the amount of the award:—**Held**: by taking the issues the co. did not waive the award.—**ROGERS v. COMMERCIAL UNION ASSURANCE CO., ROGERS v. LONDON & LANCASHIRE INSURANCE CO., ROGERS v. LONDON, LIVERPOOL & GLOBE INSURANCE CO., ROGERS v. PHOENIX INSURANCE CO.** (1895), 10 Man. L. R. 667.—**CAN.**

**PART IV. SECT. 15, SUB-SECT. 2.—A. (b).**

**1723 i. Matters within submission.]**—Upon a bill stating an award in which a

upon the merits between the parties.—**WINTER v. LETHBRIDGE** (1824), M'Cle. 253; 13 Price, 533; 148 E. R. 107.

**Annotation:—Reid.** Stonehewer v. Farrar (1845), 6 Q. B. 730.

**1721. Reference of accounts to arbitrator instead of master.]**—Accounts were referred to the master, but afterwards an order of reference was made to arbitrators to take an account of all dealings & transactions in like manner, as if same were referred to the master, & that the parties should be concluded & bound by the award, & should observe it, & further directions were reserved:—**Held**: such reference was not in nature of a reference to the master, & the parties were bound by a general award of a balance due without particulars stated, the decision being final because upon matter of fact, & no corruption or misconduct imputed.—**DICK v. MILLIGAN** (1792), 4 Bro. C. C. 117; 2 Ves. 23; 29 E. R. 808; subsequent proceedings (1794), 4 Bro. C. C. 536.

**Annotations:—Consd.** Ford v. Gartside (1792), 2 Cox, Eq. Cas. 368; Crawshay v. Collins (1818), 3 Swan. 90. **Reid.** Mackintosh v. G. W. Ry. Co. (1865), 4 Giff. 683.

**1722. — Reference to master.]**—Where a party consents to a judge's order for a reference to the master, & undertakes to pay the sum found due, he cannot afterwards dispute the amount for which the master has given his *allocatur*.—**WATKINS v. MAHON** (1836), 1 M. & W. 722; 5 Dowl. 178; 2 Gale, 129; Tyr. & Gr. 1023; 5 L. J. Ex. 247; 150 E. R. 624.

*As to what Matters.*

**1723. Matters within submission—Damages.]**—Covenantor & covenantee submitted the amount

dealt with in the award was raised **Held**: such question was *res* between the parties.—**WAZEER MAHTON v. CHUNI SINGH** (1881), 1 L. R. 7 Calc. 727; 9 C. L. R. 377.—**IND.**

**1723 vi. —.]**—An action was brought on a fire policy. After action the insurance co., under one of the conditions of the policy, demanded an arbn., as to the value of the premises destroyed, the result of which was an award finding the value to have been \$2,500, & the loss payable to pltf. \$1,700. The jury estimated his loss at \$3,500:—**Held**: pltf. was entitled to judgment for the amount of the award, the value of the building being one of the matters in difference between the parties covered by the submission, & the award being, therefore, conclusive.—**SMITH v. CITY OF LONDON INSURANCE CO.** (1886), 14 A. R. 328; 11 O. R. 38.—**CAN.**

**1723 vii. —.]**—Where, after a fire, the parties agree to an appraisalment of the loss, the award is final & conclusive as to extent of the loss sustained by the insured.—**HERON v. HARTFORD INSURANCE CO.** (1888), 4 M. L. R. 1888.—**CAN.**

**1723 viii. — Insurable interest of party.]**—In an action on a policy defts. contended that pltf. had no insurable interest, & the dispute was submitted to arbitrators:—**Held**: the ct. could not go behind the award to ascertain whether pltf. had an insurable interest.—**TROOP v. ANCHOR MARINE INSURANCE CO.** (1882), 3 R. & G. 234.—**CAN.**

**1723 ix. — Right of way.]**—Where the lands of a joint Hindu family were partitioned according to an award, in a subsequent suit:—**Held**: the ct. could not go behind the award & allow one member of the family to claim a right of way through lands allotted by the award to another.—**GOPAL CHUNDER ROY v. BROJENDRO COOMAR ROY**, 5 C. L. R. 338.—**IND.**

**1723 x. — Traffic sharing dispute.]**—**HIGHLAND RY. CO. v. GREAT NORTH**

certain sum was found due, & praying that accounts might be taken on foot of the award, the cognusor cannot by his answer impeach the award, & raise questions which had been discussed before & decided by the arbitrators.—**HILL v. BAIL** (1828), 2 Bll. (N. S.) 1.—**IR.**

**1723 ii. —.]**—A landlord & his tenant entered into a submission as to various matters in dispute between them, & in particular, as to the use of certain roads; the landlord obtained an *interim* interdict against the tenant using the roads till the issue of the submission, under a reservation of any claim for damages in consequence; & the arbiter finally found the tenant entitled to the use of the roads, & repelled all other claims between the parties "in the submission":—**Held**: this included the claim for damages reserved in the interdict granting the interdict, & an action for these damages should be dismissed accordingly.—**GRAY v. BROWN** (1833), 11 Sh. (Ct. of Sess.) 353.—**SCOT.**

**1723 iii. —.]**—**Held**: terms of reference by mutual memorial of parties & of opinion expressed upon it by the referee supported a plea of *res judicata*, in respect of matters made the subject of a subsequent action.—**FRASER v. LORD LOVAT** (1850), 7 Bell, Sc. App. 171.—**SCOT.**

**1723 iv. —.]**—D. & B. issued a *fi. fa.* against M., under which a levy on personal property was made; the parties afterwards referred all matters in dispute to arbn. An award was made in favour of M., upon which D. & B. withdrew the execution & directed the sheriff to hand over to M. the property levied on:—**Held**: D. & B. were not liable for any articles which had been lost by the sheriff. If any such claims could otherwise have been set up, they were, at all events, precluded by the award.—**MILLER v. DANIEL** (1873), 2 N. B. R. (Pug.) 113.—**CAN.**

**1723 v. —.]**—Where a case was referred to arbn., & the award was subsequently filed, & subsequently, in another suit between the same parties, a question



of damages accruing from a breach of covenant to an arbitrator. In action on the covenant:—*Held*: the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached.—*WHITEHEAD v. TATTERSALL* (1834), 1 Ad. & El. 491; 110 E. R. 1295.

*Annotations*:—*Consd.* *Comings v. Heard* (1869), L. R. 4 Q. B. 669. *Refd.* *Bates v. Townley* (1848), 12 Jur. 606.

**1724.** — *Right to fees of office.*—Where pltf. & deft., both claiming to act as clerks to the justices of a division, agreed to leave the dispute to the determination of third parties, who directed that deft. should act in the office & divide his fees with pltf.:—*Held*: an action for money had & received might be maintained to recover the moiety of the fees received, & deft. could not allege that he was legally entitled to all the fees.—*ROLAND v. HALL* (1835), 1 Hodg. 111.

**1725.** — *But not brought before arbitrator.*—In an action of covenant deft. pleaded (*inter alia*) that an action for some other matter & all matters in difference were referred, that the arbitrator ordered several sums to be paid, & that the parties should give general releases, & that deft. did pay the money & the releases were given. Pltf. replied that these matters were not before the arbitrator. Judgment was given for pltf.—*COLIGHTLY v. JEL-LICOE* (1769), 4 Term Rep. 147, n.; 100 E. R. 942.

*Annotations*:—*Refd.* *Ravee v. Farmer* (1791), 4 Term Rep. 146; *Seddon v. Tutop* (1796), 6 Term Rep. 607; *Smith v. Johnson* (1812), 15 East, 213.

**1726.** — — — — — *Disputes existing between the master & owner of a ship touching the ship's accounts on a certain voyage, they referred all actions & causes of action to arbitrators, who awarded a balance to be paid by the owner to the master. Upon a rule for an attachment for non-payment of the sum awarded:—Held*: it was not competent to the owner to claim a deduction of a certain sum, the price & proceeds of certain goods shipped on their joint account, the whole of which price had been paid by the owner in the first instance, on the ground that that particular adventure formed no part of the disputes between them & had not been submitted to nor taken into the consideration of the arbitrators, because it was plainly within the terms & scope of the reference, the direct object of which was to make a final settlement of all matters of account between the parties, & it was the owner's own fault if he kept back that item of the account.—*SMITH v. JOHNSON* (1812), 15 East, 213; 104 E. R. 824.

*Annotations*:—*Folld.* *Dunn v. Murray* (1829), 9 B. & C. 780. *Refd.* *Gueret v. Audouy* (1893), 62 L. J. Q. B. 633, C. A.

**1727.** — — — — — *Where all matters in difference in a cause are referred, & the arbitrator awards a sum to pltf. in satisfaction of his damages in the cause:—Semble*: pltf. cannot maintain another action for a demand not made before the arbitrator, but within scope of the reference to him.

The proceedings to bar pltf. in such a case may be given in evidence under the general issue in the second action.—*DUNN v. MURRAY* (1829), 9 B. & C. 780; 4 Man. & Ry. K. B. 571; 7 L. J. O. S. K. B. 320; 109 E. R. 290.

*Annotations*:—*Refd.* *Re Gillon & Mersey & Clyde Navigation Co.* (1832), 3 B. & Ad. 493. *Mentd.* *Hadley v. Green* (1832), 2 Cr. & J. 374; *Stewart v. Todd* (1846), 9 Q. B. 767, Ex. Ch.; *Re Baker* (1857), 2 H. & N. 219; *Routledge v.*

*Hislop* (1860), 2 E. & E. 549 *Gueret v. Audouy* (1893), 62 L. J. Q. B. 633, C. A.

**1728.** — — — — — *action of ejectment for land taken possession of by defts., a railway co., for the purposes of the railway, under incomplete proceedings, pursuant to Lands Clauses Consolidation Act, 1845 (c. 18), was referred to arbn., the order of reference providing that the cause & all matters in difference between the parties should be referred, & that the arbitrator should decide what sum should be paid by defts. to pltf. as the price of, or compensation for, the lands of pltf. which defts. had taken for the purpose of their railway, pltf. agreeing to execute such a conveyance as the arbitrator might direct, & that the money paid into the Bank of England should be disposed of as the arbitrator should direct. The arbitrator directed that the verdict entered for pltf. should stand & awarded a sum to be paid to pltf. as the price of, & compensation for, the land of pltf. which the co. had at the time of the making of the order of reference taken for the purpose of their railway, & directed the amount to be paid to pltf. out of the money in the Bank of England & the residue to be paid to defts., & he further awarded that there were no other matters in difference between the parties, & that the above payments were to be made & taken in full satisfaction & discharge of all matters in difference between them. It appeared that the money in the Bank included the purchase-money of other land of pltf., of which defts. had lawful possession, & pltf., treating the sum awarded as applicable to that, issued a writ of *habere facias possessionem* & was put in possession, & brought an action for *mesne profits*:—*Held*: the action was not maintainable, the *mesne profits* being included in the reference & award. *Semble*: pltf. had no right to sue out the writ of *habere facias possessionem*.—*SMALLEY v. BLACKBURN RY. CO.* (1857), 2 H. & N. 158; 27 L. J. Ex. 65; 5 W. R. 521; 157 E. R. 67.*

**1729.** — — — — — *Omitted by arbitrator.*—On a general reference, by three partners, of all matters in difference to arbn. the arbitrators found the partnership capital, on the day of the dissolution, to be, in merchandise & good debts, of a given amount, including a debt due from A., one of the partners, & that there were some dubious debts. They then ascertained the amount of the debts due from the partnership, & found the gross value of the stock which, including the debt due from A., they awarded to be divisible between the other partners, B. & C. They next found the dubious debts to be divisible as received between the three partners, & they awarded that A. should give security for the payment of his debt by instalments, & directed B. to receive the outstanding debts & effects & to pay all debts owing by the partnership, of which accounts were to be stated periodically, & of the balance of receipts, special credit was to be given for A.'s share against his debt, & the remainder was to be divided between B. & C., & any balance of payments was to be borne in the same proportions. The award was acted upon by all parties, but B. subsequently received some debts which were omitted in the accounts laid before the arbitrators & on which their award proceeded, & he also received good debts to a larger amount than had been estimated by the arbitrators. On a bill by A. against his co-partners:—*Held*: he was entitled, notwithstanding the reference was of all

OF SCOTLAND RY. CO. (1896), 33 Sc. L. R. 812.—*SCOT.*

**1725 i.** — — — — — *But not brought before arbitrator.*—In an action for implement of a decree-arbitral:—*Held*: defender's contention that there was no actionable wrong, not having been raised in the

reference, was irrelevant, & decree must be granted as craved.—*UNITED WIRE WORKS, LTD. v. CALEDONIAN RY. CO.* (1906), 13 S. L. T. 718.—*SCOT.*

**1729 i.** — — — — — *Omitted by arbitrator.*—The proposition that an award on reference of all matters in difference is no bar

to any cause of action which pltf. had against deft. at the time of the reference, if it appear that the subject-matter of the action was not inquired into, qualified; it must be pure accidental omission by the party, or rejection by the arbitrator.—*BROPHY v. HOLMES* (1828), 2 Moll. 1.—*IR.*

## ARBITRATION.

### *Sect. 15.—Construction & effect of award: Subsect. 2, A. (b) &*

matters in difference, to an account of the good debts received beyond the amount estimated by the arbitrators & to an account of the receipts in respect of dubious debts, & any over receipt, in respect of good debts, ought to follow the directions of the award with respect to the dubious debts.—*SPENCER v. SPENCER* (1828), 2 Y. & J. 249; 148 E. R. 911.

**1730. — Not in dispute at date of reference.]—**An award made upon a reference of all matters in difference between the parties does not preclude pltf. from suing upon a cause of action subsisting against deft. at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators nor included in the matters referred.—*RAVEE v. FARMER* (1791), 4 Term Rep. 146; 100 E. R. 942.

*Annotations:—***Consd.** *Thorpe v. Cooper* (1828), 5 Bing. 116, Ex. Ch. **Distd.** *Eastmure v. Laws* (1839), 5 Bing. N. C. 444. **Refd.** *Sedon v. Tutop* (1796), 6 Term Rep. 607. **Mentd.** *Riddell v. Sutton* (1828), 2 Moo. & P. 345.

**1731. — — —.]—**Where comrs. under an Inclosure Act of 1769 were to make allotments to persons possessing interests in the contiguous townships A., B. & C., & made allotments to a rector in B. & C., in respect of tithes & glebe to which he was entitled in B. & C., & in A., in respect of glebe to which he was entitled in A., but omitted to make any specific allotment in A., in respect of tithes to which he was entitled in A., the Act containing a saving clause for all persons other than those to whom allotments or compensations should be made in respect of their several interests:—**Held:** the rector was not barred from suing for his tithes in A. in 1825, although the award was to be final unless appealed against in six months.—*THORPE v. COOPER* (1828), 5 Bing. 116; 2 Y. & J. 445; 2 Moo. & P. 245; 130 E. R. 1004, Ex. Ch.

*Annotations:—***Distd.** *Bunbury v. Fuller* (1853), 9 Exch. 111. **Mentd.** *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141, C. A.

**1732. Matters not submitted—Fraud.]—**A submission to arbn. of all causes of action, etc., & an award & mutual releases resulting from it, are not binding as to a particular matter not submitted to the consideration of the arbitrator, & the fraudulent circumstances relating to which were not then disclosed.

A steward & agent, being employed to sell an estate, purchased part of it himself at an under-value, & secretly, in the name of another person. All actions & matters of difference between the parties were afterwards submitted to arbn.; an award was made & mutual releases executed. The ct., forty-seven years after the purchase & twenty-eight years after the award, set aside the purchase, because (*inter alia*) the principal was not bound by the award & release, as the deception had been continued, & the purchase & the fraudulent circumstances relating to it had not been brought under the consideration of the arbitrator.—*TREVELYAN v. CHARTER* (1835), 4 L. J. Ch. 209; *affd. sub nom.*

*CHARTER v. TREVELYAN* (1844), 11 Cl. & Fin. 714, H. L.

*Annotations:—***Mentd.** *Manby v. Bewicke* (1857), 3 K. & J. 342; *Clanricarde v. Henning* (1861), 30 Beav. 175; *Vane v. Vane* (1873), 28 L. T. 320, C. A.

**1733. Breaches of agreement subsequent to those before arbitrator.]—**Pltf. & deft. entered into an agreement as to the supply of colliery screenings by pltf. to deft. Disputes having arisen, they were referred to arbn., the submission providing that the arbitrator should have power to determine what was the true construction of the agreement & also what course should in the future be adopted by the parties so as to comply with its terms. By his award the arbitrator found that deft. was bound to keep his works going to receive the colliery screenings, & further awarded damages to each party in respect of certain breaches of the agreement, & found that the disputes referred had arisen through the wrongful refusal by deft. to keep his works regularly going during the continuance of the agreement. Subsequently pltf. brought an action against deft. for refusing to keep his works going & refusing to receive the screenings:—**Held:** the arbn. & award were no bar to the maintenance of the action, as there had been no renunciation by deft. of the agreement, treated as such by pltf., entitling the arbitrator to assess damages upon the footing that the agreement had been rescinded.—*GUERET v. AUDOUY* (1893), 62 L. J. Q. B. 633, C. A.

**1734. — — —.]—**In June, 1890, pltf. ordered from deft. two leather belts "warranted for ten years," which were paid for. Pltf. made complaints about the belts, & in Oct., 1892, brought an action claiming damages up to "Sept. 30 in consequence of deft.'s breach of contract in neglecting to keep two driving belts in repair." The case was referred by consent to a civil engineer, the reference including "all matters in difference," & he made an award in favour of pltf. for £18 10s. & costs. In May, 1893, pltf. brought another action claiming damages from Oct. 1 to Apr. 1, 1893:—**Held:** as the award covered all matters in difference between the parties, the second action failed.—*SPEAK v. TAYLOR* (1894), 10 T. L. R. 224.

**1735. Damage accruing subsequent to award.]—**The owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do) & continued the excavation wrongfully into the neighbouring mine, leaving an aperture in the coal of that mine, through which water passed into it & did damage:—**Held:** the owner of the neighbouring mine could not recover at all for damage occasioned by the flow of water in consequence of the aperture remaining unclosed, where an action on the case had already been brought for making the aperture & letting in the water, which action was referred to arbn., & pltf., being made party to the reference in respect of any injury to him by any of the matters alleged in the declaration in such action, had had damages awarded & paid to him for such injury, although the damage last complained of was subsequent to the award &

**1730 i. — Not in dispute at date of reference.]—**Where pltf. & deft. refer all causes of action, & after an award given, pltf. sues deft. for a cause of action not brought before the arbitrators, on the ground that he then had no knowledge of it, an issue tendered as to such knowledge is material.—*LUSTY v. VAN VOLKENBURGH* (1843), 1 U. C. R. 214.—**CAN.**

**1735 i. Damage accruing subsequent to award.]—**Arbitrators, to whom disputes arising from the overflowing of three acres of pltf.'s land by water thrown

back by defts.' mill were referred, awarded damages to pltf. for the injury, & that defts. should have a full fall of nine feet for their mill-dam, provided that the water on pltf.'s land was not raised thereby; defts. raised their dam to nine feet, & overflowed five acres more of pltf.'s land:—**Held:** the award did not prevent recovery of compensation for such further injury.—*CASLER v. RANSON* (1837), 5 O. S. 513.—**CAN.**

**1735 ii. —** A farm tenant entered into two submissions with a railway co. to determine his claims against the co. &

decrees-arbitral were issued by which various sums of compensation were awarded to him. More than three years afterwards, the tenant gave notice of a further claim on account of permanent damage, which he averred had not been included in the submissions, & could not have been foreseen at the time they were entered into:—**Held:** the submissions & the decrees-arbitral embraced all claims which the tenant could state as permanent damage, & his claim was not competent.—*NORTH BRITISH Ry. Co. v. HAY* (1852) 1 Stuart, 776.—**SCOT.**



payment.—*CLEGG v. DEARDEN* (1848), 12 Q. B. 576; 17 L. J. Q. B. 233; 11 L. T. O. S. 309; 12 Jur. 848; 116 E. R. 986.

*Annotations*:—*Mentd. Smith v. Kenrick* (1849), 18 L. J. C. P. 172; *Nicklin v. Williams* (1854), 10 Exch. 259.

**1736. Award may conclude questions of title.]**—Where the lessor of pltf. & deft. in ejectment had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, the award precludes deft. from disputing the lessor's title in an action of ejectment.—*DOE d. MORRIS v. ROSSER* (1802), 3 East, 15; 102 E. R. 501.

*Annotation*: *Consd. Thorpe v. Eyre* (1834), 1 Ad. & El. 926.

(c) *As to what Parties.*

**1737. Judgment creditor—Award against judgment debtor.]**—A judgment creditor must be taken to be bound by an award made against his judgment debtor in a previous suit to which he was a party, in the absence of evidence of fraud or collusion. On this point there is no difference between English & French law.—*MARTIN v. BOULANGER* (1883), 8 App. Cas. 296; 52 L. J. P. C. 31; 49 L. T. 62, P. C. Generally as to parties bound, see Nos. 93—130, *ante*.

**1738. Trustee in liquidation—Surety.]**—In Jan., 1877, K. & M., trading as partners as M. & Co., entered into an agreement for three years with C. Brothers to purchase wines to an average amount annually. The agreement provided that any dispute should be determined by arbn. In Dec., 1877, K. & M. dissolved partnership, W. being substituted as partner with M. K., in July, 1878, by a letter addressed to C. Brothers, requested them to treat the agreement of Jan. 1877, as made between W. & M. & C. Brothers, & in consideration thereof guaranteed that the wines supplied should be paid for, & that the agreement should be otherwise duly performed in all respects on the part of W. & M. In July, 1879, K. petitioned for liquidation. In Aug., 1879, C. Brothers alleged that the contract of Jan., 1877, had been broken by M. & Co., & demanded an arbn., in which a sum of £1,200 was awarded as damages for the breach. The trustee in the liquidation had notice of the proceedings, but refused to attend. C. Brothers signed judgment for the amount, & claimed to prove for it in K.'s liquidation:—*Held*: (1) the

trustee was not bound by the arbn. or award, & the proof must be disallowed; (2) judgment on an award against a principal debtor was not binding on a surety.—*Re KITCHIN, Ex p. YOUNG* (1881), 17 Ch. D. 668; 50 L. J. Ch. 824; 45 L. T. 90, C. A.

**1739. Parties neglecting to attend before arbitrator.]**—A local board of health served a notice to repair a road on testator, &, as the notice was not complied with, repaired the road themselves. After his death demand was made by the board on the tenant for life under his will & the exors., as statutory owners, for payment of the apportioned part of the expenses of the repairs. The statutory owners disputed the assessment & denied their liability. The matter went to arbn., which the owners neglected to attend, & the award was subsequently made a rule of ct. & the costs taxed. Demands were made on the tenant for life & the exors. for payment of the amount found due under the award & the taxed costs. On a motion by the exors. to restrain the board from taking any steps to enforce the award:—*Held*: the exors. having neglected to attend the arbn. or take any other means of disputing their liability, the award was final, & they were precluded from going into the merits or legality of the claim by the board.—*WEST v. DOWNMAN* (1879), 39 L. T. 666; 27 W. R. 355; *reversd.* on another point, 27 W. R. 697, C. A.

**Right of arbitrator to proceed ex parte.]**—See Nos. 890—897, *ante*.

## B. Particular Awards.

### (a) Award of General Releases.

**1740. To what it extends—Matters depending at time of submission.]**—An award of general releases extends only to matters depending at the time of the submission.—*REES v. PHELPS* (1689), 3 Mod. Rep. 264; 87 E. R. 174.

*Annotation*:—*Reid. Marks v. Marriot* (1695), 1 Ld. Raym. 114.

**1741. ———.]**—A release of all demands generally upon an award refers to the time of the submission only.—*NICHOLAS v. CHAPMAN* (1692), 3 Lev. 344; 83 E. R. 722.

**1742. ——— Submission of particular disputes only.]**—General releases awarded upon the submission of a particular dispute, though executed, release

*SECORD v. COSTELLO* (1870), 17 Gr. 328.

## PART IV. SECT. 15, SUB-SECT. 2.—A (c).

**e. Assignee.]**—Debt on submission bond. Pltf. insured his property with defts.; upon a fire a dispute arose, which was referred. Before the award, pltf. assigned the bond, the policy, & the money due thereon, to H.:—*Held*: (1) defts.' assent to this was not necessary; (2) the assignment of the bond did not, by vesting the interest in the assignee, affect the legality of the award made under it.—*HUGHES v. MUTUAL INSURANCE CO. OF NEWCASTLE* (1852), 8 U. C. R. 315.—CAN.

**f. Strangers.]**—To make an award binding upon a total stranger to a submission there should be a clear & unambiguous agreement to that effect.—*RAM DUTT RAMKISSEN DASS v. SASSOON & Co.* (1916), 1 L. R. 43 Calc. 77.—IND.

**g. Executrix.]**—Pltfs. brought ejectment, & all matters in difference were referred. The powers of the arbitrators were to extend to all accounts & differences between the parish & the late rector & deft. as his extrix. & also between deft. individually & the parish. The arbitrators awarded that deft. as extrix. was indebted to pltfs. in the sum of \$1,400, that deft. should pay that sum to pltfs. & that the judgment should be entered for pltfs. for that amount:—*Held*: the award being against deft. in her representative capacity could not be considered against her personally, &

also was an adjudication that she had assets specified.—*ST. GEORGE'S PARISH v. KING* (1878), 2 S. C. R. 143.—CAN.

**h. Parties consenting to & acting on award.]**—The award of arbitrators in pursuance of a parol submission setting & fixing a boundary line is conclusive upon the parties consenting to & acting upon the award.—*MACKENZIE v. BRODIE* (1868), 1 N. S. D. 243.—CAN.

**i. Parties not consenting to appointment of arbitrators.]**—Where parties do not give their consent to the appointment of arbitrators & the judgment proceeds on the award, the decree is not binding on those parties.—*RASH BEHAREE ROY v. DOORGABUR ROY* (1870), 14 W. R. 211.—IND.

**k. Parties not represented—Infants.]**—An administratrix was sued by her brother for a debt, & judgment was recovered; subsequently a reference was made in respect of other moneys come to her hands for the benefit of her children, & by her deposited with her brother, & this judgment & the amount due thereon were, at the arbn., mixed up with questions as to these trust moneys, & the award was in respect of all. The parties all acted as if these trust moneys, & the debts of the estate, were to be considered & dealt with together, but the infants were not represented before the arbitrators:—*Held*: the infants were not bound by the award.—

**l. ——— & creditors.]**—An award resulted from a submission to which an exor. & extrix. alone were parties & recited differences between those parties only. It appeared that other parties were interested in the estate, viz., the children & the creditors of testator:—*Held*: award not binding on latter.—*Re ESTATE OF SMITHERS* (1882), 3 R. & G. 306; 2 C. L. T. 606.—CAN.

**n. Successors of original parties.]**—Where there was no reason to suppose that the arbitrators had any idea of fixing an allowance for a longer period than the lifetime of the parties, & all those parties were dead:—*Held*: no effect could any longer be given to the award.—*MADHAVRAV DESHPANDE v. RAMRAY DESHPANDE* (1882), 1 L. R. 7 Bom. 151.—IND.

**o. Where all parties to suit do not join in submission.]**—Pltf. & some of defts. to a suit applied to refer the suit, & award was passed & a decree made in accordance with such award. Pltf. objected on the ground that all the parties to the suit had not joined in referring the suit to arbn.; the objection was dismissed, & judgment given in accordance with the award.—*JOY PROKASH IALL v. SHEO GOLAM SINGH* (1884), 1 L. R. 11 Calc. 37.—IND.



*Sect. —Construction & effect of award: Subsect. 2, B. (a) & (b) & C.]*

only that dispute.—*MARKS v. MARRIOT* (1696), 1 Ld. Raym. 114; 91 E. R. 972.

**1743. —Matters not in dispute before arbitrator.]**—Where the words of a release, executed according to the directions of an award, might extend to a matter the parties did not intend the arbitrators to adjudicate upon, & on which they did not adjudicate, the generality of the words will be restrained by the intention of the parties.—*UPTON v. UPTON* (1832), 1 Dowl. 400.

**1744. —All matters referred—All accounts closed.]**—Where all matters in difference are referred to an arbitrator, an award directing the execution of general releases closes all accounts between the parties up to the time of the submission.—*TRIMINGHAM v. TRIMINGHAM* (1835), 4 Nev. & M. K. B. 786.

**1745. When valid—Only as to matters referred.]**—An award of general releases on a special reference is good for the matters referred & void as to the rest.—*PICKERING v. WATSON* (1776), 2 Wm. Bl. 1117; 96 E. R. 660.

*See, also, Nos. 1258, 1259, 1292 1331, 1332, 1335, 1397—1399, ante.*

*(b) Other Cases.*

**1746. Award subject to Act of Parliament being obtained.]**—Where arbitrators direct that an application shall be made to Parliament to confirm their award, such award is not binding unless an Act of Parliament be applied for & obtained pursuant to such direction.—*GIBSON v. SMITH* (1741), Barn. Ch. 491; 2 Eq. Cas. Abr. 93; 27 E. R. 733.

*C. As a Defence.*

**1747. In general.]**—A plea of an award to a bill for the same matter allowed, where it did not appear there was any discovery of new evidence subsequent to the award, or any fraudulent concealment of evidence by deft. at the time of the award.—*HERBERT v. BULKELEY* (1745), Ridg. temp. H. 296; 27 E. R. 835.

**1748. —.]**—Deft. is not obliged to set out the account between him & pltf., after an award in his favour relating to that account, for a plea of an award is good not only to the merits, but to the discovery.—*TITTENSON v. PEAT* (1747), 3 Atk. 529; 26 E. R. 1105.

**PART IV. SECT. 15, SUB-SECT. 2.—**  
**B. (b).**

**p. Award postponing payment on certain conditions.]**—An action was referred. The arbitrators awarded that deft. should pay pltf. £500 on Nov. 20, 1852, & that pltf. should not enforce payment provided deft. should give good security of such payment on Dec. 1, 1852. Pltf. declared on this as an award that deft. should pay to pltf. £500 on Nov. 20, 1852:—*Held*: there was no absolute claim to the money on Nov. 20, but the right of action was suspended until Dec. 1, & would then depend on the giving of the security as directed.—*HILL v. HILL* (1854), 11 U. C. R. 262.—**CAN.**

**r. Award in special terms.]**—*ABBOTT v. SKINNER* (1861), 20 U. C. R. 414; 7 L. C. L. J. 158.—**CAN.**

**s. Award postponing date of payment under lease.]**—Deft. being in default under a demise from pltf., he & pltf. referred all differences, & the arbitrators postponed the date of payment:—*Qu.*: whether the reference & postponement would not constitute deft. a tenant at will.—*BLACK v. ALLEN* (1866), 17 C. P. 240.—**CAN.**

**t. Award directing delivery of deeds**  
—*Not equivalent to finding that party in*

*of deeds.]*—A. & B. referred certain matters in dispute between them to arbitrators, & an award was made by which A. was ordered to pay money to B. upon B. delivering up certain title deeds:—*Held*: an order on A. to pay money to B. on the latter giving up title deeds of which he denied the possession did not amount to a finding that B. was in possession of such deeds.—*PROTAP CHUNDER DEY v. TOOLSEY DASS DEY* (1902), 1 L. R. 29 Cal. 793.—**IND.**

**v. Award directing partition.]**—In cases where an award directs partition to be effected, it severs the joint interest from the moment of its date.—*BHAURAO v. RADHABAI* (1909), 1 L. R. 33 Bom. 401.—**IND.**

**PART IV. SECT. 15, SUB-SECT. 2.— C.**

**1747 i. In general.]**—The finding of an arbitrator, when unimpeached, is treated as *res judicata* between the parties to the submission.—*BELL v. MILLER* (1862), 9 Gr. 385.—**CAN.**

**1747 ii. —.]**—Parties who have signed the award of arbn. are bound by that until it is legally set aside, & until it is set aside, a suit to enforce rights irrespective of the award is not maintainable.—*GOLAM ALI KHAN v. IMAM ALI KHAN* (1867), 2 Agra, 224.—**IND.**

**1749. —.]**—An award made under an agreement, entered into after a bill is filed, to refer the whole subject-matter of the suit to an arbitrator, may be pleaded to the bill.—*DRYDEN v. ROBINSON* (1826), 2 Sim. & St. 529; 57 E. R. 448.

**1750. —Award settling amount to be deducted from claim.]**—To a declaration stating that deft. covenanted that he or A. would pay pltf. £6,800 by certain instalments, with interest thereon at £4 per cent., with a proviso that in a certain event there should be deducted from the five last instalments sums not exceeding £4,800, & that in that event pltf. should repay to deft. & A. all interest which should have been paid in respect of the sum deducted, & that in default of payment of any of the instalments the whole should be recoverable, & averring that default had been made, & that no sum was deductible under the proviso, deft. set out the deed on oyer, which contained a mutual covenant between pltf., deft., & A. that, if any disputes or differences should arise touching the sums which should be deductible under the proviso, it should be & was thereby referred to an arbitrator, & that the parties should abide his award, & deft. pleaded, as to the five last instalments & interest thereon, that certain differences had arisen between the parties to the deed touching the sums deductible from the five last instalments, & that pltf., deft., & A. did, in pursuance of the covenants in the indenture contained, submit to refer, & did then refer, the differences to the arbitrator, & same were then referred to him to determine what sum (if any) not exceeding £4,800 should be deducted by deft. & A., or either of them, from the five last instalments, that the arbitrator awarded that the whole of the £4,800, being the total amount of the five last instalments, should be deducted from the five last instalments, & that deft. did, therefore, claim to deduct, & deducted, the sum of £4,800 from the five instalments, whereof pltf. had notice:—*Held*: the plea was a good plea in bar as to the £4,800 & interest.—*PARKES v. SMITH* (1850), 15 Q. B. 297; 19 L. J. Q. B. 405; 15 L. T. O. S. 223; 14 Jur. 761; 117 E. R. 470.

*Annotations:—Distd. Ex p. Glaysher* (1864), 3 H. & C. 412. *Consd. Re Newton & Hetherington* (1865), 19 C. B. N. S. 342. *Folld. Commings v. Heard* (1869), 1 L. R. 4 Q. B. 669. *Reid. Re Ward & Secretary of State for the War Department* (1862), 32 L. J. Q. B. 53. *Mentd. Collins v. Collins*

**1747 iii. —.]**—When a submission to arbn. has been made a rule of ct., & where the award is within the terms of the submission, neither party can reopen the same question by suit in equity, though the award itself was not made a rule of ct. until after filing the bill, & the fairness of such award was impugned.—*CROOKE v. SWORDS* (1868), 5 W. W. & A'B. 136.—**AUS.**

**1747 iv. —.]**—The parties to a suit applied for an adjournment, on the ground that they had agreed to refer the matters to arbn. The ct. accordingly adjourned the suit, & an award was made thereon disallowing pltf.'s claim:—*Held*: in these circumstances, the further hearing of such suit was barred.—*SALIG RAM v. JHUNNA KUAR* (1882), 1 L. R. 4 All. 546.—**IND.**

**1747 v. —.]**—*BUCHAN v. MELVILLE* (1902), 4 F. (Ct. of Sess.) 620.—**SCOT.**

**1747 vi. —.]**—Pltf. sued for use & occupation of premises. There had been a previous action between the parties & an arbn. & an award. Deft. had paid pltf. for the period of occupation at the rent determined upon by the arbitrators with interest:—*Held*: as the award had not been set aside or questioned, this was all pltf. was entitled to.—*MACDONNELL v. DAVIES* (1915), 8 O. W. N. 315.—**CAN.**

(1858), 26 Beav. 306; *Wishart v. Fowler* (1864), 3 New Rep. 373.

**1751. Award made after action brought.]**

Where an action has been commenced upon a contract containing a provision for reference to an arbitrator of any dispute arising under the contract, & is pending, no application to stay the action having been made under the Act of 1889, s. 4, or such an application having been refused, an award made by the arbitrator under the provision for reference upon the subject-matter of the action, subsequent to the commencement thereof, & without the consent of pltf., is invalid, & will not afford a defence to the action.

By a clause in a contract between pltf. & defts., a municipal corpn., for the execution by the former of certain sewerage works, it was provided that, in case of any dispute, doubt, or difference arising or happening touching or concerning the works, or relating to quantities, description or manner of work done, executed, or to be done & executed by the contractors, or in any wise whatever relating to the interests of the corpn. or of the contractors, such doubts, disputes, or differences should from time to time be referred to & settled & decided by defts.' engineer, who should be competent to enter upon the subject-matter of such doubts, disputes or differences, with or without formal reference or notice to the parties to the contract or either of them, & who should judge, decide, order & determine thereon. Pltf. brought an action against defts. for sums which they alleged to have become due to them from defts. under the contract, & for damages for wrongful termination of the contract by defts. Defts. did not apply for a stay of proceedings in the action under the Act of 1889, s. 4. Subsequent to the commencement of the action, defts.' engineer, under the before-mentioned clause, without giving notice to the parties, & without the knowledge or consent of pltf., made an award purporting to decide the matters which were the subject of the action, & defts. pleaded his award in bar to pltf.' claim in the action:—*Held* (Vaughan Williams, L.J., *diss.*): it was not competent for the engineer to determine the matters in question pending the action, & his award was no bar to pltf.' claim in the action.—*DOLEMAN & SONS v. OSSETT CORPN.*, [1912] 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915, C. A.

**1752. When available—Not where fraud or partiality.]**—L. brought a bill against E., the other party to a reference, & the arbitrators, praying for an inspection of all the accounts on which the arbitrators had framed their award, & for an account generally by E. for all transactions during his partnership with L., & praying for the setting aside of the award for fraud or partiality & want of finality. Deft. pleaded the award as a bar to the general account:—*Held*: the plea of award was an answer to the claim for a general account, but pltf. was not precluded at the hearing of the cause from objecting to the award for fraud or partiality.—*LINGOOD v. EADE* (1742), 2 Atk. 501; 26 E. R. 702.

**1753. — Not on application for bail in action on award.]**—Where a cause, in which deft. has been holden to bail, is referred to arbn., & the arbitrator

awards to pltf. a sum exceeding £10, deft. may be holden to bail again in an action upon the award.—*COLLINS v. POWELL* (1788), 2 Term Rep. 756; 100 E. R. 408.

*Annotation*:—*Distd.* *Daniel v. Dodd* (1807), 8 East, 334.

**1754. — Not in action on matters outside arbitration.]**—The award of an arbitrator cannot be pleaded as defence to an action on matters falling outside the scope of the arbn.—*FARRER v. BATES* (1647), Aleyn, 4; 82 E. R. 884.

**1755. — Whether performance need be averred & proved.]**—To an action of trespass deft. pleaded an award that he should pay pltf. a certain sum & find a surety for the payment thereof:—*Held*: deft. must produce the submission & also show that he had paid or found a surety, otherwise the plea was not good.—*ANON.* (1477), Y. B., 17 Edw. 4, fo. 3, pl. 1.

**1756. — — — — —.]**—Pltf. declared upon three *assumpsits*, whereof two were special. Deft. pleaded generally as to all that since the promises he & pltf. had submitted themselves & all matters, etc., to arbitrators, who made their award, which he set forth in his plea & concluded in bar without alleging that he (deft.) had performed the award on his part. The award was particular as to certain cotton wool, & not of any other matters. & as to that it was conditional:—*Held*: (1) an award without performance was a good bar to an action on the case if the parties had mutual remedies against each other to compel the execution of the matters awarded, but it was otherwise if there were no mutual remedies to enforce the performance; (2) the award pleaded being conditional, & therefore, void, pltf. had no remedy to enforce the performance, & the award was no bar to the action; (3) the award being particular as to the cotton wool, deft. should have pleaded it in bar only of those promises concerning the wool, & not in bar of a general *indebitatus assumpsit* for wares sold, but should have pleaded *non assumpsit* as to that promise because the award did not extend to it; (4) if the award had been general & a good award, deft. might have pleaded it in bar of all the promises generally.—*CROFTS v. HARRIS* (1691), Carth. 187; 12 Mod. Rep. 4; 90 E. R. 712.

*Annotations*:—*Folld.* *Gascoyne v. Edwards* (1826), 1 Y. & J. 19. *Consd.* *Allen v. Milner* (1831), 2 Cr. & J. 47. *Refd.* *Wentworth v. Bullen* (1829), 9 B. & C. 840.

**1757. — — — — —.]**—If arbitrament be pleaded with mutual promises to perform it, though the party who brings the action has not performed his part, yet he shall maintain his action, because an arbitrament is like a judgment, & the party may have his remedy upon it.—*ALLEN v. HARRIS* (1696), 1 Ld. Raym. 122; 2 Lut. 1537; 91 E. R. 978.

*Annotations*:—*Folld.* *Lynn v. Bruce* (1794), 2 Hy. Bl. 317; *Gascoyne v. Edwards* (1826), 1 Y. & J. 19. *Distd.* *Allen v. Milner* (1831), 2 Cr. & J. 47. *Refd.* *Bayly v. Homan* (1837), 3 Bing. N. C. 915.

**1758. — — — — —.]**—A man may plead in bar an award for the performance of mutual independent acts before performance on his part. An award directing the release of a duty without creating a new one is no bar to an action for such duty before the release executed.—*FREEMAN v. BERNARD*

**1755 i. When available—Whether performance need be averred & proved.]**—An award for damages against one of two joint trespassers is in itself a bar, whether paid or not, & precludes any action against his co-trespasser. But in pleading an award to an action of debt, in which two are jointly bound, there, unless payment be averred, it is no bar.—*ADAMS v. HAM* (1848), 5 U. C. R. 292.—*CAN.*

**1755 ii. — — — — —.]**—A tenant pleaded a reference to arbitrators & an assignment by them of certain specified land, of which demandant had notice, & averred that he had always been & still was ready to abide by such assignment. On demurrer:—*Held*: the plea was bad, for not showing that the assignment had been actually made.—*MCLEAN v. HORTON* (1852), 9 U. C. R. 685.—*CAN.*

**iii. — — — — —.]**—*FOLWELL v. HYDE & CASIOR* (1861), 20 U. C. R. 565.—*CAN.*

**v. — — — — —.]**—Where an award is set up as a defence to an action, defts. should allege not only an award but a performance thereof.—*ROULSTONE v. ALLIANCE INSURANCE CO.* (1879), 13 L. L. T. 66.—*IR.*



**Sect. 15.—Construction & effect of award: Subsect. 2, C. D. & E.]**

(1697), 1 Ld. Raym. 247; 12 Mod. Rep. 130; 1 Salk. 69; 91 E. R. 1061.

**Annotations:—**Folld. *Clapcott v. Davy* (1700), 1 Ld. Raym. 611. **Mentd.** *Abraham v. Brandon* (1714), 10 Mod. Rep. 200; *Bates v. Townley* (1848), 2 Exch. 152.

**1759.** —.].—An award directing the release of a duty, without giving a satisfaction for it, is not before the release is executed a bar to an action for such duty.—*CLAPCOTT v. DAVY* (1700), 1 Ld. Raym. 611; 91 E. R. 1309.

**1760.** —.].—In trespass for assault, etc., deft. pleaded a submission to an award of all controversies & set forth an award made & a tender of performance. Pltf. contended that the award was not of money but of a collateral matter, namely, to provide a couple of pullets to be eaten at deft.'s house, & was no plea without performance & without a plea that pltf. had notice of the time when the pullets were to be eaten:—**Held:** although there was no remedy in debt in such a case, there was the remedy by action upon the case for non-performance of the award, & the award was a good plea without performance.—*BOISLOE v. BAILY* (1704), Holt, K. B. 711; 6 Mod. Rep. 221; 87 E. R. 972; *sub nom.* *PARSLOE (PURSLOW) v. BAILY*, 1 Salk. 76; 2 Ld. Raym. 1039.

**1761.** —.].—Arbitrament without performance is a good plea where the parties have mutual remedies.—*GASCOYNE v. EDWARDS* (1826), 1 Y. & J. 19; 148 E. R. 569.

**Annotations:—***Consd.* *Allen v. Milner* (1831), 2 Cr. & J. 47; *Comings v. Heard* (1869), L. R. 4 Q. B. 669; *The Sylph* (1867), L. R. 2 A. & E. 214.

**1762.** —.].—In *indebitatus assumpsit* for a debt, a plea of arbitrament of pltf.'s claim & an award that deft. shall pay a sum of money, without an averment of the payment thereof, is no good plea in bar.

To an *indebitatus* count for £50 for turnpike tolls deft. pleaded that differences had arisen between him & pltf. touching pltf.'s claim, that the matter in difference was referred to arbn., that each party mutually promised to abide by the award, & that an award was made whereby deft. was directed to pay to pltf. the sum of £13:—**Held:** the plea was bad, because the award merely ascertained the existence & amount of the original debt, but did not change its character or destroy its quality, & the money payable under the award was nothing but the original debt so ascertained.—*ALLEN v. MILNER* (1831), 2 Cr. & J. 47; 2 Tyr. 113; 1 L. J. Ex. 7; 149 E. R. 20.

**Annotations:—***Distd.* *Comings v. Heard* (1869) L. R. 4 Q. B. 669. **Refd.** *La Purisima Concepcion* (1849), 13 Jur. 545. **Mentd.** *Parke v. Smith* (1850), 15 Q. B. 297.

**1763. Money claim—Amount due—Res judicata.]**—Declaration for work done & materials provided, claiming £400. Plea, except as to £145 3s. 1d., parcel of the money claimed, that pltf. ought not to be admitted to allege that at the commencement of the suit any more than the sum of £145 3s. 1d. was due from deft. to pltf. in respect of the causes of action in the declaration mentioned, because, after the accruing of the causes of action & before suit, a dispute arose between pltf. & deft. as to how much was due from deft. to pltf. in respect of the causes of action, & thereupon by agreement made between them they referred the question of

how much was due from deft. to pltf. in respect of the causes of action to the award of W., & agreed to be bound by his award as to such amount, & that W. awarded that the amount due from deft. to pltf. was £145 3s. 1d.:—**Held:** as the plea did not profess to answer the entire claim of pltf., but was pleaded only to the excess over the sum found to be due by the award, it was a good plea, inasmuch as the award precluded either party from saying more or less was due.—*COMMINGS (CUMMINGS) v. HEARD* (1869), L. R. 4 Q. B. 669; 10 B. & S. 606; 39 L. J. Q. B. 9; 20 L. T. 975; 18 W. R. 61.

**Annotations:—***Mentd.* *Dover v. Child* (1876), 34 L. T. 737 *Brunsdon v. Humphrey* (1883), 52 L. J. Q. B. 756.

**In regard to what matters.]—**See Nos. 1424—1433, *ante*.

**1764. How made available—Not by application to stay.]**—Pltf. sued deft. for negligence, *per quod* pltf. became liable to pay certain sums, & lost the custom of A., B. & C. The cause was referred under an order of *Nisi Prius*, by which pltf. was precluded from bringing any new action. The arbitrator made an award in favour of pltf., who nevertheless sued deft. again, the new declaration differing from the old one in stating that pltf. had paid the money which he had before alleged himself liable to pay, & had lost the custom of D., E. & F.:—**Held:** the ct. could not stay proceedings on a summary application.—*DICAS v. JAY* (1830), 6 Bing. 519; 4 Moo. & P. 285; 8 L. J. O. S. C. P. 210; 130 E. R. 1381.

**1765.** —.].—An action was brought by pltf., a pauper, & referred to an arbitrator, who decided against pltf. Pltf. having failed on an application to set aside the award, brought a second action, which deft. sought to stay as being vexatious & against good faith, or until payment of the costs of the first action. Deft. had not applied for an attachment against pltf. for non-performance of the award:—**Held:** the application must be refused.—*EMPEY v. KING* (1844), 3 L. T. O. S. 164.

**1766.** —.].—**Doubt as to validity of award.]**—After issue joined, & notice of trial given, a cause was referred. It appeared doubtful, on affidavits, whether the award was made previous or subsequent to a revocation of the submission. The ct. refused to stay proceedings, but left deft. to plead the award, when the question would most properly be disposed of by a jury.—*LOWES v. KERMODE* (1818), 8 Taunt. 146; 2 Moore, C. P. 30; 129 E. R. 339.

**Annotation:—***Refd.* *Doleman v. Ossett Corpn.*, [1912] 3 K. B. 257, C. A.

**1767. Stay granted where action frivolous & vexatious.]**—E., a public servant, ceased to hold certain offices under the Crown in 1864. At that time his accounts for large sums of public money which had passed through his hands had not been audited. The Crown referred the accounts to two auditors, who reported E. a defaulter to a large amount. The Crown took proceedings in Ch. against E., & pending an account directed in that suit, E. in 1869 brought an action against one of the auditors for libel. By an order made by consent in that action all matters in difference between E. & the Crown were referred to arbn. The arbitrators awarded that E. should pay the Crown a considerable sum. E., treating the award as a

**1764 i. How made available—Motion for liberty to plead *puis darrein continuance*.]**—The ct. granted a motion for liberty to deft. to plead, by way of defence *puis darrein continuance*, a reference by pltf. & deft. of the matters in dispute to arbn., & the fact that an award had been made thereon.—*MAGEE*

*v. M'SLANE* (1873), 7 I. L. T. Jo. 408.—**IR.**

**1764 ii.** —.].—**Pleading award *puis darrein continuance*.]**—An award made pending a cause does not stay proceedings. If pltf. proceed, deft. must plead the award *puis darrein continuance*.—

*FIDO v. WOOD* (1838), 1 Ont. Dig. 168.—**CAN.**

**1767 i.** —.].—**Stay granted.]**—The ct. will stay an action on motion, where an award has been made in matters where objections to the award are properly questions for the ct. to determine & not



nullity, continued to harass the officers of the Govt. with actions & proceedings in respect of the same matters, & brought an action against the A.-G. in 1878, claiming two pensions in respect of the offices held by him, under Superannuation Act, 1859 (c. 26), & to have a public audit of his accounts under Exchequer & Audit Department Act, 1866 (c. 39). On a summons to stay proceedings in the action:—*Held*: (1) E. had waived all right to a public audit by consenting to the reference to arbn., & the award was conclusive against him on all points; (2) these points having all been previously decided against him, the action was frivolous & vexatious, & an abuse of the powers of the ct., & the ct. had jurisdiction to stay it on those grounds.—*EDMUNDS v. A.-G.* (1878), 47 L. J. Ch. 345; 38 L. T. 213; 26 W. R. 550.

**Effect of submission—As ground for staying proceedings.]—***See* Nos. 353—394, *ante*.

**—As condition precedent.]—***See* Nos. 290—310, *ante*.

**1768. Form of defence.]—**To an action of *assumpsit* for goods sold, etc., deft. pleaded that pltf. had entered a plaint in a county ct. for the same cause of action, & that pltf. & deft. mutually referred the action in the county ct. & all matters in difference to arbn., & that the umpire afterwards made his award of & concerning the matters in difference, etc., & that deft. had been always ready & willing, etc., to perform his part of the award, etc. Replication, that the umpire did not make his award of & concerning the matters in difference:—*Held*: the allegation that pltf. & deft. mutually referred the action in the county ct. & all matters in difference was supported by proof of an order of reference made by the judge of the county ct., under the powers given him by County Cts. Act, 1846 (c. 95), s. 77, by consent of pltf. & deft.—*ROPER v. LEVY (LEVI)* (1851), 7 Exch. 55; 2 L. M. & P. 621; 21 L. J. Ex. 28; 155 E. R. 853.

#### D. As Estoppel.

**1769. Only as to point decided.]—**Proceedings in Ch. for the infringement of a patent, the validity of which was in question, were referred to an arbitrator, who awarded that the patent was not illegal

properly determinable by a jury, & the party is not compellable to plead the award.—*MILNER v. LUTTRIL, MILNER v. BRYDGES* (1878), 2 P. & B. 87.—CAN.

**1767 ii. —Not by stay where award defective.]—**Where matters have been referred & a defective award made in favour of deft., which he has not taken proceedings to rectify, the ct. cannot stay proceedings in an action afterwards commenced.—*MARTIN v. BOARD OF LAND & WORKS* (1879), 5 V. L. R. 117.—AUS.

#### PART IV. SECT. 15, SUB-SECT. 2.—D.

**a. Ejectment.]—**Pltf. in ejectment who, before action, submitted the question of the possession of the premises to arbn., is estopped by an award in favour of deft.—*DOE d. GALBRAITH v. WALKER* (1838), 1 Ont. Dig. 167, 168.—CAN.

**b. —.]—**An award upon a question respecting real property, expressly referred, is binding upon the parties so far as respects the rights of either to bring or defend an ejectment against the other.—*DOE d. McDONALD v. LONG* (1846), 4 U. C. R. 146.—CAN.

**c. Validity of bye-law.]—**Debt on award made by arbitrators appointed to value pltf.'s property, through which debts had by their bye-law directed a road to be made:—*Held*: debts, having gone to arbn., were estopped from objecting that the bye-law was not averred in the declaration to have been under seal.—*WILSON v. PORT HOPE TOWN* (1853), 10 U. C. R. 405.—CAN.

**d. Authority of arbitrators.]—**A party suing on an award is estopped from denying the authority of the arbitrators.—*BLACK v. ALLAN* (1866), 17 C. P. 240.—CAN.

**f. Specific lien barred.]—**Where contractors would have been entitled to a specific lien on certain debentures under their original agreement:—*Held*: the fact that they had referred all matters in difference to arbn., & had obtained an award in their favour for a money payment, precluded them from obtaining that relief.—*SYKES v. BROCKVILLE & OTTAWA RY. CO.* (1862), 9 Gr. 9.—CAN.

**g. Deed of composition.]—**After assignment & execution of a deed of composition & discharge, deft., the insolvent, permitted an arbn. on pltf.'s claim to be proceeded with, personally attending the arbn. & not setting up the deed as a bar:—*Held*: this would preclude deft. from afterwards setting up such deed as a ground for setting aside a *fi. fa.* against him issued on the award.—*PIDGEON v. MARTIN* (1875), 25 C. P. 233.—CAN.

**h. Existence of highway.]—**Upon an arbn. in expropriation proceedings it was material that the arbitrators should ascertain whether a trail was a highway. The award found that it was a highway. In an action by the owner of the land against the expropriators:—*Held*: pltf. was estopped from denying that the trail in question was a highway.—

& void. In an action between the same parties for another infringement:—*Held*: deft. was not estopped from disputing the validity of the patent.—*NEWALL v. ELLIOT* (1863), 1 H. & C. 797; 1 New Rep. 441; 32 L. J. Ex. 120; 7 L. T. 753; 9 Jur. N. S. 359; 11 W. R. 438; 158 E. R. 1105.

**Annotation:—***Consd. Bedford v. Cowtan*, [1916] 1 K. B. 980 C. A.

**1770. Conclusive as to construction.]—**Where the parties to a contract have referred the question of its construction to an arbitrator, his award is conclusive evidence as to the construction in a subsequent action brought for other breaches of the same contract.—*GUERET v. AUDOUY* (1893), 62 L. J. Q. B. 633, C. A.

**1771. Must be pleaded if relied on.]—**Where pltf. in an action of trespass has an opportunity of replying an award by way of estoppel to a plea of *liberum tenementum*, he is at liberty so to reply, & is bound to avail himself of such opportunity; & if he omits to do so he cannot, at the trial, rely on the award as conclusive evidence of the facts found in his favour by the arbitrator, for in such a case the matter is left at large for the jury, & they are at liberty to find the fact either way, though the award is entitled to great weight.—*FEVERSHAM (LORD) v. EMERSON* (1855), 11 Exch. 385; 24 L. J. Ex. 254; 3 C. L. R. 1379; 156 E. R. 881.

**Annotations:—***Refd. Petrie v. Nuttall* (1856), 11 Exch. 569. *Mentd. Whittaker v. Jackson* (1864), 2 H. & C. 926.

**1772. As to construction & effect of agreement.]—***GUERET v. AUDOUY*, No. 1733, *ante*.

**1773. Who bound by — Judgment creditor.]—**Where accounts between a firm & one of its debtors had been settled by a reference & an award made thereunder:—*Held*: the judgment creditors of the firm could not, without alleging fraud or collusion in the proceedings on the reference, be admitted to impeach the award.—*MARTIN v. BOULANGER* (1883), 8 App. Cas. 296; 52 L. J. P. C. 31; 49 L. T. 62, P. C.

#### E. As Evidence.

**1774. Action for damages—Finding of miner's jury.]—**A horse having been killed by falling down

*HENNICK v. EDMONTON TOWN* (1897), 2 Terr. L. R. 462.—CAN.

**k. Interest in subject-matter.]—**An assignee of a renewable lease appointed an arbitrator, took part in the arbn. proceedings, moved to set aside the award & appealed to an Appellate Division, but not until the argument of the appeal did he raise the question that he had assigned his interest in the lease & therefore, he had no interest in the matter, & the award was a nullity:—*Held*: it was too late to raise then any such point, even if there were something substantial in it.—*TORONTO GENERAL HOSPITAL TRUSTEES v. SABASTON* (1916), 27 O. W. R. 515; 38 O. L. R. 139.—CAN.

**1769 i. Only as to point**  
*Held*: deft. was not estopped by an award from setting up a breach of a stipulation not to sell other goods of the same description before Dec. 1, 1881, as a defence to a suit on the contract.—*CARLISLE'S NEPHEWS & Co. v. RICKNAUTH BUCKTEARMALL* (1882), 1 L. R. 8 Calc. 809.—IND.

#### PART IV. SECT. 15, SUB-SECT. 2.—E.

**l. Action of account—Award not evidence.]—**To a special count upon an award made after time had expired, there was added an account stated:—*Held*: an award so given could not be taken as evidence of such account stated, as the arbitrators could not be said, after their authority had expired, to be proceeding with deft.'s assent & to

*Sect. 15.—Construction & effect of award: Sub-t. 2, E. F. G. & H. Sect. 16: Sub-sect. 1.]*

an old shaft of a mine which had not been sufficiently covered over, the owner of the horse charged a person in the possession of a mine near to the spot with being also in possession of that shaft. The latter denied that the shaft was his, but said that if a miner's jury were called, & they should say that the shaft was his, he would pay for the horse. A miner's jury was accordingly called, & they found in writing that the shaft was his:—*Held*: this finding of the jury, coupled with his declaration, was admissible in evidence against him in an action to recover compensation for the loss of the horse.—*SYBRAY v. WHITE* (1836), 1 M. & W. 435; 2 Gale, 68; Tyr. & Gr. 746; 5 L. J. Ex. 173; 150 E. R. 504.

*Annotations*:—*Mentd.* Carr v. Smith (1843), 5 Q. B. 128; Barnes v. Ward (1850), 9 C. B. 392; Williams v. Groucott (1863), 4 B. & S. 149.

**1775. Highway indictment—Award against tenant for years.]**—Upon the trial of an indictment for not repairing a highway, which it is alleged deft. is bound to repair *ratione tenuræ*, an award made under a submission by a former tenant for years of the premises can neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *post litem motam*.—*R. v. COTTON* (1813), 3 Camp. 444.

*Annotations*:—*Appld.* Richards v. Bassett (1830), 8 L. J. O. S. K. B. 289. *Refd.* Evans v. Rees (1839), 10 Ad. & El. 151; R. v. Bedfordshire (1855), 4 E. & B.

**1776. Issue between landlord & execution creditor of tenant—Award between landlord & tenant.]**—An action between the owner of land & a party holding by his permission, but claiming to hold as bailiff & not as tenant, was referred to an arbitrator, who was to say what was to be done by the parties with respect to the land. He awarded that the holding was as tenant, that the tenancy should cease on the delivery of the award, & that possession of the land should be delivered up to the owner in one month after. On an issue, between the landlord & an execution creditor of the tenant, whether the crops on the land at a certain time were the property of the party so found to have been tenant:—*Held*: the award was admissible in evidence on the part of the landlord.—*THORPE v. EYRE* (1834), 1 Ad. & El. 926; 3 Nev. & M. K. B. 214; 110 E. R. 1462.

**1777. Action as to boundary—Award as to same in reference of suit inter alios.]**—On an issue respecting the boundary of a parish & county an award in a suit *inter alios*, in which the arbitrator set out the boundary as proved before him, & a verdict was entered according to his direction, is not admissible as evidence of such boundary. Although verdicts are, upon authority, admitted as proof of reputation, the rule does not extend to awards.—*EVANS v. REES* (1839), 10 Ad. & El. 151; 2 Per. & Dav. 626; 113 E. R. 58.

*Annotations*:—*Refd.* Wenman v. Mackenzie (1855), 5 E. & B. 447. *Mentd.* Andrews v. Motley (1862), 12 C. B. N. S. 514.

**1778. Indictment for perjury—Award in cause.]**—

he stating an account for him as his agents.—*RUTHVEN v. RUTHVEN* (1850), 8 U. C. R. 12.—*CAN.*

*m. Action on bond—Award measure of damages.]*—When arbitrators, after a revocation, make an award which is unimpeached, the amount awarded is a proper measure of damages in an action on the arbn. bond.—*HATHEWAY v. CLIFF* (1851), 2 All. 267.—*CAN.*

*n. Action for obstructing drain.]*—In an action for obstructing a drain the jury found for pltf., with 6d. damages,

saying that their verdict was founded upon an award which had been made by fence-viewers:—*Held*: upon the evidence, a verdict must be entered for deft., for it was a different drain which was obstructed.—*MALONE v. FAULKNER* (1853), 11 U. C. R. 116.—*CAN.*

*o. Award where submission not by all parties to suit.]*—An arbn. award, not being one which has been made upon a reference by all the parties to the suit, is evidence against any party who agreed to the reference.—*BEEJO CHUNDER*

F. was indicted for perjury committed by deposing, in an affidavit in a cause wherein he was pltf. & E. deft., that E. owed him £50:—*Held*: in support of this indictment, evidence was not admissible that the cause of F. against E. was, after the making of the affidavit, referred by consent & an award made that E. owed nothing to F.—*R. v. FONTAINE MOREAU* (1848), 11 Q. B. 1028; 3 New Pract. Cas. 108; 17 L. J. Q. B. 187; 11 L. T. O. S. 150; 12 J. P. 534; 12 Jur. 626; 116 E. R. 757.

**1779. Action as to ownership of land—Award in action between different plaintiff & same defendant.]**

—In an action for injuring pltf.'s reversionary interest in a several fishery in an estuary of the sea, & in the soil of the bottom of the sea, both in the possession of F. as her tenant, issues were taken on pltf.'s right to the fishery & ownership of the soil. The controversy was whether the soil belonged to pltf. or to G. Pltf. gave in evidence the proceedings in an action by F. against G. One count in that action was for injuring F.'s fishery by tearing up soil, described as being the soil of pltf., & thereby destroying the fish. To this there was a plea of not guilty. The amount of damages was referred, & the arbitrator awarded nominal damages. It was proved that the act complained of in that action was committed in a part of the same estuary, & that the soil there was claimed by the same title as the soil which was the subject of the then present action, & that deft. became tenant to G. subsequent to the award. The proceedings were admitted, & pltf. had a verdict:—*Held*: they were improperly admitted, the award not being evidence of reputation, & the proceedings not being admissible for pltf., who was not a party or shown to be a privy to F., though deft. was privy to G.—*WENMAN (LADY) v. MACKENZIE* (1855), 5 E. & B. 447; 25 L. J. Q. B. 44; 25 L. T. O. S. 267; 1 Jur. N. S. 1015; 3 W. R. 626; 3 C. L. R. 1307; 119 E. R. 517.

**1780. Action on award under Lands Clauses Consolidation Act, 1845 (c. 18)—Award not evidence as to subject-matter of compensation.]**—*Semle*: in an action on an award under the above Act, when defts. plead that the compensation awarded is in respect of matters not the subject of compensation, the award is not evidence that the compensation awarded is in respect of matters the subject of compensation.—*RHODES v. AIREDALE DRAINAGE COMRS.* (1876), 1 C. P. D. 402; 45 L. J. Q. B. 861; 35 L. T. 46; 24 W. R. 1053, C. A.

*Annotations*:—*Mentd.* Re Bidder & North Staffordshire Ry. Co. (1878), 4 Q. B. D. 412, C. A.; Warburton v. Haslingden L. B. (1879), 48 L. J. C. P. 451; Bexley L. B. v. West Kent Main Sewerage Board (1882), 9 Q. B. D. 518; Knowles v. Bolton Corpn. (1900), 69 L. J. Q. B. 481, C. A.; Carpenter & Bristol Corpn. (1907), 71 J. P. 417, C. A.

**1781. Award not evidence of account stated.]**—An award is not evidence of an account stated between the parties to the submission.—*BATES v. TOWNLEY* (1848), 2 Exch. 152; 10 L. J. Ex. 399; 12 Jur. 606; 154 E. R. 414.

*Annotations*:—*Mentd.* Re Coombs (1850), 4 Exch. 839; Fernley v. Branson (1851), 16 L. T. O. S. 486; Crampton & Holt v. Ridley (1887), 20 Q. B. D. 48.

**1782. —.]**—Where matters of account in dispute are submitted to arbn., but not by bond, &

*BANERJEE v. BIHRUB CHUNDER BANERJEE* (1870), 15 W. R. 427.—*IND.*

*p. Action for rent from partner not party to lease.]*—A lessor sued to recover rents from his lessee as well as from a third party, on the allegation that they were partners & that the lease had been acquired for the partnership business:—*Held*: an award was not admissible as evidence to prove that the third party was liable to pltf. for rent.—*ABINASH CHANDRA CHATTERJEE v. PARESH NATH GHOSE* (1905), 9 C. W. N. 402.—*IND.*



the arbitrator makes an award, pltf. may give the sum awarded in evidence on the common counts in *assumpsit*, without a special count, though the sum has been given in under a judge's order.—*KEEN v. BATSHORE* (1794), 1 Esp. 194.

*Annotation*:—*Consd. Bates v. Townley* (1848), 2 Exch. 152.

#### F. As to transferring Property.

**1783. Award transferring interest of estate for years.**—Where a controversy between two persons for a lease of land was submitted to the arbitrament of S., whose award directed that one of them should have the land:—*Held*: (1) this was a good gift of the interest of the term; (2) if the award had been to permit & suffer the other to enjoy the term, there would be no gift of the interest in it.—*TRUSLOE v. YEWRE* (1591), Cro. Eliz. 223; 78 E. R. 479.

**1784. Award directing delivery of chattels—Property in same not passed.**—Under a submission to an arbitrator of all matters in difference between landlord & tenant the arbitrator awarded (*inter alia*) that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord by a certain day, upon the tenant being paid or allowed a certain sum in satisfaction for it:—*Held*: (1) the property in the hay did not pass to the landlord on his tender of the money, by the mere force of the award, against the consent of the tenant, who refused to accept the money or deliver up the hay; (2) the landlord could not maintain trover for it, but his remedy was upon the award.—*HUNTER v. RICE* (1812), 15 East, 100; 104 E. R. 782.

**1785. Award directing tenancy to terminate & land to be given up—Property in crops on land not passed.**—An action between the owner of land & a party holding by his permission, but claiming to hold as bailiff & not as tenant, was referred to an arbitrator, who was to say what was to be done by the parties with respect to the land. He awarded that the holding was as tenant, that the tenancy should cease on the delivery of the award, & that

possession of the land should be delivered up to the owner in one month after. On an issue between the landlord & an execution creditor of the tenant whether the crops on the land at a certain time were the property of the party so found to have been tenant:—*Held*: the award did not of itself change the property.—*THORPE v. EYRE* (1834), 1 Ad. & El. 926; 3 Nev. & M. K. B. 214; 110 E. R. 1462.

**Necessity for directions as to conveyances.**—See Nos. 1291, 1292, *ante*.

#### G. Where Award bad in Part.

See Nos. 1520—1543, *ante*.

**H. Where Verdict taken subject to Reference.**  
See Nos. 1544—1585, *ante*.

### SECT. 16.—SETTING ASIDE AWARD.

ARBITRATION ACT, 1889, s. 11 (2).—Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside.

#### SUB-SECT. 1.—JURISDICTION TO SET ASIDE.

**1786. What courts.**—The cts. at Westminster have no authority to set aside an award made in an action depending in the Ct. of Common Pleas, at Lancaster, & referred by order of *Nisi Prius*.—*PLUMLEY v. ISHERWOOD* (1843), 12 M. & W. 190; 13 L. J. Ex. 38; 152 E. R. 1165.

**1787. — Court of equity.**—Equity will not interfere to set aside an award made on a voluntary submission to arbn. by both parties, nor relieve against a bond given for performance of the award.—*EYRE v. GOOD* (1669), 2 Rep. Ch. 34; 21 E. R. 608.

**1788. — — —**—A bill lies to set aside for fraud an award made a rule of a ct. of law under the Act

by deft., & pltf. could not eject deft. *v. FRETWELL* (1853), 11 U. C. R. 65.—CAN.

#### PART IV. SECT. 16, SUB-SECT. 1.

**a. When jurisdiction exists.**—It is only where the submission is by rule of ct. or can be made so, or has the effect of a rule, that the ct. has any jurisdiction to set aside an award. Where the submission is compulsory under stat., & there is no provision to make it a rule of ct., the ct. has no jurisdiction. The stat. creates the tribunal & makes the award "final & binding."—*GOSS v. SURVEYOR-GENERAL* (1898), 8 Nfld. L. R. 68.—NFLD.

**1786 i. What courts—Appellate Court.**—The Appellate Ct. has jurisdiction to set aside awards, whether or not they are awards to which the Act of 1698 applies.—*JOHANNISEN v. GALBRAITH* (1906), 16 Man. L. R. 138.—CAN.

**1786 ii. — Court making order.**—An award having been directed to be made within a year by an order of the Ch. Div. where the parties were litigating concerning it:—*Held*: a motion to set aside should have been made in that division, & should be transferred.—*Re MUSKOKA TOWNSHIP & VILLAGE OF GRAVENHURST* (1884), 6 O. R. 352.—CAN.

**1786 iii. — Court in which action pending.**—Where an application to set aside an award is made on the ground that two of the arbitrators made the award without notice to the third, the application should be made to the ct. in which the action is pending.—*SMITH v. GEORGE* (1854), 12 U. C. R. 370.—CAN.

#### PART IV. SECT. 15, SUB-SECT. 2.—F.

**q. Award of land.**—An award of land does not constitute a title to such land so as to entitle the person to whom it is awarded to possession thereof.—*HIMINA v. KELLS*, O. B. & F. 156.—N.Z.

**r. Award determining right to land—Boundary dispute.**—Where in a boundary dispute a reference was made to arbitrators appointed by the settlement officer, & the arbitrators decided the boundary:—*Held*: the effect of the award was not merely to determine possession at the time, but to determine the right to the land itself.—*RAMRUNJUN CHICKERBUTTY v. RAM PROSAD DASS*, 13 C. L. R. 26.—IND.

**s. Award directing defendant to execute deed of land.**—Arbitrators awarded that pltf. was entitled to retain land as his own property, & that deft. should forthwith execute a deed of the land to pltf. or his heirs:—*Held*: the award did not operate as a conveyance of the land.—*OLIVER v. ELLIOTT* (1861), 5 All. 226.—CAN.

**t. Award deciding basis of exchange of lands.**—When two parties, desirous of exchanging portions of their estates, submitted to arbn. what amount of land should be given to each, & the award was found accordingly:—*Held*: the award did not operate as an actual conveyance of the legal estate.—*HENRY v. KIRWAN* (1859), 9 I. C. L. R. 459.—IR.

**u. Award becoming deed of partition.**—A document which purports to be an award may amount to something more than an award; if the parties to the reference affix their signatures to the award in token of their acceptance of the

decision of the arbitrators, the award may thereupon become a deed of partition & may as such become compulsorily registrable.—*TEK LAL SINGH v. SRIPALI CHOW DHURI* (1913), 18 C. W. N. 478.—IND.

**w. Award of sum in full of all claims to land.**—On a reference as to the title to land:—*Semble*: an award of \$400, "in full consideration & discharge of all pltf.'s claims to & against the land," showed that the arbitrators had decided pltf. had no further title to the land, & that it belonged to deft.—*BOND v. BOND* (1865), 15 C. P. 613.—CAN.

**x. Award of sum of money for land.**—Pltf. sued defts. for money awarded to be paid to pltf., as exors. & trustees of A., for land taken by defts. for their railway. Defts. pleaded that they had never taken possession of or used the land, & that, forthwith after publication of the award, they gave notice to pltf. that they had abandoned all intention of so doing, & withdrew from the purchase:—*Held*: defts., under 4 Will. 4, c. 29, s. 4, & subsequent stats. could not after the award was made withdraw from the purchase.—*MITCHELL v. GREAT WESTERN RY. CO.* (1874), 35 U. C. R. 148.—CAN.

**1785 i. Award directing tenancy to terminate & land to be given up.**—An award that deft. should release & give up to pltf. "the term of years (unexpired on a lease) as agreed to in the submission, & also deliver up the stock of farming utensils in proper order, & without further delay, & that the lease then held by both parties of the farm be immediately cancelled":—*Held*: not to amount to a deed of surrender



**Sect. 16.—Setting aside award: Sub-sects. 1 & 2, A.]**  
of 1698.—**LONSDALE (LORD) v. LITLEDALE** (1794)  
2 Ves. 451; 30 E. R. 720.

**Annotations:—Expld. & Distd.** *Nichols v. Chalie* (1807), 14 Ves. 265. The case charged in *Lonsdale (Lord) v. Littledale* would clearly amount to misconduct by the arbitrator; in that case, the reference growing out of the action, if no attempt was made to bar the application to the Ct. of Equity by the rule, afterwards made an order of the ct., there is no difficulty in conceiving that the application might be within the jurisdiction of a ct. of equity (**LORD ELDON, L.C.**). **Consd.** *Heming v. Swinnerton* (1845), 14 Sim. 588. **Expld. & Distd.** *Chuck v. Cremer* (1848), 2 Ph. 477. **Refd.** *Nichols v. Roe* (1833), 3 L. J. Ch. 90.

**1789.** —.]—**Qu.:** whether a general reference to arbn. by parties in a suit, then depending in Ch., made an order of a ct. of law, was an order within the Act of 1698, excluding the equitable jurisdiction to affect the award for mistake of law apparent, & to restrain an application to the ct. of law to enforce it.—**NICHOLS v. CHALIE** (1807), 14 Ves. 265; 1 Coop. temp. Cott. 419; 33 E. R. 523.

**Annotations:—Consd.** *Chuck v. Cremer* (1848), 2 Ph. 477. **Refd.** *Auriol v. Smith* (1823), Turn. & R. 121; *Nichols v. Roe* (1834), 3 My. & K. 431; *Heming v. Swinnerton* (1845), 14 Sim. 588; *Harding v. Wickham* (1861), 2 John. & H. 676.

**1790.** —.]—The jurisdiction in matters of award referred under the Act of 1698 is altogether transferred to the ct. of which the submission is made a rule.—**AURIOL v. SMITH** (1823), Turn. & R. 121; 37 E. R. 1041.

**Annotations:—Consd.** *Blackett v. Bates* (1865), 2 Hem. & M. 610. **Refd.** *Hawkesworth v. Brammall* (1840), 5 My. & Cr. 281; *Murphy v. Keller* (1851), 17 L. T. O. S. 297. **Mentd.** *Stone v. Philipps* (1837), 4 Bing. N. C. 37; *Re Huddersfield Corpn. & Jacomb* (1874), L. R. 17 Eq. 476.

**1791.** —Where an award is made in consequence of a submission under the Act of 1698, a bill to set aside the award cannot be sustained, even though it charge fraud & corruption in the arbitrator.—**DAWSON v. SADLER** (1823), 1 Sim. & St. 537, at p. 542; 2 L. J. O. S. Ch. 171; 57 E. R. 212.

**Annotations:—Consd.** *Nichols v. Roe* (1834), 5 Sim. 156. **Refd.** *Heming v. Swinnerton* (1846), 1 Coop. temp. Cott. 386.

**1792.** —.]—Where it has been agreed that a submission to an award shall be made a rule of the Ct. of Common Pleas, a ct. of equity will not interfere by granting one of the parties relief, inconsistent with the award, although the submission has not been made a rule of ct.—**DAVIS v. GETTY** (1823), 1 Sim. & St. 411; 1 L. J. O. S. Ch. 209; 57 E. R. 164.

**Annotations:—N.F.** *Nichols v. Roe* (1834), 5 Sim. 156. **Refd.** *Dawson v. Sadler* (1823), 1 Sim. & St. 537; *Heming v. Swinnerton* (1846), 1 Coop. temp. Cott. 386; *Murphy v. Keller* (1851), 17 L. T. O. S. 297; *Smith v. Whitmore* (1863), 3 New Rep. 193.

**1793.** —.]—Where it was one of the terms of the agreement to refer disputes to arbn. that the submission might be made a rule of a ct. of law at the option of either party, & a bill having been filed to set aside the award, it appeared by the answer of deft. that the submission had been made a rule of the Ct. of King's Bench by deft. subsequent to the filing of the bill:—**Held:** the common injunction which had been obtained by pltf. must be dissolved, as the Ct. of Ch. had no jurisdiction to relieve against the award.—**NICHOLS v. ROE** (1834), 3 My. & K. 431; 40 E. R. 164.

**Annotations:—Apprvd.** *Heming v. Swinnerton* (1846), 2 Ph. 79. **Refd.** *Murphy v. Keller* (1851), 17 L. T. O. S. 297; *Re Rouse & Meier* (1871), L. R. 6 C. P. 212. **Mentd.** *Whitmore v. Smith* (1861), 7 H. & N. 509, Ex. Ch.

**1794.** —The Act of 1698 excludes every jurisdiction to interfere with the execution of awards made under it, except the summary jurisdiction expressly given by it, & a bill will not lie to impeach an award made under the Act, whether the submission under which it was made has or has not been made a rule or order of ct. before bill filed.—**HEMING v. SWINNERTON** (1846), 2 Ph. 79; 1 Coop. temp. Cott. 386; 16 L. J. Ch. 90; 8 L. T. O. S. 357; 10 Jur. 907; 41 E. R. 872.

**Annotations:—Distd.** *Smith v. Whitmore* (1864), 2 De G. J. & Sm. 297. **Refd.** *Skerratt v. North Staffordshire Ry. Co.* (1848), 11 L. T. O. S. 23.

**1795.]** —.]—The ct. will not entertain a bill by a party against whom an award under a reference in an action at law has been made, the ct. of common law having full jurisdiction to do what will work complete justice between all parties.—**HARDING v. WICKHAM** (1861), 2 John. & H. 676; 4 L. T. 738; 9 W. R. 652; 70 E. R. 1230.

**Annotation:—Folld.** *Grafham v. Turnbull* (1875), 44 L. J. Ch. 538.

**1796.** —.]—An agreement to submit the affairs of a partnership to arbn., & that the submission shall be made a rule of a ct. of common law, cannot be pleaded in bar to a suit in equity, seeking discovery, complaining of plft. being sued in action, & praying for a receiver, although before the bill was filed arbitrators were appointed, & since bill filed the submission has been made a rule of the ct. The jurisdiction of the superior cts. in such a case is not ousted by C. L. P. Act, 1854. **Qu.:** whether, if the agreement to submit also contains a covenant not to take proceedings at law or in equity, in that case the submission may be pleaded in bar of proceedings in any superior ct., except that before which the reference is pending.

Where, in a reference under the Act of 1698, an award has been made, the jurisdiction in the matters of the award of every superior ct. except that before which the reference is pending is excluded.—**COOKE v. COOKE** (1867), L. R. 4 Eq. 77; 36 L. J. Ch. 480; 16 L. T. 313; 15 W. R. 981.

**Annotations:—Refd.** *Edwards v. Aberayron Mutual Ship Insec. Soc.* (1876), 1 Q. B. D. 563, Ex. Ch.; *Law v. Garrett* (1878), 8 Ch. D. 26, C. A.

**1797.** —Reference by court of law.]—Where a ct. of law has referred an action to arbn., & the arbitrator makes a mistake in his award, any application to remedy the mistake must be made to the ct. of law in which the arbn. originated, & not to a ct. of equity.—**GRAFHAM v. TURNBULL** (1875), 44 L. J. Ch. 538; 23 W. R. 645.

**1798.** —Reference at Nisi Prius.]—Upon a cause coming on for trial at *Nisi Prius*, a reference was ordered to an arbitrator:—**Semle:** the Ct. of Ch. could not interfere with the award, upon the ground of mistake on the part of the arbitrator, & it was immaterial, for this purpose, whether there was the verdict of a jury or the decision of a referee.—**CHUCK v. CREMER** (1848), 2 Ph. 477; 17 L. J. Ch. 287; 41 E. R. 1028.

**Annotations:—Folld.** *Harding v. Wickham* (1861), 2 John. & H. 676. **Consd.** *Smith v. Whitmore* (1864), 2 De G. J. & Sm. 297, L.J.J. **Folld.** *Grafham v. Turnbull* (1875), 44 L. J. Ch. 538. **Refd.** *Dudgeon v. Thomson* (1854), 24 L. T. O. S. 39, H. L.; *Smith v. Whitmore* (1863), 1 Hem. & M. 576.

**1799.** —Reference under statute.]—The Ct. of Ch. will not, on a bill filed to set aside the award of a tribunal created by Act of Parliament & thereby empowered to decide upon the matters to which the award refers, assume the functions of a ct. of appeal.—**NEWRY & ENNISKILLEN RY. CO. v. ULSTER RY. CO.** (1856), 8 De G. M. & G. 487;

28 L. T. O. S. 53 ; 2 Jur. N. S. 936 ; 4 W. R. 761 ; 44 E. R. 478, C. A.

*Annotation* :—*Mentd. Re Kent County Council & Sandgate L. B.*, [1895] 2 Q. B. 43.

**1800. Submission of proceeding in form criminal.]**

—Defts. pleaded not guilty to an indictment for not repairing a road, but withdrew that plea & pleaded guilty, subject to the award of arbitrators indifferently chosen. The arbitrators' award was against defts. On a motion for a rule to show cause why the award should not be set aside for certain objections appearing on the face of it :—*Held* : (1) this was a proceeding in form criminal, & the ct. had no power to interfere with the order of the judge at assizes ; (2) defts. ought to address their application for redress to the ct. below.—*R. v. COTESBATCH (INHABITANTS)* (1823), 2 Dow. & Ry. K. B. 265.

**1801. Submission of indictment for conspiracy.]**

An indictment for a conspiracy was removed from the Chester ct. into the King's Bench & sent to Chester to be tried. A juror was there withdrawn, & all matters in difference referred to arbn. :—*Held* : the Ct. of King's Bench had no authority to set aside the award.—*R. v. CORBISHLEY* (1824), 2 L. J. O. S. K. B. 150.

**1802. When agreement not to impeach—Illegality.]**

—A clause in a deed of submission to arbn. "that no action or suit at law or in equity shall be commenced or prosecuted against the arbitrators concerning their award when made, nor to impeach

**1802 i. When agreement not to impeach—Illegality.]**—It is not competent for the parties by an agreement to oust the jurisdiction of the ct. to set aside an award, if misconduct on the part of the arbitrators were shown, or if it were shown that the award was improperly procured.—*HURDWARY MULL v. AHMED MUSAJI SELAJI* (1908), 13 C. W. N. 63.—**IND.**

**1802 ii. — — —.]**—In an agreement to submit to arbn. it was stipulated that the decision of the arbitrator should be accepted as final, & that no appeal therefrom should be made by either party :—*Held* : this stipulation did not prevent the ct. from setting aside the award on the ground of misconduct on the part of the arbitrator.—*RANGA v. SITHAYA* (1883), 1 L. R. 6 Mad. 368.—**IND.**

**b. Reduction of interim decree competent.]**—An action sought to reduce an interim decree leaving the submission standing & leaving the arbitrator to go on & pronounce another decree :—*Held* : while such an action was not incompetent, a very strong case must be made.—*WALLS v. CONNELL* (1862), 24 Dunl. (Ct. of Sess.) 1048.—**SCOT.**

**PART IV. SECT. 16, SUB-SECT. 2.—A.**

**c. General nature of objections to an award.]**—The objections which can be raised against an award are such as at the outset are fatal to it, e.g., objections which deny its genuineness or deny that the objector was a consenting party to the arbn.—*PROTAP CHUNDER ROODRO v. HURO MONEE DOSLA* (1875), 24 W. R. 188.—**IND.**

**d. — — — "Sufficient cause."]**—The words "sufficient cause" in Civil Procedure Code, 1859, s. 327, comprehend any substantial objection which appears on the face of the award, or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the ct. in England.—*CHOWDHRI MURTAZA HOSSEIN v. BECHUNNISSA* (1876), L. R. 3 L. A. 209 ; 26 W. R. 10.—**IND.**

**e. — — —.]**—To set aside an award, the objections must be substantial & the award must be clearly bad, founded up-

on a mistake of law or fact or on fraud, partiality, misbehaviour, & excess of authority, but not on an erroneous judgment.—*MORLEY v. KLONDIKE MINES RY. CO., HARRISON v. KLONDIKE MINES RY. CO.* (1907), 5 W. L. R. 137 ; 6 W. L. R. 417.—**CAN.**

**f. No imputation on good faith—Rule discharged.]**—A rule nisi to set aside an award was discharged with costs, there being no imputation on the good faith of the arbitrator, & his award appearing from the facts & pleadings to be just & reasonable.—*HARRIS v. MCCORMICK* (1869), 2 N. S. D. 21.—**CAN.**

**g. — — — Judicial misconduct alleged.**—Where an arbitrator is accused of having been guilty of judicial misconduct, but there is no suggestion of a want of bona fides, it would be violating sound principles if the award were set aside.—*Re FALSE CREEK RECLAMATION ACT*, 1914 (1914), 7 W. W. R. 433.—**CAN.**

**h. Corruption, falsehood, bribery.]**—Where no circumstances are stated from which corruption, falsehood, & bribery can be inferred, the reduction of a decree-arbitral is not warranted.—*JOHNSTON v. CHEAPE* (1817), 6 Pat. App. 339, 342.—**SCOT.**

**k. — — —.]**—*ADAMS v. G. N. OF S. RY. CO.*, [1891] A. C. 31.—**SCOT.**

**l. Corruption & misconduct.]**—Where the subject of an arbn. is an action in ct., the award can only be set aside for corruption & misconduct of the arbitrator.—*AITKEN, SPENCE & CO. v. FERNANDO*, [1903] A. C. 200 ; 72 L. J. P. C. 63 ; 88 L. T. 178 ; 19 T. L. R. 295, P. C.—**IND.**

**m. Not objection to merits.]**—An application to set aside an award will not be sustained on objections going only to the merits.—*FORBES v. LORD*, N. B. Dig. 55 (9).—**CAN.**

**n. — — —.]**—The ct. will not set aside on affidavits setting forth a party's just claim to the allowance of large sums of money upon grounds which the arbitrators had rejected.—*McMILAN v. McLEAN* (1834), 4 O. S. 5.—**CAN.**

**o. — — —.]**—The ct. will not set aside an award upon an affidavit of merits, except upon manifestly clear & strong

the award, unless some collusion or other fraud be discovered or appear therein," does not prevent a party to the deed from moving to set the award aside (for illegality upon the face of it), though no fraud or collusion appear.—*Re MACKAY, WEST & HOLT* (1834), 2 Ad. & El. 356 ; 111 E. R. 138.

*Annotation* :—*Mentd. Wood v. Adcock* (1852), 7 Exch. 468.

**SUB-SECT. 2.—GROUNDS FOR SETTING ASIDE.**

**A. Generally.**

**1803. Malpractice — Irregularity.]**—Where an award is made a rule of ct. it shall not be set aside unless there was malpractice with the arbitrators or some irregularity, such as want of notice of meeting. An award must be performed in spite of defects in formality.—*ANON.* (1698), 1 Salk. 71 ; 91 E. R. 66.

**1804. Manifest corruption.]**—Nothing is a ground within the Act of 1698 for setting aside an award but manifest corruption in the arbitrators. The ct. will not unravel the matter & examine into the justice & reasonableness of what is awarded.—*ANDERSON v. COXETER* (1720), 1 Stra. 301 ; 93 E. R. 534.

*Annotation* :—*Mentd. Rogers v. Dallimore* (1815), 6 Taunt. 111.

grounds.—*SCOBELL v. GILMOUR* (1847), 5 U. C. R. 48. **CAN.**

**p. — — —.]**—Motions to set aside or refer back awards made on *Nisi Prius* references under C. L. P. Act, s. 160, as contemplated by 39 Vict. c. 28, are only such motions as were allowable before the passing of the Act.

Where a motion was made to set aside the award of an arbitrator merely on the ground of the decision arrived at by the arbitrator being against the evidence or weight of evidence, the motion was refused.—*TANNER v. SEWERY* (1876), 27 C. P. 53.—**CAN.**

**q. Not error of judgment.]**—It is not competent to the ct. to set aside an award for error of judgment on the part of arbitrators, in the absence of misconduct or mistake.—*RICKARDS v. RICKARDS* (1873), 3 N. S. D. 227.—**CAN.**

**r. Not inequity or injustice.]**—Inequity or injustice, however apparent, affords no ground for setting aside a decree-arbitral.—*PITCAIRN v. DRUMMOND* (1822), 1 Sh. (Ct. of Sess.) 431.—**SCOT.**

**s. Not excessive damages.]**—The ct. refused to set aside an award on the ground of its unreasonable excessiveness, there being no evidence of corruption or misconduct on the part of the arbitrators, though the ct. would not on the evidence have arrived at the same conclusion.—*CROUSE v. PARKE* (1849), 6 U. C. R. 362.—**CAN.**

**t. — — —.]**—An award cannot be impugned for excessive damages, on the affidavit of one of the arbitrators, giving no data or basis for calculation to support his opinion against the majority.—*Re GREAT WESTERN RY. CO. & CHAUVIN* (1855), 1 P. R. 288.—**CAN.**

**u. — — —.]**—An award cannot be put aside because the amount is excessive, or the result of an incorrect valuation, or reposes upon a false basis.—*LA CIE. DE CHEMIN DE FER D'ONTARIO ET QUEBEC v. LES CURES, ETC., DE STE. ANNE DU BOUT DE L'ILE* (1889), 5 M. L. R. 51.—**CAN.**

**v. — — —.]**—*Held* : in absence of irregularity or partiality on the part of the umpire, an award could not be set aside as being excessive.—*TEDDER v. GREIG* (1912), A. D. 73.—**S. AF.**



**Sect. 16.—Setting aside award: Sub-sect. 2, A. & B.]**

**1805. Fraud or corruption.]**—The ct. will not set aside an award for defects appearing thereon, but only for fraud or corruption in the arbitrators.—**HUTCHINS v. HUTCHINS** (1738), Andr. 297; 95 E. R. 406.

**Annotation:—***Apld.* **Pedley v. Goddard** (1796), 7 Term Rep. 73.

**1806. Partiality & corruption.]**—On a bill to set aside an award, pltf. will not be suffered to go into legal objections, but only for partiality & corruption, unless an account is prayed.—**CHAMPION v. WENHAM** (1754), Amb. 245; 27 E. R. 164.

**1807. Partiality & misbehaviour—Exceeding commission.]**—An award will not be set aside but for partiality & misbehaviour of the arbitrators, or for their exceeding their commission.—**SUMPTER v. LIFE** (1774), Dick. 497; 21 E. R. 362.

**1808. Corruption or misbehaviour — Exceeding commission—Admitted mistake.]**—An award upon a general reference cannot be impeached for erroneous judgment upon facts, but may for corruption, misbehaviour, excess of power, & mistake admitted by the arbitrators; in the first three

#### SECT. 16, SUB-SECT. 2.—B.

**w. “Misconduct Meaning of.]**—The word “misconduct,” as used in Civil Procedure Code, s. 521 (a), should be interpreted in the sense in which it is used in English law with reference to arbn. proceedings. It does not necessarily imply moral turpitude, but it includes neglect of the duties & responsibilities of the arbitrators, & of what cts. of justice expect from them before allowing finality to their awards.—**GUNGA SAHAR v. LEKHRAJ SINGH** (1886), 1 L. R. 9 All. 253.—**IND.**

**x. — Inadequacy of award may be evidence of.]**—The inadequacy of an amount awarded cannot in itself be sufficient ground for setting aside the award, but may be evidence of misconduct on the part of the arbitrators.—**ROWAND v. MARTIN** (1890), 7 Man. L. R. 160.—**CAN.**

**y. — What must be proved—What constitutes waiver.]**—A party to an arbn. does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious, & before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award. It is not necessary that there should be absolute proof of misconduct before an award will be set aside on that ground; it is enough if there is a reasonable doubt raised in the judicial mind that all was fair in the conduct of the arbitrators.—*Re DOBERER & MAGAW'S ARBITRATION* (1903), 10 B. C. R. 48.—**IND.**

**z. — Refusal to amend bad award.]**—The refusal of arbitrators to amend a clearly bad award is misconduct.—**DEB NARAIN SINGH v. RAJMONEE KOONWAR** (1865), 3 W. R. 168.—**IND.**

**a. — In weighing of evidence.]**—In making an award the umpire stated that he relied on the evidence of one witness in preference to the evidence of some witnesses called on the other side. It was contended that his evidence had been improperly admitted, but no objection had been taken to the admissibility of the evidence before the arbitrators:—*Held*: the evidence having been admitted without objection, the weight to be given to the evidence was a matter for the consideration of the umpire, & his reliance on that evidence did not constitute legal misconduct.—*Re KEE & NATIONAL MORTGAGE & AGENCY CO. OF NEW ZEALAND, LTD.* (1917), N. Z. L. R. 173.—**N.Z.**

**b. — Refusal to receive proof.]**—A refusal by an arbiter to receive proof,

where proof is necessary, may amount to what the ct. would consider as a ground for setting aside an award.—**JOHNSTON v. CHEAPE** (1817), 5 Dow. 247; 3 E. R. 1318.—**SCOT.**

**c. — Not refusal to state case.]**—An unreasonable refusal to state a case on points of law, where power is given so to do, is not ground for setting aside an award.—**BAILEY v. HART** (1883), 9 V. L. R. 311.—**AUS.**

**d. — Failure to inform party of communication from other side.]**—**BURTA v. MUNICIPAL COMMITTEE OF LAHORE** (1902), L. R. 29 I. A. 168.—**IND.**

**e. — Irregularity.]**—A decree-arbitral was reduced, on the ground that the oversman had conducted an experiment in relation to certain goods, the subject of the arbn., in the absence of one of the parties.—**HEGGIE & CO. v. STARK & SELKRIQ** (1825), 3 Sh. (Ct. of Sess.) 488.—**SCOT.**

**f. — —.]**—An award will be set aside, if it appear that all the parties in the cause were not before the arbitrators on the arbn.—**WHITTY v. ATKINSON** (1829), 3 Ir. L. Rec. 91.—**IR.**

**g. — —.]**—Circumstances in which a reduction of a decree-arbitral, chiefly on the ground that the arbiter had refused to take evidence, was dismissed.—**MACDONALD v. MACDONALD** (1843), 16 Sc. Jur. 131.—**SCOT.**

**h. — —.]**—Where the proceedings of arbitrators had not been strictly regular, & the consequences of sustaining the award would be more serious than those of setting it aside, the ct. set it aside.—**BROWN v. GURRIER** (1851), 2 All. 124.—**CAN.**

**k. — —.]**—In an action of reduction of a decree-arbitral, on the ground that the arbiter had held communications as to the subject-matter of reference, of which the one party was aware, while the other, pursuer, was in ignorance:—*Held*: the matters founded on did not amount to legal corruption.—**BARR v. MACNAUGHTON (WILSON'S TRUSTEE) & BRUCE** (1852), 25 Sc. Jur. 18.—**SCOT.**

**l. — —.]**—*Held*: it was no objection to a decree-arbitral that the oversman had pronounced it on information acquired in his capacity of oversman elect.—**CRAWFORD v. PATERSON** (1858), 20 Dunl. (Ct. of Sess.) 488.—**SCOT.**

**m. — —.]**—Where the arbitrators had held a meeting & made their award without sufficient notice to one of the parties, the award was set aside.—

cases there must be satisfactory evidence against them, for the ct. favours awards.—**MORGAN v. MATHER** (1792), 2 Ves. 15; 30 E. R. 500.

**Annotations:—***Consd.* *Re Whiteley & Roberts*, [1891] 1 Ch. 558. *Refd.* *Re Plews & Middleton* (1845), 6 Q. B. 845. *Mentd.* *Rufford v. Bishop* (1829), 7 L. J. O. S. Ch. 108.

**1809. Corruption or partiality — Irregularity of conduct.]**—A bill will not lie to set aside an award on a question of fact referred to arbn., except for corruption, partiality, or irregularity of conduct in the arbitrators.—**GOODMAN v. SAYERS** (1820), 2 Jac. & W. 249; 37 E. R. 622.

**Annotations:—***Refd.* *Little v. Newton* (1841), 9 Dowl. 437. *Moseley v. Simpson* (1873), L. R. 16 Eq. 226.

#### B. Misconduct.

**1810. Corruption—Taking money before making award.]**—Where an arbitrator takes money, whether for charges or anything else, before making his award, it will be set aside.—**SHEPHERD (SHEP-PARD, SHEPHARD) v. BRAND** (1734), 2 Barn. K. B. 463; Cunn. 51; Lee temp. Hard. 53; 94 E. R. 620.

**Annotations:—***Distd.* *Kendrick v. Davies* (1837), 5 Dowl. 693. *Refd.* *Re Kenworthy & Queen Insee.* (1893), 9 T. L. R. 181.

**JONES v. REMINGTON** (1873), 7 I. L. T. Jo. 355.—**IR.**

**n. — —.]**—**QUEBEC CORPN. v. QUEBEC STREET RY.** (1886), 12 R. L. 412.—**CAN.**

**o. — —.]**—If irregularities can be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator.—**AMIR BEGAM v. BADRUD-DIN MURAIN** (1914), 1 L. R. 36 All. 336.—**IND.**

**p. — —.]**—*Re KEE & NATIONAL MORTGAGE & AGENCY CO. OF NEW ZEALAND, LTD.* (1917), N. Z. L. R. 173.—**N.Z.**

**q. — Not mere indiscretion.]**—Where the conduct of the arbitrators, although in one respect indiscreet, is on the whole unexceptionable & the conclusions of the arbitrators are legal & within their authority, there is no ground for setting aside.—*Re FRASER & PAINT* (1877), 3 R. & C. 10.—**CAN.**

**1810 i. Corruption.]**—An award will only be set aside for corruption.—**ELLIS v. DEANE** (1830), 3 Ir. L. Rec. 1st ser. 363.—**IR.**

**1810 ii. —.]**—If the parties agree to refer a case to arbn., the ct. has no further jurisdiction except the award were quarrelled with on the ground of corruption in the arbitrators.—**WOODLEY v. JOHNSON** (1818), 1 Moll. 394.—**IR.**

**1810 iii. Requisites of.]**—An action of reduction of a decree-arbitral was tried by a jury on issues of corruption. The jury found for pursuer. On a motion for a new trial:—*Held*: in order to justify the jury in finding corruption it was necessary that there should have been evidence of a moral bias or unfairness on the part of the arbiter, & as there had been no such evidence the verdict could not be sustained.—**CAMERON v. MENZIES** (1868), 6 Macph. (Ct. of Sess.) 279.—**SCOT.**

**1810 iv. — Making charges for work done.]**—*Held*: a submission to the law agents of the parties was not voided, in consequence of one of the agents making charges for what he had done in the submission as for ordinary professional business.—**LYLE v. FAICOMER OR LYLE** (1842), 15 Sc. Jur. 74.—**SCOT.**

**1810 v. — Attempting to borrow from parties.]**—An arbiter applied to one of the parties for a loan but was refused. The arbiter then applied to the other party & was also refused by him:—



**1811. Interest in subject-matter.]**—An award was set aside, the arbitrators being interested in the cargo, touching which the award was made, & therefore, putting too great a value thereon.—**EARL (EARLE) v. STOCKER** (1691), 2 Vern. 251; 1 Eq. Cas. Abr. 50; 23 E. R. 763.

*Annotation* :—**Consd.** *Re Whiteley & Roberts*, [1891] 1 Ch. 558.

**1812.** .].—A. having acted as agent for a purchaser & as such, made an offer to the vendor of a price for a certain piece of land, was afterwards appointed arbitrator on behalf of the purchaser, & the vendor then appointed an arbitrator to act with him in settling the price to be paid for the land :—*Held* : the vendor had waived any objection to the purchaser's arbitrator.

The vendor's arbitrator was, unknown to the vendor, a surveyor of, & shareholder in, a co. materially interested in the success of the undertaking for which the land was bought, & the umpire chosen by the vendor's arbitrator from a list furnished by the purchaser's arbitrator was, also unknown to the vendor, a surveyor employed in some matters by the same co. :—*Held* : there were not such objections to either as to afford judicial grounds for setting aside the award.—*Re ELLIOT (ELLIOTT) & SOUTH DEVON RY. CO.* (1848), 2 De G. & Sm. 17; 11 L. T. O. S. 42; 12 Jur. 445; 64 E. R. 8.

*Annotation* :—**Consd.** *Re Clout & Met. & Dist. Ry. Cos.* (1882), 46 L. T. 141.

**1813.** —.].—The ct. set aside an award, on the ground that the claim had been assigned to one of the arbitrators, though the award was made by the umpire, who was ignorant of the assignment.—**BLANCHARD v. SUN FIRE OFFICE** (1890), 6 T. L. R. 365.

**1814. Bias—Indebtedness to one party.]**—The ct. will not set aside an award merely on the ground that the arbitrator, at the time of the reference & award, was indebted to one of the parties & did not communicate that fact to the other.—**MORGAN v. MORGAN** (1832), 1 Dowl. 611; 2 L. J. Ex. 56.

*Held* : while the proceedings of the arbiter were grossly irregular, they did not amount to corruption, & in respect they were not shown to have influenced the award, the award must stand.—**MORISONS v. THOMSON'S TRUSTEES** (1880), 18 Sc. L. R. 97.—**SCOT.**

**1811 i. Interest in subject-matter.]**—It is not a valid objection to an arbiter that he has himself an interest in the matter, & where it is well known to parties before they sign a submission that the arbiter has an interest in the subject of the reference, the award is good notwithstanding the interest.—**JOHNSTON v. CHEAPE** (1817), 5 Dow. 217; 3 E. R. 1318.—**SCOT.**

**1811 ii.** .].—Where an oversman is a shareholder in a co., which is party to the submission, a decree-arbitral should be reduced, inasmuch as he acted as a judge in his own cause.—**SMITH v. LIVERPOOL & LONDON & GLOBE INSURANCE CO.** (1887), 24 Sc. L. R. 672.—**SCOT.**

**1811 iii. Interest disqualifying party referring.]**—F., a member of a municipal council, took part at a meeting of the council when it was decided to refer to arbn. the price to be paid by the council for certain leasehold interests, of one of which F. was owner :—*Semble* : supposing the council had power to refer to arbn., the award would be vitiated so far as F. was concerned, but not so far as the other leaseholders were concerned.—**SOLICITOR-GENERAL v. DUNEDIN CORPN.**, 1 J. R. N. S. 1.—**N.Z.**

**1814 i. Bias.]**—There is an appeal to the Superior Ct. from all awards of arbi-

trators, where the proprietors pretend lesion or prejudice.—**COURNOYER v. RICHELIEU** (1915), 21 R. de J. 212.—**CAN.**

**1814 ii.** —.].—*Must be clearly shown.*—The ct. will not disturb an award on the grounds of partiality in the arbitrators, unless the partiality is very clearly shown.—**LLOYD v. HOSKINS** (1840), 1 Kerr. 132.—**CAN.**

**1814 iii.** —.].—*Must be proved.*—*Re DOBERER & MAGAW'S ARBITRATION* (1903), 24 C. L. T. Occ. N. 113.—**CAN.**

**1814 iv.** —.].—*Not inferred from inadequacy of sum awarded.*—Where parties have agreed to refer, & have nominated their own tribunal, mere inadequacy of the amount awarded is no proof of partiality or misconduct of such a nature as to enable the ct. to set aside the award.—**WELLINGTON CORPN. v. AITKEN, WILSON & CO.** (1914), 33 N. Z. L. R. 897.—**N.Z.**

**1814 v.** —.].—*Relationship.*—The fact that an arbitrator is a brother of one of the parties to arbn. proceedings affords a real likelihood of an operative prejudice on the part of the arbitrator.—*Re TURNBULL & PIPESTONE* (1915), 8 W. W. R. 982.—**CAN.**

**1814 vi.** —.].—*Creditor of one party.*—The fact of one of the arbitrators being a creditor of one of the parties is not sufficient to make an award invalid.—**HALL v. WILSON** (1857), 7 C. P. 272.—**CAN.**

**1814 vii.** —.].—*Arbitrator retained as solicitor of one party as executor.*—An award was set aside, on the ground that one of the arbitrators was disqualified

**1815.** —.].—*Re KENWORTHY & QUEEN INSURANCE CO.* (1893), 9 T. L. R. 181.

**1816.** —.].—*Assurance that charges would not exceed certain sum.*—The existence of any circumstance calculated to bias the mind of an arbitrator unknown to either of the parties who have submitted to his decision is a sufficient ground for the interference of the ct.

Where a builder by his contract bound himself to abide by the decision & certificates of an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a certain specified amount, although he refused to guarantee that amount, the ct. did not consider the decision of the architect made under such a bias as binding, but gave directions so as to ascertain under the authority of the ct. how much remained justly due to pltf.—**KEMP v. ROSE** (1858), 1 Giff. 258; 32 L. T. O. S. 51; 22 J. P. 721; 4 Jur. N. S. 919; 65 E. R. 910.

*Annotations* :—**Consd.** *Scott v. Liverpool Corp.* (1858), 3 De G. & J. 334. **Refd.** *De Worms v. Mellier* (1873), L. R. 16 Eq. 554; *Edwards v. Aberayron Mutual Ship Insee. Soc.* (1876), 1 Q. B. D. 563, Ex. Ch. **Mentd.** *Larriere v. Morgan* (1872), 26 L. T. 339; *Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co.* (1875), 10 Ch. App. 520, n.; *Botterill v. Ware Grdns.* (1886), 2 T. L. R. 621, C. A.

**1817.** —.].—*Retention to give evidence in other matters.*—In an arbn. under Lands Clauses Consolidation Act, 1845 (c. 18), Y., the arbitrator on behalf of claimants, selected W. to act as umpire from the names of three persons submitted to him by R., the arbitrator on behalf of resps. On Oct. 11 the parties went before the umpire. The award was made on Nov. 22, taken up by resps., & served upon claimants on Dec. 10. W. had given evidence on behalf of resps. on Nov. 3 & 30, with respect to the value of other property in the same neighbourhood, on claims against resps. Y. saw in the newspapers that W. was giving evidence in the other cases, & on Oct. 11, when the arbitrators & umpire went to view the premises, he had noticed that R. showed W. other property in

having been regularly retained as solr. of the estate of which deft. was the exor.—**SUMNER v. BARNHILL** (1879), 3 R. & C. 501.—**CAN.**

**1814 viii.** —.].—*Previous connection with suit as counsel for party.*—An award was made by an arbitrator in favour of deft. Subsequently it was discovered that the arbitrator, a judge of the county ct., had, while at the bar, prepared & read an affidavit opposing a motion made by pltf.'s counsel for a reference :—*Held* : no disqualification.—**McLELLAND v. JENNETT** (1879), 1 R. & G. 52.—**CAN.**

**1814 ix.** —.].—*Sub-agent for agent of one party.*—Arbitrators must be indifferent, & an award made by arbitrators, one of whom was at the time of the arbn. sub-agent for an agent of defts., in obtaining risks, was held void, although he only acted in that capacity to a small extent.—**VINEBERG v. GUARDIAN FIRE & LIFE ASSURANCE** (1892), 19 A. R. 293.—**CAN.**

**1814 x.** —.].—*Employment offered during hearing & accepted after award.*—**CONMEE v. CANADIAN PACIFIC RAILROAD CO.** (1889), 16 U. R. 839.—**CAN.**

**1814 xi.** —.].—*Expression of opinion.*—*Held* : it was no objection to the competency of an award that it decided upon matters on which the arbitrator, as the servant of one of the parties, had been engaged, or that the arbitrator had had disputes with the contractor & formed an opinion adverse to him, unless it could be shown that he would not listen to argument & that he was not prepared to modify the opinion already formed even if shown to be wrong.—**BARRY v. MINISTER FOR WORKS** (1906), 8 W. A. J. R. 53.—**AUS.**

**Sect. 16.—Setting aside award: Sub-sect. 2, B. & C.]**

the same neighbourhood, but he did not know, at the time he selected W. to act as umpire, that he was about to be retained by resps. to give evidence in other & similar cases. No objection was made by claimants, nor by any one on their behalf, that W. was not a disinterested person until Dec. 20:—**Held:** (1) claimants had sufficient knowledge of the position of W. before the award was made, & having given no notice of objection until Dec. 20, they must be taken to have consented to W. acting as umpire; (2) the objection was a proper one, had it been taken in time (STEPHEN, J.).—*Re CLOUT & METROPOLITAN & DISTRICT RY. Cos.* (1882), 46 L. T. 141.

**1818. — Evidence given on behalf of one of parties in other inquiry.]**—There is no such necessary incompatibility in an umpire in one reference to arbn. acting as a witness, on behalf of one of the parties to it, in another & similar reference, as to invalidate his award on the ground of bias.—*Re HAIGH & LONDON & NORTH WESTERN & GREAT WESTERN RY. Cos.*, [1896] 1 Q. B. 649; 65 L. J. Q. B. 511; 74 L. T. 655; 44 W. R. 618; 12 T. L. R. 298.

**1819. Expression of opinion.]**—An arbitrator does not necessarily misconduct himself by expressing an opinion on the subject-matter of the reference before formally entering upon it, even though such expression be made in writing & be identical in terms with the award finally made.—*HUTCHINSON v. HAYWARD* (1866), 15 L. T. 291.

**1820. Statement that evidence would not weigh on his mind.]**—Deft. having brought several actions against pltf's., they filed a bill for an account & to restrain the actions. The ct. made an order referring the matters to arbn. An award was made in deft.'s favour, & pltf's. objected to it on the ground that, on certain affidavits being tendered to the arbitrator on behalf of pltf's., he had said that he would look at them, but that they would not weigh on his mind as evidence:—**Held:** the arbitrator's statement that the affidavits would not weigh on his mind as evidence was no ground for setting the award aside, there being no evidence of misconduct on the part of the arbitrator.—*IMPERIAL ROYAL CHARTERED AZIENDA ASSICURATRICE OF TRIESTE v. FUNDER* (1872), 27 L. T. 637; 21 W. R. 116, C. A.

**1821. Omission to deal with costs.]**—It is no ground for setting aside an award that the arbitrator has said nothing as to pltf.'s costs, the plain inference being that he meant pltf. to pay his own costs.—*ROSE v. REDFERN* (1861), 10 W. R. 91.

**1822. Failure to state case.]**—If a party to an arbn., acting *bonâ fide*, requests the arbitrator on reasonable grounds either to state a special case for the opinion of the ct. upon some questions so arising & material for consideration, or to delay his award until the party can himself apply to the ct. for an order directing a special case, & the arbitrator refuses to comply with the request or by summarily making his award attempts to preclude

the party from applying, the arbitrator is *prima facie* guilty of a breach of duty towards that party. But if the application is frivolous & made merely for the purpose of delay, the arbitrator will be right in refusing it & will be upheld by the ct. if he does so.

A breach of duty of this character is *prima facie* misconduct on the part of an arbitrator within s. 11 of the Act of 1889, & justifies the ct., even after an award has been completed, in setting it aside under s. 11 (2), or in remitting it for reconsideration under s. 10 (1).—*Re PALMER & Co. & HOSKEN & Co.*, [1898] 1 Q. B. 131; 67 L. J. Q. B. 1; 77 L. T. 350; 46 W. R. 49; 14 T. L. R. 28; 42 Sol. Jo. 32, C. A.

**Annotation:—***Apld. Re Montgomery, Jones & Liebenenthal* (1898), 78 L. T. 406, C. A.

**1823. Departing from terms of submission — Disregarding standard sample.]**—If arbitrators, or a committee of appeal, disregard a standard they are required by the conditions of the contract to go by (as if they disregard a particular standard sample), their award will be set aside for misconduct.—*Re CORN TRADE ASSOCN. & COUVELA & VOLKART* (1888), 4 T. L. R. 209.

**1824. — Disregarding basis provided in submission.]**—By an agreement a matter in dispute was to be submitted to arbn. on the "basis of Riga usance." An award regular upon the face of it was made by an arbitrator validly appointed, who did not have the agreement before him at the time of the arbn. & had never heard of Riga usance, & in making his award had no regard to Riga usance:—**Held:** the award being regular upon the face of it, it must be presumed, in the absence of evidence to the contrary, that everything was rightly & duly performed, & the award was in accordance with Riga usance.—*BLAND & Co., LTD. v. RUSSIAN BANK FOR FOREIGN TRADE* (1906), 11 Com. Cas. 71.

**1825. — Improperly allowing sum—Waiver ineffectual.]**—Upon the face of an award, the arbitrator appeared to have improperly disallowed a sum of £818. On an application to a ct. of equity to set aside the award, resp. offered to allow it:—**Held:** the award must be set aside.—*SKIPWORTH v. SKIPWORTH* (1846), 9 Beav. 135; 50 E. R. 294.

**1826. Illegality.]**—Where a partnership is illegal, money paid by one of two partners for the other on account of losses incurred by them on partnership insurances cannot be recovered in an action brought by him against the other partner, & if this, with other causes of dispute between the two, be referred to an arbitrator, who awards a sum due from one to the other for money so paid, the ct. will set aside that part of the award.—*AUBERT v. MAZE* (1801), 2 Bos. & P. 371; 126 E. R. 1333.

**Annotations:—***Mentd. Re Scott, Ex p. Bell* (1813), 1 M. & S. 751; *Cannan v. Bryce* (1819), 3 B. & Ald. 179; *M'Callan v. Mortimer* (1842), 9 M. & W. 636.

**1827. —.]**—Though an arbitrator on a question of mixed law & fact has allowed transactions

**1819 i. Expression of opinion.]**—A contract provided for payment of damages for delay in completing the work, the amount to be ascertained by a reference to the employer's architect. A dispute having arisen, the architect wrote to the contractors: "Regarding your call on me, etc. I do not intend now to arbitrate in connection with the matter, but I may state that after consideration of all the points the liability for the delay lies apart from your interests in the contract":—**Held:** the architect had disqualified himself from acting as arbiter in the matter, he having thought fit to call on the subject, & his letter

expressing quite clearly pre-judgment of the question.—*M'LAUCHLAN & BROWN v. MORRISON* (1900), 8 S. L. T. 279.—**SCOT.**

**1823 i. Departing from terms of submission—Disregard of legal rights.]**—Where the legal rights are not harsh, but the award disregards them entirely, it is void for inequality & partiality.—*JEKYLL v. WADE* (1860), 8 Gr. 363.—**CAN.**

**r. Failure to comply with statutory requirements.]**—Motion to set aside an award between A. & B. & the town of P., on the ground (*inter alia*) that the arbi-

trators did not file their notes under R. S. O., 1887 (c. 184), s. 401:—**Held:** the omission to file wrought no prejudice, as the case turned on the principle of assessment & not on the details of the evidence.—*Re HARVEY & PARKDALE* (1888), 16 O. R. 372.—**CAN.**

**s. Acts of arbitrators after award—No ground for setting aside.]**—An award cannot be impeached because the arbitrators afterwards did an act required neither by the law nor by the submission.—*KULA NAGABUSHANAM v. KULA-SESHACHALAM* (1863), 1 Mad. 178.—**IND.**



apparently illegal, as premiums of insurance on a voyage to a hostile port, the ct. will not set aside the award.—**WOHLENBERG v. LAGEMAN** (1815), 6 Taunt. 251; 1 Marsh. 579; 128 E. R. 1031.

*See, also, cases in Sect. 8, Sub-sect. 5, ante.*

**Errors & omissions in recitals in award.]—***See cases in Sect. 6, Sub-sect. 2, ante.*

**Mistakes in award.]—***See cases in Sect. 13, Sub-sects. 1 & 2, ante.*

**Award outside submission.]—***See cases in Sect. 8, Sub-sect. 2, ante.*

**Lack of certainty & finality of award.]—***See cases in Sect. 8, Sub-sect. 3, ante.*

**Failure to find on various issues separately.]—***See cases in Sect. 8, Sub-sect. 9, ante.*

**Failure to adjudicate on all matters submitted.]—***See cases in Sect. 8, Sub-sect. 8, ante.*

**Misconduct during hearing.]** *See cases in Part III., Sect. 2, ante.*

**Failure to deal properly with costs.]—***See cases in Sect. 20, post.*

**Improperly or excessively charging fees, etc.]—***See cases in Part II., Sect. 5, Sub-sect. 4, ante.*

#### *C. Improperly procuring Award.*

**1828. Fraud— Releases & bond granted in award cancelled.]—**An award was obtained by fraud, & under the award general releases were given & a bond sealed & delivered by one party to the other:—*Held*: the releases & bond should be brought into ct. to be cancelled.—**NORGATE v. PONDER** (1627), Nels. 6; 21 E. R. 775.

**1829. — When discovered after award.]—**Where a party applies to set aside an award on the ground of newly discovered fraud, he is bound to show that it is a new discovery & that he could not, with due diligence, have made the discovery before.—**AURIOL v. SMITH** (1823), Turn. & R. 121; 37 E. R. 1041.

*Annotations:—Mentd.* Stone v. Phillipps (1837), 4 Bing. N. C. 37; Hawkesworth v. Brammall (1840), 5 My. & Cr. 281; Murphy v. Keller (1851), 17 L. T. O. S. 297; Blackett v. Bates (1865), 2 Hem. & M. 610; *Re* Huddersfield Corpn. v. Jacomb (1874), L. R. 17 Eq. 476.

**1830. — & concealment.]—**If an account stated, & releases, are pleaded to a bill to set aside an award & to have an account, & deft. swears the accounts taken by the arbitrators were true accounts, but does not answer particular concealments & frauds alleged in the bill, the plea is bad.—**SOUTH SEA CO. v. BUMSTEAD** (1734), 2 Eq. Cas. Abr. 80; 22 E. R. 70.

**1831. Award unfairly obtained— Set aside.]—**

**WARD v. PERIAM** (1721), Turn. & R. 131; 2 Eq. Cas. Abr. 91; 37 E. R. 1046.

*Annotations:—Apld.* Dawson v. Sadler (1823), 1 S'm. & St. 537. *Consd.* Nichols v. Roe (1834), 5 Sim. 156. *Refd.* Auriol v. Smith (1823), Turn. & R. 121.

**1832. Concealment of facts.]—**The facts of the case submitted to arbitrators are to be fully laid before them, & if there has been any industry or art used by either of the parties to conceal, it is sufficient to make void the award.—**METCALF v. IVES** (1737), West temp. Hard. 82; Lee temp. Hard. 382; 95 E. R. 248; *sub nom.* MEDCALFE v. MEDCALFE, 1 Atk. 63.

*Annotations:—Refd.* Ridout v. Payne (1747), 1 Ves. Sen. 10; Campbell v. Twenlow (1814), 1 Price, 81. *Mentd.* Morris v. Burrows (1737), West temp. Hard. 242; Herne v. Herne (1741), Barn. Ch. 430; Honnor v. Morton (1828), 3 Russ. 65; Broadalbane v. Chandos (1836), 4 Cl. & Fin. 43, H. L.; Boileau v. Rutlin (1848), 2 Exch. 665; Lee v. Head (1855), 1 Jur. N. S. 722.

**1833. Papers withheld.]—**Bill to open an account for fraud, setting out particular instances of error & fraud in the account. The bill stated that there had been a reference & award, but charged that there would not have been such an award if papers had been produced which were withheld by deft. To this bill deft. pleaded the award, & the plea also stated a release of the matters contained in the bill. The plea was overruled.—**BURTON v. ELLINGTON** (1791), 3 Bro. C. C. 196; 29 E. R. 487.

**1834. Misrepresentation of facts.]—**A submission to arbn. was made a rule of ct. & an award made. A bill stated the award to have been obtained by misrepresentation of facts not then known to pltf. Plea, the award alone, & no answer:—*Held*: the plea was bad.—**GARTSIDE v. GARTSIDE** (1796), 3 Anst. 735; 145 E. R. 1023.

**1835. —.]—**A count in a declaration charged a false & fraudulent representation by defts., by reason whereof arbitrators awarded pltf. less compensation than they would otherwise have done:—*Held*: it disclosed no cause of action.

That is no ground of action: if the award was obtained by fraud, pltf. should have applied to the ct. to set it aside (**POLLOCK, C.B.**).—**BLAGRAVE v. BRISTOL WATERWORKS CO.** (1856), 1 H. & N. 369; 26 L. J. Ex. 57; 156 E. R. 1245.

*Annotation:—Mentd.* Goldsmid v. Hampton (1858), 27 L. J. C. P. 286.

**1836. False statements.]—**A cause having been referred to an arbitrator, he made his award in favour of deft. Pltf. applied to the ct. to set aside the award, on the ground of certain false statements having been made before the arbitrator by one of the witnesses examined, but the ct. refused to grant the application.—**PILMORE v. HOOD** (1839), 8 Dowl. 21; 8 Scott, 180; 3 Jur. 1153.

**1837. Perjury.]—**The ct. will refuse to set aside an award of an arbitrator, on the ground that the evidence of a material witness differed from & was contrary to evidence he had previously given in another arbn., which fact the party, against whom the evidence was given, only discovered subsequently to the award.—*Re* **GLASGOW & SOUTH WESTERN RY. CO. & LONDON & NORTH WESTERN RY. CO.** (1888), 52 J. P. 215.

#### **PART IV. SECT. 16, SUB-SECT. 2.—C.**

**1828 i. Fraud— Suppression of evidence.]—**To set aside there must have been some fraudulent suppression of evidence or other malpractice of the successful party, which should be definitely stated in the plaint.—**HURCHURN DASS v. HAZARE MULL**, 1 Ind. Jur. O. S. 12.—**IND.**

**1828 ii. — Concealment of facts.]—**The ct. will relieve against an award made in ignorance, on the part of the arbitrators, that important transactions had not

been entered in the books of a firm, in consequence of which omission the award had been to a corresponding amount too favourable to one party.—**WILSON v. RICHARDSON** (1851), 2 Gr. 448.—**CAN.**

**1832 i. Concealment of facts.]—**Where deft. made a representation to the arbitrators which was to influence their conduct, but suppressed a material fact, the ct. set aside the award.—**HICKMAN v. LAWSON** (1860), 8 Gr. 386.—**CAN.**

**t. One arbitrator misleading his co-**

**arbitrator.]—**An agreement was entered into for the appointment of two arbitrators they being empowered to select a third who should act with them. The arbitrators first appointed made an award which failed to comply with one of the material terms of the submission:—*Held*: the fact that one of the arbitrators was misled by his co-arbitrator in connection with the signing of the award would form a good ground for an application to set the award aside.—**HALL v. QUEEN INSURANCE CO.** (1906), 39 N. S. L. R. 295.—**CAN.**



*Sect. 16.—Setting aside award: Sub-sect. 2, D.;*

*D. Other Cases.*

**1838. Fresh evidence.]**—The ct. will not set aside an award on the ground that fresh evidence was discovered after the award was made, unless it is shown, as in the case of a new trial, that there was some surprise & that the evidence was such as a reasonable diligence could not have obtained.—*EARDLEY v. OTLEY* (1818), 2 Chit. 42.

**1839. —.]**—*Instrumenta noviter reperta* are not a ground for setting aside a decree-arbitral, especially if the want of timely discovery has been owing to the negligence of the party desirous of setting it aside.—*SHARP v. BURY* (1813), 1 Dow. 223; 3 E. R. 680.

*See, also, Nos. 1948—1950, post.*

**1840. Waiver — Permitting part performance — Attending taxation of costs.]**—An award having directed that pltf. should do certain repairs, for which purpose he should have power to enter on

the premises:—*Held*: deft. did not waive the objection to the award, by permitting pltf. to enter & perform the repairs, nor by attending the taxation of costs, nor by applying to pltf. for delay of execution, which application was acceded to by pltf. on terms which deft. did not accept.—*HAYWARD v. PHILLIPS* (1837), 6 Ad. & El. 119; 1 Nev. & P. K. B. 288; Will. Woll. & Dav. 1; 6 L. J. K. B. 110; 1 Jur. 102; 112 E. R. 46.

*Annotations:—Mentd.* *Jones v. Powell* (1838), 1 Will. Woll. & H. 60; *Hobdell v. Miller* (1840), 2 Scott. N. R. 163; *Land v. Hudson* (1843), 12 L. J. Q. B. 365; *Wood v. Wyld* (1847), 8 L. T. O. S. 394; *Jones v. Ives* (1850), 15 Jur. 107; *R. v. Hardey* (1850), 19 L. J. Q. B. 196; *Gapp v. Elwes* (1852), 20 L. T. O. S. 70; *Law v. Blackburn* (1853), 14 C. B. 77.

**SUB-SECT. 3.—GROUNDS FOR REFUSING TO SET ASIDE.**

**1841. Defect in rule.]**—If, upon a reference, either party is precluded by the terms of the rule from

**PART IV. SECT. 16, SUB-SECT. 2.—D.**

**1838 i. Fresh evidence.]**—An award will not be set aside on the ground of the discovery of material evidence after the award, where the party who speaks as to the discovery of the paper swears only in general terms that he had made diligent search, etc., without stating the particular circumstances relating to the search & finding.—*WOODWARD v. MERRITT*, N. B. Dig. 55 (10).—**CAN.**

**1838 ii. —.]**—Pltf., having advised the arbiters that he could supply proof to controvert the facts on the assumption of which the findings proceeded & receiving no answer, brought an action of reduction of the decree-arbitral & of payment & damages. The ct. refused to set aside the decree-arbitral.—*Mowbray v. Dickson* (1848), 10 Duml. (Ct. of Sess.) 1102.—**SCOT.**

**1838 iii. —.]**—Discovery of fresh evidence is no ground for setting aside an award, unless it be shown satisfactorily why it was not before obtained.—*DEAN v. PETERBOROUGH & COBBOURGH RY. CO.* (1856), 2 P. R. 79.—**CAN.**

**1838 iv. — Fraud.]**—A claim was submitted to arbn.; the arbiters found that the property was not over-insured, & that the co. were liable; the co. brought a reduction of the decree-arbitral, averring that since the action was raised they had discovered that the insurance was fraudulent & that the property was actually destroyed by defender by fire:—*Held*: the first averment was relevant to set aside the decree.—*HERCULES INSURANCE CO. v. HUNTER* (1835), 14 Sh. (Ct. of 147).—**SCOT.**

**v. — Surprise.]**—Where parties to a protracted reference thought their case so strong that it would be impossible for the arbitrator to find against them, & did not do all that it was in their power to do to repel the case of their opponent, relief against an adverse award on the ground of surprise & discovery of new evidence was refused.—*SEVERN v. COSGRAVE* (1866), 2 C. L. J. O. S. 11.—**CAN.**

**1838 vi. — Failure to proceed before umpire.]**—An award will not be set aside, where pltf. has not been prepared to prove his case before the umpire.—*REDMOND v. WADDY*, Ir. L. Rec. 1st ser. 129.—**IR.**

**u. Arbitrary decision — Civil Procedure Code, 1859, s. 324.]**—It is no ground to set aside an award of arbitrators, under the above Code, that the arbitrators decided the case against the written statement of deft.—*GOOROO CHURN DEY v. RAMDHONE PAUL* (1867), 7 W. R. 28.—**IND.**

**v. Not failure to give notice of taxation of costs.]**—An award, after disposing

of the different issues in pltf.'s favour, assessed his damages over & above his costs & charges at £52, & fixed the costs of the reference & award at £20. The costs of the suit were afterwards taxed without notice to deft., & a demand made of the amount awarded, the costs of the award as fixed by the arbitrator, & the taxed costs:—*Held*: the want of notice of taxation was not a ground for setting aside the award.—*JONES v. REID* (1852), 1 P. R. 247.—**CAN.**

**w. Not impossibility of performance.]**—*HARRY TOWN v. NORTHERN RY. CO.* (1862), 22 U. C. R. 25.—**CAN.**

**x. Award made out of time.]**—*GLASGOW, BARRHEAD & NEILSTON RY. CO. v. NITSHILL COAL CO.* (1850), Bell, Sc. App. 325; 22 Sc. Jur. 627.—**SCOT.**

**y. —.]**—An award executed after the time expired cannot be supported.—*HELPS v. ROBLIN* (1856), 6 C. P. 52.—**CAN.**

**z. Submission void.]**—Parties agreed to refer their disputes to arbn., pltf. having been induced by threats to do so. The proceedings of the arbitrators were admittedly irregular, but an award was made against one of the parties who subsequently sued deft. in the county ct. The judge found that the arbn. proceedings were irregular, but was of opinion that pltf. had by his conduct & acquiescence waived all objections to the award:—*Held*: the agreement of arbn. was wholly void.—*LAFERRIERE v. CADIEUX* (1896), 11 Man. L. R. 175.—**CAN.**

**a. Failure of submission by death of party.]**—*ROBERTSON v. CHEYNES (A. & H.)* (1847), 19 Sc. Jur. 224.—**SCOT.**

**b. Lack of authority in arbitrator.]**—To interfere with an arbiter is most inexpedient, unless he is exercising, or is proposing to exercise, a jurisdiction which he does not have (*LORD JUSTICE CLEIRK*).—*LICENSES INSURANCE CORPN. & GUARANTEE FUND, LTD. v. SHEARER* (1907), 44 Sc. L. R. 6.—**SCOT.**

**c. Disqualification of party initiating proceedings.]**—*Ontario Ditches & Watercourses Act, 1894, s. 24*, which provides that an award thereunder, after expiration of the time for appealing to the judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings, does not validate an award or proceedings, where the party initiating the latter is not an owner.—*McKILLOP TOWNSHIP v. LOGAN TOWNSHIP* (1899), 29 S. C. R. 702.—**CAN.**

**d. All necessary parties not parties to submission.]**—When, in a suit by wife against husband, the matter was re-

ferred to arbn., it is not a good objection to the award that no regular separation had taken place, & that the wife's next friend was not a party to the submission.—*BATEMAN v. ROSS* (1813), 1 Dow. 235, 244; 3 E. R. 684, 687.—**IR.**

**e. All parties to suit not parties to submission.]**—A. brought a suit against B. & his tenants, & it was arranged between A. & B. that the matter should be referred to arbn., the tenants not joining in the submission:—*Held*: the fact of the tenants not having joined in the submission did not vitiate the award.—*BISHOKA DASIA v. ANUNTO LALL PAIN* (1879), 4 C. L. R. 65.—**IND.**

**f. —.]**—An award made in the course of a suit is not rendered invalid by the mere fact that a party whose name was in the record, but who was not a necessary party to the suit, is not made a party to the arbn. proceedings.—*SABTA PRASAD v. DHARAM KIRTI SARAN* (1912), 1 L. R. 35 All. 107.—**IND.**

**g. Minor children injuriously affected.]**—An award as to division of property left to minor sons, alleged to give effect to the wishes of a father regarding a partial division of his property after his death, was set aside, so far as it affected those sons, on proof that the partition was injurious to them.—*RAMNARAIN PORAMANICK v. SREEMUTTY DOSSEE* (1864), 1 W. R. 281.—**IND.**

**h. Award calling for payment jointly & severally—Partners.]**—Appls. & resps. entered into an agreement unitedly to cultivate sugar cane, but terminated the agreement. A question arose as between applts., who were partners, & resps., as to whether applts., on whose lands the canes had been cultivated, were entitled to retain the roots with or without compensation to resps., & the question as to the value of such roots to applts. was referred to arbn. The umpire decided applts. were to pay to resps. the sum of £2,708:—*Held*: the award could not be set aside, on the ground that it had been made against applts. jointly & severally.—*TEDDER v. GREIG* (1912), A. D. 73.—**S. AF.**

**j. Certificate of doubt by arbitrators.]**—A certificate of doubt by arbitrators is not sufficient ground for setting aside an award.—*PERCY v. TOWGOOD* (1829), 2 Ir. L. Rec. 1st ser. 500.—**IR.**

**PART IV. SECT. 16, SUB-SECT. 3.**

**k. Award made rule of court—No objection.]**—It is no objection to a motion to set aside an award that the award has been made an order of ct.—*Re LAWSON & HUTCHINSON* (1872), 19 Gr. 84.—**CAN.**

## PART IV.—THE AWARD.

going into evidence of that which he is desirous to try, his remedy is to move to set aside the rule of reference, but he cannot impeach the award.—*DOE d. CARLISLE (LORD) v. MORPETH (BAILIFF, ETC.)* (1811), 3 Taunt. 378 ; 128 E. R. 150.

**1342. Submission obtained by fraud.]**—Where a submission to arbn. has been obtained by fraud the ct. will not set aside the award, but will set aside the order of reference.—*SACKETT v. OWEN* (1813), 2 Chit. 39.

**1843. Rejection of equitable case or question.]**—The ct. will not review an award on a suggestion that the arbitrator, to whom all matters in difference were referred, considered only the legal & rejected the equitable questions, when the party applying does not state to the ct. any equitable case or question which he supposes the arbitrator to have rejected.—*CRAVEN v. CRAVEN* (1817), 1 Moore, C. P. 403 ; 7 Taunt. 644 ; 129 E. R. 256.

*Annotation :—***Refd.** *Harrison v. Creswick* (1853), 13 C. B. 399.

**1844. Previous rule for same purpose discharged.]**—The ct. will not grant a second rule to set aside an award when a rule for that purpose has already been discharged.—*Re HELLYER & SNOOK* (1818), 2 Chit. 265.

**1845. Applicant having received costs of reference & award.]**—A party, after receiving the costs of reference & award, which by the terms of a rule of reference were to be paid by the other party, cannot move to set aside the award.—*KENNARD v. HARRIS* (1824), 2 B. & C. 801 ; 4 Dow. & Ry. K. B. 272 ; 107 E. R. 580.

*Annotation :—***Apld.** *Simmons v. King* (1845), 2 Dow. & L. 786.

**1846. Award void — Revocation.]**—Where an award is void, & nothing can be done upon it without suit, the ct. will not interfere to set it aside, because such suit must fail. But where a cause is referred by order of *Nisi Prius*, & the arbitrator has power to order a verdict to be entered for either party, & he makes an award, ordering a verdict to be entered, although such award be void, the ct. will set it aside, for otherwise the party in whose favour the award is made will have judgment upon the verdict without any new proceeding to enforce the award.—*DOE d. TURNBULL v. BROWN* (1826), 5 B. & C. 384 ; 8 Dow. & Ry. K. B. 100 ; 108 E. R. 143.

**1847. Award only bad in part—Defect causing no injury.]**—It is no ground for setting aside an award that the arbitrator has provided for a future contingency not adverted to by the submission, if it should not be injurious to the party complaining. If it be injurious & be a matter not within the terms of the submission & the power of the arbitrator, the award may be set aside *quoad* that part of it alone, leaving the rest valid.—*WINTER v. LETH-*

**l. Action to enforce award pending.]**—Where an action on the award is pending an application to set aside will be refused, if the grounds could be urged as a defence under the pleas.—*SMITH v. GEORGE* (1854), 12 U. C. R. 370.—**CAN.**

**m. —.]**—A motion by deft. to set aside the award may go on concurrently with an action to enforce it.—*HUYCK v. WILSON* (1898), 18 P. R. 44.—**CAN.**

**1846 i. Award void.]**—Where an award is a nullity so that an action to enforce it must fail, it is not usual for the ct. to set it aside.—*Re HIGGINS, FIELDING & WIGHT & VICTORIAN RAILWAYS COMRS.* (1885), 11 V. L. R. 140.—**AUS.**

**1846 ii. —.]**—Where an award is a nullity the ct. will not, as a rule, interfere to set it aside.—*BUCKLEY v. LAND & WORKS BOARD, GRAHAM v.*

*VICTORIAN RAILWAYS COMRS.* (1893), 19 V. L. R. 522.—**AUS.**

**1852 i. Waiver—Acquiescence for long period.]**—Very strong reasons must be adduced to have an award set aside by the ct. in a case where no objections have been made to it for years after it has been pronounced, nor until circumstances are so changed that all means of ascertaining otherwise the claims which it bears to settle have become impracticable.—*FORBES v. EDINBURGH WATER CO.* (1830), 8 Sh. (Ct. of Sess.) 459.—**SCOT.**

**1852 ii. —Laches.]**—The ct. will not entertain an application to set aside an award when the award was to be entered on the *postea* as a verdict of a jury, when appet. has been guilty of laches.—*FOULIS v. KINNEAR* (1835), Ber. [47], 26.—**CAN.**

**1852 iii. Acceptance of award.]**

*BRIDGE* (1824), M'Cle. 253 ; 13 Price, 533 ; 148 E. R. 107.

*Annotation :—***Consd.** *Stonehewer v. Farrar* (1845), 6 Q. B. 730.

**1848. Applicant having consented to variation in submission—Attempt to set aside award on ground that variation not under seal.]**—Where a submission under seal has been varied by indorsing on it a new agreement (as for changing one of the arbitrators), to which both the principal parties have expressly assented, one of these parties cannot afterwards move to have the award set aside on the ground that the indorsement was not under seal.—*Re TUNNO & BIRD* (1833), 5 B. & Ad. 488 ; 2 Nev. & M. K. B. 328 ; 3 L. J. K. B. 5 ; 110 E. R. 870.

*Annotations :—***Mentd.** *Re Jamieson & Binns* (1836), 4 Ad. & El. 945 ; *James v. Attwood* (1839), 7 Scott, 841 ; *Re Greenwood & Titterton* (1839), 9 Ad. & El. 699 ; *Re Hodson & Drewry* (1839), 7 Dowl. 569 ; *Re Hopper Barningham & Wrightson* (1867), 36 L. J. Q. B. 97.

**1849. Pending judge's order to stay proceedings.]**—In a cause which had been referred to arbn. by an order of *Nisi Prius*, the arbitrator made an award in favour of deft., who thereupon signed judgment. Pltf. obtained a rule to set aside the award, notice of which was served upon deft. Deft. afterwards, & before the argument of pltf.'s rule, obtained a judge's order to stay all further proceedings until pltf. should have given security for costs :—**Held :** the ct. could not entertain the application for setting aside the award whilst that order remained in force.—*BADHAM v. BADHAM* (1848), 1 Exch. 824 ; 10 L. T. O. S. 308 ; 154 E. R. 351.

**1850. Waiver—Objection that one of parties was an infant.]**—After an award has been made it is too late for the unsuccessful party to object that certain infants have been parties to the submission, & that certain other interested persons have not been parties to it. He cannot be allowed to take the chance of an award in his favour, & that failing, to claim to set aside the whole proceedings for a defect in the submission of which he had full cognizance when he entered into it.—*JONES v. POWELL* (1838), 6 Dowl. 483 ; 1 Will. Woll. & H. 60.

*Annotation :—***Apld.** *Re Wyld, Ex p. Wyld* (1860), 2 De G. F. & J. 642.

**1851. —Acting on award.]**—**Held :** deft., having voluntarily paid money & received a watch under an award, which he at the time must have known to be bad, could not afterwards be heard to say that the award was bad when he had acted upon it, & as it appeared, himself insisted upon acting upon it.—*GAPP v. ELWES* (1852), 20 L. T. O. S. 100.

**1852. —Acquiescence for long period.]**—After a submission of all matters in difference, & an award made by an umpire, a release given, & an acquiescence of nine years, the award will not be

Matter in dispute had been referred, & a sum awarded to be paid by deft. to pltf. Pltf. afterwards filed a bill for an account generally. Deft., in his answer, insisted on the award. A motion by pltf. that such sum as the ct. should think proper should be paid by deft. was grounded on an affidavit which also impeached the award on the ground of miscalculation :—**Held :** pltf. could not impeach an award & yet want a sum of money on the credit of it, & the motion must be refused.—*RICE v. RICE* (1787), Vern. & Scr. 107.—**IR.**

**1852 iv. —.]**—parties had treated all matters under three contracts as being within the submission, the co. could not object that the award was *ultra vires* as a whole ; (2) as the decree-arbitral did not separate its findings so as to enable part to be reduced & part sustained, it must be sustained *in toto*.—*NORTH BRITISH RY. CO.*



16.—*Setting aside award: Sub-sects. 3 & 4,*

## A.

set aside, or the matters unravelled, upon a suggestion that the umpire had particular matters only under his consideration.—*JONES v. BENNETT* (1713), 1 Bro. Parl. Cas. 528; 1 E. R. 735.

**1853.** — *After defence to action on award.* — Under a submission to arbn. containing no provision for making it a rule of ct. an award was made in June, 1859, finding a sum due from S. to W. In Dec., 1859, W. brought an action on the award, to which S. pleaded *nul tiel agard*, & adduced in support of the plea evidence that the arbitrators had made their award according to the opinion of a third party, & not their own. A verdict was found for S., leave being reserved to W. to move to have it entered for him. In June, 1860, the Ct. of Exch. discharged a rule *nisi* which had been obtained for that purpose, but in Dec., 1861, the Ct. of Exch. Ch. reversed that decision on the ground that the above defence was not available by way of plea. In Mar., 1862, S. filed his bill to set aside the award & to be relieved against the judgment:—*Held* (TURNER, L.J., *diss.*): pltf. must by his course of conduct be taken to have elected to defend himself against the award by defending the action & to abandon all other modes of opposition, & he must abide by the result of the action, & the bill had been properly dismissed.—*SMITH v. WHITMORE* (1864), 2 De G. J. & Sm. 297; 4 New Rep. 525; 33 L. J. Ch. 713; 11 L. T. 169; 10 Jur. N. S. 1190; 13 W. R. 2; 46 E. R. 390, L.JJ.

**1854.** — *Acquiescence.* — Pltf. disputed an award of valuers for the price of growing crops, on the ground that it was made upon a wrong principle. On settlement he took the sum awarded, & signed a receipt for it, writing the words "under protest" at the top. He afterwards waited nine months, & then filed a bill:—*Held*: he was precluded by delay & what amounted to acquiescence from disputing the valuation.—*PARROTT v. SHELLARD* (1868), 16 W. R. 928.

*v. BARR & Co.* (1855), 28 Sc. Jur. 34.—**SCOT.**

**1852 v.** — *Where matters in dispute are referred to arbn., & it is found that one question at issue is omitted from the reference, & that the award returned by the arbitrators contains no decision thereon, the party interested should bring the omission to the notice of the ct. If he fails to do so, the ct. is not wrong in not passing any order or coming to any decision on that point.*—*RAJ NARAIN ROY v. JUGGESSUR MOOKERJEE* (1870), 14 W. R. 247.—**IND.**

**1852 vi.** — *Held*: the adoption of an award by the ct. amounted to a ratification of what had been done by the arbitrators, & the parties, having made no objection to the action of the ct., must be taken to have waived any objection to the award.—*HAR NARAIN SINGH v. BHAGWANT KUAR* (1887), 1 L. R. 10 All. 137.—**IND.**

**1852 vii.** — *Pltf. in a suit, which was one on an account stated, agreed to refer to arbn. the question whether the accounts were correct or not. The decree was passed on the very day the award was filed:—Held*: pltf. was not estopped from taking objections to the award by reason of his silence when the decree was pronounced.—*PHIRAN v. BAHORAN* (1875), 7 N. W. 367.—**IND.**

**1852 viii.** — *Held*: even if an award were bad, deft. having acted on it & accepted the benefits it gave him, had precluded himself from impeaching it.—*BRIJ MOHAN LAL v. SHYAM SINGH* (1901), 1 L. R. 24 All. 164.—**IND.**

**1852 ix.** — *Parties to an award in a boundary dispute petitioned*

the settlement officer to lay pillars along the lines settled by the arbitrators:—*Held*: their so doing amounted to an acceptance of the award.—*RAMRUNJUN CHUCKERBUTTY v. RAM PRASAD DASS*, 13 C. L. R. 26.—**IND.**

**1852 x.** — *Not attendance under protest.* — Defts. applied to the ct. to set aside an award in favour of pltf., having previously attended the hearing of the arbn. after objecting to the jurisdiction of the arbitrators:—*Held*: their objection was not thereby waived.—*HIGGINS, FIELDING & WIGHT v. VICTORIAN RAILWAY COMRS.* (1885), 11 V. L. R. 140.—**AUS.**

## PART IV. SECT. 16, SUB-SECT. 4.—A.

**1856 i.** *Application by party benefiting by alleged defect.* — An award cannot be set aside at the instance of one of defts., on the ground of a claim being improperly allowed against pltf.s.—*TREMAIN v. MACKINTOSH* (1873), R. E. D. 447.—**CAN.**

**1856 ii.** — *Even though the arbitrator may have exceeded his authority, it is not open to the party benefited by the award to take exception to it on that ground, & he is, therefore, bound by the award.*—*NARSINGH NARAYAN SINGH v. AJODHYA PRASAD SINGH* (1911), 16 C. W. N. 256.—**IND.**

**n.** *Award in action against sureties—Motion by principals.* — *Held*: although the suit at law referred was against the sureties only, it was competent for the principals to move against the award in respect of it.—*Re WHEELER v. MURPHY* (1855), 2 P. R. 32.—**CAN.**

## SUB-SECT. 4.—THE APPLICATION TO SET ASIDE.

A. *Who may apply and how Application made.*

**1855.** *Application by party in whose favour award made.* — A party in whose favour a mistake has been made cannot avail himself of it to set aside the award (LORD DENMAN, C.J.).—*MOORE v. BUTLIN* (1837), 7 Ad. & El. 595; 2 Nev. & P. K. B. 436; Will. Woll. & Dav. 638; 7 L. J. Q. B. 20; 2 Jur. 153; 112 E. R. 594.

*Annotations*:—*Mentd.* Tuck v. Tuck (1839), 5 M. & W. 109; Kilner v. Bailey, Potter v. Lewis (1839), 5 M. & W. 382; Eastmure v. Laws (1839), 5 Bing. N. C. 444; Falcon v. Benn (1841), 11 L. J. Q. B. 73; Ford v. Beech (1846), 11 Q. B. 842; Rodgers v. Maw (1846), 15 M. & W. 444; Spradbery v. Gillan (1851), 6 Exch. 422.

**1856.** *Application by party benefiting by alleged defect.* — An award is not necessarily bad for want of finality, or for inconsistency, because the arbitrator has found for pltf. on one of the issues, in respect of which he has given no damages. It may be ground for moving to set aside the award at the instance of pltf., but not by deft., for he cannot be prejudiced by the omission to award damages.—*COX v. KERSLAKE, KERSLAKE v. COX* (1867), 16 L. T. 396.

**1857.** *Made without taking up award.* — A rule to set aside an award, void on the ground of its having been made by two out of three arbitrators without the concurrence of the third, may be drawn up without reading the award, the party seeking to set aside the award not being bound to incur the expense of taking it up.—*HINTON v. MEAD* (1855), 24 L. J. Ex. 140; 24 L. T. O. S. 222; 1 Jur. N. S. 46; 3 W. R. 161; 3 C. L. R. 325.

B. *Notice of Motion.*

*See R. S. C., Ord. 52, r. 4.*

**1858.** *Grounds must be stated—Shortly.* — In all orders to show cause why awards should not be set aside, the short grounds, on which they are applied for & obtained, must be stated.—*SMITH v. BRISCOE* (1822), 11 Price, 57; 147 E. R. 400.

**o.** *Bill for rectification with prayer for general relief.* — In a bill to rectify an award, because the arbitrators had acted beyond the submission, there was also a prayer for general relief:—*Held*: under this prayer for general relief pltf. was entitled to have the award set aside.—*VERNON v. OLIVER* (1884), 11 S. C. R. 156.—**CAN.**

**p.** *By motion, not by writ.* — The practice & procedure to be followed in Saskatchewan for setting aside an award is the practice & procedure as it was in England on Jan. 1, 1898, & the proceedings must be commenced by motion & not by writ.—*SWIFT CURRENT v. LESLIE* (1916), 33 W. L. R. 528; 9 W. W. R. 1024.—**CAN.**

**q.** *Motion by summons in chambers.* — A motion to set aside should be by summons in chambers, & not by notice of motion; but where resp. appears & does not object, he must be taken to waive the irregularity.—*ANNABLE v. ANNABLE* (1908), 8 W. L. R. 132; 1 Sask. L. R. 222.—**CAN.**

**r.** *Supplemental bill.* — *WOODLEY v. JOHNSTON* (1828), 1 Moll. 394.—**IR.**

**s.** *Not on motion—Bill must be filed.* — *BURDELL v. ELLIOT* (1865), 1 Ch. Ch. 326.—**CAN.**

## PART IV. SECT. 16, SUB-SECT. 4.—B.

**1858 i.** *Grounds must be stated.* — In moving to set aside the rule *nisi* must contain the objections on which the party relies.—*MCDONALD v. MARMAUND* (1857), 2 Thom. 79.—**CAN.**



**1859.** In application to set aside certificate.]—The rule requiring the grounds of objection to an award to be stated upon a rule *nisi* to set it aside applies to the certificate of an arbitrator empowered to ascertain the amount due from deft. to pltf., & to certify the same to the associate, by whom a verdict is to be entered accordingly.—*CARMICHAEL v. HOUGHEN* (1834), 3 Nev. & M. K. B. 203.

**1860.** — In specific terms.]—In a rule *nisi* to set aside an award, it is not necessary to specify in detail the objections to the award, provided the objections are so specified in the affidavit upon which the rule is obtained.—*RAWSTHORN v. ARNOLD* (1827), 6 B. & C. 629; 9 Dow. & Ry. K. B. 556; 5 L. J. O. S. K. B. 270; 108 E. R. 583.

*Annotations* :—*Distd.* Boodle v. Davies (1835), 3 Ad. & El. 200. *N.F.* Gray v. Leaf (1840), 8 Dowl. 654. *Mentd.* Allenby v. Proudlock (1835), 4 Dowl. 54; Hayward v. Phillips (1837), 1 Nev. & P. K. B. 288; Bacon v. Smith (1840), 5 Jur. 549; Riccard v. Kingdon (1846), 15 L. J. Q. B. 269.

**1861.** —.]—The rule *nisi* to set aside an award must state in specific terms the ground of objection. It is not enough to state generally that the arbitrator has exceeded his authority, or that the award is uncertain, or not final.—*BOODLE v. DAVIES* (1835), 3 Ad. & El. 200; 1 Har. & W. 420; 4 Nev. & M. K. B. 788; 111 E. R. 389.

*Annotations* :—*Folld.* Allenby v. Proudlock (1835), 4 Dowl. 54; Gray v. Leaf (1840), 8 Dowl. 654; Staples v. Hay (1843), 1 Dow. & L. 711. *Refd.* Jones v. Powell (1838), 1 Will. Woll. & H. 60; Dunn v. Warlters (1842), 9 M. & W. 293. *Mentd.* Yates v. Knight (1835), 2 Scott, 470; Matlock Gas Light Co. v. Peters (1856), 6 R. & B. 215; Re Marsack & Webber (1860), 2 E. & E. 637; Dunhill v. Moore (1867), 17 L. T. 148; Stevens v. Chapman (1871), L. R. 6 Exch. 213.

**1862.** —.]—In stating the grounds on which it is sought to set aside an award, it is not sufficient to state a general head of objection, as "misapprehension of the terms of the reference."—*ALLENBY v. PROUDLOCK* (1835), 4 Dowl. 54; 1 Har. & W. 357.

*Annotations* :—*Folld.* Gray v. Leaf (1840), 8 Dowl. 654. *Mentd.* Hayward v. Phillips (1837), 6 Ad. & El. 119; Paxton v. Great North of England Ry. Co. (1846), 8 Q. B. 938.

**1863.** —.]—It is insufficient to state the grounds of objection to an award in a rule for setting it aside in general terms, as that the award is not final, that the arbitrator has exceeded his authority, that the award is uncertain, or that the arbitrator has not awarded on all the matters referred to him.—*GRAY v. LEAF* (1840), 8 Dowl. 654.

**1864.** — What is sufficient.]—In a rule *nisi* for setting aside an award, an objection "that

the arbitrator has not awarded on a matter in difference submitted to him" is sufficiently specific.—*DUNN v. WARLTERS* (1842), 9 M. & W. 293; 1 Dowl. N. S. 626; 11 L. J. Ex. 188; 152 F. R. 124.

*Annotations* :—*Consd.* Staples v. Hay (1843), 1 Dow. & L. 711. *Mentd.* Creswick v. Harrison (1850), 1 L. M. & P. 721; Harrison v. Creswick (1853), 13 C. B. 399; Re Beaufort v. Swansea Harbour Trustees (1860), 8 C. B. N. S. 146.

**1865.** —.]—In a rule *nisi* to set aside an award, the statement, as a ground for the motion, "that the arbitrator has exceeded his authority," is insufficient, unless the affidavit point out some specific objections in that respect.—*STAPLES (STAPLE) v. HAY (HEY, HAGUE)* (1843), 1 Dow. & L. 711; 13 L. J. Q. B. 60; 2 L. T. O. S. 153; 8 Jur. 315.

**1866.** —.]—A notice of motion in the Ch. Div. to set aside the award of an arbitrator should specify the grounds of objection, by analogy to the practice under C. L. P. Act, 1852. An objection on "good grounds" is insufficient.—*MERCIER v. PEPPERELL* (1881), 19 Ch. D. 58; 51 L. J. Ch. 63; 45 L. T. 609; 30 W. R. 228.

**1867.** — Effect of failure to state.]—Although the objections to an award should be stated in the rule *nisi* to set it aside, yet, if it be not done, the ct. is not precluded from entering into any valid objection that may be raised to the award.—*DICAS v. JAY* (1828), 5 Bing. 281; 2 Moo. & P. 448; 7 L. J. O. S. C. P. 80; 130 E. R. 1069.

*Annotation* :—*Expld.* Gisborne v. Hart (1839), 5 M. & W. 50.

**1868.** —.]—An award was held bad for not giving damages on one of the issues.—*Held* : the objection could not prevail because the rule *nisi* had not been obtained on that ground.—*GRENELL (GRENVILLE, GRENFIELD) v. EDGCOMBE* (1845), 7 Q. B. 661; 14 L. J. Q. B. 322; 5 L. T. O. S. 215; 9 Jur. 709; 115 E. R. 638.

**1869.** Service of notice out of jurisdiction.]—An award was made against resps., a foreign co. carrying on business in Sweden, in an arbn. held in England in pursuance of a clause contained in an agreement entered into in France between resps. & appcts., a foreign co. carrying on business in France. The clause in the agreement, under which the arbn. took place, provided that in the event of any dispute arising under the agreement the same should be submitted to arbitrators to be appointed by each party, or in case of need to an umpire to be appointed by the arbitrators. Appcts. & resps. respectively appointed a Frenchman & an Englishman as arbitrators, & the arbitrators appointed an Englishman as umpire, by whom the award was made in England. Under the agreement resps. "elected" a French

**1860 i.** — In specific terms.]—To make objections to an award relevant at all, they ought to present the allegation of a specific case of irregularity or incompetency in the proceedings in the reference, averring distinctly what is the particular ground of objection which it is proposed to substantiate.—*CAMPBELL v. CAMPBELL* (1843), 5 Duml. (Ct. of Sess.) 530.—*SCOT.*

**1860 ii.** —.]—*WALLS v. CONNELL & BELL* (1862), 34 Sc. Jur. 535.—*SCOT.*

**1860 iii.** — New grounds cannot be raised on appeal.]—*OAKES v. HALIFAX (CITY)* (1879), 4 S. C. R. 640.—*CAN.*

**1860 iv.** — Rule must be drawn up on reading award.]—The rule must be drawn up on "reading the award," & the alleged defects in the award must be sufficiently pointed out.—*GRAND RIVER NAVIGATION CO. v. McDUGALL* (1843), 1 U. C. R. 255.—*CAN.*

**1860 v.** —.]—The rule must be drawn up on "reading the award," & the alleged defects in the award must be sufficiently pointed out.—*WILKINS v. PECK* (1846), 4 U. C. R. 263.—*CAN.*

**1860 vi.** —.]—A rule *nisi* to set aside must contain the grounds on which the party moving therefor relies, & must also be drawn up on reading the award or a copy of it.—*GRANT v. HALL* (1865), 2 Old. 72.—*CAN.*

**1867 i.** — Effect of failure to state.]—*Held* : pursuers were not debarred by the absence of any pertinent averments on their record from seeking reduction of the award upon a new ground.—*DAVIDSON v. LOGAN* (1907), 45 Sc. L. R. 142.—*SCOT.*

**a.** "On reading award, etc."]—*TRACEY v. HODGEST* (1849), 7 U. C. R. 5.—*CAN.*

**b.** *S. P. JACOBS v. RUTTAN* (1851), 2 Ch. Ch. 138.—*CAN.*

**c.** *S. P. HARRIS v. MCCORMICK* (1869), 2 N. S. D. 21.—*CAN.*

**d.** *S. P. Re JOHNSON & MONTREAL & CITY OF OTTAWA RY. CO.* (1876), 40 U. C. R. 359.—*CAN.*

**e.** *Supplementary notice.*]—On a motion to set aside an award, the ct. allowed the party prejudiced to serve a supplementary notice embodying objections as to the course of the umpire

& arbitrators, which had come to light on cross-examination, there being strong reasons for apprehending that the award was not a fair award.—*Re LAWSON & HUTCHINSON* (1872), 19 Gr. 84.—*CAN.*

**f.** *Amendment of rule.*]—F. & B. agreed to an arbn. The following was one of the provisions: "It is distinctly agreed that each party hereto shall at once obey the award, & shall not appeal from or move against same, or in any way resist same; . . . & no resort shall be had to any legal or equitable proceedings to resist or alter same." On an application by rule *nisi* to set aside the award for misconduct of the arbitrators, & on other grounds.—*Held* : as a bill could have been filed in equity to impeach the award, the rule might be amended by adding, after the style of ct., the words "in equity," after which relief could be granted.—*Re FISHER & BROWN* (1884), 1 Man. L. R. 116.—*CAN.*

**1869 i.** Service of notice.]—A copy of the affidavit of execution of an award need not be served with the award on a motion to set it aside.—*MCPHERSON v. WALKER* (1851), 1 P. R. 30.—*CAN.*

domicil:—*Held*: there was no jurisdiction under R. S. C., Ord. 11, r. 8a, to grant leave to resps. for service on appcts. out of the jurisdiction of a notice of motion to set aside the award.—*Re* AKT. ROBERTSFORS & SOCIÉTÉ ANONYME DES PAPERIES DE L'AA, [1910] 2 K. B. 727; 80 L. J. K. B. 13; 103 L. T. 503.

### C. Time for Application.

**Time limit — Present practice in England.]—**R. S. C., Ord. 64, r. 14, was annulled & the following rule substituted by R. S. C. (March) 1919: An application to set aside or remit an award may be made at any time within six weeks after such award has been made & published to the parties. Provided that the court or a judge may by order extend the said time either before or after the same has elapsed.

— **Former practice in England.]—**See Act of 1698, s. 2, R. S. C., Ord. 64, r. 14, before above alteration.

**1870. — General rule.]—Held**: a motion to set aside an award must be made before the last day of the next term after such award was published; otherwise it was too late, & an attachment for the non-performance of it might issue.—*FREAME v. PINNEGER* (1774), 1 Cowp. 23; 98 E. R. 947.

*Annotations*:—**Consd.** *Pedley v. Goddard* (1796), 7 Term Rep. 73. **Refd.** *Hare v. Fleay* (1851), 17 L. T. O. S. 184.

**1871. S. P. LOWNDES v. LOWNDES** (1801), 1 East, 276; 102 E. R. 107.

**1872. S. P. AURIOL v. SMITH** (1823), Turn. & R. 121; 37 E. R. 1041.

*Annotations*:—**Consd.** *Blackett v. Bates* (1865), 2 Hem. & M. 610. **Refd.** *Hawkesworth v. Bramhall* (1840), 5 My. & Cr. 281; *Murphy v. Keller* (1851), 17 L. T. O. S. 297. **Mentd.** *Stone v. Phillips* (1837), 4 Bing. N. C. 37; *Re Huddersfield Corpn. & Jacob* (1874), L. R. 17 Eq. 476.

**1873. S. P. Re BURT** (1826), 5 B. & C. 668; 8 Dow. & Ry. K. B. 421; 4 L. J. O. S. K. B. 276; 108 E. R. 249.

**1874. S. P. SACHET v. FOSTER** (1833), 3 L. J. Ex. 37.

### PART IV. SECT. 16, SUB-SECT. 4.—C.

**1870 i. Time limit—General rule.]—***CAMPBELL v. CAMERON* (1843), 1 U. C. R. 29.—CAN.

**1870 ii. S. P. WOOD v. MOODIE** (1845), 3 U. C. R. 79.—CAN.

**1870 iii. S. P. PUBLIC WORKS COMR. v. DALY** (1848), 6 U. C. R. 33.—CAN.

**1870 iv. S. P. CARTER v. ADAMS** (1851), 2 All. 211.—CAN.

**1870 v. S. P. Re MATTHEWS v. WEBSTER** (1852), 1 P. R. 75.—CAN.

**1870 vi. S. P. HARRIS v. MCCORMICK**, 2 N. S. D. 21.—CAN.

**1870 vii. S. P. CUMMING v. GRAHAM** (1853), 1 P. R. 122.—CAN.

**1870 viii. S. P. WHEELER v. MURPHY** (1855), 2 P. R. 32.—CAN.

**1870 ix. S. P. BROWN v. HARDING** (1856), 3 All. 351.—CAN.

**1870 x. S. P. WILLIAMS v. MCPHERSON** (1855), 2 P. R. 49.—CAN.

**1870 xi. S. P. PERLEY v. LODER** (1856), 2 P. R. 105.—CAN.

**1870 xii. S. P. McNULTY v. JOBSON** (1856), 2 P. R. 119.—CAN.

**1870 xiii. S. P. MURPHY v. COTTON** (1858), 14 U. C. R. 426.—CAN.

**1870 xiv. S. P. McLEARY v. SMITH** (1859), 5 L. C. L. J. 212.—CAN.

**1870 xv. S. P. TAYLOR v. BOSTWICK** (1859), 1 Ch. Ch. 53.—CAN.

**1870 xvi. S. P. SILVER v. McCULLOCH** (1870), 2 N. S. D. 104.—CAN.

**1870 xvii. S. P. Re WARD & VICTORIA WATER WORKS** (1874), 1 B. C. R. 114.—CAN.

**1870 xviii. S. P. WEIR v. CUMMINGER** (1876), 2 R. & C. 173.—CAN.

**1870 xix. S. P. Re FRASER & PAINT** (1877), 3 R. & C. 10.—CAN.

**1870 xx. S. P. MOYLE v. KINGSTON CITY** (1878), 43 U. C. R. 307.—CAN.

**1870 xxi. S. P. WILSON v. RICHARDSON** (1878), 43 U. C. R. 365.—CAN.

**1870 xxii. S. P. BECKFORD v. LLOYD** (1880), 1 Cout. Dig. 145.—CAN.

**1870 xxiii. S. P. PARDEE v. LLOYD** (1880), 5 A. R. 1.—CAN.

**1870 xxiv. S. P. KEEN v. EDWARDS** (1888), 12 P. R. 625.—CAN.

**1870 xxv. S. P. GREEN v. CITIZENS INSURANCE CO.** (1890), 18 S. C. R. 338.—CAN.

**1870 xxvi. S. P. BALDWIN v. WALSH** (1890), 20 O. R. 511.—CAN.

**1870 xxvii. S. P. Re CANGHILL & BROWER** (1897), 24 A. R. 142.—CAN.

**1870 xxviii. S. P. Re GAISON & NORTH BAYTOWN** (1891), 16 P. R. 179.—CAN.

**1870 xxix. S. P. CLISH v. FRASER** (1895), 28 N. S. L. R. 163.—CAN.

**1870 xxx. S. P. HUYCK v. WILSON** (1898), 18 P. R. 44.—CAN.

**1870 xxxi. S. P. Re KETCHUM & OTTAWA CITY** (1913), 24 O. W. R. 113; 4 O. W. N. 828; 9 D. L. R. 274.—CAN.

**1870 xxxii. S. P. LACHINE RY. CO. v. KELLY** (1914), 21 R. L. N. S. 1; 20 D. L. R. 587.—CAN.

**1870 xxxiii. S. P. Re HUSBANDS & HUSBANDS** (1884), 10 V. L. R. 208.—AUS.

**1875. S. P. DODD v. PLATT** (1859), 1 L. T. 135; 6 Jur. N. S. 631.

**1876. — Sittings substituted for terms.]—**An award was made on Mar. 28, 1877. An application to set it aside, under the Act of 1698, s. 2, was made in the Easter sittings on a day after May 8. Easter term in 1877, under the former procedure, would have begun on Apr. 15 & ended on May 8:—*Held*: the application ought to have been made on a day before May 8, for "terms" still existed as a measure for determining the time within which an award should be set aside under the above sect.—*CHRIST COLLEGE (CHRIST'S HOSPITAL), BRECKNOCK (GOVERNORS) v. MARTIN* (1877), 3 Q. B. D. 16; 46 L. J. Q. B. 591; 36 L. T. 537; 25 W. R. 637, C. A. *Annotation*:—**Consd.** *Re Oliver & Scott* (1889), 43 Ch. D. 310.

**1877. To what time limits apply — Submission by rule of Court in action pending.]—**The ct. is not limited by time from setting aside an award founded on a submission by rule of ct. in an action pending, where there has been a plain mistake of the arbitrator, although the application be not made in the term next after the making of the award. But in ordinary cases it will look to the limitation of time given by the Act of 1698 as a rule to guide its discretion as to the time of reviewing awards.—*ROGERS v. DALLIMORE* (1815), 6 Taunt. 111; 1 Marsh. 471; 128 E. R. 975.

*Annotations*:—**Consd.** *Allenby v. Proudlock* (1835), 4 Dowl. 54. **Appld.** *Sherry v. Okes* (1835), 1 Har. & W. 119; *Hobbs v. Ferrars* (1840), 4 Jur. 825. **Mentd.** *Re Hall & Hinde* (1841), *Drinkwater*, 214; *Hemsworth v. Bryant* (1844), 4 L. T. O. S. 157.

**1878. — Reference at Nisi Prius.]—**A motion to set aside an award under a reference at *Nisi Prius* was allowed to be made after the first four days of term, where the award was published too late in the vacation to take the necessary proceedings before.—*BENNETT v. SKARDON* (1829), 5 Man. & Ry. K. B. 10.

*Annotation*:—**Dbtd.** & **N.F.** *Allenby v. Proudlock* (1835), 4 Dowl. 54. *Bennett v. Skardon* is no authority. It shows

**1870 xxxiv. S. P. WATT v. McDOWELL**, 2 L. R. N. Z. 410.—N.Z.

**1870 xxxv. — Reasonable time.]—**Whether there has been unreasonable delay in taking proceedings must depend on the circumstances.

Notice was posted in D. on Nov. 23, 1915, to a party residing in P. that the award was ready, a copy of the award was posted to him from D. on Dec. 14, & he commenced proceedings on Feb. 19, 1916:—*Held*: as a motion could not have been dealt with before vacation, & as proceedings were commenced with reasonable promptitude after the vacation had expired, there had not been any unreasonable delay.—*Re RIVERTON BOROUGH & NEW ZEALAND DREAD-NOUGHT GAS CO., LTD.* (1916), 35 N. Z. L. R. 601.—N.Z.

**g. How time calculated.]—**The time for moving runs from the time deft. is notified of the award having been made, not from the making.—*DEXTER v. FITZGIBBON* (1857), 4 U. C. L. J. 43.—CAN.

**h. — From publication.]—**When an award is complete, an action may be brought upon it forthwith, though deft. has the right to move against it within the proper time after "publication" to the parties.—*HUYCK v. WILSON* (1898), 18 P. R. 44.—CAN.

**k. — —.]—**The six weeks, allowed by s. 465 of Municipal Act, R. S. O. 1897 (c. 223), for an application to set aside an award, run from the publication to the parties of the award.—*Re BURNETT & DURHAM TOWN* (1899), 31 O. R. 262.—CAN.

**l. — From filing.]—***SHEPHERD v. CANADIAN PACIFIC RAILROAD CO.* (1886), 11 P. R. 517.—CAN.



no more than the opinion of a learned counsel that it was a safe course to guard against an objection like the present by obtaining, within the first four days of the term, leave under special circumstances to move against the award afterwards. The motion was unopposed (COLERIDGE, J.).

**1879.** —.].—An award made in pursuance of an order of *Nisi Prius*, referring a cause & other matters in difference, may be objected to at any time before the end of the term next after publication.—ALLENBY v. PROUDLOCK (1835), 4 Dowl. 54; 1 Har. & W. 357.

*Annotations* :—**Refd.** Hayward v. Phillips (1837), 6 Ad. & El. 119; Paxton v. Great North of England Ry. Co. (1846), 8 Q. B. 938. **Mentd.** Gray v. Leaf (1840), 8 Dowl. 654.

**1880.** —.].—Where an arbitrator, to whom a cause is referred, finds a verdict for pltf. in a certain sum, & then, at the request of the parties, states facts to raise a question of liability to the whole or a reduced amount, a motion to enter a verdict for the lesser sum is in effect a motion to set aside the award, & must be made within the time limited for that purpose.—ANDERSON v. FULLER (1838), 7 Dowl. 51; 4 M. & W. 470; 1 Horn & H. 352; 8 L. J. Ex. 48; 150 E. R. 1514.

*Annotations* :—**Folld.** Paxton v. Great North of England Ry. Co. (1846), 8 Q. B. 938. **Refd.** Scott v. Van Sandau (1844), 6 Q. B. 237; Riccard v. Kingdon (1846), 15 L. J. Q. B. 269. **Mentd.** Bradbee v. Christ's Hospital Governors (1842), 4 Man. & G. 714.

**1881.** —.].—SYNGE v. JERVOISE (1807), 8 East, 466; 103 E. R. 422.

*Annotations* :—**Refd.** Thompson v. Jennings (1825), 10 Moore, C. P. 110. **Mentd.** Rogers v. Dallimore (1815), 6 Taunt. 111; Allenby v. Proudlock (1835), 1 Har. & W. 357.

**1882.** —.].—RAWSTHORN v. ARNOLD (1827), 6 B. & C. 629; 9 Dow. & Ry. K. B. 556; 5 L. J. O. S. K. B. 270; 108 E. R. 583.

*Annotations* :—**Consd.** Allenby v. Proudlock (1835), 4 Dowl. 54. **Refd.** Riccard v. Kingdon (1846), 15 L. J. Q. B. 269. **Mentd.** Boodle v. Davies (1835), 3 Ad. & El. 200; Bacon v. Smith (1840), 5 Jur. 549; Gray v. Leaf (1840), 8 Dowl. 654.

**1883.** —.].—SELL v. CARTER (1833), 3 L. J. Ex. 65.

**1884.** —.].—SHERRY v. OKES (1835), 3 Dowl. 349; 1 Har. & W. 119.

*Annotations* :—**Expld.** Platt v. Hall (1837), 2 M. & W. 391. **Dbtd.** R. v. G. W. Ry. Co. (1844), 5 Q. B. 597. **Refd.** Tilt v. Dickson (1847), 4 C. B. 736; Smith v. Whitmore (1863), 1 Hem. & M. 576.

**1885.** —.].—LYNG v. SUTTON (1836), 2 Hodg. 106; 3 Scott, 187.

**1886.** S. P. MORTIN (MARTIN) v. BURGE (1836), 4 Ad. & El. 973; 6 Nev. & M. K. B. 201; 111 E. R. 1049.

*Annotation* :—**Consd.** Paxton v. Great North of England Ry. Co. (1846), 10 Jur. 430.

**1887.** —.].—HAYWARD v. PHILLIPS, No. 1549, ante.

**1888.** —.].—PAXTON v. GREAT NORTH OF ENGLAND RY. CO. (1846), 8 Q. B. 938; 15 L. J. Q. B. 270; 7 L. T. O. S. 137; 10 Jur. 430; 115 E. R. 1127.

**1889.** —.].—BORROWDALE v. HITCHENER, No. 1582, ante.

**1890.** —.].—**Judge's order.**—Where by a judge's order a cause only was referred to arbn., a motion to set aside the award made after the fourth day of the term following the publication of the award :—**Held** : too late, & affidavits accounting for the delay not allowed to be filed.—RICCARD (RICKARD) v. KINGDON (1846), 15 L. J. Q. B. 269; 7 L. T. O. S. 142.

**Proceedings in Chancery.**—**Held** : cts. of equity were not confined by the Act of 1698 to allow of exceptions to awards within the time prescribed by the Act, as well as the cts. of common law.—ALARDES v. CAMBEL (1729), 1 Barn. K. B. 152; 94 E. R. 105.

*Annotation* :—**Refd.** Pownall v. King (1801), 6 Ves. 10.

**1892.** —.].—**Award in vacation.**—**Held** : where an award was made in vacation, on a verdict taken nominally subject to a reference, or under an order of *Nisi Prius*, an application to set it aside must be made within the first four days of the next ensuing term.—THOMPSON v. JENNINGS (1825), 10 Moore, C. P. 110; 3 L. J. O. S. C. P. 80.

*Annotation* :—**Refd.** Allenby v. Proudlock (1835), 4 Dowl. 54.

**1893.** —.].—An award having been made in vacation, a rule to set it aside was obtained on the last day of the next term, but the agreement of reference had not then been made a rule of ct. :—**Held** : the case was within the Act of 1698, s. 2.

A rule to make the articles of reference a rule of ct. was obtained in the vacation, as of the last day of the term in which the rule for setting aside the award had been granted :—**Held** : too late to support the latter rule.—*Re* HUGHES & EMMETT (1825), 3 L. J. O. S. K. B. 175.

**1894.** —.].—**Application to set aside judgment founded on award.**—An action of *assumpsit* in which the pleas were *non assumpsit*, & payment by persons unknown, was referred by an order of *Nisi Prius* which ordered, etc., "deft., by his counsel, admitting his liability to pltf. in respect of the several matters alleged in the declaration, that a verdict be entered for pltf., damages £20,000, costs 40s., but that such verdict shall be subject to the award of the arbitrator named." At the first meeting deft.'s counsel objected to proceeding without amending the order, alleging it to be doubtful whether as worded it enabled the arbitrator to find, on the second issue, for his client. Pltf.'s counsel contended that it was sufficient for that purpose, & the arbitrator expressed the same opinion, & said that he had power to direct a verdict for deft. on that issue; & the reference then proceeded. The award directed a verdict for pltf. on the first issue, & for deft. on the second. No motion was made to set aside the award within the time limited by law. But after the *postea* had been drawn up pursuant to the award, & judgment had been signed by deft., pltf. applied to set aside the *postea*, judgment & subsequent proceedings, on the ground that the arbitrator had exceeded his authority in directing a verdict on the second issue for deft. The ct. refused the rule, on the grounds (1) to grant it would be indirectly to set aside the award, which pltf. by his own laches had precluded himself from calling on the ct. to do directly; (2) as pltf.'s counsel at the reference had concurred in the view that the arbitrator had power over the verdict, & thereby prevented deft. from applying to have the order of reference amended, pltf. could not now be allowed to take the objection to the exercise of the power by the arbitrator.—GRAVATT v. ATTWOOD (1850), 1 L. M. & P. 392; 19 L. J. Q. B. 474.

**1895.** What constitutes "application"—**Filing affidavit**—**Notice of motion insufficient.**—The filing of an affidavit in support of a notice of motion to set aside an award is a complaint within the Act of 1698, s. 2, which requires complaint to be made within a certain time, though notice of motion alone is not sufficient.—*Re* HUDDERSFIELD CORPN. & JACOMB (1874), 10 Ch. App. 92; 44 L. J. Ch. 96; 31 L. T. 466; 23 W. R. 100, L.JJ.

*Annotations* :—**Consd.** Smith v. Parkside Mining Co. (1880), 6 Q. B. D. 67. **Mentd.** *Re* Gallop & Central Queensland Meat Export Co. (1890), 25 Q. B. D. 230.

**1896.** —.].—**Service of notice of motion.**—An action having been referred to arbn., the award was published on July 14. On Nov. 24 (being the last day but one of the old Michaelmas term) defts. moved the ct. to set aside the award, but the ct. refused the application on the ground that notice of motion had not been given to pltf. as required by R. S. C., 1875, Ord. 53, rr. 3 & 4. Defts. afterwards,



16.—*Setting aside award: Sub-sect. 4, C.*

on same day, served on pltf. a notice that on Nov. 27 they would move the ct. to set aside the award:

—*Held*: the service of notice of motion on Nov. 24 was a complaint made in the ct. before the last day of the next term after the publication of the award within the Act of 1698, s. 2, although no affidavit was filed before the last day.—*SMITH v. PARKSIDE MINING CO.* (1880), 6 Q. B. D. 67; 50 L. J. B. 144; 29 W. R. 154.

*Annotation*:—*Appld. Re Gallop & Central Queensland Meat Export Co.* (1890), 25 Q. B. D. 230.

**1897.** —.]—An award was made & published on Feb. 27. Notice of motion to set it aside was served on May 20. The motion did not appear in the day's list for hearing during the Easter sittings, which ended on May 23, but came on to be heard afterwards:—*Held*: the notice of motion having been given before the last day of the sittings next after the award, the "application" was within the time prescribed by R. S. C., Ord. 64, r. 14, & the motion was not too late.—*Re GALLOP & CENTRAL QUEENSLAND MEAT EXPORT CO., LTD.* (1890), 25 Q. B. D. 230; 59 L. J. Q. B. 460; 62 L. T. 834; 38 W. R. 621.

**1898. Grounds for extension — Mere intimation of intention.**]—Deft. gave pltf. to understand he intended to move to set aside an award between them. Pltf., who intended to make the same motion, allowed a term to elapse, & then moved, deft. having omitted to do so:—*Held*: no sufficient reason for the delay.—*EMET (EMMETT) v. OGDEN* (1831), 7 Bing. 258; 9 L. J. O. S. C. P. 88; 131 E. R. 99.

**1899. — Failure to take up award owing to excessive charges.**]—On a reference of a cause & all matters in difference by a judge's order one of the parties moved, after the proper time, to set the award aside:—*Held*: no excuse for the delay that the arbitrator made an exorbitant charge for the award, in consequence of which the party applying did not take it up.—*MACARTHUR v. CAMPBELL* (1833), 5 B. & Ad. 518; 2 Nev. & M. K. B. 444; 110 E. R. 882.

*Annotations*:—*Consd. Allenby v. Proudlock* (1835), 4 Dowl. 54; *Brooke v. Mitchell* (1840), 6 M. & W. 498. *Folld. Moore v. Darley* (1845), 1 C. B. 445. *Apprvd. Paxton v. G. N. of England Ry. Co.* (1846), 8 Q. B. 938. *Refd. Sherry v. Okes* (1835), 1 Har. & W. 119. *Mentd. Roberts v. Eberhardt* (1857), 3 C. B. N. S. 482.

**1900. — — — — —**]—It is no excuse for not applying within the proper time to set aside an award that the party had been prevented from obtaining a knowledge of its contents by the arbitrator's improperly demanding an extortionate sum for his fees.—*MOORE v. DARLEY* (1845), 1 C. B. 445; 135 E. R. 613.

**1901. — Misconduct of other party.**]—Where, from the misconduct of one of the parties to an award, the submission cannot be made a rule of ct., so as to enable the opposite party to make it a rule of ct. before the last day but one of the first term after the award, the time for a motion to set it aside will be enlarged until the following term.—*PERRING v. KEYMER* (1834), 3 Dowl. 98.

*Annotations*:—*Consd. & Distd. Reynolds v. Askew* (1837), Will. Woll. & Dav. 366. *Distd. Hemming v. Mid. Ry. Co.* (1847), 11 Jur. 657. *Refd. Re Smith & Blake* (1838), 1 Will. Woll. & H. 406; *Hemsworth v. Bryant* (1844), 4 L. T. O. S. 157; *Re Huddersfield Corpn. & Jacomb* (1874), L. R. 17 Eq. 476. *Mentd. Dodd v. Platt* (1859), 1 L. T. 135.

**1902. — — — — — Refusal to allow order to be made rule of court.**]—Where a submission was by order of reference at *Nisi Prius*, & defts., in whose favour the award was made, had possession of the order of reference, & although requested by pltf., delayed making it a rule of ct. till it was too late to move within the time ordinarily limited for setting

aside an award, the ct. ordered defts. either to make the order of reference a rule of ct., or to file it with one of the masters, so as to enable pltf. to make it a rule of ct., & allowed pltf. to move to set the award aside in a subsequent term *nunc pro tunc*.—*BOTTOMLEY v. BUCKLEY* (1845), 4 Dow. & L. 157.

**1903. — Facts not known in time.**]—A cause being pending, it was agreed to refer it to arbn., which was done by articles of agreement, & not by order of a judge:—*Held*: (1) an award made under the reference was made under the Act of 1698; (2) it was no excuse for not making a motion to set it aside in the term next after the award was made & published that the submission had not then been made a rule of ct.; (3) a motion subsequently made was too late, even though the facts on which the motion was made had not come to the knowledge of the party within that time; (4) a person moving to set aside an award not under the above Act, after the time for moving for a new trial had expired, must show clearly to the ct. the reasons why the application was made so late.—*REYNOLDS v. ASKEW* (1837), 5 Dowl. 682; Will. Woll. & Dav. 366.

*Annotation*:—*Distd. Hemming v. Mid. Ry. Co.* (1847), 11 Jur. 657.

**1904. — Affidavit late in arriving from country.**]—An application made on the last day but one of the term for leave to move, on the last day of the term, to set aside an award, on the ground that the affidavit on which the motion was to be founded had not arrived from the country, was refused by the ct.—*Re EVANS & HOWELL* (1842), 4 Man. & G. 767; 5 Scott, N. R. 240; 134 E. R. 315.

*Annotation*:—*Folld. Re Huddersfield Corpn. & Jacomb* (1874), L. R. 17 Eq. 476.

**1905. — Information of award.**]—Where, upon a reference of a cause & all matters in difference, pltf. was informed, on the last day of Easter term, that the arbitrator had awarded that a sum of money was due from him to deft.:—*Held*: an application, made on the last day but one of Michaelmas term, to set aside the award, on the ground that pltf. had received no notice of a meeting before the arbitrator, at which it was arranged that pltf. should reply on deft.'s case, was too late.—*HEMSWORTH v. BRIAN* (1844), 7 Man. & G. 1009; 8 Scott, N. R. 843; 14 L. J. C. P. 36; 4 L. T. O. S. 157; 135 E. R. 409.

**1906. — Illness of applicant.**]—The sickness of a person, who desires to set aside an award, is not a sufficient excuse for postponing the application to the ct. beyond the term next after the publication. He should move to have the time enlarged.—*GUARDINO v. BROWN* (1856), 27 L. T. O. S. 57; 2 Jur. N. S. 358; 4 W. R. 456.

**1907. — Proceedings pending in Chancery.**]—Where a rule *nisi* had been granted to set aside an award involving certain accounts, & before it came on for argument cross bills had been filed in Ch. by each party for the taking of the accounts, the Ct. of Exch., with the consent of the parties, enlarged the rule generally until the first term after the chief clerk's certificate had become final.—*STAFFORD v. STAFFORD* (1871), 25 L. T. 572.

**1908. Powers of Court in regard to enlargement of time.**]—The ct. has power, under R. S. C., Ord. 64, r. 14, to enlarge the time for moving to set aside an award, notwithstanding the expiration of the time limited by the Act of 1698, s. 2.—*Re OLIVER & SCOTT* (1889), 43 Ch. D. 310; 59 L. J. Ch. 148; 61 L. T. 552; 38 W. R. 476.

*Annotation*:—*Distd. Re Plymouth Breweries, Re Prince Arthur Public House, Plymouth*, [1918] 1 K. B. 573.

**1909. Previous rule.**]—*Held*: a motion to set aside an award under the Act of 1698 must be

made before the last day of the term next after the award should have been made & published, & the ct. had no discretionary power to extend the time for making the motion.—*Re SMITH & BLAKE* (1838), 1 Will. Woll. & H. 406 ; 2 Jur. 1015.

**1910. No extension by consent.]**—A motion to set aside an award cannot be made, even with the consent of both parties, later than one term after the award has been published.—*Re NORTH BRITISH RY. CO. & TROWSDALE* (1866), L. R. 1 C. P. 401 ; 35 L. J. C. P. 262 ; *sub nom. Ex p. TROWSDALE*, 12 Jur. N. S. 786.

**1911. Waiver of objection.—Taking office copy of affidavits.]**—A rule had been obtained in Easter term for setting aside an award on the ground of misconduct in the arbitrator. The rule was enlarged to Trinity term upon the usual terms that all affidavits to be used in showing cause should be filed four days before the commencement of that term. On showing cause it was sought to object to the reading of the affidavits on the ground that they had not been duly filed :—*Held* : the party objecting was estopped by having taken office copies of the affidavits objected to.—*Re MACKAY* (1843), 1 Dow. & L. 206 ; 12 L. J. Q. B. 337.

*Annotation :—Refd. Francis v. Webb* (1849), 7 C. B. 731.

**1912. Effect of time limit.]**—A rule to set aside an award under the Act of 1698 cannot be amended by drawing it up on reading an additional affidavit, which is not sworn until the last day of the term next after the award was made.—*Re HOLLOWAY & MONK* (1838), 1 Will. Woll. & H. 405 ; 2 Jur. 921.

#### D. Evidence.

**1913. How affidavit entitled.]**—Affidavits in support of or in answer to a rule for setting aside an award made a rule of ct. under the Act of 1698, s. 1, there being no action previously brought, nor any cause in ct., need not be entitled.—*BAINBRIGGE v. HOULTON* (1804), 5 East, 21 ; 102 E. R. 976.

**1914. —.]**—On motions to set aside awards where there is no cause pending, it is not necessary that the affidavits on showing cause should be entitled with the christian & surnames of the parties, although the rule is generally drawn up with the names of the parties, as if there was a cause pending.—*ANON.* (1804), 1 Smith, K. B. 358.

**1915. Sufficiency of affidavit.]**—Where it was stipulated that in case of the breach of an agreement the sum of £100 should be received as a stipulated debt binding on each party, as to the amount, & an

action for damages generally, for the breach of this agreement, was referred to an arbitrator, who awarded only £10 damages :—*Held* : in order to entitle the party to come to set aside this award, it was necessary expressly to state in the affidavit that this clause was pointed out to the arbitrator at the time, & that he was required to act upon it.—*PINKERTON v. CASLON* (1819), 2 B. & Ald. 704 ; 106 E. R. 522.

**—Must show that claims alleged to have been omitted were not considered.]**—Where cross actions & all matters in difference are referred to arbn., & the award decides the actions only, it is no objection to the award that a claim not included in either action was brought before the arbitrator upon which he has not adjudicated, unless it be also averred that he did not take such claim into his consideration.—*R. v. ST. KATHARINE DOCK CO.* (1832), 4 B. & Ad. 360 ; 1 Nev. & M. K. B. 121 ; 110 E. R. 491.

*Annotations :—Mentd. R. v. Nottingham Old Water Works Co., Ex p. Turner* (1837), 6 L. J. K. B. 89 ; *R. v. Eastern Counties Ry. Co.* (1840), 2 Ry. & Can. Cas. 260 ; *R. v. Victoria Park Co.* (1841), 1 Q. B. 288 ; *Moffatt v. Dickson* (1853), 1 C. L. R. 294.

**1917. Award exhibited.]**—A rule to set aside an award was drawn up on reading “ the affidavit of deft., & the paper writing thereto annexed,” & the affidavit in support of the rule stated facts to show that the paper writing was a copy of the award :—*Held* : sufficient.—*HAYWARD v. PHILLIPS* (1837), 6 Ad. & El. 119 ; 1 Nev. & P. K. B. 288 ; Will. Woll. & Dav. 1 ; 6 L. J. K. B. 110 ; 1 Jur. 102 ; 112 E. R. 46.

*Annotations :—Folld. Land v. Hudson* (1843), 12 L. J. Q. B. 365. *Mentd. Jones v. Powell* (1838), 1 Will. Woll. & H. 60 ; *Hobdell v. Miller* (1840), 2 Scott, N. R. 163 ; *Wood v. Wyde* (1847), 8 L. T. O. S. 394 ; *R. v. Hardey* (1850), 19 L. J. Q. B. 196 ; *Jones v. Ives* (1850), 15 Jur. 107 ; *Gapp v. Elwes* (1852), 20 L. T. O. S. 70 ; *Law v. Blackburn* (1853), 14 C. B. 77.

**1918. — Must show that arbitrator was required to adjudicate on matters.]**—The ct. will not grant a rule to set aside an award on the ground that it omits to decide on certain matters in difference, unless it plainly appears from the affidavits that those matters were distinctly brought under the arbitrator's attention, & that he was expressly required to adjudicate upon them.—*LAYMAN v. GOWAN* (1841), 10 L. J. C. P. 95 ; 5 Jur. 7.

*cc., No. 1958, post.*

#### PART IV. SECT. 16, SUB-SECT. 4.—D.

**m. Necessity for proof.]**—The ct. will not set aside an award, on the ground of partiality of an umpire, without very cogent evidence of it ; strong suspicion is not enough.—*Re BAILEY & HART* (1883), 9 V. L. R. 311.—*AUS.*

**n. —.]**—Where it does not appear that an arbitrator is in a position with regard to the parties or the matter in dispute that might cast suspicion on his impartiality there must be proof of actual partiality or dishonesty to justify setting aside the award.—*DOBERER v. MEGAW* (1903), 34 S. C. R. 125.—*CAN.*

**o. Onus of proof.]**—Where one of the parties seeks to set aside an award on the ground that the third arbitrator was not duly appointed the *onus* of establishing the grounds relied on is on appct.—*KEDY v. DAVISON* (1901), 34 N. S. L. R. 233.—*CAN.*

**p. —.]**—It lies upon the party objecting to an award to show that arbitrators have exceeded their authority, if that be the ground of objection.—*M'CABE v. GREY* (1849), 13 I. L. R. 343.—*IR.*

**q. What must be established.]**—In a suit to set aside three points must be made good by plffs. : (1) that the award is void or voidable ; (2) that plffs. have a reasonable apprehension that such instrument, if left outstanding, may cause them serious injury ; (3) that the ct. ought, in the circumstances, in the exercise of its discretion, to adjudge the award void or voidable & order it to be delivered up & cancelled.—*VULLEY MAHOMED v. DATTUBHOY HASSAM* (1900), 1 L. R. 25 Bom. 10.—*IND.*

**1915 i. Sufficiency of affidavit.]**—Facts relied on to set aside an award must be distinctly sworn to, & if denied the denial is conclusive.—*SLACK v. McEATHRON* (1845), 3 U. C. R. 184.—*CAN.*

**1915 ii. —.]**—A charge of corruption & partiality against an arbitrator must be sustained by specific, not by general, affidavits.—*BURR v. GAMBLE* (1854), 4 Gr. 626.—*CAN.*

**1915 iii. — That award made in time.]**—Where the time for making an award expired on Sept. 1, & the affidavit of execution of the award was sworn on Aug. 7 :—*Held* : it was sufficient, without stating on what day the award was

executed.—*McPHERSON v. WALKER* (1851), 1 P. R. 30.—*CAN.*

**1917 i. — Award exhibited.]**—The objections taken to the award was that having been made *ex p.* it was void, & it was urged that it might, therefore, be set aside without producing it :—*Held* : otherwise.—*Re JOHNSON & MONTREAL & CITY OF OTTAWA RY. CO.* (1877), 40 U. C. R. 359.—*CAN.*

**1919 i. — Must show that there were other matters.]**—In order to impeach an award of arbitrators which determines certain specific matters, on the ground that it does not dispose of all the questions to be disposed of under a general submission of matters in dispute, it must be shown affirmatively that there were matters in dispute other than those disposed of.—*MORROW v. LINDSAY* (1907), 7 W. L. R. 48.—*CAN.*

**1920 i. Affidavit by arbitrator—Dissenting arbitrator.]**—On a motion to set aside an award made by two of the three arbitrators, the third arbitrator dissenting, the evidence of the dissenting arbitrator as to the basis on which the valuation of the assets & liabilities was made is properly admissible.—*Re SOUTHAMPTON & SAUGEEN* (1906), 12 O. L. R. 214 ; 7 O. W. R. 334.—*CAN.*



*Sect. 16.—Setting aside award: Sub-sect. 4, D. E. & F. Sect. 17: Sub-sect. 1.]*

**1919. — Must show that there were other matters—Attempt to set aside award for lack of finality.]**—A cause was referred to an arbitrator, & subsequently by a memorandum all matters in difference also; the award disposed of the cause, but did not recite the memorandum, or show that there were any other matters in difference. On motion to set aside the award for not being final:—*Held*: the affidavit must show that there were other matters in difference.—*BENNETT v. BRIGHTON CORPN.* (1868), 17 L. T. 509; 16 W. R. 361.

**1920. Affidavit by arbitrator—Barrister.]**—The ct. will not direct a barrister to make an affidavit respecting anything which has been done by him as an arbitrator, but the ct. will give him the option either to state to the ct. any matters he may think proper, or to make an affidavit.—*MANSFIELD v. PARTINGTON* (1824), 2 L. J. O. S. K. B. 153.

**1921. —.]**—Upon a motion to set aside an award, or to refer it back to the arbitrator, the ct. will receive evidence by affidavit, including evidence of the arbitrator.—*MILLS v. BOWYERS' SOCIETY, BOWYERS' SOCIETY v. MILLS* (1856), 3 K. & J. 66; 69 E. R. 1024.

*Annotations:—Consd. Re Whiteley & Roberts, [1891] 1 Ch. 558. Mentd. Re Altken's Arbitration (1857), 3 Jur. N. S. 1296; Clayton v. Westminster Brymbo Coal & Coke Co. (1864), 11 L. T. 366; Re Walton Shore Road, Essex, & Re Warner v. Powell (1866), 15 W. R. 303; Flynn v. Robertson (1869), L. R. 4 C. P. 324; Dinn v. Blake (1875), L. R. 10 C. P. 388; Re Ke'ghley, Maxsted & Durant, [1893] 1 Q. B. 405, C. A.*

**1922. —.]**—On a motion to set aside an award the arbitrator's evidence is admissible to impeach the award on the ground of fraud or of mistake, either as to the subject-matter of the reference, or as to some legal principle which goes directly to the basis on which the award is founded.—*Re DARE VALLEY RY. CO.* (1868), L. R. 6 Eq. 429; *sub nom. Re RHYS & RICHARDS & DARE VALLEY RY. CO.*, 37 L. J. Ch. 719.

*Annotations:—Appld. Buccleuch v. Metropolitan Board of Works (1870), L. R. 5 Exch. 221. Expld. Grafham v. Turnbull (1875), 44 L. J. Ch. 538. Refd. Buccleuch v. Metropolitan Board of Works (1872), L. R. 5 H. L. 418, H. L. Mentd. Dinn v. Blake (1875), L. R. 10 C. P.*

*See, also, Nos. 1698—1701, ante.*

**1923. Admission by arbitrator out of Court.]**—Evidence of an admission out of ct. by an arbitrator that he made his award improperly is not admissible in support of an application to set aside the award.—*Re WHITELEY & ROBERTS, [1891] 1 Ch. 558; 60 L. J. Ch. 149; 64 L. T. 81; 39 W. R. 248; 7 T. L. R. 172.*

*Annotation:—Mentd. Lendon v. Keen, [1916] 1 K. B. 994.*

**1924. Written statement of grounds not part of award.]**—For the purpose of setting aside an award, on the ground that the arbitrator has mistaken the law, the ct. will not look at a written statement of the grounds of his decision delivered by him to the parties, & of the same date with the award, unless it be made out that the arbitrator intended the reasons to form part of his award.—*R. v. SOUTH-WESTERN RY. CO.* (1852), 20 L. T. O. S. 110.

**1925. Letters from arbitrator no part of award.]**—An action for use & occupation having been referred to the master, under C. L. P. Act, 1854, s. 3, the master certified that there was nothing due from

deft. to plffs., & on the same day wrote a letter to deft.'s attorney, which he showed to plffs.' attorney, & in which, "in order to carry out the friendly spirit of arrangement which appeared to exist between the parties," he gave his opinion on several questions raised upon an agreement between deft. & some third parties "as founded upon the evidence given in the cause referred," & in order "to assist the parties, & to prevent the necessity for future litigation." On motion to set aside the certificate, on the ground that it appeared from the arbitrator's letter that he was mistaken in the law:—*Held*: whether he were mistaken or not, the letter formed no part of the award, & could not be looked at by the ct.—*HOLGATE (HOLDGATE) v. KILLICK* (1861), 7 H. & N. 418; 31 L. J. Ex. 7; 5 L. T. 358; 10 W. R. 19; 158 E. R. 536.

**1926. Effect of delay in filing affidavit.]**—Where, on a motion to set aside an award, the affidavit of the arbitrator was not filed within the time limited by the ct., they refused to allow its being read.—*CLEESBY v. PEESE* (1824), 8 Moore, C. P. 524.

**1927. Pleadings should be referred to.]**—The ct., in considering the sufficiency of an award, will look at the pleadings in the cause referred. *Seem*: they ought to be brought before the ct. by the party moving to set aside the award.—*ALLEN v. LOWE, LOWE v. ALLEN* (1843), 4 Q. B. 66; 3 Gal. & Dav. 395; 12 L. J. Q. B. 115; 7 Jur. 416; 114 E. R. 822.

**1928. Arbitrator's notes.]**—On a motion to set aside an award the ct. will not look at the notes of the arbitrator.—*DOE d. HAXBY v. PRESTON* (1846), 3 Dow. & L. 768; 1 New Pract. Cas. 464; 1 Saund. & C. 77; 7 L. T. O. S. 117.

**1929. Original submission.]**—The original agreement of reference may be looked at on a motion to set aside an award, though the rule *nisi* be not drawn up on reading it, for the rule *nisi* is drawn up on reading the rule making the agreement of reference a rule of ct., & the agreement of reference is in law part of the rule embodying it.—*OSWALD v. GREY (EARL)* (1855), 24 L. J. Q. B. 69.

**1930. Inspection of documents referred to in affidavit.]**—Notice of motion to set aside an award on the ground of misconduct of an arbitrator having been given, an affidavit was sworn by the arbitrator for the purpose of being used by the party in whose favour the award was made at the hearing of the motion. This affidavit referred to certain letters which had passed between that party's solr. & the arbitrator. The affidavit was not filed, but a copy of it had been furnished to the opposite party:—*Held*: the letters were documents referred to in an affidavit within R. S. C., Ord. 31, r. 15, & a judge had jurisdiction to make an order for inspection of them under r. 18 of the order.—*Re FENNER & LORD, [1897] 1 Q. B. 667; 66 L. J. Q. B. 498; 76 L. T. 376; 45 W. R. 486, C. A.*

**1931. Further affidavits admitted.]**—A rule was obtained to set aside an award made in favour of pltf., on the ground that it decided matters not included in the order of reference. In opposition to this rule affidavits were made that the arbitrator decided those matters at the request of deft. Deft. asking leave to adduce affidavits to contradict this, the ct., while declining to lay down any rule of practice, granted the application, at the same time giving pltf. leave to answer the affidavits proposed to be made.—*PRITCHARD v. LEECH* (1856), 2 Jur. N. S. 475.

**1928 i. Arbitrator's notes.]**—A decree-arbitral, *ex facie* unobjectionable, cannot be reduced as *ultra vires* by reference to the arbitrator's notes of opinion.—*POLLOCK v. KING* (1828), 3 Fac. Coll. 1033.—*SCOT.*

petent & contrary to the general rule to look into the referee's notes.—*MACKENZIE v. GIRVAN* (1840), 3 Dunl. (Ct. of Sess.) 318.—*SCOT.*

*r. Objections dehors award.]*—*ROCHE v. R.* (1845), 8 I. Eq. R. 638.—*IR.*

*s. Parol evidence.]*—A report of arbitrators cannot be attacked by parol testimony, when it is of itself otherwise conclusive.—*JOSEPH v. OSTELL* (1856), 1 L. C. J. 265; 11 L. C. R. 499.—*CAN.*

**1928 ii. —.]**—*Held*: it was incom-



**1932. Failure to send copy of affidavit.]**—A notice of motion to set aside an award, which would expire on the last day of the sittings next after such award, was served without any copy of the affidavit in support of the application:—*Held*: though the ct. might not have power to enlarge the time for making the application under R. S. C. Ord. 64, r. 7, there was power under Ord. 70, r. 1, to hear the application, although the time had expired, if the ct. deemed fit.—*Re WIGGESTON HOSPITAL & STEPHENSON* (1885), 54 L. J. Q. B. 248.

*Annotation*:—**Expld. & Distd.** *Petty v. Daniel* (1886), 56 L. J. Ch. 192.

#### E. Costs.

**1933. Whether applicant entitled to.]**—Pltf. is not entitled to the costs of an unsuccessful motion to set aside an award, although the improper construction which deft. had put on the award induced the application.—*HOCKEN v. GRENFELL* (1837), 4 Bing. N. C. 103; 6 Dowl. 250; 3 Hodg. 250; 5 Scott, 391; 132 E. R. 728.

**Who liable for—Arbitrator acting under Agricultural Holdings Act, 1908 (c. 28).]**—*See AGRICULTURE*, p. 47, *ante*.

**1934. Where rule refused but case remitted back.]**—A rule to set aside an award upon the ground that the arbitrator had improperly rejected evidence was discharged as to that ground, but the award was referred back to the arbitrator to state what portion of the sum awarded by him was awarded in respect of the action & what portion, if any, in respect of the other matters in difference. The arbitrator certified that there were before him no matters in difference but the action:—*Held*: pltf. was entitled to the costs of the rule.—*GODDARD v. SMITH* (1849), 13 L. T. O. S. 159.

#### F. Appeal.

**1935. County court order of reference—Court of Appeal.]**—A suit in a county ct. having been referred by the judge thereof to an arbitrator, under County Cts. Act, 1846 (c. 95), s. 77, & the arbitrator's award having been entered up as the judgment, an application was made to the judge to set aside the award, on the ground that the arbitrator had exceeded his jurisdiction by taking into consideration matters not referred to him. The judge having refused the

application:—*Held*: the Ct. of Appeal had no jurisdiction, under County Cts. Act, 1850 (c. 61), s. 14, to entertain an application on appeal from the judge to set aside the award.—*MAYER v. FARMER* (1878), 3 Ex. D. 235; 47 L. J. Q. B. 760; 26 W. R. 760.

**1936. Appeal analogous to application for new trial.]**—An appeal from a refusal to set aside an award is analogous to an application for a new trial, & should be set down in the list of interlocutory appeals.—*Re DELAGOA BAY RY. CO. & TANCRED* (1889), 61 L. T. 343; 37 W. R. 578, C. A.

**1937. Extension of time for appealing.]**—A mistake by counsel, as to the terms of a rule limiting the time in which an appeal could be brought to the Ct. of Appeal against a decision of the Divisional Ct. setting aside an award:—*Held*: not to constitute a special circumstance which would justify the Ct. of Appeal in granting an extension of time for appealing.—*Re COLES & RAVENSHEAR*, [1907] 1 K. B. 1; 76 L. J. K. B. 27; 95 L. T. 750; 23 T. L. R. 32; 51 Sol. Jo. 45, C. A.

*Annotations*:—**Consd. & Distd.** *Baker v. Faber*, [1908] W. N. 9, C. A.; *The Charlotte*, [1908] P. 206, C. A. **Distd.** *Rumbold v. L. C. C. & Scott* (1909), 100 L. T. 259, C. A. **Refd.** *Nicholson v. Piper* (1907), 24 T. L. R. 16, C. A.

### SECT. 17.—REMITTING AWARD.

*See Arbitration Act, 1889, s. 10 (1).*

#### SUB-SECT. 1.—JURISDICTION.

**1938. Apart from statute—No power without consent.]**—An arbitrator made his award in pltf.'s favour, but, in calculating the sum claimed to be due, made a mistake in the amount of the sum which pltf. was supposed to be entitled to recover:—*Held*: the ct. had no authority after the arbitrator had made his award to refer the award back without the consent of the parties.—*Ex p. CUERTON* (1826), 7 Dow. & Ry. K. B. 774.

**1939. — Power to remit second time.]**—Where an order of reference has a clause empowering the ct., if the award be disputed, to remit the matters for the reconsideration of the arbitrator & the case

#### PART IV. SECT. 16, SUB-SECT. 4.—E.

**t. Discretion of court.]**—Arbn. Act, 1897, s. 42, gives a discretion to the ct. in setting aside an award to deal with the costs.—*KENNEDY v. BEAL* (1898), 29 O. R. 599.—CAN.

**u. — Application granted without costs.]**—When the ground on which an award was set aside was not raised by the notice of motion to set aside, the application was granted without costs.—*Re HUSBANDS & HUSBANDS* (1884), 10 V. L. R. 208.—AUS.

**v. Who liable for—Arbitrator.]**—An award was set aside on the ground that the referee had not heard the parties & had conferred with each of them separately. The referee was a party to the action to have the award set aside:—*Held*: no costs should be allowed to or against the referee because, although he acted injudiciously, he had tried to deal fairly.—*WILKERSON v. MCGUGAN* (1912), 20 W. L. R. 651; 2 W. W. R. 121; 2 D. L. R. 11.—CAN.

#### PART IV. SECT. 16, SUB-SECT. 4.—F.

**w. Practice Court.]**—No appeal lies from the decision of the judge in Practice Ct. on an application to set aside an award.—*BROWN v. OVERHOLT* (1856), 14 U. C. R. 64.—CAN.

**x. Court of Appeal.]**—An appeal lies from a judgment of the Practice Ct. to the Ct. of Appeal on a rule to

J.—VOL. II.

set aside an award.—*CARROL v. STRATFORD* (1876), 7 P. R. 11.—CAN.

**Right to appeal reserved by submission.]**—The question of infringement of a patent was referred to arbn., & the order of reference gave the same right of appeal from the findings as from a judgment of the ct. in a case tried by a judge alone:—*Held*: on a review of the findings in the award, the same principles were applicable as on an appeal from the Supreme Ct. to the Ct. of Appeal.—*WADE & OTHERS* (No. 2), (1909), 29 N. Z. L. R. 577.—N.Z.

**z. What objections can be raised.]**—In Nova Scotia, where the rule *nisi* to set aside specifies objections, & no new grounds are added by amendment in the ct. below, no other ground of objection to the award can be raised on appeal.—*OAKES v. HALIFAX (CITY)* (1879), 4 S. C. R. 640.—CAN.

**a. Appeal not "proceeding for same cause."]**—*CAUGHELL v. BROWER* (1897), 17 P. R. 438.—CAN.

#### PART IV. SECT. 17, SUB-SECT. 1.

**b. Under 3rd R. S. (c. 146), s. 11—5th R. S. (c. 115), s. 11—Extends to voluntary submission.]**—The power of the ct. or judge under the above enactments to remit back extends to references by consent of parties as well as to compulsory references.—*ANNIS v. COOK* (1866), 2 Old. 163.—CAN.

**c. Under Common Law Procedure Act, 1854, s. 8.]**—As a general proposition, on a motion to vary or set aside an award, the ct. may, under C. L. P. Act, 1854, s. 8, refer the matters submitted back to the arbitrators whose original powers will thereupon be revived.—*Re JOSEPH* (1884), 1 B. C. R. Pt. 11, 38.—CAN.

**d. Under Common Law Procedure Act, 1856—Court of Chancery.]**—The Ct. of Ch. has jurisdiction under the above Act to remit an award to the arbitrator.—*WRIGHT v. GRIFFIN* (1874), 1 L. R. 8 Eq. 560.—IR.

**e. Arbitration Act, Ontario.]**—An award may be remitted for reconsideration under the above Act, though the result of the reconsideration may be to have the award virtually set aside by a different, or even contrary, decision of the arbitrators.—*GREEN v. CITIZENS' INSURANCE CO.* (1890), 18 S. C. R. 338.—CAN.

**f. Consolidated Rule 652—Part of case.]**—By the above rule the ct. may remit the case referred or any part back for further consideration.—*KENNEDY v. BEAL* (1898), 29 O. R. 599.—CAN.

**g. Under British Columbia Railway Act.]**—There is no jurisdiction to remit an award in an arbn. held under the above Act.—*Re CANADIAN NORTHERN PACIFIC RY. CO. & FINCH* (1914), 20 B. C. R. 87.—CAN.

**Sect. 17.—Remitting award: Sub-sects. 1 & 2.]**

is so remitted:—*Qu.*: whether the ct. may remit the case for reconsideration a second time.—*NICKALLS v. WARREN* (1844), 6 Q. B. 615; 2 Dow. & L. 549; 14 L. J. Q. B. 75; 9 Jur. 10; 115 E. R. 231.

*Annotation*:—*Consd. Huntley v. Binbrooke* (1853), 1 E. & 787.

**1940. — Power to remit on single point.]**—Where an order of reference provides that if either party should dispute the award or any part thereof, or on motion to the ct. to set same aside, or any part thereof, the ct. should have power to refer the same or any part thereof to the arbitrator, a motion to refer back the award to the arbitrator, on one point, or to set same aside, is a sufficient disputation to enable the ct. under the power contained in the order of reference, to refer the award back to the arbitrator on the single point.—*WRIGHT v. NORWICH GUARDIANS* (1847), 8 L. T. O. S. 392.

**1941. Under Common Law Procedure Act, 1854, s. 8—Extends to voluntary submissions.]**—*Held*: the above sect., giving the ct. or a judge power to remit matters referred to the reconsideration of the arbitrator, applied to references authorised by a submission containing a clause that it might be made a rule of ct., & not expressly excluding such power, & the sect. was not confined to compulsory references ordered under the powers of the Act.—*Re MORRIS & MORRIS* (1856), 6 E. & B. 383; 25 L. J. Q. B. 261; 27 L. T. O. S. 103; 2 Jur. N. S. 542; 4 W. R. 549; 119 E. R. 908.

*Annotations*:—*Apld. Re Rouse & Meler* (1871), L. R. 6 C. P. 212. *Mentd. Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189; *Beaufort v. Swansea Harbour Trustees* (1860), 8 C. B. N. S. 46.

**1942. Court of Chancery.]**—*Held*: (1) the Ct. of Ch. had the same jurisdiction over arbitrators & awards under the above Act as the cts. of common law; (2) where an award was in part reasonable & conclusive, but in another part imperfect & deficient, that ct. would, on the application of any of the parties in difference, remit it back to the arbitrators to reconsider & amend.—*Re AITKEN'S ARBITRATION* (1857), 3 Jur. N. S. 1296; 6 W. R. 145.

*Annotation*:—*Apld. Re Warner & Powell* (1866), L. R. 3 Eq. 261.

**1943. Only where could have remitted if remitting clause.]**—*Held*: the above sect. empowered the ct. to remit the matters referred to the reconsideration of the arbitrator only in cases where, before that Act, the ct. might have remitted them if the submission had contained a clause empowering the ct. to do so.—*HODGKINSON v. FERNIE* (1857), 3 C. B. N. S. 189; 27 L. J. C. P. 66; 6 W. R. 181; 140 E. R. 712.

*Annotations*:—*Distd. Beckett v. Mid. Ry. Co.* (1866), Har. & Ruth. 189. *Apld. Dinn v. Blake* (1875), L. R. 10 C. P. 388; *Landauer v. Assor*, [1905] 2 K. B. 184. *Distd. British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. Co. of London*, [1912] 3 K. B. 128, C. A. *Mentd. Hogg v. Burgess* (1858), 4 Jur. N. S. 668; *London Dock Co. v. Shadwell Parish* (1862), 1 New Rep. 91; *May v. Mills* (1914), 30 T. L. R. 287.

**1944. Only where power to set aside award.]**—Upon compulsory references to arbn. under the above sect.:—*Held*: there was no power to remit

an award to the arbitrator, where there would not be power to set aside the award, & there was no such power, except in cases of misconduct, or of error on the face of an award.—*HOGGE (HOGG) v. BURGESS* (1858), 3 H. & N. 293; 27 L. J. Ex. 318; 31 L. T. O. S. 119; 4 Jur. N. S. 668; 6 W. R. 504; 157 E. R. 482.

*Annotations*:—*Apld. Baggalay v. Borthwick* (1861), 10 C. B. N. S. 61; *Holloway v. Francis* (1861), 9 C. B. N. S. 559. *Distd. Holgate v. Killick* (1861), 7 H. & N. 418.

**1945. —.]**—A reference under the above Act confers upon the master the same powers & imposes upon the parties the same liabilities as in the case of a reference under an ordinary submission or rule or order; & the ct. will not remit the matter to the master for reconsideration, except where there is ground for setting aside his certificate, nor will they, where the master has declined to state a case for the opinion of the ct. under s. 5, remit the matter to him, in order to give one of the parties an opportunity of applying to the ct. to direct a case to be stated under s. 4.—*BAGGALAY v. BORTHWICK* (1861), 10 C. B. N. S. 61; 142 E. R. 372; *sub nom. BAGULEY (BAGUELLY) v. MARKWICK (MARTHWICK)*, 30 L. J. C. P. 342; 4 L. T. 245; 9 W. R. 537.

*Annotation*:—*Refd. Gibbon v. Parker* (1860), 5 L. T. 584.

**1946. —.]**—An action was referred by judge's order under the above Act to one of the masters of the ct., who was to be at liberty to state any point of law, desired by either party, for the opinion of the ct. The master, after hearing both parties gave his certificate in favour of pltf., & declined to submit to the ct. for its opinion a point of law which was taken by deft. on the hearing. Deft. having moved to set aside the certificate, on the grounds of the master's refusal to state the point of law as requested by deft., & that the master had decided in favour of pltf.'s claim upon an erroneous construction of the terms of a certain deed on which pltf.'s claim was founded:—*Held*: (1) the clause in the order of reference giving liberty to the master to state a case was not compulsory, & the matter having been fully discussed before the arbitrator, the ct. would not set aside the certificate or remit the case back to the arbitrator; (2) there was no difference in this respect between compulsory references under the Act & voluntary arbn. by consent of parties.—*GIBBON v. PARKER* (1862), 5 L. T. 584.

**1947. Under Act of 1889, s. 10—Although arbitrator functus officio.]**—The ct. has power under the above sect. to remit the matters referred to the reconsideration of the arbitrator, even although the arbitrator be *functus officio*.—*Re STRINGER & RILEY BROTHERS*, [1901] 1 K. B. 105; 70 L. J. Q. B. 19; 49 W. R. 111; 45 Sol. Jo. 46, D. C.

**SUB-SECT. 2.—GROUNDS FOR REMITTING AWARD.**

**1948. Fresh evidence.]**—After an award made in favour of B. against W., on a submission to reference between them, which contained a clause empowering

**PART IV. SECT. 17, SUB-SECT. 2.**

**h. Ground which would have justified setting aside.]**—An award will only be referred back on the grounds that would formerly have justified it being set aside.—*LATTA v. WALLBRIDGE* (1861), 7 U. C. L. J. 207.—*CAN.*

**k. Not grounds for new trial.]**—Matters will not be referred back upon the same grounds, as to the discovery of

new evidence, etc., as would support an application for a new trial.—*McCLAIN v. MAITLAND* (1858), 2 P. R. 279.—*CAN.*

**1948 i. Fresh evidence.]**—The ct. refused either to set aside or refer back for the discovery of new evidence.—*LATTA v. WALLBRIDGE* (1861), 7 U. C. L. J. 207.—*CAN.*

**1948 ii. —.]**—The ct. is justified in

remitting an award, if new evidence is discovered which could not have been discovered before the award was made.—*GREEN v. CITIZENS' INSURANCE CO.* (1890), 18 S. C. R. 338.—*CAN.*

**1948 iii. — Discoverable before award.]**—The ct. may remit an award, on the ground that material evidence has been discovered since the award, although such evidence might, by the use of due diligence, have been dis-



the ct. to remit the matters to the reconsideration of the arbitrators, W. moved to send back the award to the arbitrators, on the ground that since the award he had discovered a letter in the handwriting of B., which contained material evidence in his favour. The arbitrators deposed that had such a letter in the handwriting of B. been produced at the reference their decision would have been materially affected. B., in answer, swore that the letter was not in his handwriting, but was an absolute forgery. The ct. remitted the case to the arbitrators for them to say if the letter were in B.'s handwriting, & if they found that it was, then for them to reconsider the matters in difference.—*Re BURNAND & WAINWRIGHT* (1850), 1 L. M. & P. 455; 19 L. J. Q. B. 423.

*Annotations* :—*Distd.* *Caswell v. Grovatt* (1861), 10 W. R. 91. *Apprvd.* *Re Keighley, Maxsted & Durant*, [1893] 1 Q. B.

covered before.—*Re BENNETT BROTHERS* [1910], V. L. R. 51.—**AUS.**

1948 iv. — *What must be shown.*—*Held*: no case was made out for remitting the action to the arbitrator on the ground of the discovery of fresh evidence, it not being shown that the evidence could not have been obtained by reasonable diligence.—*LEMAY v. McRAE* (1888), 16 O. R. 307.—**CAN.**

1. *Fraud or fraudulent concealment.*—A ct. is justified in remitting an award, if fraud or fraudulent concealment on the part of the persons in whose favour it is made is established.—*GREEN v. CITIZENS' INSURANCE CO.* (1890), 18 S. C. R. 338.—**CAN.**

m. — *—*—A claim for compensation was referred under Act VI. of 1882. Thereafter appcts. alleged that at the arbn. proceedings resp. fraudulently concealed certain facts, & appcts. prayed for an order referring the matter back to the arbitrator to take further evidence:—*Held*: it was not clear that a fraud had been committed which would justify an interference with a judgment of the ct.—*CAPE TOWN TOWN COUNCIL v. PINN* (1906), 23 S. C. 213; 16 C. T. R. 309.—**S. AF.**

n. *Under Act VIII. of 1859, s. 323—Grounds for remitting.*—The above Act authorises a ct., which refers a case to arbitrators, to remand it to them for reconsideration when their award contains mistakes, omissions, or defects which cannot be amended by the ct. under s. 322.—*MOHUN KISHEN v. BHOOBUN SHYAM* (1867), 7 W. R. 406.—**IND.**

o. *Under Arbitration Act, 1897 (c. 62), s. 11—Grounds for remitting.*—The only cases in which the ct. will remit matters referred to an arbitrator for reconsideration under the above Act are:—(1) where the award is bad on the face of it; (2) where there has been misconduct on the part of the arbitrators; (3) where there has been an admitted mistake, & the arbitrator himself asks that the matter may be remitted; & (4) where additional evidence has been discovered after the making of the award.—*Re GRAND TRUNK RY. CO. & PETRIE* (1901), 21 C. L. T. 529; 2 O. L. R. 284.—**CAN.**

p. — *—*—*Re CRAWFORD & ALLEN* (1903), 5 Tecr. L. R. 393.—**CAN.**

q. *Under Arbitration Act, 1890—Grounds for remitting.*—The power given by the above Act to refer back will not be exercised upon principles different from those previously regulating discretion in such matters. Motion to set aside or refer back an award, on the ground that one of the arbitrators had executed it under a mistake as to its effect, refused.—*Re JARDINE & MULLINS* (1896), 14 N. Z. L. R. 725.—**N.Z.**

r. *Failure of party to attend through misapprehension.*—Where on application for an attachment it appeared that deft. had not attended the arbn. through some misapprehension, the matters were

referred back.—*BLECHER v. LOYALL* (1856), 2 P. R. 14.—**CAN.**

s. *Arbitrator failing to decide all matters.*—Cross rules had been obtained for an attachment for non-performance & to set aside. It was uncertain whether certain questions had been decided, & the ct. under C. L. P. Act, 1856, s. 88, referred back the matters in dispute, discharging the rule for attachment without costs.—*Re SMITH v. RANNEY* (1859), 2 P. R. 82.—**CAN.**

t. — *—*—Where arbitrators did not decide certain matters specifically referred to them, the award was not set aside but was remitted back under Arbn. Act, 1892, s. 9.—*Re AMOS & AMOS* (1893), 14 N. S. W. L. R. 295.—**AUS.**

u. *Arbitrator failing to determine finally amount.*—The ct. sent back an award, in order to ascertain the amount to be paid by pltf. for wharfage, etc. ordered to be paid by him.—*SAHL v. MACDONNELL* (1886), 7 N. S. W. L. R. 385.—**AUS.**

v. *Arbitrator failing to decide dispute.*—*Held*: as the umpire had failed to draw the inference of fact necessary to decide the matter in dispute, the case should be referred back to him with a direction as to the nature of the matter to be decided.—*LIEBE v. MOLLOY* (1906), 4 C. L. R. 347.—**AUS.**

w. *Arbitrator acting in excess of authority.*—When an arbitrator had exceeded his powers in directing a refund, the ct. referred the award back, leave being given to adduce new evidence.—*Re HAMILTON & HAMILTON CATARACT* (1908), 13 O. W. R. 121.—**CAN.**

x. *Arbitrator failing to comply with previous order.*—*Held*: an award should be remitted to the arbitrator for reconsideration under R. S. O. 1897 (c. 62), s. 11, he having failed to comply with the terms of a previous order.—*Re POWELL & LAKE SUPERIOR POWER CO.* (1905), 5 O. W. R. 49; 9 O. L. R. 236.—**CAN.**

y. *Lack of due consideration.*—Arbitrators made an award hastily, & one of them afterwards said that the award ought to have been for fifty times as much:—*Held*: in these circumstances it could not be said that this arbitrator had fully considered the questions submitted, & the matters were referred back.—*Re INGERSOLL & ELLWOOD* (1861), 3 P. R. 162.—**CAN.**

z. *Misconduct.*—Where an award was set aside on grounds of legal (as distinguished from moral) misconduct of the arbitrator, & the indefiniteness of the award:—*Held*: the ct. could, under Arbn. Act (IX. of 1899), ss. 13 & 14, remit the award to the arbitrator for reconsideration.—*Re CROMPTON & CO., LTD. & MOHAN LAL* (1913), 1 L. R. 41 Calc. 313.—**IND.**

a. — *Irregularity.*—On a motion to sustain an award it was objected that parties had not been heard. This being admitted, the ct. remitted to the referee

405, C. A. *Folld. Sprague v. Allen* (1899), 15 T. L. R. 150. *Refd. Hodgkinson v. Fernie* (1857), 6 W. R. 181.

1949. — *—*—Under the Act of 1889, s. 10, the ct. or a judge has power to remit an award to the arbitrator for reconsideration, where it appears that since the making of the award material evidence has been discovered which might have affected the arbitrator's decision.—*Re KEIGHLEY, MAXSTED & CO. & DURANT & CO.*, [1893] 1 Q. B. 405; 62 L. J. Q. B. 105; 41 W. R. 437; 9 T. L. R. 107; 37 Sol. Jo. 99; 7 Asp. M. L. C. 268; 4 R. 136, C. A.; *sub nom. Re MAXTED, KEIGHLEY & CO. & BRYAN DURANT & CO.*, 68 L. T. 61.

*Annotations* :—*Apld.* *Re Palmer & Hosken* [1898], 1 Q. B. 131, C. A.; *Re Montgomery, Jones & Liebenenthal* (1898), 78 L. T. 406, C. A. *Folld. Re Baxters & Mid. Ry. Co.* (1906), 95 L. T. 20, C. A. *Refd. Re Enoch & Zaretsky, Bock*, [1910] 1 K. B. 327, C. A.

to give parties an opportunity of being heard before him.—*LYLE v. NELSON* (1844), 6 Dunl. (Ct. of Sess.) 1163.—**SCOT.**

b. — *—*—After an award remit to the referee to hear parties further refused, although the referee, on being examined, admitted that he was not himself acquainted with the practice of merchants in a certain trade out of which one of the claims arose, & that, having previously expressed his willingness to receive evidence on that point, he ultimately decided without such evidence.—*Low v. BANKS* (1836), 14 Sh. (Ct. of Sess.) 869.—**SCOT.**

c. — *—*—On a motion to the ct. to interpose their authority to a judicial award the other party stated that he had not been sufficiently heard, that, for some time prior to the issue of the award, the arbirer had neither seen nor heard the parties, & that he had, in the *interim*, taken up new views, prejudicial to the party objecting, & had acted on them in the award, without making the parties previously aware of this or issuing any notes of his intended award. The ct. refused to interpose their authority & remitted to the referee to hear the parties further.—*BAXTER v. MACARTHUR* (1836), 14 Sh. (Ct. of Sess.) 549.—**SCOT.**

d. — *—*—Arbitrators met, & two agreed upon an amount & told the third (who dissented) that they intended to award that amount, & afterwards, in the absence of the third, & without notice to him, they increased the award; the objection being that the same two arbitrators took evidence secretly & without notice to the third, & during his absence, by going to see a mill at the urgent request of deft.:—*Held*: there was sufficient ground to refer the case back.—*HALL v. WILSON* (1858), 7 C. P. 272.—**CAN.**

e. — *—*—Where it appeared that certain of the arbitrators heard evidence in the absence of each other & of the witnesses, & that they took into consideration the financial ability of the owners as an element in their determination:—*Held*: such conduct invalidated the award, but same should not be set aside but referred back for consideration under Arbn. Act, 1893, s. 10.—*Re TRYTHALL* (1896), 5 B. C. R. 50.—**CAN.**

f. — *—*—One of the parties to an arbn. was taken by surprise by the publication of an award, & deprived of a further hearing with regard to the construction of the contract in question & deprived of the opportunity to apply to have a special case stated on the question of law involved. The award was referred back.—*Re BROOKS SCANLON O'BRIEN CO.* (1911), 17 W. L. R. 408.—**CAN.**

g. *Award bad in part.*—An award bad in part, as not expressing the intention of the arbitrators, may be referred back to the arbitrators for further consideration.—*NEVILL v. NEWFOUNDLAND* (1900), 8 Nfld. L. R. 369.—**NFLD.**



**Sect. 17.—Remitting**

**1899.** —. —. The ct. has power to remit an award on the discovery of fresh evidence; & where evidence, which would have affected the mind of the arbitrator, had been discovered, the award was ordered to be remitted.—*SPRAGUE v. ALLEN & SONS* (1899), 15 T. L. R. 150.

See also Nos. 1838, 1839, *ante*.

**Errors & omissions in recitals in award.]—**See cases in Sect. 6, Sub-sect. 2, *ante*.

**Mistakes in award.]—**See cases in Sect. 13, Sub-sects. 1 & 2, *ante*.

**Award outside submission.]—**See cases in Sect. 8, Sub-sect. 2, *ante*.

**Lack of certainty & finality of award.]—**See cases in Sect. 8, Sub-sect. 3, *ante*.

**Failure to find on various issues separately.]—**See cases in Sect. 8, Sub-sect. 9, *ante*.

**Failure to adjudicate on all matters submitted.]—**See cases in Sect. 8, Sub-sect. 8, *ante*.

**Misconduct during hearing.]** See cases in Part III. Sect. 2, *ante*.

**Failure to deal properly with costs.]—**See cases in Sect. 20, *post*.

**Improperly or excessively charging fees.]** See cases in Part II. Sect. 5, Sub-sect. 4, *ante*.

**1951. Arbitrator considering letters not submitted in evidence.]—**Where a letter-book, containing copies of letters which had been adduced in evidence before an arbitrator, & marked by him as read, was, at the close of the case, left in his hands in order that he might, before making his award, refer to the copies so adduced, & he referred to a copy of a letter contained in the book which had not been marked as having been adduced in evidence, the ct. directed that the case should be referred back to the arbitrator, in order that the party, against whom the letter complained of had been used, might have an opportunity of explaining

its contents.—*DAVENPORT v. VICKERY* (1861), 9 W. R. 701.

**1952. Excessive charges.]—**The ct. will not send back an award to the arbitrators merely because their charges for making the award are excessive & are calculated on a principle different from that which either of the parties believed they would adopt.—*BAKER v. STEVENS* (1866), 14 L. T. 448.

**1953. Refusal to certify for costs.]—**An action involving a question of right was referred to arbn. by an order of reference, which gave the arbitrator the same power as a judge at *Nisi Prius* under 3 & 4 Vict. c. 24, s. 2, & provided that, in case of any defect, the cause might be referred back to him by the ct. Deft. pleaded thirteen pleas. The arbitrator found all the issue for pltf., with a farthing damages, but, being applied by him to certify for costs that the action was really brought to try a right, he refused. Upon motion to refer back the case to be amended:—*Held*: where parties, by their consent to the order of reference, placed the arbitrator in the situation of a judge at *Nisi Prius*, the ct. would not send the case back to him, unless they would, in similar circumstances, have directed a new trial for want of the certificate.—*BERRY v. DUNN* (1843), 7 Jur. 703

**1954. Failure to deal with costs.]—**It is no ground for sending back an award that the arbitrator has said nothing as to pltf.'s costs, the plain inference being that he meant pltf. to pay his own costs.—*ROSE v. REDFERN* (1861), 10 W. R. 91.

**1955. Failure to state case.]—***Re PALMER & Co. & HOSKEN & Co.*, No. 1822, *ante*.

**1956.** —. —. —. References to the master under C. L. P. Act, 1854, stand upon the same footing with regard to applications to send them back for re-consideration as ordinary references, & the ct. will not send an award back to the master in order that he may state a case, which at the hearing he has declined to do.—*HOLLOWAY v. FRANCIS* (1861), 9 C. B. N. S. 559; 142 E. R. 219.

*Annotation*:—*Refd. Baggalay v. Borthwick* (1861), 10 C. B. N. S. 61.

**SUB-SECT. 3.—GROUNDS FOR REFUSING TO REMIT AWARD.**

**Unreasonable delay.]—**See Nos. 1962—1966, *post*.

**1957. Where arbitrator would be entitled to return award as it stood.]—**An award, which found generally for pltf., was good on the face of it, but it appeared by affidavit that pltf. had given no evi-

**PART IV. SECT. 17, SUB-SECT. 3.**

**h. Breach of duty—Award set aside.]**—On a submission of a cause & all matters in difference therein, subject to such points of law as should properly arise, a question arose as to the sufficiency of certain evidence tendered; the arbitrators decided that the evidence was sufficient, merely reporting what the legal objections were. The ct. refused to refer the matter back to the arbitrators, but simply set aside their award & the verdict.—*ROSS v. BRUCE COUNTY* (1871), 21 C. P. 548.—**CAN.**

**k. Previous awards remitted back.]—**Arbitrators having made two previous awards, which had both been referred back to them, the ct. refused to refer the matter back to them, but ordered that it be remitted to the judge of the county ct.—*Re ALBEMARLE & EASTNOR* (1880), 46 U. C. R. 183.—**CAN.**

**1957 i. Where arbitrator would be entitled to return award as it stood.]—***KENNEDY v. PIGOTT* (1889), 18 S. C. R. 699.—**CAN.**

**l. Where award set aside.]—**Where an award has been set aside on the ground of misconduct on the part of one of the arbitrators, there is no power to refer back the award.—*WOOD v. GOLD* (1894), 3 B. C. R. 281.—**CAN.**

**m.** —. —. —. Although an award was set aside, the matter was referred back to the same arbitrator, there being nothing in his conduct justifying his removal.—*Re BROOKS SCANLON O'BRIEN Co.* (1911), 17 W. L. R. 408.—**CAN.**

**n. Matter outside submission ignored.]**—An application to refer back an award in a case where a tenant had a lease & had erected buildings, there being no provision as to buildings erected by the tenant, & where the arbitrators in arriving at the rent for a renewed term had fixed a "ground rent" without taking the buildings into consideration, was dismissed with costs.—*Re ALLEN & NASMITH* (1900), 30 O. R. 335; 27 A. R. 536.—**CAN.**

**o. Reception of doubtful evidence.]—**Where arbitrators received & gave effect

in their award to certain evidence, & gave a certificate to that effect, & that they were in doubt as to whether they should have received the evidence:—*Held*: an order to remit back should be refused.—*Re GRAND TRUNK RY. Co. & PETRIE* (1901), 21 C. L. T. 529; 2 O. L. R. 284.—**CAN.**

**p. Award made rule of court.]—**A fact was fraudulently concealed by resp., which materially affected the amount of the damages awarded him:—*Held*: had the award not been made a rule of ct. it would have been referred back.—*CAPE TOWN TOWN COUNCIL v. PINN* (1906), 23 S. C. 213; 16 C. T. R. 309.—**S. AF.**

**q. Arbitrators not bound to state case.]—**An award was in favour of pltf., & one of the arbitrators certified that the contract was binding, & the engineer's certificate conclusive, & that the award had been based on that assumption. Pltf. moved to refer back the award with a direction that the contract did

dence on one of the issues, & deft. had established, by evidence, his special pleas, the arbitrator finding against him on these issues, on the ground that the pleas were bad in law. The ct. refused to remit back the award.

If the award went back to the arbitrator, & it appeared he had not acted in a way inconsistent with the statements made by deft.'s counsel, he would say, "I am satisfied with the award as it stands," & then it must stand, & the parties must be satisfied with the result (*per CUR.*).—*PEAT v. GREEN* (1844), 2 L. T. O. S. 308, 367.

**1958. Matter not brought to attention of arbitrator.]**—An application to remit back an award upon a reference of all matters in difference, upon the ground that the arbitrator had omitted to decide upon a cross-claim, was refused upon the ground that it did not appear upon the affidavits that the matter had been brought before the arbitrator.—*ERSKINE v. WALLACE* (1863), 3 New Rep. 138; 12 W. R. 134.

*See, also*, No. 1918, *ante*.

**1959. No request to umpire for case.]**—An agreement of reference, in an appeal against a poor-rate, contained a clause enabling the arbitrators, at the request of either party, to state a case, to be settled by the umpire, for the opinion of the ct. The arbitrators having disagreed, the umpire made his umpirage, & subsequently, at the request of applts., set out the principles upon which he had acted, with a view of enabling applts. to have the question discussed in ct. Upon a rule calling upon defts. to show cause why the umpirage should not be sent back to the umpire, in order that he might state the facts more fully, the ct. refused to interfere, as applts. had had the opportunity of getting a case stated, & instead of doing so, had taken their chance of getting the umpirage made in their favour.—*LONDON DOCK CO. v. SHADWELL PARISH* (1862), 1 New Rep. 91; 32 L. J. Q. B. 30; 7 L. T. 381; 27 J. P. 324; 11 W. R. 89.

#### SUB-SECT. 4.—THE APPLICATION TO REMIT AWARD.

**1960. How made—On trial of counterclaim.]**—*Qu.*: whether, upon a counterclaim in an action on an award, the judge who tries the action has any jurisdiction to remit the award to the arbitrator under the Act of 1889, s. 10.—*PEDLER v. HARDY* (1902), 18 T. L. R. 591.

**1961. By whom made—Party disputing validity but not seeking to set aside award.]**—Where a submission provided that in the event of either party disputing

the validity of the award, & moving the ct. to set the same aside, the ct. should have power to remit the matters referred to the arbitrator, & deft. moved to remit the award to the arbitrator for amendment:—*Held*: the award might be remitted to the arbitrator in favour of deft., who disputed the validity of the award, without seeking to set it aside, & the clause in question was not confined to cases of applications to set aside the award as against the party disputing the validity of it.—*BRADLEY v. PHELPS* (1851), 6 Exch. 897; 21 L. J. Ex. 310; 155 E. R. 810.

**1962. When made—Last day of next term—Act of 1698, s. 2.]**—A motion that an award should be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him at that time, must be made before the last day of the next term after such award made, according to the above sect., although the arbitrator be not charged with corruption or undue means.—*ZACHARY v. SHEPHERD* (1788), 2 Term Rep. 781; 100 E. R. 421.

**1963. — Same time as application to set aside.]**—When a cause was referred, with all matters in difference, at *Nisi Prius*, & the order of reference empowered the Ct. of Queen's Bench, in the event of any application being made on the subject of the award, to refer the matter back to the arbitrator for further consideration:—*Held*: the application to refer back must be made within the same time as an application to set aside an award.—*DOE d. BANKS (BRAGGS) v. HOLMES* (1848), 12 Q. B. 951; 12 L. T. O. S. 193; 116 E. R. 1126.

**1964. — Refused after long delay.]**—A rule to pay money pursuant to an award was discharged, on the ground of the award being bad. Three years afterwards pltf. applied to have the award sent back to the arbitrator for reconsideration, pursuant to a power in the submission. No explanation was given of the delay:—*Held*: the application was too late.—*DOE d. MAYS (MAYO, MAYNES, MAINS) v. CANNELL (CANNEW)* (1853), 22 L. J. Q. B. 321; 21 L. T. O. S. 79; 17 Jur. 347; 1 W. R. 307.

**1965. — — —.]**—Although the reference to arbn. of a question of disputed compensation, pursuant to Public Health Act, 1875 (c. 55), s. 180, is a submission to arbn. by consent within C. L. P. Act, 1854, & the ct. has a discretionary power, under s. 8 of that Act, "at any time" to remit the award back to the reconsideration of the arbitrator, the ct., in the exercise of its discretion, may take into consideration the lapse of time between the making of the award & the application to remit, & may refuse the order to remit on the ground (*inter alia*) that it was too late.—*WARBURTON v.*

not bind, or to refer back the certificate for amendment, by stating the facts:—*Held*: as the arbitrators had not chosen to submit any point for decision & were not bound to do so, the ct. could not interfere.—*KESTIVEN v. GOODERHAM* (1861), 20 U. C. R. 500.—*CAN.*

*r. Award good on face of it.]*—An application to the ct. to remit an award was refused with costs, on the ground that there was no mistake of law or fact apparent on the face of the award.—*MCSHARRY v. RAILWAY COMRS.* (1899), 20 N. S. W. L. R. 40.—*AUS.*

*s. — —.]*—*CLEARY v. CLEARY* (1860), 10 L. C. L. R. 329.—*IR.*

*t. — —.]*—The effect of C. L. P. Act, s. 164, enabling the ct. to refer back, is not in any way to alter the arbitrator's power or authority; & the ct., therefore, refused to refer back upon an objection not apparent on the face of the award.—*READ v. WEIR* (1861), 20 U. C. R. 544.—*CAN.*

#### PART IV. SECT. 17, SUB-SECT. 4.

**1960 i. How made—By notice of motion.]**—An application to remit an award back to arbitrators was refused by the chambers judge, on the ground that it was made by summons instead of upon notice of motion:—*Held*: pltf. having failed to comply with the practice provided in Jud. Act (Ord. 52, r. 4), the application was properly dismissed.—*AUSTEN v. BERTRAM* (1891), 23 N. S. L. R. 379.—*CAN.*

**1962 i. When made—After entry of judgment.]**—After entry of judgment by pltf. in a referred action it is too late to move to refer back to enable an arbitrator to certify for costs.—*KEEF v. HAMMOND* (1863), 9 U. C. L. J. 157.—*CAN.*

**1962 ii. — First six days of next term.]**—On a compulsory reference a motion to refer back may be made within the first six days of the term following its publication.—*KESTIVEN v. GOODERHAM* (1861), 20 U. C. R. 500.—*CAN.*

**1962 iii. — Next term.]**—An award was made on May 17, 1873, the Saturday

before Easter term, but nothing was done which delay was not accounted for, until Sept. 2, when deft. obtained a certificate from the arbitrator as to a mistake made, & on Sept. 11 obtained a summons in chambers to remit back:—*Held*: the application was not too late.—*CONNOR v. MCCORMACK* (1873), 23 C. P. 271.—*CAN.*

**1962 iv. — — — Excuse for delay.]**—*Held*: delay in moving to have an award remitted back for correction from Aug. 21, when the award was made, until Dec. 4, was sufficiently accounted for by the loss of the *Nisi Prius* record & submission.—*STEWART v. BEATTIE* (1876), 37 U. C. R. 538.—*CAN.*

**1962 v. — "Any time."]**—C. L. P. Amendment Act (Ireland), 1856, s. 11 gives the ct. jurisdiction to remit, at any time, an award to the arbitrator, in order that he may correct a superficial error:—*Semble*: the ct. will, in every case, limit a time within which the amendment must be made.—*COLEMAN v. CORK & YOUGHAL RY. CO.*, 13 L. C. L. R. 368; 6 Ir. Jur. 124.—*IR.*



**Sect. 17.—Remitting award: Sub-sects. 4 & 5.**  
**18 & 19: Sub-sects. 1 & 2, A**

**HASLINGDEN LOCAL BOARD (1879), 48 L. J. Q. B. 451, D. C.**

**Annotations:—**Apprvd. Knowles v. Bolton Corpn., [1900] 2 Q. B. 253, C. A. **Mentd.** Re Clifford & Bury Town Council (1888), 58 L. T. 522; Re Yeadon L. B. & Yeadon Waterworks Co. (1889), 41 Ch. D. 52, C. A.

**1966. — Reasonable time.]—**The ct. has a discretion to entertain an application to refer back an award if made within a reasonable time, or for good cause shown, though made after the time which was fixed for such applications under the old system of terms.—**LEICESTER v. GRAZEBROOK (1879), 40 L. T. 883.**

**Sec, now, R. S. C. Ord. 64, r. 14 (R. S. C. (March) 1919, r. 17).**

**1967. To whom remitted back—Survivors of several arbitrators.]—**By an order of reference an action was referred to the award of twelve persons, six to be named by each party to the action, & it was ordered that in the event of either of the parties disputing the validity of the award, etc., the ct. should have power to remit the matters thereby referred or any of them to the reconsideration of the twelve persons, & in the event of any of the parties declining to act, or dying before they or he should have made their or his award, the parties might, or, if they could not agree, one of the barons of the ct., might appoint fresh arbitrators. After the arbitrators had made an award one of the twelve died. On motion to set aside the award, which was admitted to be bad:—**Held:** the ct. had power to remit back the matters referred to the surviving eleven & a fresh arbitrator to be appointed in pursuance of the power in the submission.—**LORD v. HAWKINS (1857) 2 H. & N. 55; 157 E. R. 23.**

**1968. Umpire.]—**Where a cause has been referred to arbn., & the arbitrators have in the ordinary mode appointed an umpire & referred the matters in dispute to him, upon a decision of the ct. or judge remitting the matters referred for reconsideration, the umpire is an arbitrator for such a purpose.—**CLAYTON v. WESTMINSTER BRYMBO COAL & COKE CO., LTD. (1864), 11 L. T. 366; 13 W. R. 134.**

**Admissibility of affidavit by arbitrator.]—**See No. 2618, *post*.

**1969. Appeal from order refusing to remit—Interlocutory.]—**An appeal from a refusal to remit an award to the arbitrator is analogous to an application for a new trial, & should be set down in the list of interlocutory appeals.—**Re DELAGOA BAY RY. CO. & TANCRED (1889), 61 L. T. 343; 37 W. R. 578, C. A.**

**Time for new or amended award.]—**See cases in Part II. Sect. 2, *ante*.

**Duty of arbitrator where award remitted.]—**See cases in Part III. Sect. 2, *ante*.

#### SUB-SECT. 5.—PROCEEDINGS WHEN AWARD REMITTED.

**1970. Proceedings when award remitted—Power of court as to costs.]—**Where, upon a rule to set aside an award, the matters referred to are remitted by the ct. to the reconsideration of the arbitrator, the ct. may, under C. L. P. Act, 1854,

s. 8, order that the costs of such rule shall be in the discretion of the arbitrator.—**Re PEARSON (1864), 4 New Rep. 60; sub nom. PEARSON v. OVERELL, 12 W. R. 709.**

**1971. — Power of arbitrator over costs.]—**By order of *Nisi Prius*, & consent of parties, a cause was referred to an arbitrator, who was to determine what he should think fit to be done by the parties respecting the matters in dispute, the costs of the cause to abide the event, the costs of the reference & award to be in the discretion of the arbitrator. Power was reserved to the ct., in case of any objection being made to the award, to refer back the cause to the same arbitrator. The arbitrator awarded in favour of pltf., ordering deft. to pay the costs of the reference & award. On motion to set aside the award, as uncertain & not final, the ct. ordered the award to be referred back to the arbitrator, for the purpose of his deciding on certain matters specified in the order. Nothing was said as to costs in this order. The arbitrator made an amended award, deciding on the matters referred back, confirming his first award in all other respects & ordering deft. to bear the costs of the amended award:—**Held:** he had power to make the order as to costs, under the original order of reference.—**M'RAE v. M'LEAN (1853), 2 E. & B. 946; 22 L. T. O. S. 118; 18 Jur. 244; 2 W. R. 63; 2 C. L. R. 391; 118 E. R. 1020.**

**1972. — Costs of abortive award.]—**Application to set aside a further award in an arbn. which had been referred back to same arbitrator, on the ground (*inter alia*) that the arbitrator had not awarded the costs by the further award, & that the costs were in his discretion:—**Held:** the former award disposed of the costs, & the further award was confined to the question referred back to the arbitrator, & his silence would decide that each party should pay his own costs.—**Re COOK (1849), 14 L. T. O. S. 207.**

**1973. — —.]—**Where an award is referred back to the arbitrator on the ground of defect, & the arbitrator hears fresh evidence & makes a new award, the costs of such matters as are strictly connected with the abortive award are to be borne equally by the respective parties to the award.—**BLAIR v. JONES (1851), 6 Exch. 701; 20 L. J. Ex. 925.**

**1974. Costs of second reference.]—**By an order of reference, all matters in difference were referred to an arbitrator, who was to ascertain & certify what verdict ought to be given, & his certificate was to be entered up as the verdict of a jury. The arbitrator certified that a verdict should be entered for pltf. for a certain sum, & told the parties that each should pay his own costs of the reference, which was acceded to by them, & on a motion to set aside the certificate, the ct. ordered the cause to be referred back to same arbitrator when he certified to same effect, but omitted to give any direction as to the costs of the second reference in the last certificate:—**Held:** pltf. was entitled to them as, in the absence of any specific direction to the contrary, such costs must follow the verdict as a matter of course.—**MACKINTOSH v. BLYTH (1823), 1 Bing. 269; 8 Moore, C. P. 211; 1 L. J. O. S. C. P. 99; 130 E. R. 108.**

**Annotation:—****Mentd.** Brown v. Nelson (1844), 13 M. & W. 397.

**1966 l. — Reasonable time.]—**An application to remit back need not be made within the time limited for moving to set aside, but must be made within a reasonable time, & delay must be satisfactorily accounted for.—**Re CITIZEN'S INSURANCE CO. & HENDERSON (1889), 13 P. R. 70.—CAN.**

**u. Service of rule.]—**Service on one

of two persons jointly a party to an arbn. of a rule *nisi* to refer back the award is sufficient.—**Re ARMSTRONG & CULLEY (1878), 4 V. L. R. 178.—AUS.**

**v. Exercise of power to remit back—****May be exercised repeatedly.]—**Under a submission giving power to the ct. to refer back upon any application to set aside, the power may be exercised re-

peatedly.—**Re MANLEY v. ANDERSON (1859), 2 P. R. 354.—CAN.**

**w. Appeal from order remitting back.]—**The legality of an order remitting an award for the reconsideration of the arbitrators may be challenged on appeal against the decree ultimately passed.—**GEORGE v. VASTIAN SOURY (1898), 1 L. R. 22 Mad. 202.—IND.**



## SECT. 18.—PERFORMANCE OF AWARD.

**1975. What constitutes performance.]—**An award, that the parties shall mutually release all actions up to the date of the award, is performed by the tender of a release of all actions up to the time of the submission.—*BAKER v. ROCHESTER* (1668), 1 Sid. 365 ; 82 E. R. 1160.

**1976. Award to execute release to satisfaction of other party's counsel.]—**Part of an award was that deft. should seal & execute such a release to pltf. as should be to the satisfaction of pltf.'s counsel, within seven days :—*Held* : deft. must prepare & tender the release.—*BAKER v. BULSTRODE* (1673), 2 Lev. 95 ; T. Raym. 232 ; 1 Vent. 255 ; 1 Mod. Rep. 104 ; 83 E. R. 466.

*Annotations* :—*Mentd.* *Meriton v. Stevens* (1741), Willes, 271 ; *Giles v. Grover* (1832), 9 Bing. 128.

**1977. Award to pay money at particular time & place.]—**Upon an award for the payment of money at a particular time & place, the party who is to make the payment is bound to attend, though the other does not.—*DOYLEY v. BURTON* (1700), 1 Ld. Raym. 533 ; 91 E. R. 1256.

**1978. Award of release of all actions to time of award.]—**A release of all actions to the time of the submission would be a good performance of an award to release all actions to the time of the award (*HOLT, C.J.*).—*ABRATHUT v. BRANDON* (1713), Gilb. 118 ; 93 E. R. 279.

**1979. Award of general release to time of award.]—**If an award be that a general release to the time of award may be given, a release to the time of the submission is a good general release.—*ANON.* (1691), 12 Mod. Rep. 8 ; 88 E. R. 1129.

**Performance as defence to proceedings to enforce award.]—***See* Nos. 2062—2064, 2096, *post*.

**When necessary to plead performance in enforcing award.]—***See* Nos. 1755—1762, *ante*.

## SECT. 19.—ENFORCEMENT OF AWARD.

## SUB-SECT. 1.—IN GENERAL.

**1980. Scottish award—Whether Common Law Procedure Act, 1854, applicable.]—**A motion for a rule, calling on deft. to show cause why he should not be ordered to pay a large sum of money due upon an award made in Scotland & the agreement to refer containing no stipulation that the award might be made a rule of ct. in England, was founded on Judgments Act, 1838 (c. 110), s. 18 :—*Held* : that Act did not apply. *Qu.* : whether C. L. P. Act, 1854, s. 17, applied.—*HILL v. LINDSAY* (1857), 30 L. T. O. S. 136.

**1981. Foreign award—Not enforceable as judgment of foreign Court.]—**An award in a foreign arbn. is not a decision, which a ct. here ought to recognise as a foreign judgment, & cannot be enforced.—*MERRIFIELD, ZIEGLER & CO. v. LIVERPOOL COTTON ASSOCN., LTD.* (1911), 105 L. T. 97 ; 55 Sol. Jo. 581.

## PART IV. SECT. 18.

**1975 i. What constitutes performance—Tender of balance.]—**An award directed that A. should pay B. money, & that B. should pay A. half the costs when taxed :—*Held* : a tender by A. of the balance between the sum awarded & the half of the taxed costs was not a compliance with the award.—*WATT v. W.* (1844), 7 I. Eq. R. 334.—*IR.*

**1975 ii. — Tender of deed ordered—Lack of title.]—**Declaration on an award that deft. should execute & deliver to pltf. a sufficient conveyance in fee, with the usual covenants of certain

land. Breach that deft. never had any title, & so could not perform the award. Plea, that deft. did, in pursuance of the award, execute & tender to pltf. such deed as in the declaration mentioned. On demurrer :—*Held* : plea good.—*ANDERSON v. VAN BUSECK* (1859), 18 U. C. R. 172.—*CAN.*

## PART IV. SECT. 19, SUB-SECT. 1.

**1981 i. Foreign award—Not enforceable as judgment.]—**An award was made by arbitrators in England directing deft. to pay pltf. a certain sum. The award was by an order of the High Ct., England, directed to be enforced in the same

## SUB-SECT. 2.—BY ORDER OF THE COURT.

## A. Under Arbitration Act, 1889 (c. 49), s. 12.

**In what cases—Foreign & Scottish awards.]—***See* Nos. 1980, 1981, *ante*.

**1982. Effect of Act of 1889, s. 12—Cannot enter judgment—Bankruptcy notice.]—**A judgment obtained in pursuance of an order purporting to be made under the Act of 1889, to enforce an award on a submission by entering judgment in accordance therewith, is not a final judgment in an action upon which a bkpcy. notice can be founded within Bkpcy. Act, 1883 (c. 52), s. 4 (1) (g).

The ct. has no jurisdiction under the Act of 1889, s. 12, to order judgment to be entered in accordance with the award (*VAUGHAN WILLIAMS & FLETCHER MOULTON, L.J.J.*).

An application for a bkpcy. notice is not a method of enforcing an award within s. 12 (*FLETCHER MOULTON, L.J.*).—*Re BANKRUPTCY NOTICE, Re A JUDGMENT DEBTOR*, [1907] 1 K. B. 478 ; 76 L. J. K. B. 171 ; 96 L. T. 131 ; 23 T. L. R. 214 ; 51 Sol. Jo. 132 ; 14 Mans. 1, C. A.

**1983. — Statutory reference.]—**An award in an arbn. under Public Health Act, 1875 (c. 55), s. 150, cannot be enforced under the above Act.—*Re WILLESDEN LOCAL BOARD & WRIGHT*, [1896] 2 Q. B. 412 ; 65 L. J. Q. B. 567 ; *sub nom.* *WILLESDEN LOCAL BOARD v. WRIGHT*, 75 L. T. 13 ; 60 J. P. 708 ; 44 W. R. 676 ; 12 T. L. R. 539, C. A.

*Annotation* :—*Mentd.* *Re Stoker & Morpeth* (1914), 84 L. J. K. B. 1169.

**1984. — Nature of application.]—**An application to enforce an award in same manner as a judgment or order to same effect under the above sect. is a "civil proceeding in the High Ct." within Bkpcy. Act, 1890 (c. 71), s. 1.—*Re A BANKRUPTCY PETITION, Ex p. CAUCASIAN TRADING CORPN., LTD.*, [1896] 1 Q. B. 368 ; 74 L. T. 47 ; 12 T. L. R. 226 ; *sub nom.* *Re BIRCH, Ex p. CAUCASIAN TRADING CORPN., LTD.*, 65 L. J. Q. B. 346 ; 44 W. R. 439 ; 3 Mans. 1, C. A.

*Annotations* :—*Refd.* *Re Colman & Watson*, [1908] 1 K. B. 47, C. A. *Mentd.* *China Steam Navigation Co. v. Van Laun* (1905), 22 T. L. R. 26 ; *Re A Debtor* (1906), 96 L. T. 131, C. A. ; *Re A Bankruptcy Notice*, [1907] 1 K. B. 478, C. A.

**1985. Service out of jurisdiction.]—**An award had been made against applts., foreigners resident out of the jurisdiction, in an arbn. alleged to have been held in pursuance of a provision contained in an agreement between applts. & resp. to the effect that, in the event of any dispute arising under the agreement, the same should be submitted to arbitrators to be appointed, to which arbn., however, applts. had refused to be parties :—*Held* : there was no jurisdiction to allow service on applts. out of the jurisdiction of a summons for leave to enforce the award under the Act of 1889, s. 12.—*RASCH & CO. v. WULFERT*, [1904] 1 K. B. 118 ; 73 L. J. K. B. 20 ; 52 W. R. 145 ; 20 T. L. R. 70 ; 48 Sol. Jo. 82 ; *sub nom.* *Re WULFERT & RASCH & CO.*, 89 L. T. 493, C. A.

*Annotation* :—*Apld.* *Re Akt. Robertsfors & La Soc. Anon. Des. Papeteries De L'Aa*, [1910] 2 K. B. 727.

manner as a judgment. Deft. left England & left the sum unpaid. Pltfs. instituted a suit in the High Ct. of Calcutta to recover the sum :—*Semble* : the order was not such a judgment as to entitle pltfs. to sue upon it.—*DEEP NARAIN SINGH v. MINNIE DIETERT* (1904), 8 C. W. N. 207 ; I. L. R. 31 Calc. 274.—*IND.*

**a. Against whom enforceable.]—**The ct. will not enforce an award to the detriment of persons not parties to the reference.—*SOUDAMINI GHOSH v. GOPAL CHANDRA GHOSH* (1914), 19 C. W. N. 948.—*IND.*

*Sect. 19.—Enforcement of award: Sub-sect. 2, A. &*

**1986. Appeal—"Practice & procedure."**—An appeal, from an order of a judge at chambers upon an application to enforce an award on a submission to arbn. under the Act of 1889, is an appeal in a matter of "practice & procedure" within Judicature (Procedure) Act, 1894 (c. 16), s. 1 (4).—*Re COLMAN & WATSON*, [1908] 1 K. B. 47; 77 L. J. K. B. 121; 97 L. T. 857; 24 T. L. R. 39; 52 Sol. Jo. 28, C. A.

*Annotation:—Consd. Miller, Gibb v. Smith & Tyrer*, [1916] 1 K. B. 419.

**1987. Effect of order—Does not preclude action.]**—A person who has obtained an order for leave to enforce an award under the Act of 1889, s. 12, is not thereby prevented from bringing an action upon the award.—*CHINA STEAM NAVIGATION CO., LTD. v. VAN LAUN* (1905), 22 T. L. R. 26.

*B. Under Judgments Act, 1838 (c. 110), s. 18.*

*(a) In what cases available.*

**1988. Who may apply—Solicitor refused.]**—A cause had been referred, & an award made that a co., who were parties to the award, should pay pltf. a sum of money. Before the money was paid, pltf. became bkpt., & his attorney claimed the money from the co. for his costs, which exceeded the amount awarded. The co. having refused to pay the attorney without the consent of bkpt.'s assignees, the attorney applied to the ct. for an order upon the co. to pay the amount:—*Held*: the claim was not sufficiently free from doubt to warrant the ct. making an order, which since s. 18 of the above Act would have the effect of a judgment, but the attorney's remedy was by an action in his client's name upon the award. *Qu.*, whether, even if the claim had been free from doubt, the ct. would have granted a rule to enforce payment of an attorney's lien.—*HOLCROFT v. MANBY* (1844), 7 Man. & G. 843; 2 Dow. & L. 319; 8 Scott, N. R. 473; 13 L. J. C. P. 208; 3 L. T. O. S. 282; 135 E. R. 342.

*Annotations:—Apld. Lloyd v. Mansell* (1853), Bail Ct. Cas. 130; *Re —* (1853), 1 W. R. 150. *Refd. Dunn v. West* (1850), 10 C. B. 420.

**1989. ———.]**—Where the terms of an award were "to pay to pltf. or his attorney," & pltf. having become insolvent, the attorney claimed a lien on the award for his costs, an order for deft. to pay the amount awarded & costs to pltf.'s attorney was refused.—*Re —* (1853), 1 W. R. 150.

**1990. — Bankrupt plaintiff—Tort.]**—An action for an illegal arrest having been referred, the award directed that final judgment should be entered for pltf., with £50 damages, & gave him the costs of the reference & award. The arbitrator had no authority to direct judgment to be entered, & the award was remitted to the arbitrator, who, in a second award, recited that he had made a former award, that it had been referred back, & gave pltf. the same damages & costs of the reference & award, & also the costs of the amended award. After the first award pltf. became insolvent. The vesting order was made after the reference back, & a few days before the second award. On an application that defts. should pay to pltf. or his attorney the damages awarded & both sets of costs:—*Held*: the action being for a personal tort, no right could pass to the assignees until the matter was adjudicated on, which was not done until the second award, & as that award was not made until after the vesting order, the title of pltf. would be good unless the assignees interfered, which they had not done, & the application must be granted.—*BREARCY v. KEMP* (1855), 24 L. J. Q. B. 319; 3 W. R. 575; 3 C. L. R.

**1991. Where sum awarded—Submission made rule of Court.]**—The ct. has power to call on a party to an award, the submission to which has been made a rule of ct., to pay the amount of the sum awarded.—*DOE v. AMEY* (1841), 8 M. & W. 565; 1 Dowl. N. S. 23; 10 L. J. Ex. 466; 5 Jur. 898; 151 E. R. 1163.

*Annotations:—Distd. Graham v. Darcey* (1848), 6 C. B. 537. In *Doe v. Amey*, the sum payable by the party was ascertained by the award, & that circumstance is relied on by the ct. (*WILDE, C.J.*). *Refd. Hare v. Fleay* (1851), 2 L. M. & P. 392. *Mentd. Dickenson v. Allsop* (1845), 13 M. & W. 722; *Doe d. Harrison v. Hampson* (1847), 4 C. B. 745; *Hutchinson v. Gillespie* (1856), 25 L. J. Ex. 103; *Talbot v. Shrewsbury* (1873), 42 L. J. Ch. 877.

**1992. Only where money payable by rule itself.]**—Under an agreement of reference a sum was awarded to be paid by pltf. to deft., & afterwards the agreement was made a rule of ct.:—*Held*: deft. could not, by virtue of the rule of ct., issue execution for the sum, under s. 18 of the above Act, that clause being applicable, for such purpose, only where the money payable by the rule was expressed in the rule itself.—*JONES v. WILLIAMS* (1839), 11 Ad. & El. 175; 4 Per. & Dav. 217; 113 E. R. 381.

*Annotations:—Consd. Rickards v. Patterson* (1841), 8 M. & W. 313. *Apld. Doe v. Amey* (1841), 8 M. & W. 565. *Expld. Neale v. Postlethwaite* (1841), 5 Jur. 747. *Distd. Hodgson v. Patterson* (1842), 5 Scott, N. R. 76; *Doe d. Pennington v. Barrell* (1847), 16 L. J. Q. B. 296. *Expld. Hare v. Fleay* (1851), 15 Jur. 1038. That was a very suspicious beginning [of the practice]; it arose out of a suggestion made by the ct., which was, therefore, eminently extra-judicial; but there are a number of cases reported in which these orders have been made, & the practice of making them is now inveterate (*MAULE, J.*). *Refd. Beaufort v. Philipps* (1847), 11 Jur. 600; *Lloyd v. Harris* (1849), 8 C. B. 63. *Mentd. Talbot v. Shrewsbury* (1873), 42 L. J. Ch. 877.

**1993. Power discretionary—Only where attachment before statute.]**—The ct. refused to make an order on deft. to pay a sum awarded, pursuant to the above sect., the case not being one in which they would have granted an attachment.—*CRESWICK v. HARRISON* (1850), 10 C. B. 441; 1 L. M. & P. 721; 20 L. J. C. P. 56; 16 L. T. O. S. 195; 15 Jur. 108; 138 E. R. 176; subsequent proceedings *sub nom. HARRISON v. CRESWICK* (1853), 13 C. B. 399.

*Annotations:—Refd. Re Beaufort & Swansea Harbour Trustees* (1860), 8 C. B. N. S. 146. *Mentd. Mays v. Cannell* (1854), 3 C. L. R. 218.

**1994. ———.]**—The ct. will not make an order under the above Act for payment of money directed to be paid by an award, except in a case where an attachment would have been granted.—*Re LAING & TODD* (1853), 13 C. B. 276; 138 E. R. 1204.

**1995. Award on compulsory reference.]**—*Qu.*: whether an award made upon a reference under C. L. P. Act, 1854, s. 3, was enforceable by attachment or order under Judgments Act, 1838, s. 18.—*TALBOT v. FISHER* (1857), 2 C. B. N. S. 471; 140 E. R. 502.

**1996. When no attachment could issue—No express direction to pay.]**—If an award finds that pltf. is entitled to recover a certain sum from deft., the ct. will grant a rule ordering deft. to pay the amount, although the award contains no direction to deft. to pay the amount, & though, consequently, no attachment could issue.—*BOWEN (BOWER) v. BOWEN (BOWER)* (1862), 31 L. J. Q. B. 193; 5 L. T. 685; 8 Jur. N. S. 193.

*(b) Grounds for granting or refusing order.*

**1997. Invalidity of award.]**—It is as competent to object to the goodness of an award, on showing cause against a rule requiring a party to pay money, as it is on a rule for an attachment for non-performance of it.—*KERR v. JESTON (GEESTON)* (1841), 1 Dowl. N. S. 340; 6 Jur. 62.

*Annotation:—Refd. Lord v. Lord* (1855), 5 E. & B. 404.



**1998. Doubts as to validity of award.]**—It is competent to take any objection, which would be available on showing cause against a rule for an attachment for non-performance of an award, in showing cause against a rule to show cause why a sum should not be paid pursuant to an award, in order to issue execution, under s. 18 of the above Act, & if there be a doubt whether the award be good, the ct. will not make a rule absolute for payment of the money directed by the award.—*SPENCE v. CLARKSON* (1842), 6 Jur. 1112.

**1999. —.**]—Where an arbitrator directed a verdict to be entered for defts., which he had no power to do, & ordered pltf. to pay certain costs, & there was a question of law as to the validity of the award, the ct. refused a rule calling upon pltf. to show cause, under the above sect., why he should not pay the costs awarded.—*DICKENSON v. ALISOP* (1845), 13 M. & W. 722; 2 Dow. & L. 657; 14 L. J. Ex. 136; 4 L. T. O. S. 330; 153 E. R. 303.

*Annotation:—Reid. Smith v. Troup* (1849), 7 C. B. 757.

**2000. —.**]—A cause & all matters in difference between the parties were referred to two arbitrators & an umpire, the costs of the cause to abide the result. The umpire awarded that all further proceedings in the cause should thenceforth cease & be no further prosecuted, & that pltf. should pay to deft. 12s. 0½d., found to be due to him. A demand was made of £21 16s. 2d., being the costs in the cause, but not of the 12s. 0½d. A rule having been obtained, calling on pltf. to show cause why he should not pay deft. both those sums, the ct., considering the validity of the award doubtful, refused to make the rule absolute even as to the sum demanded.—*TATTERSALL v. PARKINSON* (1848) 2 Exch. 342; 17 L. J. Ex. 208; 154 E. R. 524.

**2001. — Sum not ascertained due & payable when award made.]**—The ct. refused to make an order under s. 18 of the above Act, for the payment of a sum alleged to have become payable under an award, where the money was not ascertained to be due & payable at the time of the making of the award.—*GRAHAM v. DARCEY* (1848), 6 C. B. 537; 6 Dow. & L. 385; 18 L. J. C. P. 61; 12 L. T. O. S. 149; 136 E. R. 1358.

**2002. — Payment to third party directed—Affidavit.]**—A dispute between A. & B., two ship-owners, as to a collision, was by agreement referred, the agreement providing that “all such disputes & differences, claims, demands, & damages in respect thereof, should be referred to the arbitrators,” & that “all the costs & charges in & about the submission, the reference, & award, should be in the discretion of the arbitrators.” The arbitrators ordered “that all disputes between the parties touching the matters in difference should cease & determine,” that A. should pay “for the damages & costs incurred by B. in consequence of the collision, £72 6s.,” & that “the arbitrators charges & expenses attending the reference, amounting to £62 14s. 10d. should be borne in equal proportions by A. & B., & that the sums of £72 6s. & £62 14s. 10d., making together £135 0s. 10d., should be paid, within ten days from the execution of the award, to C.” The ct. refused to make a rule, under s. 18 of the above Act, ordering A. to pay the £72 6s. to B., there being nothing on the face of the award to show how the payment to C. was to enure as a payment for the benefit of B., although there was an affidavit stating that C. was agent for B.’s vessel, & acted as his agent in the matter of the arbn., & that the money was directed to be paid to him as such agent.—*Re LAING & TODD* (1853), 13 C. B. 276; 138 E. R. 1204.

**2003. — Sum made payable to arbitrator himself.]**—By an agreement of reference between P. & S., costs were in the discretion of the arbitrator. The award directed that £149 5s. 7d., being the

costs of the award, should be paid by the parties in the following proportions: that £25 should be paid by P. to certain attorneys forthwith, & £124 5s. 7d., the residue, should be paid by S. in like manner, & if P. paid any part of the £124 5s. 7d., that S. should repay it to him. On an application by P. for a rule calling on S. to pay the several sums:—*Held*: as the arbitrator had fixed in the award the amount payable to himself, the matter was too doubtful to grant a rule.—*PARKINSON v. SMITH* (1861), 30 L. J. Q. B. 178; 9 W. R. 340.

**2004. — Objection not apparent.]**—Where on a rule *nisi* ordering deft. to pay a sum of money due under an award, a question was raised as to the validity of the award, on the ground of its having been executed by the arbitrators at different times & not in the presence of each other, the ct. refused to decide that question on such a motion, & discharged the rule.

Where a cause has been referred by a judge’s order:—*Semle*: a party showing cause against a rule to pay the sum awarded is confined to objections apparent upon the submission & the award, & cannot bring the pleadings before the ct. on affidavit for the purpose of objecting to the sufficiency of the award.—*WRIGHT v. GRAHAM* (1848), 3 Exch. 131; 18 L. J. Ex. 29; 12 L. T. O. S. 199; 154 E. R. 787.

**2005. Objection not apparent on face of award—Affidavits.]**—It is not competent to a party, in answer to a motion under s. 18 of the above Act, to raise by affidavit any objection which does not appear upon the face of the award, as, for instance, that the arbitrator (the action referred being for a libel, with a plea of not guilty, & a justification as to part) has found for pltf. on the first issue (the finding on the second being for deft.), but without damages.

By an order of reference, a cause & all matters in difference were referred to a barrister, “but so as the reference hereby made be not proceeded with until the arbitrator hereby appointed shall have made & published his award in an action of *T. v. A.*, now pending in the Ct. of Exch., & which action has been referred to the award of the arbitrator.” Upon a motion under the above sect.:—*Held*: it was no answer to the rule that the award omitted to state on the face of it that, previously to proceeding with the reference, the arbitrator had made an award in *T. v. A.*, for the ct. would presume that he did his duty.—*DAVIES v. PRATT* (1855), 17 C. B. 183; 25 L. J. C. P. 71; 139 E. R. 1039.

**2006. Perjury alleged—Not apparent on face of award.]**—It is no answer to a rule to pay money pursuant to an award that the party, in whose favour the award is made, has, since the award, been committed to take his trial for perjury, committed during the arbn.

This objection could only have been available, if at all, on a motion to set aside the award. Pltf. has not applied to do that, & the time for setting aside the award is not past. It is almost a sacred rule that on a motion for a rule to pay money pursuant to an award no objection can be raised except for matters apparent on the face of the award (*CROMPTON, J.*).—*WOOLLEN v. BRADFORD* (1864), 33 L. J. Q. B. 129; *sub nom.* *BRADFORD v. WOOLLAM*, 3 New Rep. 490; 9 L. T. 731; 10 Jur. N. S. 206; 12 W. R. 381.

**2007. Award good as to part.]**—A submission of reference, after referring the amount of damages caused by certain trespasses, provided that the costs & the charges of the agreement, & the costs, charges, & expenses of, & attending or incident to the arbn., including the payment to be made to the referees & their umpire, & for any proofs that might be required by them, should be borne & paid by S., & should be awarded accordingly. The award



**Sect. 19.—Enforcement of award: Sub-sect. 2, B. (b) & (c); sub-sect. 3.]**

found the amount of damages, & then found a further sum to be due for costs, but did not distinguish the amount due to the referees, & awarded the sum so found due for costs to be paid to O., who was only mentioned in the attestation clause of the award as clerk to the attornies of the successful party:—*Held*: a rule might be granted to compel the payment of the sum awarded for damages, for, if the award of the costs were in any degree defective, it was separable from the rest of the award.—*Re LLOYD & SPITTLE, Re ADDISON & SPITTLE* (1849), 18 L. J. Q. B. 151; 13 Jur. 587.

**2008. Conduct of arbitrator.]**—On motion summarily to enforce an award, by calling on a party to show cause why he should not pay the sum awarded, the conduct of the arbitrator will not be gone into by the ct.—*MANLEY v. BRAY* (1847), 11 Jur. 521.

**2009. Where unascertained cross-claim.]**—The ct. refused a rule for payment of money under an award, where it appeared that the costs (unascertained) of certain proceedings in Ch. were payable to the other party under the same award.—*LAMBE v. JONES* (1860), 9 C. B. N. S. 478; 9 W. R. 202; 142 E. R. 188.

**2010. Where cross-claim or set-off.]**—If a person, ordered to pay money under an award, satisfies the ct. that he has a *bond fide* claim for a cross-demand larger than the sum awarded which he might reasonably hope to support by way of set-off to an action on the award, the ct. will not grant a rule ordering him to pay the sum awarded. *Semble*: it is otherwise, if the set-off be one cognisable only in equity.—*SWAYNE & BOVILL v. WHITE & PONSFORD* (1862), 31 L. J. Q. B. 260; 10 W. R. 759.

(c) Procedure.

**2011. Service & demand—What required.]**—Upon a rule calling upon deft. to show cause why he should not pay a sum of money awarded against him under a reference of a suit to arbn., the ct. made the rule absolute, though the forms of service required under the old practice on motions for attachments had not been pursued.—*DOE d. MOODY v. SQUIRE* (1842), 7 Jur. 236.

*Annotation*:—*Distd. Wilson v. Foster* (1843), 6 Man. & G. 149.

**2012.** .].—In order to obtain a rule for the payment of money under an award & *allocatur*, personal service in general is necessary, but this may be dispensed with in special circumstances.

Where a rule to show cause on Nov. 20 had not been served on deft. until that day at Birmingham, the ct., on the 25th (the last day of term), refused to make it absolute, but enlarged it till the next term.—*HAWKINS v. BENTON* (1844), 2 Dow. & L. 465; 1 New Pract. Cas. 49, 60; 14 L. J. Q. B. 9; 8 Jur. 1122.

*Annotations*:—*Apld. Smith v. Troup* (1849), 7 C. B. 757. *Refd. Winwood v. Holt* (1845), 3 Dow. & L. 85.

**2013.** .].—It is not necessary, on an application for a rule for payment of money pursuant to an award, to show the same formalities of demand & refusal which are necessary on moving for an attachment.—*Ex p. STANESBY* (1845), 4 L. T. O. S. 353.

**2014. Demand—Necessity for.]**—A motion for a rule calling on deft. to show cause why he should not pay a sum of money due on an award was refused, where there had been personal service of the award & *allocatur*, but no demand of payment by an attorney duly authorised.—*CHENNET v. COOPER* (1845), 6 L. T. O. S. 157.

**2015. — Personal demand dispensed with—Party evading service.]**—A personal demand of money payable under an award, with a view to a

proceeding on a rule of ct., under s. 18 of the above Act, may be dispensed with, where the party is evidently keeping out of the way to avoid the demand.—*SMITH v. TROUP* (1849), 7 C. B. 757; 6 Dow. & L. 679; 18 L. J. C. P. 209; 13 L. T. O. S. 73; 137 E. R. 300.

*Annotations*:—*Refd. Neale v. Gordon Lennox*, [1902] 1 K. B. 838, C. A. *Mentd. Welsh v. Roe* (1918), 87 L. J. K. B. 520.

**2016. Demand by one—Award to pay to either of two.]**—An award directed deft. to pay a certain sum to pltf. or S., his attorney:—*Held*: a demand by S. was sufficient to found a motion under the above sect.—*HARE v. FLEAY* (1851), 11 C. B. 472; 2 L. M. & P. 392; 20 L. J. C. P. 249; 17 L. T. O. S. 184; 15 Jur. 1038; 138 E. R. 557.

*Annotation*:—*Refd. O'Toole v. Pott* (1857), 7 E. & B. 102.

**2017. Demand by one of several.]**—An award, made on a reference of an action by two pltf. to recover debt. from deft., ordered deft. to pay a sum of money to pltf. One pltf. alone demanded the money from deft., & swore that deft. had not paid him, & to the best of his belief, had not paid his co-pltf. nor the attorney, & that the money was still wholly due & unpaid. On an application on the part of pltf. for a rule calling on deft. to pay the money pursuant to the award:—*Held*: the demand by one pltf. was sufficient to warrant the granting the rule.—*DREW v. WOOLCOCK* (1854), 24 L. J. Q. B. 22; 3 C. L. R. 78.

**2018. Service of rule—Personal service.]**—A rule obtained with the view to issue execution under s. 18 of the above Act for payment of money due under an award & master's *allocatur*, which have been personally served, is notwithstanding such service a rule to show cause only, & the ct. refused to make that rule absolute without a personal service of it, there not appearing to be any difficulty in effecting it.—*WINWOOD v. HOULT* (*HOLT, HALL*) (1845), 14 M. & W. 197; 3 Dow. & L. 85; 15 L. J. Ex. 10; 5 L. T. O. S. 178; 9 Jur. 454; 153 E. R. 447.

**2019. — — — Unless party evading.]**—Personal service of a rule *nisi* to pay a sum of money under an award cannot be dispensed with, unless it appear that deft. is evading service. Service on his attorney is not sufficient.—*EVANS v. PROSSER* (1865), 5 New Rep. 318; 34 L. J. Q. B. 256; 11 L. T. 718; 13 W. R. 351.

**2020. — — — Unless party left jurisdiction—Service at residence.]**—An action for mesne profits was, together with all matters in difference between the parties, referred to arbn., & the arbitrator awarded deft. to pay to pltf. £1,850, with the costs of the reference & award, which were afterwards taxed by the master at £86 14s., & an *allocatur* to that amount made accordingly. A party having been sent to deft.'s residence to make a demand of the money, found his premises in the possession of his daughter-in-law, who said they had been assigned to her by deft., who had left the country. The ct., on affidavit of the above facts, granted a rule, calling on deft. to show cause why he should not pay the amount of the award & *allocatur*, the rule to be served on the daughter-in-law. *Semble*: if personal service on deft. had been effected, & a demand made of the amount, the rule would be granted absolute in the first instance.—*DOE v. AMEY* (1841), 8 M. & W. 565; 1 Dowl. N. S. 23; 10 L. J. Ex. 466; 5 Jur. 898; 151 E. R. 1163.

*Annotations*:—*Distd. Graham v. Darcey* (1848), 6 C. B. 537. *Refd. Hare v. Fleay* (1851), 2 L. M. & P. 392. *Mentd. Dickenson v. Allsop* (1845), 13 M. & W. 722; *Doe d. Harrison v. Hampson* (1847), 4 C. B. 745; *Hutchinson v. Gillespie* (1856), 25 L. J. Ex. 103; *Talbot v. Shrewsbury* (1873), 42 L. J. Ch. 877.

**2021. — — — — —.]**—Where deft. had said that he would not pay under an award, a rule *nisi* to pay the money was made absolute, upon

proof that it had been served by leaving it at deft.'s house, in the hands of his sister-in-law, who said that his wife was upstairs in bed, & that deft. had gone to America.—*STYRING (STYRLING) v. LLOYD* (1864), 3 New Rep. 488; 9 L. T. 730; 12 W. R. 384.

**2022. — Filing not allowed.]**—Upon a rule calling upon deft. to show cause why he should not pay a sum of money awarded against him, the ct. refused to allow service of the rule by affixing it in the master's office, it appearing that deft. was out of the kingdom.—*WILSON v. FOSTER* (1843), 6 Man. & G. 149; 6 Scott N. R. 936; 12 L. J. C. P. 330; 134 E. R. 844.

*Annotation* :—*Expld.* *M'Kenzie v. Sligo & Shannon Ry. Co.* (1850), 19 L. J. C. P. 142.

**2023. At what time—Before time limit for setting aside.]**—An order, under s. 18 of the above Act, for payment of money pursuant to an award, upon a reference by a judge's order of a cause & all matters in difference between the parties, may be granted before the time for moving to set aside the award has expired, the motion in that case being in the nature of a writ of error, & not of a motion in arrest of judgment.—*HARE v. FLEAY* (1851), 11 C. B. 472; 2 L. M. & P. 392; 20 L. J. C. P. 249; 17 L. T. O. S. 184; 15 Jur. 1038; 138 E. R. 557.

*Annotation* :—*Refd.* *O'Toole v. Pott* (1857), 7 E. & B. 102.

**2024. Proceedings — Production & deposit of award.]**—When a rule is granted to pay money pursuant to an award, the original award must be produced & deposited with the master at the time of drawing up the rule. The fact that the award has been deposited as a security with a person who has advanced money on it, & who declines to produce it on the drawing up of the rule, & to allow it to be deposited with the master for fear of losing his lien on it, is no sufficient reason for allowing the rule to be drawn up on production of a verified copy, for if the lender is willing to assist in the application & produces the award, & gives the master notice that he is entitled to it, the master will draw up the rule and will hold the award for the lender until the judgment of the ct. has been executed & then return it to him.—*DAVIS v. POTTER* (1852), 21 L. J. Q. B. 134.

**2025. —.]**—Upon obtaining a rule absolute for the payment of money under an award, the award itself must be left with the master, & not a copy merely.—*Re M'REA & POTTER* (1852), 18 L. T. O. S. 247.

**2026. — Rule to show cause.]**—In an arbn. where there was no action, an application to enforce payment of the sum awarded was made in the form of a rule to show cause, without notice to the other side :—*Held* : this mode of proceeding was right.—*Re PHILLIPS & GILL* (1875), 1 Q. B. D. 78; 45 L. J. Q. B. 136; 24 W. R. 158.

**2027. — In Chancery Division.]**—Where an action has been referred to an arbitrator by the Ch. Div., it is not necessary to make the award a rule of ct. before an order to enforce the award can be obtained.—*JONES v. WEDGEWOOD* (1881), 19 Ch. D. 56; 51 L. J. Ch. 206; 30 W. R. 228.

**2028. —.]**—All matters in dispute were referred to arbn. by an order made in the Ch. Div., & the arbitrator made an award :—*Held* : the award could be enforced without being made a rule of ct.—*Re FORREST, BURROWES v. FORREST, FORREST v. BURROWES* (1881), 19 Ch. D. 57 n.

*Annotation* :—*Folld.* *Jones v. Wedgewood* (1881), 19 Ch. D. 56.

**2029. Evidence in support—Affidavit as to enlargement of time.]**—An order of reference empowering an arbitrator to enlarge the time for making his award having been made a rule of ct., on affidavits verifying the order & the enlargements, the ct. granted a rule calling on deft. to pay two sums

of money, pursuant to the award, without the production of a fresh affidavit that the enlargement had been duly made.—*PFEIBLES v. HAY* (1844), 8 Jur. 338.

**2030. — Affidavit of execution of award.]**—A rule for the payment of money pursuant to an award was discharged, where there was no affidavit of the execution of the award sought to be enforced, & leave to renew the application upon better materials was refused.—*R. v. EASTERN UNION Ry. Co.* (1852), 18 L. T. O. S. 255.

#### SUB-SECT. 3.—BY JUDGMENT AND EXECUTION PURSUANT TO ORDER OF REFERENCE OR WHEN VERDICT ENTERED SUBJECT TO AWARD.

**2031. Power to enter judgment without order.]**—Where a verdict is taken *pro forma* at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury, & pltf. is entitled to enter up judgment for the amount without first applying to the ct. for leave to do so.—*LEE v. LINGARD* (1801), 1 East, 401; 102 E. R. 155.

*Annotations* :—*Refd.* *Allenby v. Proudlock* (1835), 1 Har. & W. 357. *Mentd.* *Re Burgess* (1818), 2 Moore, C. P. 745.

**2032. —.]**—A verdict having been taken, subject to a reference, before Jud. Act, 1873 (c. 66), came into operation, the arbitrator to have power to direct a verdict for either party, the award was not made until after the Act came into operation :—*Held* : judgment on the award could be signed without obtaining an order of the ct. or of a judge. *Semble* : where the award, made under a reference since the Act, is final & conclusive on the parties, judgment may be signed on the award, though no direction to that effect is given in the order of reference or in the award, & it is not necessary to set down the action on motion for judgment under Ord. 40, r. 3.—*LLOYD v. LEWIS* (1876), 2 Ex. D. 7; 46 L. J. Q. B. 81; 35 L. T. 539; 25 W. R. 102, C. A.

*Annotations* :—*Distd.* *Longman v. East, Pontifex v. Severn, Mellin v. Monico* (1877), 47 L. J. Q. B. 211, C. A. *Consd.* *Johnson v. Wilson* (1882), 46 L. T. 647, C. A. *Mentd.* *Frederici v. Vanderzee* (1877), 2 C. P. D. 70, C. A.

**2033. — When judgment may be signed.]**—*Qu.* : whether judgment for a sum of money awarded by an award reducing a verdict can be entered before the day on which the payment of the sum is awarded.

Execution ought not to be had for it before the day of payment.—*CALLARD v. PATTERSON* (1812), 4 Taunt. 319; 128 E. R. 352.

**2034. —.]**—Where a verdict has been found, subject to a reference, & the award has not been made until some terms afterwards, judgment cannot be entered up as of the term next after the verdict, without a special application to the ct.—*BROOKE v. FEARNES* (1833), 2 Dowl. 144.

**2035. —.]**—In Mar., 1854, at the Spring Assizes a verdict was entered for pltf. subject to a reference. In Apr. following pltf. died. On the last day of Michaelmas Term the arbitrator made his award, directing that the verdict for pltf. should stand :—*Held* : as by 17 Car. 2, c. 8, an exor. was entitled to two terms from the verdict to enter up judgment, & as the verdict was inchoate only till the award was made, & the extrix. could not have entered up judgment in Michaelmas Term, an application in the following Easter Term to enter up judgment as of Easter Term, 1854, *nunc pro tunc*, was in time.—*HEATHCOTE v. WING (WYNN)*



## ARBITRATION.

**Sect. 19.—Enforcement of award: Sub-sects. 3 & 4, A. B. & C.]**

(1855), 11 Exch. 355; 25 L. J. Ex. 23; 25 L. T. O. S. 247; 3 C. L. R. 1110; 156 E. R. 868.

**2036. ———.]—**A verdict was taken in vacation, subject to the award of an arbitrator, to whom the cause & all matters in difference were referred. The award was made directing a verdict in favour of pltf. Before the following term, but more than fourteen days after the publication of the award, pltf. signed judgment. A summons having been obtained to set aside the judgment:—**Held:** the judgment was regular, & it was not necessary, before signing judgment, to wait till the time for moving to set aside the award had elapsed.—**O'TOOLE v. POTT** (1857), 7 E. & B. 102; 26 L. J. Q. B. 88; 28 L. T. O. S. 248; 3 Jur. N. S. 361; 5 W. R. 256; 119 E. R. 1186.

**2037. Motion for judgment on award.]—**Pltf. had a verdict for his security, & matters in difference were referred to arbn. by rule & an award was duly made. Pltf. elected to proceed upon the verdict & not by attachment for non-performance of the award, & moved for leave to enter judgment & take out execution for the money awarded:—**Held:** the application was proper, for pltf. had no right to enter judgment without leave of the ct.—**KETTLE v. GROVE** (1742), Barnes, 57; 94 E. R. 804.

**Annotation:—****Refd.** Allenby v. Proudlock (1835), 4 Dowl. 54.

**2038. ———.]—**On motion for judgment on deft. indicted for a nuisance, where a verdict, subject to a reference to an arbitrator, has been consented to, deft. is entitled to notice of the motion, & also to copies of the affidavits on which the motion is to be made.—**R. v. GORE** (1839), 8 Dowl. 102.

**2039. Motion for judgment on verdict as reduced.]—**The ct. will give leave in the first instance to enter up judgment on a verdict reduced by an award.—**HIGGINSON v. NESBITT** (1797), 1 Bos. & P. 97; 126 E. R. 798.

**Annotation:—****Refd.** Allenby v. Proudlock (1835), 4 Dowl. 54.

**2040. Where no verdict or judgment ordered.]—**A replevin cause having been referred after issue joined & before jury sworn, the arbitrator found one issue for deft., & awarded payment of rent due to him, but ordered no verdict or judgment to be entered:—**Held:** deft. was not entitled on motion to enter up judgment in the action for the rent &

costs of the action taxed for him.—**GRUNDY v. WILSON** (1817), 7 Taunt. 700; 129 E. R. 278.

**2041. ——— Where award lost.]—**If an award is lost, the ct. will, nevertheless, permit judgment to be entered accordingly, upon affidavit of its contents.—**HILL v. TOWNSEND** (1810), 3 Taunt. 45; 128 E. R. 19.

**Annotation:—****Consd.** *Re Darwin* (1831), 9 L. J. O. S. K. B. 183.

**See also** No. 1565, *ante*.

**2042. No execution without judgment.]—Held:** the form of the writ of execution, where matter of account was referred to & decided on by an arbitrator, officer of the ct., or county ct. judge, as settled by the judges by the rule of Michaelmas vacation, 1854, did not dispense with the signing of judgment or the obtaining a rule or order under Judgments Act, 1838 (c. 110), s. 18.—**KENDIL v. MERRETT** (1856), 18 C. B. 173; 25 L. J. C. P. 251; 2 Jur. N. S. 523; 4 W. R. 594; 139 E. R.

**Annotations:—****Refd.** *Talbot v. Fisher* (1857), 2 C. B. N. S. 471; *Robertson v. Sterne* (1862), 13 C. B. N. S. 248.

### SUB-SECT. 4.—BY ACTION ON AWARD.

#### A. In General.

**2043. Action lies—Pleadings.]—**An action of debt lies on an award. Pltf. must allege a mutual submission. Form of declaration considered.—**HODSDEN v. HARRIDGE** (1669), 2 Wms. Saund. 61.

**Annotations:—****Mentd.** *Ambrose v. Brooks* (1738), West temp. Hard. 567; *R. v. Morrall* (1818), 6 Price, 24; *Scales v. Jacob* (1826), 11 Moore, C. P. 553; *Paget v. Foley* (1836), 3 Scott. 120; *Gwynne v. Burnell* (1840), 1 Scott N. R. 711; *Tobacco Pipe Makers' Co. v. Loder* (1851), 16 Q. B. 765; *Thorne v. Kerr* (1855), 25 L. J. Ch. 57; *Curlewis v. Mornington* (1858), 32 L. T. O. S. 29, Ex. Ch.; *Lee v. Wilmot* (1866), L. R. 1 Exch. 364; *Lievesley v. Gilmore* (1866), L. R. 1 C. P. 570.

#### B. What Plaintiff must show.

**2044. Only what necessary to support claim.]—**In action of debt upon an award pltf. need show forth nothing more than is necessary to support his

### PART IV. SECT. 19, SUB-SECT. 4.—A.

**b. Right to bring action—Civil Procedure Code, s. 327, not imperative.]—**A suit lies to enforce an award made without the intervention of a ct. of justice. The procedure provided in the above Code is not imperative upon pltf., who seeks to enforce an award so made.—**PATANIAPPA CHETTI v. RAYAPPA CHETTI** (1868), 4 Mad. 119.—**IND.**

**c. Form of action.]—**Pltf. had been awarded a certain sum in accordance with the terms of an instrument under seal:—**Held:** for the non-payment of such award pltf. should sue in covenant, & he could not sue in *assumpsit* unless some new consideration, apart from the written instrument, could be proved.—**TAIT v. ATKINSON** (1845), 3 U. C. R. 152.—**CAN.**

**d. Nature of action — Action on award not action for specific performance.]—**A suit to enforce an award cannot be treated as a suit for specific performance of a contract within Indian Limitation Act, 1877, Sched. II., art. 113.—**SHEO NARIAN v. BENI MADHOB** (1901), I. L. R. 23 All. 285.—**IND.**

**e. ———.]—**A suit for the recovery of a certain sum of money with interest due on an award is not a suit for specific performance, but for the recovery of money & for relief incidental thereto. Such a suit is, therefore, not affected by

Specific Relief Act, ss. 21 & 30.—**FARDUNJI EDALJI v. JAMSETJI EDALJI** (1904), I. L. R. 28 Bom. 1.—**IND.**

**f. Who may bring action.]—**When an award directs two to pay each a certain sum, & one is obliged to pay the whole, the party so paying can compel contribution by suing the other in covenant for non-performance of the award.—**ALLEN v. COY** (1849), 7 U. C. R. 419.—**CAN.**

### PART IV. SECT. 19, SUB-SECT. 4.—B.

**g. Non-payment of sum awarded.]—**Non-payment of the money awarded is a sufficient breach, without averring notice of an award.—**TURNER v. ALWAY** (1836), 5 O. S. 45.—**CAN.**

**h. ———.]—**In debt on an award the declaration set out an award that deft. should pay £900 in a particular way, & assigned as a breach non-payment in the terms of the award, but did not negative payment in money:—**Held:** the declaration was bad.—**KINGSTON BANK COMRS. v. DALTON** (1840), 1 Ont. Dig. 113.—**CAN.**

**k. That award made within reasonable time.]—**When the submission does not limit any time for the award, pltf. need not aver that it was made within a reasonable time, nor allege notice of the award.—**ADAMS v. HAM** (1848), 5 U. C. R. 292.—**CAN.**

**l. Whether readiness to perform counterpart must be averred.]—**An award directed that deft. should pay pltf. a sum of money, & that on such payment pltf. should deliver two parcels of sleepers. In an action on the award for the money:—**Held:** it was not necessary for pltf. to aver a readiness to deliver the sleepers.—**HASSELL v. WILSON** (1850), 1 All. 618.—**CAN.**

**m. Written award.]—**An arbitrator verbally awarded that deft. should pay to pltf. \$25. Subsequently he made a written award to the same effect. Pltf. having sued as upon a verbal submission:—**Held:** it was not necessary to produce the written award.—**DAVIS v. MCGIVERN** (1853), 11 U. C. R. 112.—**CAN.**

**n. Matters must be identified with award.]—**Plea in *assumpsit* on an award:—**Held:** bad, for not identifying the matters referred with the cause of action.—**CALVIN v. MCPHERSON** (1854), 4 C. P. 150.—**CAN.**

**o. Submission bond executed by defendant.]—**In an action on an award it is sufficient to produce the submission bond executed by deft., without that executed by pltf.—**TOWSLEY v. WYTHES** (1858), 16 U. C. R. 139.—**CAN.**

**p. Whether whole award must be set out.]—**Where an action is on the award, & not on the bond, it is not necessary to



claim.—PERRY v. NICHOLSON (1757), 1 Burr. 278 ; 2 Keny. 557 ; 97 E. R. 313.

**2045. Mutual submission.]**—In debt on an award, the execution of the submission by all the parties must be proved.

It was necessary for plffs. to allege a mutual submission by all the parties. There was no sufficient evidence of the execution of the bond by plffs. By declaring on the award, plff. takes upon himself the *onus* of proving a mutual submission. By declaring on the bond, he transfers the burden of proof to deft., for it lies on the latter to discharge himself from the penalty by showing a performance of the conditions (BAYLEY, J.).—FERRER & ROLLASON v. OVEN (1827), 7 B. & C. 427 ; 1 Man. & Ry. K. B. 222 ; 6 L. J. O. S. K. B. 28 ; 108 E. R. 783.

*Annotation* :—**Expld. & Distd.** Adams v. Bankart (1835), 1 Gale, 48.

**2046. —.**—In debt on an award a mutual submission must be shown.—DILLEY (DILLY) v. POLHILL (1732), 2 Stra. 923 ; 2 Barn. K. B. 42, 55 ; 93 E. R. 943.

*Annotations* :—**Refd.** Winter v. White (1819), 1 Brod. & Bing. 350 ; Ferrer v. Oven (1827), 7 B. & C. 427.

**2047. Appointment of third arbitrator.]**—In an action on an award made under a judge's order, where the submission is to A. & B. & such third person as they shall appoint, to satisfy an allegation that A. & B. appointed C. it is not enough to put in an award executed by all the three, reciting that A. & B. did appoint C., & to prove that C. acted along with them in the arbn., but the formal act of appointment must be put in evidence.—STILL v. HALFORD (1814), 4 Camp. 17.

*Annotations* :—**Distd.** Manning v. Eastern Counties Ry. Co. (1843), 12 M. & W. 237. **Refd.** Berney v. Read (1845), 7 Q. B. 79 ; Lievesley v. Gilmore (1866), Har. & Ruth. 849.

**2048. Order of court & award.]**—In action upon an award, the declaration stated that a former cause was pending, & by a rule of ct. was referred to the award of A., & that he duly made & published his award of & concerning the premises so

referred to him, & did thereby find, etc. To this deft. pleaded that A. did not duly make & publish his award of & concerning the premises referred, in manner & form, etc.:—**Held** : the production of the award (which was good on the face of it), & of the rule of ct., was *prima facie* sufficient to support the issue on the part of plff., & if deft. wished to impeach the award, he must do so by his own evidence.—GISBURNE (GISBORNE) v. HART (1839), 5 M. & W. 50 ; 7 Dowl. 402 ; 8 L. J. Ex. 197 ; 3 Jur. 536 ; 151 E. R. 23.

*Annotations* :—**Refd.** Brooks v. Parsons (1843), 13 L. J. Q. B. 50 ; Dresser v. Stansfield (1845), 14 M. & W. 822. **Mentd.** England v. Davison (1841), 6 Jur. 261 ; Roberts v. Eberhardt (1857), 3 C. B. N. S. 482.

### C. Defences available.

**2049. Not partiality of arbitrator.]**—To debt upon an award deft. pleaded *nil debet* :—**Held** : partiality in the arbitrators could not be given in evidence, for the remedy was in equity, or at law by action against the arbitrators if they had been corrupt.

The plea of *nil debet prima facie* admits the award, & there never was an instance where this kind of evidence was permitted to be given. It would be to suffer evidence that affects third persons, the arbitrators themselves. An award is a judgment by judges chosen by the parties themselves, & a jury in a special verdict cannot find any matter or fact *dehors* the award ; by parity of reason, nothing *dehors* the award (as partiality is) can be given to them in evidence. If this evidence was permitted, plff. would be wholly unprepared at the trial, for all that he has to do is to prove the submission & the award ; the corruption or partiality of the arbitrators may be wholly unknown to plff. ; it concerns the arbitrators themselves (*Per* (UR.)—WILIS v. MACCARMICK (1763), 2 Wils. 148 ; 95 E. R. 736.

*Annotations* :—**Consd.** Riddell v. Sutton (1828), 2 Moo. & P. 345. **Refd.** Braddick v. Thompson (1807), 8 East. 344.

**2050. Whether invalidity of award.]**—In an action on an award to recover the sum awarded, deft. cannot dispute the validity of the award, his proper

set out the whole award, but only so much as will support plff.'s case.—McCALLUM v. MCKINNON (1865), 15 C. P. 561.—CAN.

q. — *Award bad in part.*—The ct. had decided that one portion of an award was bad, but the other portion good. Plff. sued for non-compliance with the latter, but omitted to set out the former part:—**Held** : the omission was immaterial.—BOND v. BOND (1865), 16 C. P. 327.—CAN.

r. *Not demand or elapse of reasonable time.*—C. L. P. Act, s. 171 did not in any way alter the pleadings in the case of awards. Where the declaration showed the submission on a certain day & the award within a few days thereafter:—**Held** : it was not necessary to aver a demand to comply with the award, or that a reasonable time had elapsed before action.—REID v. REID (1866), 16 C. P. 247.—CAN.

### PART IV. SECT. 19, SUB-SECT. 4.—C.

s. *In general.*—Any facts which vitiate an award (misconduct of arbitrators excepted) are pleadable in bar of an action on the award, notwithstanding they are not apparent on the face of the award.—RIDEOUT v. STICKNEY (1849), 1 All. 350.—CAN.

t. *Jurisdiction of court.*—In answer to a bill to enforce an award, deft. by answer objected to the jurisdiction of the ct., the submission providing that the submission & award should be made a rule of the Queen's Bench or Common Pleas:—**Held** : the objection to the jurisdiction would have prevailed if

properly taken, as the parties to the submission had agreed upon their forum, but deft., having submitted to the jurisdiction by his answer, & himself asked the intervention of the ct., could not then be heard to object at the hearing on bill & answer.—MOORE v. BUCKNER (1881), 28 Gr. 606.—CAN.

u. *Not fraud of arbitrators.*—A plea setting up fraud on the part of the arbitrators as a defence to an action on the award is bad.—BOULTENHOUSE v. MILNER (1876), 3 N. B. R. (Pug.) 690.—CAN.

**2050 i. Whether invalidity of award.]**—On a motion for the enforcement of an award, its validity may be impeached.—BUCKLEY v. LAND & WORKS BOARD, GRAHAM v. VICTORIAN RAILWAYS COMRS. (1893), 19 V. L. R. 522.—AUS.

**2050 ii. — Apparent on face of award.]**—An objection to an award on demurrer to a declaration on an award must appear on its face or by facts stated.—MCINTYRE v. MCINTYRE (1870), 1 P. E. I. 307.—CAN.

**2050 iii. — Misconduct of arbitrator.]**—To an action on an award, deft. pleaded on equitable grounds that the arbitrator proceeded *ex p.*, without notice to deft., refused to hear deft. & his witnesses, or allow him a reasonable opportunity of proving his case, & examined plff. & his witnesses privately & in the absence of deft.:—**Held** : plea bad.—PEUCHEN v. LAMB (1875), 25 C. P. 588.—CAN.

**2050 iv. — Award not properly executed.]**—*Semble* : an objection that two arbitrators made the award without

notice to the third can be taken advantage of in an action on the award.—SMITH v. GEORGE (1855), 12 U. C. R. 370.—CAN.

**2050 v. — Failure to dispose of costs.]**—That costs are not given in an award to the extent of the submission is no objection on demurrer.—WHITE v. MCKELLAR 1 J. R. 1.—N. Z.

**2050 vi. — Time not duly enlarged.]**—In an action on an award the declaration set out in full a deed of submission. There was a plea that the enlargement was not made until after the arbitrators' authority had ceased:—**Held** : the plea was bad.—McCULLOCH v. WHITE (1873), 33 U. C. R. 331.—CAN.

**2050 vii. — Informality of award.]**—HOPE v. CROOKSTON BROTHERS (1890), 17 R. (Ct. of Sess.) 868.—SCOT.

**2050 viii. — Want of jurisdiction in arbitrators.]**—When a suit is brought to enforce an award a party to it can show that it is not binding upon him, on the ground of want of jurisdiction in the arbitrators.—BHAURAO v. RADHABAI (1909), 1 L. R. 33 Bom. 401.—IND.

**2050 ix. — Incompleteness of award.]**—M'CONNELL & REID v. SMITH (1911), 1 S. L. T. 333.—SCOT.

**2050 x. — Statutory requirements not complied with.]**—In an action on an award under Railway Act it was objected that the award was made without the day's notice to deft.'s arbitrator required by the Act:—**Held** : no objection.—WIDDER v. BUFFALO & LAKE

**Sect. 19.—Enforcement of award: Sub-sect. 4, C.; sub-sect. 5.]**

course being to apply to the ct. to have it set aside.—**SWINFORD v. BURN** (1818), Gow. 5.

**Annotations:—**Consd. **Crampton & Holt v. Ridley** (1887), 20 Q. B. D. 48. **Refd.** **Hoggins v. Gordon** (1842), 3 Q. B. 466.

**2051.** —.]—To a declaration in debt on an award, deft. pleaded a special plea showing that the arbitrator had not awarded on all the issues in the cause referred to him:—**Held**: the plea of "no award" meant no valid award, & the above plea was bad, as being an argumentative denial of the validity of the award.—**DRESSER v. STANSFIELD** (1845), 14 M. & W. 822; 15 L. J. Ex. 274; 6 L. T. O. S. 192; 153 E. R. 708.

**Annotations:—**Folld. **Armitage v. Coates** (1849), 4 Exch. 641. **Consd.** **Roberts v. Eberhardt** (1857), 3 C. B. N. S. 482. **Refd.** **Re Smith v. Reece, Re Reece v. Smith** (1850), 14 Jur. 483; **Adcock v. Wood** (1851), 2 L. M. & P. 501. **Mentd.** **Humphreys v. Pearce** (1852), 7 Exch. 696.

**2052. Not refusal of court to enforce by attachment.]—**A refusal by the ct. to enforce an award by attachment does not decide on the validity of the award, considered as the subject of an action.—**JACKSON v. CLARKE** (1825), M'Cle. & Yo. 200; 148 E. R. 382.

**Annotations:—**Mentd. **Donlan v. Brett** (1834), 2 Ad. & El. 344; **Cock v. Gent** (1845), 14 M. & W. 680; **Law v. Blackburn** (1853), 14 C. B. 77; **Everest v. Ritchie** (1862), 7 H. & N. 698.

**2053. Award void in law.]—**To a declaration on an award, defts., after setting out the submission & award at full length, pleaded as follows: "defts. in fact say that the award is bad & void in law, & this they are ready to verify":—**Held**: this plea was good in point of form & substance.—**THORP (THORPE) v. COLE** (1835), 2 Cr. M. & R. 367; 4 Dowl. 457; 1 Gale, 443; 5 Tyr. 1047; 5 L. J. Ex. 24; 150 E. R. 158; *affd.* (1836), 1 M. & W. 531, Ex. Ch.

**Annotations:—**Refd. **Holdsworth v. Barsham** (1862), 2 B. & S. 480. **Mentd.** **Wallis v. Day** (1837), 6 L. J. Ex. 92.

**2054. Award not award of arbitrators.]—**Where an award is valid in form, & is made on all the matters

referred & on no more, & is intended by the arbitrators to express their decision, an objection that the arbitrators had made their award without exercising their own judgment, but according to the opinion of a third person, by whose decision they had beforehand agreed to be bound, cannot be taken on a plea of *nul tiel agard* to an action on the award, but ought to be raised on a motion to set the award aside.—**WHITMORE v. SMITH** (1861), 7 H. & N. 509; 31 L. J. Ex. 107; 5 L. T. 618; 8 Jur. N. S. 514; 10 W. R. 253; 158 E. R. 574, Ex. Ch.

**Annotations:—**Folld. **Thorburn v. Barnes** (1867), L. R. 2 C. P. 384; **Bache v. Billingham** (1893), 63 L. J. M. C. 1, C. A. **Refd.** **Flynn v. Robertson** (1869), L. R. 4 C. P. 324.

**2055. Not fraud of parties or misconduct of arbitrators.]—**Where an agreement of reference takes place out of ct. & there is no clause that the submission shall be made a rule of ct., the award not being under the Act of 1698, fraud of the parties interested in the award, or misconduct of the arbitrators making it, cannot be reached at law. You cannot plead such fraud or misconduct to an action on the award; neither can you in an action on the award go into evidence to prove such fraud or misconduct (**LEACH, M.R.**).—**DYER v. DAWSON** (1822), 1 Coop. temp. Cott 420; 47 E. R. 929.

**2056. Not irregularity in conduct of arbitrators.]—**A. gave a bond & judgment to B. for balance of an account, & B. assigned the judgment to C. After submission by A. & C., & award that C. was entitled to the benefit of the judgment, a bill was filed by C. on the ground of the award, & it was objected by A. that the judgment was given to B. for a much larger sum than was really due, & upon an understanding that it was to stand only as a security for what was actually due, & that the award had been made in his absence, & that the arbitrators had not given him credit for several sums which he had paid to B. on account of the judgment. The objections of A. had been stated before the arbitrators by his counsel & solrs.:—**Held**: C. was entitled to the benefit of the judgment for the whole sum.—**HILL v. BALL** (1828), 2 Bli. N. S. 1; 1 Dow. & Cl. 164; 4 E. R. 1030, H. L.

**HURON RY. CO.** (1865), 24 U. C. R. 222. —**CAN.**

**2054 i. Award not award of arbitrators.]—**Pursuers sued for the balance of the price of the crop on a farm taken over by defender as incoming tenant, & fixed by arbiters. The defence was that there had been no award by the arbiters, who had differed, & that the reference devolved on the oversman, who had fixed a sum as the price of the crop:—**Held**: a good defence.—**LONDONS v. HUNTER** (1881), 18 Sc. L. R. 502.—**SCOT.**

**1. Invalidity of submission—Statute of Frauds.]—**Deft. assigned certain lands to pltf., & covenanted to put him in possession. The covenant having been broken, pltf. & deft., by parol, referred their differences to an arbitrator, who, by parol, awarded that pltf. should reconvey the land to deft., & that deft. should pay £100 to pltf. Pltf. tendered a re-conveyance of the land to deft., & deft. having refused to accept, pltf. brought an action on the award for £100:—**Held**: the action was not maintainable, the contract between the parties being for an interest in land, which had not been reduced into writing, as required by the above Stat.—**JOHNSTON v. M'ALLISTER** (1835), 1 Jo. Ex. Ir. 499.—**IR.**

**g. — Lack of power to refer.]—****Held**: a person, who had stated that the other side had no power to refer, was entitled to plead the incompetency of the reference by way of exception against a demand for the sum awarded.—**THOMSON'S TRUSTEES v. MUIR** (1867), 6 M. 145.—**S. AF.**

**h. Objections dehors award.]—****ROCHE v. R.** (1845), 8 L. Eq. R. 638.—**IR.**

**k. Performance — Must be proved.]—**To an action on an award deft. pleaded performance only. At the trial a verdict was entered for deft.:—**Held**: deft. not entitled to a verdict in his favour, for he had pleaded performance which he had failed to prove.—**ANDERSON v. VAN BUSECK** (1859), 18 U. C. R. 172.—**CAN.**

**l. Not receipt expressed to be in full of all dues & demands, etc.]—**Where a party had, subsequent to an award, paid the other party a sum of money & taken a receipt from him expressed to be in full of all dues & demands to date:—**Held**: the receipt, although prepared by one party in good faith & signed by the other with knowledge of its contents & of all the circumstances, was no bar to an action on the award.—**BENNETT v. MURRAY** (1865), 1 Old. 614.—**CAN.**

**m. Plea of no award.]—****Held**: under a plea of no award a party could not dispute the arbitrators' authority to award a particular sum, but might have pleaded *nunquam indebitatus*, which would have brought the submission in issue.—**HODGSON v. WHITBY TOWN** (1858), 17 U. C. R. 230.—**CAN.**

**n. Set-off.]—**A set-off of a sum certain is a good plea in debt on a submission bond, assigning as a breach the non-payment of a sum certain awarded.—**LINGFORD v. MUSGROVE** (1843), 6 O. S. 642.—**CAN.**

**o. — Receipt by plaintiff of money to defendant's use.]—**In an action on an award:—**Held**: as no defence had been set up to the award at the trial, & no action taken to set aside the award, deft. could not set up a defence that pltf. had since received money to deft.'s use.—**MCKENZIE v. SOMMERS** (1864), 14 C. P. 97.—**CAN.**

**p. Lack of opportunity to have award altered.]—**It is not sufficient cause against an action on an award that the unsuccessful party, not having been furnished with the minutes of the award, had lost the opportunity of suggesting certain alterations in it.—**BEWLEY v. SULLIVAN** (1833), Hayes & J. 354.—**IR.**

**q. Effect of plea of nunquam indebitatus.]—**In an action of *assumpsit* upon an award:—**Held**: the general issue of *nunquam indebitatus* put in issue the submission to arbn., the enlargement of the time & the making of an award in accordance with the submission.—**ABBOTT v. SKINNER** (1861), 7 U. C. L. J. 158.—**CAN.**

**r. When action on award will be stayed.]—**A judge in chambers will not interfere to stay proceedings on an award, in order that a motion may be made in term to set it aside, when the facts are conflicting.—**MCLEARY v. SMITH** (1859), 5 U. C. L. J. 212.—**CAN.**

**s. —.]—****HENNEBERRY v. HENNEBERRY** (1865), 5 Nfld. L. R. 145.—**NFLD.**



**2057. Not plene administravit.]**—An extrix. referred to arbn. to be finally determined on disputes & differences respecting certain unsettled accounts, without making any reservation as to assets, & the arbitrators, without finding assets, awarded her to pay a certain sum:—*Held*: *plene administravit* was no bar to an action on the award.—*RIDDELL v. SUTTON* (1828), 5 Bing. 200; 2 Moo. & P. 345; 7 L. J. O. S. C. P. 60; 130 E. R. 1037.

*See, also*, Nos. 256—261, *ante*.

**Statute of Limitation.]**—*See* Nos. 1713—15, *ante*.

#### SUB-SECT. 5.—BY ACTION ON BOND.

**2058. Necessity for demand.]**—An award, on a controversy respecting a lease & arrears of rent, that the party should pay so much for the arrears is a sum in gross, payable without demand.

Debt upon an obligation of £100, conditioned for the performance of the award of A. of all matters betwixt them. A. had awarded that deft. should pay to pltf. £13 6s. 8d. for rent in arrear of a house, & should pay half yearly for the enjoyment of the house for three years & a half £15 at the Annunciation, & Saint Michael, or within forty days after, & that, if he failed of the payment, that then the award for his enjoying the house should be void. Deft. pleaded payment of the £13 6s. 8d. at the days, & pleaded the tender of the rent at the tenement, & that none were there to receive it:—*Held*: this rent or sum was a sum in gross, & payable without demand by deft. at his peril, who ought to seek out the obligee to pay it.—*FURSER v. PROWD* (1617), Cro. Jac. 423; 79 E. R. 361.

**2059. —.]**—Pltf. & deft. had submitted themselves to the award of an arbitrator indifferently chosen between them to arbitrate, ordain & finally adjudge of & upon the premises, & deft. undertook & promised pltf. that, if deft. should not perform the award to be made, he would pay £40 to pltf.

when he should be thereunto requested. The arbitrator awarded that deft. should pay to pltf. various sums amounting in all to £8, & that both parties should give mutual releases, & that deft. should deliver a fine to pltf. In *assumpsit* pltf. set out the above facts & alleged that deft. had not paid the £8, nor delivered the fine, nor paid the £40 to pltf. according to his promise, but pltf. did not allege any demand of the £40:—*Held*: the declaration must aver a special request.—*BIRKS v. TRIPPET* (1666), 1 Saund. 28; 1 Sid. 303; 85 E. R. 32.

**Annotations:—***Consd.* *Rowe v. Young* (1820), 2 Bl. 391. *Apld.* *Re Dilworth, Ex v. Lancaster Canal Co.* (1831), Mont. 27. *Expld. & Apld.* *Wharton v. King* (1831), 2 B. & Ad. 528. *Distd.* *Hooper v. Woolmer* (1850), 10 C. B. 370. *Refd.* *Simpson v. Routh* (1824), 2 B. & C. 682; *Maylam v. Norris* (1845), 1 C. B. 244; *Harrison v. Creswick* (1853), 13 C. B. 399; *Jewell v. Christie* (1867), L. R. 2 C. P. 296; *Re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833, C. A. *Mentd.* *Child v. Sands* (1693), 1 Salk. 31; *Creswick v. Harrison* (1850), 10 C. B. 441.

**Necessity for demand in enforcing payment by attachment.]**—*See* Nos. 2107—2128, *post*.

**2060. What plaintiff must show—Breach—8 & 9 Will. 3, c. 11.]**—In debt on bond, conditioned to perform an award, pltf. must assign a breach under the above Act, & cannot have judgment for the penalty & take out execution for the single sum awarded, though the measure of damages be ascertained by the award.—*WELCH v. IRELAND* (1805), 6 East. 613; 2 Smith K. B. 666; 102 E. R. 1424.

**Annotations:—***Refd.* *Murray v. Stair* (1823), 2 B. & C. 82; *Gillingham v. Waskett* (1824), M'Cle. 198.

**2061. Whole demand.]**—In an action brought on an arbn. bond pltf. must set forth the whole demand.—*PERRY v. NICHOLSON* (1757), 1 Burr. 278; 2 Keny. 557; 97 E. R. 313.

**2062. Defences—Performance.]**—A release delivered to a stranger is good performance of an award, if no particular place be mentioned for delivery.—*ALFORD v. LEE* (1587), Cro. Eliz. 54; 2 Leon. 110; 78 E. R. 315.

**Annotation:—***Refd.* *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671.

#### PART IV. SECT. 19, SUB-SECT. 5.

**t. At what time action competent.]**—In an action on a bond to perform an award it is not necessary that a month should elapse after written notice from the arbitrator to defts. of the making of the award.—*MASSON v. ROBERTSON* (1879), 44 U. C. R. 323.—CAN.

**2060 i. What plaintiff must show—Specific breach.]**—In an action on a bond for performance of an award, the particular breach relied on must be stated in the declaration; it is not sufficient to state it generally.—*BURGOYNE v. BURGOYNE*, N. B. Dig. 583 (34).—CAN.

**2060 ii. —.]**—Particular breach in bond for performance of award must be stated in declaration.—*GESNER v. CAIRNS* (1853), 2 All. 595.—CAN.

**2060 iii. — Bond, submission & award.]**—In an action upon a submission bond, plea *non est factum*, & subsequent suggestion of breaches by pltf., it is sufficient to prove the bond & submission set out upon the record, & an award tallying with it.—*LOSSING v. HORNED* (1825), Tay, 219.—CAN.

**2060 iv. — Two breaches averred—One supported.]**—In debt on bond if two breaches be assigned in the replication, it will be sufficient on general demurrer if one only be supported.—*BOYD v. DURAND* (1836), 5 O. S. 122.—CAN.

**2060 v. — Mutual submission.]**—In debt on an award under bonds of submission, it is necessary to show a mutual submission.—*SKINNER v. HOLCOMB* (1842), 6 O. S. 336.—CAN.

**2060 vi. — Award made in manner stipulated.]**—Where, by the condition of an arbn. bond the award was directed to be in writing, indented under the hands & seals of the arbitrators:—*Held*: a declaration not averring that the award was indented was bad.—*COBURN v. TAYLOR* (1843), 2 Kerr. 120.—CAN.

**2060 vii. — Non-performance.]**—Where to debt on an arbn. bond, deft. pleaded performance & pltf. replied setting out the award, which was for payment by deft. of a debt due to A. by pltf. & deft. as co-partners, & that pltf. was obliged to pay the debt to A., but did not show otherwise than by inference that it had not been paid by deft.:—*Held*: the replication was bad.—*LYMBURNER v. NORTON* (1845), 1 U. C. R. 485.—CAN.

**2060 viii. — Proof of award.]**—In debt on bond:—*Held*: the award was sufficiently proved by showing that defts. had acted upon it by paying a portion of the sum awarded.—*HUGHES v. MUTUAL FIRE INSURANCE CO. OF DISTRICT OF NEWCASTLE* (1852), 9 U. C. R. 387.—CAN.

**2060 ix. — In answer to plea of no award.]**—Action on bond. Plea, that the bond was conditioned to perform an award, & no award made:—*Held*: pltf. must reply specially, denying the condition, or setting out an award & alleging a breach, & he could not take issue.—*COWAN v. WHITE* (1863), 9 U. C. L. J. 131.—CAN.

**2060 x. — Informal declaration insufficient.]**—Declaration in debt alleging

a reference by bonds with a penalty, & setting out the award thereon, assigning breaches for non-performance, & concluding "whereby an action had accrued to recover the sum of £1,000 above demanded":—*Held*: had as an informal declaration on the bond of submission.—*SIMPSON v. MOFF* (1843), 6 O. S. 511.—CAN.

**2062 i. Defences—In general.]**—Any facts which vitiate an award (except misconduct of the arbitrators) may be pleaded in bar to an action on the arbn. bond.—*RIDEOUT v. STICKNEY* (1849), 1 All. 350.—CAN.

**2062 ii. — Objections in law.]**—In debt on bond to perform an award, a plea setting forth more legal grounds of objection is bad.—*BOYD v. DURAND* (1836), 5 O. S. 122.—CAN.

**2062 iii. — Where two separate parts to award.]**—If there be two separate parts in an award, an answer to one part cannot be pleaded in bar of both in an action on bond to perform an award.—*BOYD v. DURAND* (1836), 5 O. S. 122.—CAN.

**2062 iv. — Award out of time.]**—Submission by bond. On the day limited the arbitrators were prepared to award, but, all parties believing the time would not expire until next day, deferred the publication then at deft.'s request, & heard further evidence on both sides next day, & then made their award:—*Held*: the extension of time was a parol submission, & *assumpsit* was maintainable thereon for not performing the award, although no action would lie on



*Sect. 19.—Enforcement of award: Sub-sects. i  
A. B. C. & D.]*

**2063.** ———.]—In debt upon a bond upon condition to stand to the award of S., deft. pleaded that S. had arbitrated that he should pay to pltf. £10, & said he had paid it to pltf.'s wife, who received it:—*Held*: pltf. entitled to judgment.—*FROND & BATT'S CASE* (1589), 1 Leon. 320; 74 E. R. 291.

**2064.** ———.]—Lessees of land, & of coal mines found or to be found therein, covenanted forthwith to proceed to sink for coal as far as could & ought to be accomplished by persons acquainted with the nature of collieries, & as in such case was usual & customary, & to erect fire engines for the purpose, by June 24, 1806, or, in default thereof, to pay so much to the lessor as arbitrators should award. After the day past, without any new pits sunk, etc., the parties named arbitrators to award concerning the damage, loss, & delay to the lessor, if any, & whether any rent or other satisfaction should be made to him on that account, & the lessees gave a bond to the lessor conditioned to perform the award. Afterwards the arbitrators awarded that the lessees had not performed their covenant, by not having proceeded to sink for the coal so far as could & ought to be accomplished, etc. (in the words of the covenant) on or before June 24, 1806, for which they awarded to the lessor £150 on account of all damages & losses then incurred on account of such breach, & that the lessees should sink coal mines, & erect fire engines for getting the coals demised on or before June 24, 1807, & in default thereof & until the same should be done, they should pay a yearly rent of £200 to the lessor as a compensation for the lord's share reserved under the lease. To an action on the bond:—*Held*: it was a sufficient answer by the lessees to save the condition, that they had paid the £150 awarded for the breach of the covenant up to June 24, 1806, & as to the subsequent period from thence till June 24, 1807, that on divers days between, etc., they did well & truly sink coal in the lands demised as far as could & ought to be accomplished, etc. (in the words of the covenant), & were ready & willing to have sunk & completed the pits, & to have erected the necessary fire engines, etc., within the time limited by the award, but that at the time of making the lease, & from thenceforth, there were no mines of coal under the lands as could or ought to be worked by any person acquainted with the nature of collieries, or as in such cases it was usual or customary to work, or as would have defrayed the necessary expenses of working & getting the same, all which premises defts. ascertained & proved

by due & sufficient experiments & trials then and there made; (2) leave should be given to amend by taking issue on the sufficiency of the experiments.—*HANSON v. BOOTHMAN* (1810), 13 East, 22; 104 E. R. 274.

**SUB-SECT. 6.—BY ATTACHMENT.**

*See, now, Debtors Act, 1869 (c. 62), s. 4.*

**A. At whose instance.**

**2065. Executor of party.]**—An exor. may have, without *scire facias*, or other process of revivor, an attachment for non-performance of an award made in his testator's cause in his lifetime in favour of testator.—*ROGERS v. STANTON* (1816), 7 Taunt. 575; 129 E. R. 229.

*Annotations*:—*Consd.* *MAFFEY v. Godwyn* (1832), 1 Nev. & M. K. B. 101. *Distd.* *Bowker v. Evans* (1885), 15 Q. B. D. 565, C. A.

**2066. Personal representatives of deceased party.]**—The ct. will not grant an attachment for the non-payment of costs payable under an award, at the instance of the personal representative of a deceased party, to which party they were to have been paid.—*R. v. MAFFEY, MAFFEY v. GOODWIN* (1833), 1 Dowl. 538; 1 Nev. & M. K. B. 101.

**2067. Stranger.]**—Where a person is not a party to the reference, an attachment for non-payment of money pursuant to an award cannot be obtained by him, although by the terms of the award the money is in fact to be paid to him.—*Ex p. Skeete* (1839), 2 Will. Woll. & H. 49; *sub nom.* *HALL v. SKEET*, 3 Jur. 870.

**B. Against whom.**

**Parties bound by award.]**—*See cases in Part I. Sect. 5.*

**2068. Party resident outside jurisdiction.]**—The ct. will grant an attachment against a party for non-performance of an award which has been made a rule of ct., though he reside out of the jurisdiction of the ct.—*HOPCRAFT v. FERMOR* (1823), 1 Bing. 378; 8 Moore, C. P. 424; 2 L. J. O. S. C. P. 29; 130 E. R. 153.

*Annotation*: *Apld.* *Ex p. Wyatt* (1837), Will. Woll. & Dav. 76.

**C. In what cases.**

*See, now, Debtors Act, 1869 (c. 62), s. 4.*

**2069. Discretion of court — Contradictory affidavits.]**—Enforcing an award by process of contempt is discretionary, & the ct. will not do it where there are contradictory affidavits as to the performance.—*HALES v. TAYLOR* (1726), 2 Stra. 695; 93 E. R. 790.

the bond.—*HULL v. ALWAY* (1836), O. S. 375.—**CAN.**

**2062 v. — Errors in pleading.]**—*BENNETT v. PARKS* (1850), 1 C. P. 370.—**CAN.**

**2062 vi. — — —.]**—*Held*: it was repugnant to plead to an action of debt on bond for non-performance of an award that the arbitrators did not make "the said award" before a certain date, when it had been nowhere asserted that any award had been made.—*FINKLE v. ARNOLD* (1848), 6 U. C. R. 168.—**CAN.**

**2062 vii. — No award—Subsequent pleadings.]**—Pltf. declared in debt on bond for the performance of an award. Deft. pleaded no award upon the premises. Pltf. replied setting out the award. Deft. rejoined matter extrinsic of the award, & relied upon it for showing the award void:—*Held*: the rejoinder was bad, as being a departure from the plea.—*MAXWELL v. RANSOM* (1844), 1 U. C. R. 219.—**CAN.**

**2062 viii. — — —.]**—*TEWSELEY v. DUNLOP* (1844), 1 U. C. R. 138.—**CAN.**

**2062 ix. — In equity.]**—*GERRIE v. McDONELL* (1859), 18 U. C. R. 146.—**CAN.**

**2062 x. — Mistake in bond.]**—*GERRIE v. McDONELL* (1860), 18 U. C. R. 146.—**CAN.**

**2062 xi. — Not that submission not stated to be mutual.]**—In an action on a sealed agreement to abide by an award, it is no objection in arrest of judgment that the submission is not stated to be mutual.—*FRENCH v. WEIR* (1858), 17 U. C. R. 245.—**CAN.**

**2062 xii. — Not defects in merits of award.]**—In an action on a bond to perform where the award has in fact been made, its merits cannot be tried.—*MASSON v. ROBERTSON* (1879), 44 U. C. R. 323.—**CAN.**

**2062 xiii. — Plea of no award.]**—Declaration in debt on a submission bond, averring that the award was made

on the day appointed. Plea, "no award." Replication, an award within the time—to wit, on a day & year different from the year stated in the declaration. On general demurrer:—*Held*: the replication was sufficient.—*JUDGE v. JUDGE* (1838), 5 O. S. 692.—**CAN.**

**2062 xiv. — — —.]**—*CROKER v. HOGGAN* (1843), 6 O. S. 508.—**CAN.**

**PART IV. SECT. 19, SUB-SECT. 6.—C.**

**a. Award requiring delivery of land.]**—The ct. will enforce performance of an award by attachment, though it extends to the delivery of possession of land.—*McPHERSON v. WALKER* (1850), 1 P. R. 30.—**CAN.**

**b. Award for payment by instalments with interest.]**—When arbitrators award the payment of a sum of money by instalments, with interest until paid, an attachment will not lie for non-payment of the principal.—*NAPIER v. NAPIER* (1833), 1 Ir. L. Rec. N. S. 154.—**IR.**

**2070. Doubt.]**—The ct. will not grant an attachment for non-performance of an award, if there be the least doubt as to its correctness, but will leave the party to his action or enlarge the rule *nisi* to afford time to amend the award.—MIDDLETON'S CASE (1823), 1 L. J. O. S. K. B. 153.

**2071. —.]**—An attachment will not be granted for disobedience of an award, unless the duty to be performed or the money to be paid be distinctly ascertained therein.—GRAHAM v. DARCEY (1848), 6 C. B. 537; 6 Dow. & L. 385; 18 L. J. C. P. 61; 12 L. T. O. S. 149; 136 E. R. 1358.

**2072. As of course.]**—An attachment goes of course for non-performance of an award.—ANON. (1774), Lofft, 451; 98 E. R. 742.

**2073. Second application.]**—In showing cause against a rule for attachment for non-performance of an award, affidavits cannot be used to show that the award is impracticable, uncertain or not final, nor can the award be impeached except for defects apparent on the face of it. The rule, that an application once disposed of cannot be renewed under the same circumstances & for the same object, is not binding in all cases.

An award directed that A. should pay the arbitrators' costs, & should be reimbursed by B., & a rule for an attachment against B. for not reimbursing A. was discharged, because the affidavits did not show that A. had paid them to the arbitrator. A. had not then paid them, but had given his note for the amount which he afterwards paid. On a second motion an attachment was granted, on the ground that the payment by A. was a new fact, which took the case out of the ordinary rule, it appearing also that there had been contumacy in the party against whom the rule was directed & hardship on appct.—*Re BUTLER, BAKER & MASTERS* (1849), 13 Q. B. 341; 116 E. R. 1293; *sub nom.* BUTLER v. MASTERS, 13 L. T. O. S. 23; *sub nom.* MASTERS v. BUTLER & BAKER, 18 L. J. Q. B. 328; 13 Jur. 869.

**2074. —.]**—A rule for an attachment for non-performance of an award may be moved on a fresh contempt (by a fresh demand & refusal) after a former motion has been refused for want of a sufficient affidavit of a contempt.—DICKSON v. OLIPHANT (1846), 6 L. T. O. S. 414.

**2075. Claim for interest on sum awarded.]**—On an award directing payment of money at a certain time, interest from that time till payment may be recovered by action, but not by motion for attachment.—*Re CHURCHER & STRINGER* (1831), 2 B. & Ad. 777; 1 Dowl. 332; 109 E. R. 1334; *sub nom.* CHURCHER v. STRINGER, 9 L. J. O. S. K. B. 318.

#### D. Effect of Contemporaneous Proceedings.

**2076. Action on award.]**—Upon award made a rule of ct., the party may proceed both by action & attachment at the same time.

H. bound himself in a bond to stand to the award of S. An award was made & the party, in whose favour the award was, moved for an attachment for non-performance which was granted. Pending that he brought an action on the bond. A motion that he might not proceed both ways was denied for the reason that pltf. would have no satisfaction upon the attachment.—ANON (1703), 1 Salk. 73; 91 E. R. 69.

*Annotation:—Expld.* Stock v. De Smith (1735), Cunn. 160. In the case in 1 Salk. 73 no action was depending when the attachment was granted, though in that case I should have thought it considerable whether, when he had got bail to his action, the ct. should not have stopped the attachment; but, however, the attachment there was granted before any action brought (LORD HARDWICKE, C.J.).

**2077. —.]**—The ct. refused to stay proceedings in an action of debt on an award, on the ground that debt. was actually in custody upon an attach-

ment for breach of it, as the proceedings upon the attachment were begun first & could not hinder the proceeding by way of action, which was a greater & more beneficial remedy. *Semble*: it would have been otherwise if the action on the award had been brought before the motion for attachment.—PATERSON v. GROSS (1732), 2 Barn. K. B. 227; 94 E. R. 466.

**2078. —.]**—If a party bring an action on an award, he is precluded from moving for an attachment for non-performance.—STOCK v. DE SMITH (SMITH) (1735), Cunn. 160; Lee *temp.* Hard, 106; 95 E. R. 66.

*Annotation:—Distd.* Mendell v. Tyrrell (1841), 9 M. & W. 217.

**2079. —.]**—To a prayer for an attachment for non-performance of an award, it was objected that an action of debt had already been brought in the Common Pleas on the same award:—*Held*: after the party had made his election by bringing an action, the ct. ought not to grant an attachment, & no other rule should be granted than a rule for an attachment, on pltf. undertaking to discontinue his action.—ANON. (1738), Andr. 299; 95 E. R. 407.

*Annotation:—Consd.* Paull v. Paull (1833), 2 Cr. & M. 235. The case in Andrews appears to have been before the ct. in *Badley v. Loveday* (1797), 1 Bos. & P. 81, yet the rule was there refused (LORD LYNDHURST, C.B.).

**2080. —.]**—The ct. will not grant an attachment for non-performance of an award, pending an action brought on the award, nor allow pltf. to waive the action in order to apply for the attachment.—BADLEY v. LOVEDAY (1797), 1 Bos. & P. 81; 126 E. R. 790.

*Annotations:—Distd.* Higgins v. Willes (1828), 3 Man. & Ry. K. B. 382; Paull v. Paull (1833), 2 Cr. & M. 235; Mendell v. Tyrrell (1841), 9 M. & W. 217.

**2081. —.]**—The ct. will grant an attachment for the non-payment on demand of money awarded, after an action on the award commenced & discontinued, where the action was not pending at the time of the demand.—HIGGINS v. WILLES (1828), 3 Man. & Ry. K. B. 382; *sub nom.* *Re HIGGEN & WILLIS*, 7 L. J. O. S. K. B. 90.

**2082. —.]**—An attachment for not performing an award will not be granted, if an action has been commenced, except upon the terms of discontinuing the action & paying the costs.—PAULL (PAUL) v. PAULL (PAUL) (1833), 2 Cr. & M. 235; 2 Dowl. 340; 4 Tyr. 72; 3 L. J. Ex. 11; 149 E. R. 747.

*Annotations:—Distd.* Mendell v. Tyrrell (1841), 9 M. & W. 217. *Mentd.* *Re* Dodington (1839), 7 Scott, 733.

**2083. —.]**—If a party proceeds to enforce an award by attachment, & afterwards by action, the attachment may be set aside, but on terms.—LONSDALE (EARL) v. WHINNAY (1834), 1 Cr. M. & R. 591; 3 Dowl. 263; 5 Tyr. 203; 4 L. J. Ex. 7; 149 E. R. 1216.

*Annotation:—Distd.* Mendell v. Tyrrell (1841), 9 M. & W. 217.

**2084. —.]**—The ct. will discharge with costs a rule *nisi* for an attachment for non-payment of costs, pursuant to an award, if an action for the recovery of the sum in dispute was pending at the time of the demand made.—BAKER v. WELLS (1841), 9 Dowl. 323.

**2085. Filing affidavit of debt in Court of Bankruptcy.]**—An arbitrator having awarded a sum of money to be paid by debt. to pltf., the latter filed an affidavit of debt in the Ct. of Bkpcy., under Judgments Act, 1838 (c. 110), s. 8, & debt. then entered into a bond, conditioned, in the words of the Act, for the payment of the money, but omitting the alternative of rendering himself to gaol:—*Held*: pltf. was not precluded by having adopted that proceeding from proceeding by attachment.—MENDELL (MENDEN) v. TYRRELL (1841), 9 M. & W.



**Sect. 19.—Enforcement of award: Sub-sect. 6, D. E. & F. (a) & (b).]**

217; 1 Dowl. N. S. 453; 12 L. J. Ex. 121; 6 Jur. 18; 152 E. R. 92.

*E. Grounds of Objection to Application.*

**2086. Willingness to perform.]**—An award required deft. (*inter alia*) to pay pltf. a sum of money, & to pull down a wall which he had built upon pltf.'s ground. On an application for an attachment for breach of the award deft. stated on affidavit that he had actually tendered the money to pltf. that was due upon the award, & was ready to pull down the wall, provided pltf. would be bound to enter into a rule of ct. not to bring an action of trespass against deft. for so doing:—*Held*: these were reasonable terms to be agreed to, & the rule should be made absolute for the attachment, the rule to lie in the officer's hand, & not be executed at all, provided deft. should pull down the wall within a month's time.—*PALUCER v. COTTON* (1734), 2 Barn. K. B. 460; 94 E. R. 618.

**2087. Claim of set-off.]**—On an application for attachment for non-payment of money awarded, it appeared that the arbitrator was debarred by the rule from the consideration of deft.'s demand on pltf., & that deft., having brought his action against pltf., pltf. had pleaded the general issue & given notice to set off his demand under the award. Pltf. refusing to consent to a reference to the prothonotary, the rule was made absolute for attachment, but ordered to stay a month in the officer's hands.—*HARRISON v. OLIVER* (1739), Barnes, 56; 94 E. R. 804.

*Annotation*:—*Apld.* *Swayne & Bovill v. White & Ponsford* (1862), 31 L. J. Q. B. 260.

**2088. Counterclaim.]**—If, after an award directing payment of money to pltf., matter arises which gives deft. a counterclaim against pltf. for an equal amount, the ct. will not grant an attachment on the application of pltf. to enforce payment of the money to him.—*REES v. REES* (1856), 25 L. J. Q. B. 352.

**2089. Pending application to set aside award.]**—The ct. will not grant an attachment for non-payment of a sum of money awarded, which was demanded while a rule for setting aside the award was pending.—*DALLING v. MATCHETT* (1740), Willes, 215; Barnes, 57; 125 E. R. 1138.

**2090. Irregularity at hearing—Proceeding ex parte.]**—On showing cause against a rule for an attachment advantage may be taken of an irregularity in the award, *e.g.*, that the arbitrators have proceeded *ex p.*, by affidavits impeaching it, though the time for setting it aside has elapsed.—*ANON.* (1754), 1 Keny. 118; 96 E. R. 937.

**2091. Not defects not apparent on face of award.]**—A party cannot, in showing cause against an attachment for not performing an award, impeach the award for defects not appearing on it.—*HOLLAND v. BROOKS* (1795), 6 Term Rep. 161; 101 E. R. 489.

*Annotations*:—*Apprvd.* *Brazier v. Bryant* (1825), Bing.

**PART IV. SECT. 19, SUB-SECT. 6.—E.**

**c. Award not stating exors. had assets.]**—Where exors. submitted to arbn., with a proviso that it should not be taken as an admission of assets, & the arbitrators awarded that they should pay a certain sum, without stating that they had assets, a rule for an attachment against them for non-payment was refused.—*GILBERT v. SIMPSON* (1844), 1 Ont. Dig. 122.—*CAN.*

**d. New arrangement subsequent to award.]**—Attachment will not be granted where a new arrangement has been made between the parties, subsequent to the award; but the successful party will be

left to an action on the award.—*THOMPSON v. MACKLEM* (1855), 1 P. R. 293.—*CAN.*

**e. Execution of trust deed after award.]**—Execution by deft. of an assignment in trust for creditors, by which pltf. is to be first paid, & acceptance of such assignment by pltf., is no answer to an application for attachment on an award for the same debt.—*MCKENZIE v. MCKENZIE* (1856), 2 P. R. 157.—*CAN.*

**f. Impossibility of performance owing to uncertainty.]**—Where an award is vague, & defts. swear that it is impossible to comply with it, owing to uncer-

167. *Apld.* *Hill v. Marshall* (1827), 5 L. J. O. S. C. P. 161. *Refd.* *R. v. Grant* (1849), 13 Jur. 1026; *Davis v. Pratt* (1855), 17 C. B. 183.

**2092.** —.]—On a rule *nisi* for an attachment on an award no objection can be taken to it that does not appear on the face of it.—*PAULL v. PAULL* (1833), 2 Cr. & M. 235; 2 Dowl. 340; 4 Tyr. 72; 3 L. J. Ex. 11; 149 E. R. 747.

**2093.** —.]—A party cannot, on showing cause against an attachment for non-performance of an award good on the face of it, use affidavits impeaching the award.—*MASTERS v. BUTLER & BAKER* (1849), 18 L. J. Q. B. 328; 13 Jur. 869; *sub nom.* *BUTLER v. MASTERS*, 13 L. T. O. S. 23.

**2094. Illegality apparent on face of award.]**—Upon an application for an attachment for non-performance of an award, the submission to which was made a rule of ct. by virtue of the Act of 1698, it is competent to the parties to object to the award for any illegality apparent upon the face of it, although the time limited by that stat. for applying to the ct. to set aside the award is expired.—*PEDLEY v. GODDARD* (1796), 7 Term Rep. 73; 101 E. R. 861.

*Annotations*:—*Consd.* *Lowndes v. Lowndes* (1801), 1 East, 276; *Auriol v. Smith* (1823), Turn. & R. 121.

**2095. Not corruption of arbitrator.]**—Corruption in the arbitrator is no answer to a motion for an attachment for non-performance of an award.—*BRAZIER v. BRYANT* (1825), 3 Bing. 167; 10 Moore, C. P. 587; 130 E. R. 477.

*Annotations*:—*Apld.* *Hill v. Marshall* (1827), 5 L. J. O. S. C. P. 161. *Refd.* *R. v. Grant* (1849), 13 Jur. 1026.

**2096. Performance.]**—An award directed that deft. should not again use a certain way, & was made a rule of ct. On an application for attachment for disobedience of the rule, it being alleged that acts of trespass had been committed by deft.'s domestic & other servants, it appeared that, since the making of the award, he had neither used the way himself, nor permitted or authorised its use by any of his servants, & that the instances of user relied on by pltf. had been by day labourers, persons not so much under the control of their employer as domestic servants might be supposed to be:—*Held*: the application must be refused, as deft. had not been guilty of anything that could be reasonably construed to amount to a breach of good faith.—*RUSSELL v. YORKE* (1837), 4 Scott, 422; 1 J. P. 125; 1 Jur. 356.

**2097. Delay in enforcement.]**—The ct. refused to proceed by attachment upon an award made eight years before, & left the party to proceed by action.—*Re DARWIN* (1831), 9 L. J. O. S. K. B. 183.

**2098. S. P. LODGE v. PORTHOUSE** (1774), Lofft, 388; 98 E. R. 708.

*Annotation*:—*Apld.* *Tebbutt v. Ambler* (1813), 12 L. J. Q. B.

**Mistakes & defects in award.]**—See cases in Sect. 13, Sub-sects. 1 & 2, *ante*.

tainty, an attachment will be refused.—*Re MANLEY & ANDERSON* (1856), 2 P. R. 106.—*CAN.*

**g. Award void.]**—Upon a rule to pay money or for an attachment, the party opposing may show by affidavit that the award is a nullity.—*BUCKLEY v. LAND & WORKS BOARD, GRAHAM v. VICTORIAN RAILWAYS COMRS.* (1893), 19 V. L. R. 522.—*AUS.*

**2091 i. Not defects not apparent on face of award.]**—Objections not appearing on the face of the award cannot be raised against an application for attachment.—*BLEECHER v. LOYALL* (1856), 2 P. R. 14.—*CAN.*



*F. Proceedings.**(a) Service of Award.*

**2099. Necessity for personal service.]**—The ct. will not infer personal service of an award to bring a party into contempt.—*BRANDER v. PENLEAZE* (1814), 5 Taunt. 813; 128 E. R. 912.

**2100. —.]**—The ct. will not grant an attachment against an attorney, to compel the payment of money in pursuance of an award, unless personal service can be proved, the party having another remedy open to him, namely by action.—*TURNER v. BLUNDELL* (1848), 12 L. T. O. S. 177.

**2101. —.]**—The ct. will not break in upon the rule which requires personal service for the purpose of an attachment, although deft. keeps himself secluded in order to evade service, & there is reason to believe that the rule of ct. has been brought to his knowledge.—*THOMAS v. RAWLINGS* (1859), 28 L. J. Ex. 347; 33 L. T. O. S. 186.

**2102. Sufficiency of service.]**—On a motion for attachment for not performing an award, it appeared that the affidavit of service was that the deponent showed deft. the award & rule, & before he could give him a copy deft. left his house & a copy was left at the door:—*Seemle*: this was insufficient service.—*R. v. ASHLY* (1725), 11 Mod. Rep. 396; 88 E. R. 1111.

**2103. —.]**—If deft. will not take the copy of an award & rule, the other requisites of a service being complied with, it is sufficient for a rule nisi for an attachment.—*ELLIS v. GILES* (1836), 5 Dowl. 255; 2 Har. & W. 329.

**2104. —.]**—To constitute a proper service of an award, a copy must be delivered to the party, & the original must, at the same time, be shown to him.

Where the copy was personally delivered to the party on Oct. 21, & a demand of performance made on the 23rd, the original being then for the first time shown:—*Held*: this was not such a service as to form the foundation either of an attachment or of a rule under Judgments Act, 1838 (c. 110), s. 18.—*LLOYD v. HARRIS* (1849), 8 C. B. 63; 7 Dow. & L. 118; 18 L. J. C. P. 346; 13 L. T. O. S. 258; 137 E. R. 432.

**2105. Service on Sunday.]**—If an award be made by rule of ct., & the party who refuses to obey the award absconds, so that he cannot be found on a weekday, a service thereof on a Sunday is sufficient to bring him into contempt whereon to have an attachment.—*ANON.* (1697), 12 Mod. Rep. 158; 88 E. R. 1233.

**2106. Personal knowledge sufficient.]**—Personal knowledge of an award & rule of ct. makes the party liable to an attachment for not performing the award, although he has not been personally served.—*Re BOWER* (1823), 1 B. & C. 264; 107 E. R. 98.

*Annotations*:—*Folld. Re Dodington* (1839), 5 Bing. N. C. 591. *Refd. Lloyd v. Harris* (1859), 8 C. B. 63.

*(b) Demand of Performance.*

**2107. Necessity for demand—No time fixed for payment.]**—Where an award fixes no certain time of payment, the party liable ought at his peril to make payment within a convenient time, & the other party need not make any request.—*BRET v. ANDREW (AUDARS)* (1587), Gouldsb. 63; 1 Leon. 71; 75 E. R. 996; *sub nom. BRET'S CASE*, Owen, 7.

*Annotation*:—*Mentd. Crouche v. Fastolfe* (1680), T. Raym. 418.

**2108. — Where refusal to comply with order.]**—Where pltf. had been ordered to comply with the terms of an award thereafter to be made, but when the award was made he refused to do so:—*Held*: the proper course was not to attach him for contempt of the order made, but to make another order directing him to comply with the terms of the award within a certain time, & that otherwise he should be attached.—*BIRDSALL v. BRADLEY* (1863), 9 L. T. 436.

**2109. — Personal demand.]**—Attachment lies for not performing an award, though not strictly good in law, if not impossible. But personal demand is necessary.—*FORSTER v. BRUNETTI* (1696), 1 Salk. 83; 91 E. R. 78.

**2110. —.]**—There must be personal notice, & a demand of the money, to bring a party into contempt for not performing an award.—*ANON.* (1698), 12 Mod. Rep. 257; 88 E. R. 1305.

**2111. —.]**—Payment on an award must be demanded before an attachment can issue.—*CHANLER v. DRIVER* (1699), 12 Mod. Rep. 317; 88 E. R. 1348.

**2112. —.]**—An attachment for not paying a sum of money pursuant to an award cannot issue before a personal demand has been made, even though the time & place for payment of the money awarded be specified in the award.—*BRANDON v. BRANDON* (1799), 1 Bos. & P. 394; 126 E. R. 972.

*Annotation*:—*Folld. Dodington v. Hudson* (1824), 1 Bing. 410.

**2113. —.]**—Upon an award to perform a purchase of land, & pay the price upon conveyance of the land by pltf. to deft., deft. is not in contempt before tender of a conveyance executed, & demand of the money & refusal to accept & pay.—*STANDLEY v. HEMMINGTON* (1816), 6 Taunt. 561; 2 Marsh. 276; 128 E. R. 1153.

**2114. — Attempt to serve personally unsuccessful.]**—The ct. refused to dispense with the rule that for an attachment there must be personal service, & a demand made, although it appeared that every possible attempt had been made to serve deft. personally & make demand upon him, but without success.—*THOMAS v. RAWLINGS* (1859), as reported in 33 L. T. O. S. 186; S. C., 28 L. J. Ex. 347.

**2115. Demand by third person—Unstamped indorsement on award.]**—An indorsement on an award, unstamped, is a sufficient authority to a third person to demand the money awarded.—*LANGMAN v. HOLMES* (1775), 2 Wm. Bl. 990; E. R. 582.

*Annotation*:—*Expld. Laughner v. Laughner* (1831), 1 Tyr. 352.

**2116. — Whether power of attorney necessary.]**—On demanding the execution of a deed, directed by an arbitrator, where such demand is made by a third person, it is not necessary that such person should be empowered by deed or power of attorney, in order to enable the party to have an attachment, though it may be so where the demand is of money directed to be paid to the party.—*KENYON v. GRAYSON* (1804), 2 Smith, K. B. 61.

*Annotation*:—*Folld. Tebbutt v. Ambler* (1843), 12 L. J. Q. B. 220.

**2117. —.]**—A person was directed by an award to sign a release to the opposite party. The solr. for the opposite party tendered a release to him, but he refused to sign it. The ct. would not grant an attachment for a contempt, because the

PART IV. SECT. 19, SUB-SECT. 6.— SUMNER (1830), 1 Ont. Dig. 123.  
F. (a). CAN.

**2102 i. Sufficiency of service.]**—To bring a party into contempt for not paying money awarded, the original rule & other papers should be shown when the copies are served.—*KENT v.*

**2102 ii. —.]**—To enforce performance of an award, the proper mode is to serve an order that the party do within a time therein to be limited perform the award, which order must be indorsed

properly. An attachment issued for non-performance of an award, when no such order had been served, was set aside with costs, although an order making the award an order of ct. with such notice indorsed had been duly served.—*WILSON v. SWITZER* (1859), 1 Ch. Ch. 44.—CAN.

**Sect. 19.—Enforcement of award: Sub-sect. 6, F.**

solv. had not a power of attorney to do that specific act.—**HUMPHRIES' CASE** (1824), 2 L. J. O. S. K. B. 78.

**2118.** ———.]—Where a demand of money under an award, with a view to a motion for an attachment, has been made by a person authorised by letter of attorney, the authority must be shown to the party at the time, & it must appear on the affidavit filed in support of the application.—**JACKSON v. CLARKE** (1824), 13 Price, 208; M'Cle. 72; 147 E. R. 967.

**Annotations:—Mentd.** Donlan v. Brett (1834), 2 Ad. & El. 344; Cock v. Gent (1845), 14 M. & W. 680; Law v. Blackburn (1853), 14 C. B. 77; Everest v. Ritchie (1862), 7 H. & N. 698.

**2119.** ———.]—Where an arbitrator directed by his award that pltf. should execute deeds of assignment & mtge. & release, & a demand of execution was made by an agent of deft.'s attorney:—**Held**: it was not necessary that the agent should be authorised by a power of attorney.—**TEBBUTT v. AMBLER** (1843), 12 L. J. Q. B. 220; 7 Jur. 304.

**2120.** ——— **Execution of power must be shown—Copy left on party.**]—To support an attachment for non-performance of an award on demand made by a third person, who acts under a power of attorney, the execution of the power of attorney must be shown by the subscribing witness, & a copy of the power of attorney must be left with the party upon whom the demand is made.—**LAUGHER v. LAUGHER** (1831), 1 Cr. & J. 398; 1 Dowl. 284; 1 Tyr. 352; 148 E. R. 1477.

**Annotation:—Refd.** Anon. (1839), 3 Jur. 23.

**2121.** ——— **Power of attorney must be produced.**]—To found a motion for an attachment for non-payment of money pursuant to an award, where the demand is made under a power of attorney, it must appear that the power of attorney was produced to the party at the time the demand was made.—**BOYES v. HEWETSON** (1836), 2 Scott, 837.

**2122. Demand by one of several plaintiffs—Whether power of attorney necessary.**]—An award directed that a bond should be delivered up to pltf. upon demand:—**Held**: a demand made by one pltf., without a power of attorney from the others, was an insufficient demand to obtain an attachment.—**SYKES v. HAIGH** (1835), 4 Dowl. 114; 2 Scott, 193; 1 Hodg. 197.

**Annotations:—Distd.** Corbett d. Clymer v. Nicholls (1851), 2 L. M. & P. 87. **Refd.** Bailey v. Curling (1851), 20 L. J. Q. B. 235.

**2123. Demand by attorney—Award to pay to plaintiff or his attorney.**]—An award directed deft. to pay a certain sum to pltf., or to S., his attorney:—**Held**: a demand by S. was sufficient to found a motion for an attachment.—**HARE v. FLEAY** (1851), 11 C. B. 472; 2 L. M. & P. 392; 20 L. J. C. P. 249; 17 L. T. O. S. 184; 15 Jur. 1038; 138 E. R. 557.

**Annotation:—Mentd.** O'Toole v. Pott (1857), 7 E. & B. 102.

**2124. Sufficiency of demand.**]—An award directed (*inter alia*) that pltf. should, on a given day, deliver up to deft. a warrant for a hogshead of port wine lying at the London Docks, describing it by its number & marks. The demand required pltf. to deliver up "one hogshead of port wine," describing it:—**Held**: this was not a sufficient demand to

support an attachment.—**HEMSWORTH v. BRIAN** (1845), 1 C. B. 131; 2 Dow. & L. 844; 14 L. J. C. P. 134; 4 L. T. O. S. 315; 135 E. R. 486.

**Annotation:—Mentd.** Rule v. Bryde (1847), 1 Exch. 151.

**2125.** ———.]—An award ordered H. to pay, on a day & at a place named, to the attorney of C., for C.'s use, one sum for debt, & another for C.'s costs of the reference, & then directed that C. should pay to the arbitrator's attorney, at or before delivery of the award, £62 10s. for the costs of the arbitrator & of the award, & that H. should, on a day & at a place named, repay the sum of £62 10s. to the attorney of C. for C.'s use. H. not complying with the award, a demand was duly made on him on C.'s behalf for payment of the three specific sums, but H. did not pay any of them. On an application by C. against H. for an attachment for not paying the three sums:—**Held**: assuming the direction to pay the £62 10s. to be valid, no attachment could issue in respect of that sum, as it was not shown that C. had paid it in the first instance for the arbitrator's use, but the ct. could mould the rule, & the attachment might issue in respect of the other two sums.—**Re CARDIGAN (EARL) & HENDERSON** (1852), Bail Ct. Cas. 98; 22 L. J. Q. B. 83.

**2126. Time for making demand.**]—If a demand is not made for a sum of money pursuant to an award until some months after the day on which it is directed to be paid, an attachment for non-payment may nevertheless be granted.—**Re CRAIK** (1839), 7 Dowl. 603; 2 Will. Woll. & H. 52.

**Annotation:—Distd.** Doe d. Williams v. Howell (1850), 5 Exch. 299.

**2127.** ———.]—An award directed that pltf. should on or before Mar. 23 next duly execute an indenture in a specified form. No demand of the execution of the instrument was made upon pltf. before or on the day mentioned in the award:—**Held**: pltf. was not liable to an attachment for refusing to execute the deed on demand made after Mar. 23.

The refusal to execute the deed after the day mentioned in the award has not rendered [the party refusing] liable to an attachment for disobedience to the order. It by no means follows that, where the non-performance of an award would support an action, in every such case an attachment would be granted (**POLLOCK, C.B.**).—**DOE d. WILLIAMS v. HOWELL** (1850), 5 Exch. 299; 19 L. J. Ex. 232; 15 L. T. O. S. 69; 155 E. R. 128.

**2128.** ———.]—On a motion for an attachment for non-payment of money pursuant to an award, it is no objection that the demand was not made till upwards of two years after making the award.—**BAILEY v. CURLING** (1851), 2 L. M. & P. 161; 20 L. J. Q. B. 235.

**Annotation:—Mentd.** Drew v. Woolcock (1854), 24 L. J. Q. B. 22.

**(c) Notice of Motion.**

**2129. Application how made—Title.**]—Two actions of A. v. B. & B. v. A., & all matters in difference between the parties, were referred, the costs of the reference & award as to the actions to be in the discretion of the arbitrator. The award found that there was due from B. to A. £52 18s., & directed that B. should bear his costs in the action brought by him against A., & also A.'s costs of that action, that A. was entitled to recover £52 18s. in the action brought by him against B., & that B. should

**PART IV. SECT. 19, SUB-SECT. 6.—F. (c).**

**h. Nature of rule.**]—The rule for an attachment for non-payment of an award is properly a four, not a six, day rule.—**JONES v. REID** (1852), 1 P. R. 247.—**CAN.**

**2129 i. Application how made—On read-**

**ing rule.**]—The original award must be brought into ct., & the rule for attachment drawn up upon reading it:—**Semble**: such rule may be granted on showing service of a copy of the award, with the demand of performance, the original having before been shown to deft.—**MCLEAN v. KERZAR** (1854), 1 P. R. 125.—**CAN.**

**2129 ii.** ——— **Affidavits must be referred to.**]—A rule nisi for attachment, drawn up "upon reading the rule of ct., award, *allocatur*, & papers filed in the cause," is insufficient; the affidavits filed, & necessary to bring the party into contempt, should be specifically referred to.—**DICKEY v. MULHOLLAND** (1858), 2 P. R. 169.—**CAN.**

pay that sum on demand to A., together with A.'s costs of the action, & that each party should bear his own costs of the reference, & half the expense of the award. The action of B. v. A. had not proceeded beyond the writ, & consequently there was no costs due therein to A. The agreement of reference having been made a rule of ct., the rule being entitled "In the matter of the arbn. between A. & B., A. v. B.," & the £52 18s. & taxed costs of the action of A. v. B. having been duly demanded, the ct. granted an attachment against B. for non-payment of those two sums.—*Re PIKE & NEWMAN, PIKE v. NEWMAN* (1854), 14 C. B. 425; 22 L. T. O. S. 226; 139 E. R. 175.

(d) *Affidavits in Support.*

**2130. How intitled.]**—Where a submission to an award is made a rule of ct. under the Act of 1698, there being no action, the affidavits on which to apply for an attachment for disobeying the award need not be intitled in any cause, but the affidavits in answer must.—*BEVAN v. BEVAN* (1790), 3 Term Rep. 601; 100 E. R. 755.

**2131. ———.]**—The affidavits made in answer to a rule *nisi* for an attachment must be intitled on the civil side of the ct. in the cause out of which the motion arises, but, after the rule for the attachment is granted, the affidavits in any matter concerning such attachment are intitled on the Crown side.—*WHITEHEAD v. FIRTH* (1810), 12 East, 166; 104 E. R. 65.

**2132. ———.]**—A rule *nisi* for an attachment for non-payment of money under an award was intitled, "In the matter of ———," but the affidavit of service was entitled "Between A., pltf., & C., deft.":—*Held*: irregular, as it should have been intitled the same as the rule.—*Re HOUGHTON* (1828), 2 Moo. & P. 452; 7 L. J. O. S. C. P. 71.

**2133. Original award lost.—Copy.]**—Upon affidavit that the original award was lost, by coming up in the Bristol mail, which was robbed, a rule *nisi* for an attachment was granted upon a copy of it.—*ROBINSON v. DAVIS* (1722), 1 Stra. 526; 93 E. R. 677.

**2134. Verifying award—Witness absent.]**—Where the affidavit verifying an award could not be obtained in consequence of the barrister's clerk having left him, & his residence being unknown, the ct. granted a rule *nisi* for an attachment for non-payment of the award, but directed that the rule should not be drawn up till an affidavit had been obtained & filed by some person acquainted with the clerk's handwriting.—*BELTON v. JARRETT* (1843), 8 Jur. 83.

**2135. ——— Time.]**—It is not necessary that an affidavit for an attachment for non-performing an award should state that it was made before the authority of the umpire expired, if the affidavit of execution appears from the *jurat* to have been sworn before that time.—*TREW v. BURTON* (1833), 1 Cr. & M. 533; 3 Tyr. 559; 2 L. J. Ex. 236; 149 E. R. 511.

**2136. ———.]**—Where the making & publishing of an award are sworn to, but without fixing the

time, the award itself bearing date within the time limited by the order of reference, on motion for an attachment for non-performance, the ct. will not presume that the award was made & published after that time.—*DOE d. CLARKE v. STILLWELL* (1838), 8 Ad. & El. 645; 3 Nev. & P. K. B. 701; 1 Will. Woll. & H. 532; 2 Jur. 591; 112 E. R. 983.

*Annotations:—Mentd.* *Wynne v. Wynne* (1841), 2 Scott, N. R. 615; *Re Andrewes* (1845), 5 L. T. O. S. 202.

**2137. ———.]**—If to the affidavit, upon an application for an attachment for non-performance of an award, there be annexed a copy of the award, from which, & from the submission, which has been made a rule of ct., it appears that the award was within the time limited by the submission, it is not necessary that the affidavit should state the execution of the award within that time.—*HIGGINS v. STREET* (1856), 25 L. J. Ex. 285; 27 L. T. O. S. 191.

**2138. Enlargement of time.]**—Where an award is made after the time originally given to the arbitrators, but authority was also given to them to enlarge the time, an award within the enlarged time authorised is good upon the face of it, though it do not recite that the arbitrators did in fact enlarge the time; but the ct. will not grant an attachment for non-performance of the award without the verification of the fact.—*GEORGE v. LOUSLEY* (1806), 8 East, 13; 103 E. R. 249.

*Annotations:—Refd.* *Wohlenberg v. Lageman* (1815), 6 Taunt. 251; *Smith v. Reeves* (1836), 2 Har. & W. 306. *Mentd.* *Re Coombs* (1850), 4 Exch. 839; *Richardson v. Worsley* (1850), 5 Exch. 613.

**2139. ———.]**—Where an award was made out of the time originally allowed, but authority had been reserved to the arbitrator to enlarge the time, & though the award stated upon the face of it that the arbitrator had enlarged the time so as to cover the award, yet there was no affidavit of that fact, the ct. refused an attachment for non-performance of the award, it not appearing to them judicially that the arbitrator had any authority to make the award, without which the ct. had no jurisdiction.—*MOULE v. STAWELL* (1812), 15 East, 99, n.; 104 E. R. 782.

*Annotations:—Consd.* *Wohlenberg v. Lageman* (1815), 6 Taunt. 251. *Expld.* *Roberts v. Evans* (1865), 6 B. & S. 1.

**2140. ———.]**—Where an award appears to have been made out of the time originally given to the arbitrator by the rule of ct., which rule, however, reserved to him the power of enlarging the time, it is not enough for obtaining an attachment for non-performance of the award that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit; & it should also appear that deft. had notice of such enlargement of the time within which the award was made, when served with the rule for the attachment.—*DAVIS v. VASS* (1812), 15 East, 97; 104 E. R. 781.

*Annotations:—Consd.* *Wohlenberg v. Lageman* (1815), 6 Taunt. 251. *Refd.* *Re Smith & Reeves* (1837), 5 Dowl. 513; *Barton v. Ranson* (1838), 1 Horn & H. 11; *Re Dodington* (1839), 5 Bing. N. C. 591.

PART IV. SECT. 19, SUB-SECT. 6.—  
F. (d).

**2130 i. How intitled.]**—In an application for an attachment for the non-payment of money awarded, the rule *nisi* was intitled, "In the matter of A. v. B." The affidavit of service was intitled in the same way. The rule making the submission a rule of ct. was intitled in that ct., "A. v. B." The affidavit of the execution of the award was intitled in the ct. where the application was made:—*Held*: there was no material variance between the intituling of the rule *nisi* & the other previous papers.—*Re BECKETT v. COTTON* (1848), 5 U. C. R. 271.—CAN.

**2130 ii. ———.]**—In attachment proceedings an affidavit denying service of the award must be intitled in the cause, & not "The Queen v. Deft.," as it is an affidavit made before the attachment has been ordered.—*HEATHERS v. WARDMAN* (1849), 4 U. C. R. 173.—CAN.

**k. Award.]**—The award must be before the ct. before an attachment will be granted for non-performance.—*MARKS v. MARKS* (1847), 3 Kerr, 486.—CAN.

**l. ——— How proved.]**—The attesting witness to an award may be compelled to attend & prove the award.—*TAYLOR v. BOSTWICK* (1859), 1 Ch. Ch. 23.—CAN.

**m. Appointment of umpire.]**—Where the award is made by an umpire, it must be shown how he was appointed, & his appointment must be in writing.—*CARPENTER v. VANDERLIP*, 1 Ont. Dig. 123.—CAN.

**n. Authority to demand performance.]**—To obtain an attachment for non-payment of an award, the affidavit should show that the person making the demand had a power of attorney for that purpose, & that the party on whom the demand was made knew of it.—*POWELL v. McMARTIN* (1830), Dra. 169.—CAN.



*Sect. 19.—Enforcement of award: Sub-sect. 6, F. (d), G. H.; sub-sect. 7.]*

**2141.** ——.]—Where arbitrators have power to enlarge the time for making their award, & have enlarged it, & made their award in the additional time, in order to bring deft. into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged, that the award was made within the enlarged time, & that deft. has been personally served with notice of those facts. *Semble*: the affidavit for an attachment for non-performance of an award must, contrary to the usual practice, always state the time of execution of the award.—*WOHLENBERG v. LAGEMAN* (1815), 6 Taunt. 251; 1 Marsh. 579; 128 E. R. 1031.

*Annotations*:—*Refd.* *Re Smith & Reeves* (1836), 5 Dowl. 513; *Re Dodington* (1839), 5 Bing. N. C. 591.

**2142.** ——— **Indorsement made rule of Court.**]—An arbitrator had power to enlarge the time for making his award, by indorsement on the order of reference; that order, together with two indorsements, enlarging the time, was made a rule of ct.:—*Held*: on moving for an attachment for not performing the award, it was not necessary to produce an affidavit that the indorsements were duly made.—*DICKINS v. JARVIS* (1826), 5 B. & C. 528; 108 E. R. 197; *sub nom.* *DICKINS v. SMITH*, 8 Dow. & Ry. K. B. 285.

*Annotations*:—*Folld.* *Re Smith & Reeves* (1836), 5 Dowl. 513. *Refd.* *Barton v. Ranson* (1838), 1 Horn & H. 11.

**2143.** ———.]—Where an arbitrator has the power to enlarge the time for making his award, & the enlargements are made a part of the rule of ct., an affidavit of such enlargements is not necessary in order to obtain an attachment.—*Re SMITH & REEVES* (1836), 5 Dowl. 513; *sub nom.* *SMITH v. REEVES*, 2 Har. & W. 306.

**2144.** ———.]—Where an order of reference & enlargement of time have been made a rule of ct., it cannot be shown as against an attachment for non-performance of the award that there was no affidavit that the time was enlarged, but, if in fact there is no such affidavit, the proper course is to move to set aside the rule of ct.—*BARTON v. RANSON* (1838), 3 M. & W. 322; 6 Dowl. 384; 1 Horn & H. 11; 7 L. J. Ex. 86; 150 E. R. 1168.

*Annotations*:—*Mentd.* *Doe d. Clarke v. Stillwell* (1838), 8 Ad. & El. 645; *Bradbee v. Christ's Hospital* (1842), 4 Man. & G. 714; *Scott v. Van Sandau* (1844), 6 Q. B. 237.

**2145.** ——— **Enlargement by order.**]—Where a cause is referred by a judge's order, made by consent of the parties, & the time for making the award is afterwards enlarged by a judge's order, on moving for an attachment for not performing the award, it must be shown that the order enlarging the time was made by consent.—*HALDEN v. GLASSCOCK* (1826), 5 B. & C. 390; 8 Dow. & Ry. K. B. 151; 108 E. R. 145.

*Annotations*:—*Distd.* *Dickins v. Jarvis* (1826), 5 B. & C. 528. *Refd.* *Re Smith & Reeves* (1836), 5 Dowl. 513.

**2146.** **Service of award.**]—An affidavit of the service of an award & umpirage, disclosing a regular service, is sufficient to obtain an attachment for non-performance, although the surname of the umpire is misdescribed.—*Re SMITH & REEVES* (1836), 5 Dowl. 513; *sub nom.* *SMITH v. REEVES*, 2 Har. & W. 306.

*See, also*, Nos. 2099—2106, *ante*.

**2147.** **Non-performance.**]—On an application for an attachment for non-performance of an award which directed a sum of money to be paid to pltf., it was alleged that pltf. had not sufficiently sworn in his affidavit that deft. was not at the place for payment of the money at the time appointed:—*Held*: on this ground the application must be refused.—*PIGOT v. STIBS* (1733), 2 Barn. K. B. 307; 94 E. R. 577.

**2148.** ——.]—Where an award directed the costs should be borne in equal moieties, & that, if either party paid the whole, the other should repay the moiety:—*Held*: the affidavit in support of an attachment for non-payment of the moiety must state that the party had paid the whole, & it was not sufficient to state that the other party was informed that the whole had been paid.—*Re SMITH & REEVES* (1836), 5 Dowl. 513; *sub nom.* *SMITH v. REEVES*, 2 Har. & W. 306.

**2149.** ———.]—Where an arbitrator, to whom a case was referred, awarded that the action should cease, & that a sum of money should be paid by pltf. to deft., & deft.'s costs having been taxed, both sums were demanded of pltf.:—*Held*: inasmuch as the arbitrator had exceeded his authority in directing payment of the sum of money to deft., an affidavit which stated that deft. demanded of pltf. the sum of money, & also the amount of the costs, but that pltf. did not pay the same, or any part thereof, was not sufficient to ground an attachment.—*POYNER (PAYNER) v. HATTON* (1840), 7 M. & W. 211; 8 Dowl. 891; 10 L. J. Ex. 64; 151 E. R. 742.

**2150.** ———.]—Where a demand is made, under power of attorney, for payment of money, pursuant to an award, it is sufficient to found a rule for an attachment if the attorney swears to the demand & refusal, & that the sum remains unpaid, & it is not necessary that the party himself shall swear that the money was not paid.—*R. v. PAGET* (1841), 5 Jur. 872.

**2151.** ———.]—The affidavit for an attachment for non-performance of an award alleged a demand of payment directed by the award, & a refusal to pay, but did not sufficiently negative the fact of the money not having been paid:—*Held*: sufficient.

Where the rule was for an attachment against A. & B. jointly for non-performance of an award, & the affidavits showed a non-payment of one sum by A. & of another sum by B. due from them severally, the ct. discharged the rule.—*Re ANDREWES & ANDREWES* (1845), 5 L. T. O. S. 202.

**2152.** ———.]—The affidavit, upon which a rule nisi for an attachment for not paying a sum awarded by an arbitrator is moved for, must directly negative the payment of the money at the particular time & place mentioned in the award.—*OLDACRE v. SMITH* (1853), 21 L. T. O. S. 141.

**2153.** **Explaining delay in application.**]—After the lapse of four years from the making an award the ct. will not grant an attachment for its non-performance without an affidavit explaining the delay.—*STOREY (STORY) v. GARRY (GALLEY)* (1840), 8 Dowl. 299; 4 Jur. 72.

**2154.** **Proof of mutual bonds.**]—In an action for an escape upon process of attachment, for contempt in not performing an award, pltf. alleged in his declaration that there were mutual bonds of submission, but failed in proving this fact, & proved the rule of ct. ordering the attachment, but had not set it out in his declaration:—*Held*: the action could not be maintained, the proof being defective in one case, & the statement defective in the other.—*BRAZIER v. JONES* (1828), 8 B. & C. 124; 2 Man. & Ry. K. B. 88; 6 L. J. O. S. K. B. 261; 108 E. R. 989.

**2155.** **Payment of arbitrator's costs.**]—Where an award between A. & B. directed that the costs of the arbitrator should, in the first instance, be paid by A. & afterwards reimbursed & paid by B. to A., & by the master's *allocatur* on taxation, after giving A. credit for having paid the arbitrator's costs, a certain sum was specified as the "balance to be paid by B. to A.":—*Held*: it was not sufficient, in order to support an attachment against B. for non-payment of such sum, to show a demand of it, as due by virtue of the *allocatur*, without also showing, by affidavit, that A. had first paid the arbitrator's

costs.—**MASTERS v. BUTLER & BAKER** (1849), 18 L. J. Q. B. 328; 13 Jur. 869.

**2156. Procedure when award lost.**—The ct. may proceed to enforce an award by attachment upon proof of the copy or draft of an award, on being satisfied that the original is lost.—*Re DARWIN* (1831), 9 L. J. O. S. K. B. 183.

*See, also, No. 2133, ante.*

#### G. Costs.

**2157. Rule discharged on preliminary objection.**—Where, upon showing cause against a rule for an attachment for non-performance of an award, the ct. discharges the rule without costs, on a preliminary objection to the insufficiency of the affidavit demanding the performance of the award, the objecting party has a right to enter into the merits in order to have the rule discharged with costs.—*Re CHAMBERLAIN* (1840), 8 Dowl. 686.

**2158. "Costs of attachment"—Costs of inquiry included.**—An attachment for non-performance of an award was ordered to remain suspended to await the result of an inquiry, but it was to be discharged upon payment of the costs of the attachment, if deft. performed certain conditions within a certain time. Deft. having failed to perform the condition within the time, the attachment issued, & deft. then complied:—*Held*: the costs of the inquiry were to be considered as part of the costs of the attachment.—*TYLER v. CAMPBELL* (1839), 5 Bing. N. C. 192; 1 Arn. 465; 7 Scott, 116; 132 E. R. 1078.

#### H. Effect of Attachment.

**2159. Does not exempt from performance of award.**—A party attached for contempt in not performing an award, & sentenced to imprisonment for a definite period, is not, by undergoing such imprisonment, exonerated from the performance of the award.

The non-performance of the award is not a single act of contempt which will be purged by a definite period of imprisonment; but the prisoner may, at the expiration of the term for which the ct. upon this occasion sentences him, if the award shall then remain unperformed, be again brought up to answer for his continuing contempt. Nor will he thereby, as I conceive, be relieved from an action upon the award (*WILDE, C.J.*).—*R. v. HEMSWORTH* (1846), 3 C. B. 745; 8 L. T. O. S. 162; 136 E. R. 299.

#### SUB-SECT. 7.—SPECIFIC PERFORMANCE.

*See, generally, SPECIFIC PERFORMANCE.*

**2160. May be decreed—Conveyance of estate—Consideration paid.**—Bill lies to compel specific performance of an award to convey an estate, where the party submitting has received the money in consideration whereof he is to convey the estate sued for.—*HALL v. HARDY* (1733), 3 P. Wms. 187; 2 Eq. Cas. Abr. 28, pl. 35; 24 E. R. 1023.

*Annotations*:—**Folld.** *Selby v. Whitbread*, [1917] 1 K. B. 736. **Refd.** *Daniel v. Adams* (1764), Amb. 495. **Mentd.** *Howell v. George* (1815), 1 Madd. 1.

**2161. Principle on which granted or refused—Invalid submission—Statute of Frauds.**—Where, in the course of the proceedings before an arbitrator, the parties agree by parol that the arbitrator shall determine as to a lease to be granted, such an agreement is within the above Act, & the award, having directed a lease to be made, cannot be enforced.—*WALTERS v. MORGAN* (1792), 2 Cox, Eq. Cas. 30 E. R. 169.

**2162. — Reasonableness not considered.**—The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous agreement between the parties; & although the illegality of the acts of which it directs the execution will afford a ground for refusing to decree the performance, the ct., considering an award as the decision of judges chosen by the parties, will not examine whether it is unreasonable.—*WOOD v. GRIFFITH* (1818), 1 Swan. 43; 1 Wils. Ch. 34; 36 E. R. 291.

*Annotations*:—**Folld.** *Selby v. Whitbread*, [1917] 1 K. B. 736. **Refd.** *Hawksworth v. Brammell* (1840), 5 My. & Cr. 281; *Nickels v. Hancock* (1855), 7 De G. M. & G. 300; *Blackett v. Bates* (1865), 2 Hem. & M. 610. **Mentd.** *Cockell v. Taylor*, *Collett v. Preston*, *Preston v. Collett* (1852), 15 Beav. 103; *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, P. C.; *James v. Kerr* (1889), 40 Ch. D. 449.

**2163. — Misconduct of arbitrator—Refused.**—M. being possessed of a house & lands for a term of years under a lease, by the covenants of which he was bound to keep & deliver up the premises in repair, at the expiration of the term, entered into an agreement with C., who had acquired the reversion in the premises, subject to the term, that C. should grant to him a new lease; & thereupon an agreement between M. & C. was executed, whereby C. agreed to grant to M. a lease of the premises for a term of forty-seven years, at such yearly rent as should be put upon the same by two chosen arbitrators, & in case of difference between them, that an umpire should be named by them, & the rent fixed by a majority of the three. The arbitrators having differed, an umpire was called in, who with the arbitrator for M., the tenant, received evidence to show that, at the date of the agreement between M. & C., the premises were in a very ruinous state, & that it would require £800 to put them in repair. Upon this view of the case, & assuming as the basis of their award that M. was not bound to repair, & that he had agreed to expend £800 in repairs, they adjudged & awarded that a rent of £60 per annum should be paid by M. to C. during the term of forty-seven years. But the arbitrator for M., the tenant, had differed from the umpire as to the amount of rent, & refused to concur in a larger rent than £43, until he was prevailed on by the entreaty of M.'s wife to concur with the umpire in fixing the rent at £60:—*Held*: M. was not entitled to specific performance of the agreement, in the circumstances attending the award.—*CHICHESTER v. M'INTIRE* (1830), 4 Bli. N. S. 78; 1 Dow & Cl. 460; 5 E. R. 28.

**2164. — Delay—Refused.**—Pltf. agreed to lease a coal mine to deft. on such terms as arbitrators might fix. An award was signed, & possession having been previously taken, specific performance was sought on the footing of the award:—*Held*: three years & a half delay in the filing of the bill after possession had been given up was a complete answer to the suit for specific performance.—*EADS v. WILLIAMS* (1854), 4 De G. M. & G. 674; 3 Eq. Rep. 244; 24 L. J. Ch. 531; 24 L. T. O. S. 162; 1 Jur. N. S. 193; 3 W. R. 98; 43 E. R. 671, L.C.

*Annotations*:—**Folld.** *Levy v. Stogdon*, [1898] 1 Ch. 478. **Mentd.** *Barclay v. Messenger* (1874), 43 L. J. Ch. 449; *Bottomley v. Ambler* (1877), 38 L. T. 545, C. A.

**2165. — Award ultra vires—Good in part only.**—The ground on which the Ct. of Ch. interferes to decree specific performance of an award not made a rule of that ct. is that the award is an agreement between the parties to the submission, & that most, if not all, of the principles regulating specific performance are applicable. If the arbitrator exceeds

#### PART IV. SECT. 19, SUB-SECT. 6.—H.

**2159 i. Does not exempt from performance of award.**—Proceeding by attach-

ment on an award is no bar to subsequent action on the same award, though the ct. may stay the action so that deft. be

released from the attachment.—*DEXTER v. FRIZGIBBON* (1857), 4 U. C. L. J. 43.—**CAN.**

**Sect. 19—Enforcement of award: Sub-sects. 7 & 8.**  
**Sect. 20: Sub-sect. 1, A.]**

his authority, or does not decide all the matters submitted to him, or decides something which cannot be carried out consistently with the intention of the parties as shown by the terms of the submission, specific performance of the award cannot be decreed, as the award, to that extent, does not embody an agreement between the parties. *Semble*: the ct. cannot in such a case separate that part of the award which cannot be enforced, & decree specific performance of the rest.—**NICKELS v. HANCOCK** (1855), 7 De G. M. & G. 300; 3 Eq. Rep. 689; 1 Jur. N. S. 1149; 44 E. R. 117, L.JJ.

**Annotation**:—**Refd.** **Blackett v. Bates** (1865), 2 Hem. & M. 610.

**2166. — Relief not mutual—Delay—Award partly unenforceable.**—An award directed the execution of a lease to pltf. of certain portions of a railway running over deft.'s land, & further provided that the lessor might from time to time require the lessee to supply engine-power during such time as he should keep an engine or engines for use. Twelve months after the date of the award, pltf. filed a bill for specific performance, & the ct. decreed specific performance of so much of the award as related to the execution of the lease, & by the same decree, after declaring that deft. was entitled during the continuance of the lease, & during such time as the lessee should keep an engine or engines for use, but not otherwise, to require the lessee to supply engine-power, awarded an injunction to restrain pltf. from interfering with deft. in the enjoyment of his rights, & privileges. On appeal **LORD CRANWORTH**, C. reversed the decree, on the ground that the relief was not mutual, inasmuch as specific performance could not be granted of the portion of the award which required pltf. to supply engine-power. *Semble*: the delay of pltf. in filing his bill, having been caused by his own proceedings at law to set aside the award, would have been fatal to his success, if there had been no other objection.—**BLACKETT v. BATES** (1865), 1 Ch. App. 117; 35 L. J. Ch. 324; 13 L. T. 656; 12 Jur. N. S. 151; 14 W. R. 319, L. C.

**Annotations**:—**Refd.** **Ryan v. Mutual Tontine Westminster Chambers Assocn.**, [1893] 1 Ch. 116, C. A.; **Danubian Sugar Factories v. I. R. Comrs.**, [1901] 1 K. B. 245, C. A. **Mentd.** **Wolverhampton & Walsall Ry. Co. v. L. & N. W. Ry. Co.** (1873), L. R. 16 Eq. 433; **Phipps v. Jackson** (1887), 56 L. J. Ch. 560.

**2167. Annuity awarded.**—R. agreed with Y., for valuable consideration, to pay an annuity to W. for the joint lives of W. & R. Afterwards, at the suggestion of Y., R. consented to allow the matters in question to be referred to arbn. R. declined to comply with the award of the arbitrator, & a bill

was filed by Y. & W. against R. to enforce compliance with the award, or (alternatively) for specific performance of the previous agreement:—*Held*: a suit to enforce pltf.'s demand was sustainable in equity.—**PEEL v. PEEL** (1869), 17 W. R. 586.

**2168. Granted.**—**KENNET v. HORNOR** (1581), Ch. Cas. in Ch. 158; 21 E. R. 92.

**2169. —.**—**BARKER v. BARKER** (1576), Cary, 57; 21 E. R. 31.

**2170. —.**—**REIGNOLDS v. LATHAM** (1578), Cary, 106; 21 E. R. 56.

**2171. —.**—**TWYN v. TWINN** (1597), Toth. 16; 21 E. R. 110.

**2172. —.**—**BOOTH v. PECKOVER** (1639), 1 Rep. Ch. 138; 21 E. R. 530.

**2173. —.**—**BISHOP v. BISHOP** (1639), 1 Rep. Ch. 142; 1 Cas. in Ch. 40; Toth. 17; 21 E. R. 532.

**2174. —.**—**CALT v. SMITH** (1645), Toth. 17; 21 E. R. 110.

**2175. —.**—**NORTON v. MASCALL** (1687), 2 Rep. Ch. 304; 2 Vern. 24; 1 Eq. Cas. Abr. 51, pl. 8; 21 E. R. 685.

**2176. —.**—**A.-G. v. CLEMENTS** (1823), Turn. & R. 58; 37 E. R. 1016.

**Annotation**:—**Consd.** **A.-G. v. St. John's Hospital, Bath** (1865), 1 Ch. App. 92.

**2177. —.**—**ORMOND (MARQUIS) v. KYNNESELEY** (1824), 2 Sim. & St. 15; 2 L. J. O. S. Ch. 178; 57 E. R. 250.

**Annotations**:—**Refd.** **Wilkinson v. Page** (1842), 11 L. J. Ch. 193; **Wood v. Taunton** (1849), 11 Beav. 449.

**2178. —.**—**HAWKSWORTH v. BRAMMALL** (1840), 5 My. & Cr. 281; 41 E. R. 377.

**Annotation**:—**Folld.** **Blackett v. Bates** (1865), 2 Hem. & M. 610.

**2179. —.**—**WOOD v. TAUNTON** (1849), 11 Beav. 449; 18 L. J. Ch. 207; 13 L. T. O. S. 277; 13 Jur. 954; 50 E. R. 891.

**Annotation**:—**Distd.** **Cudlip v. Smedley** (1863), 3 New Rep. 246.

**2180. Refused.**—**WAKEFIELD v. HAWSON** (1577), Cary, 64; 21 E. R. 34.

**2181. —.**—**DAIE v. WOOD** (1582), Toth. 16; 21 E. R. 110.

**2182. —.**—**BISHOP v. WEBSTER** (1704), 1 Eq. Cas. Abr. 51; 21 E. R. 867.

**2183. —.**—**THOMPSON v. NOEL** (1738), 1 Atk. 60; 26 E. R. 40.

**2184. —.**—**A.-G. v. JACKSON** (1846), 5 Hare, 355; 67 E. R. 950.

#### SUB-SECT. 8.—UNDER COLONIAL STATUTES AND RULES.

*See cases infra.*

#### PART IV. SECT. 19, SUB-SECT. 7.

**2168 i. Granted.**—**HODDER v. TURVEY** (1873), 20 Gr. 63.—**CAN.**

**2168 ii. —.**—**BRIJ MOHAN LAL v. SHIAM SINGH** (1901), I. L. R. 24 All. 164.—**IND.**

**2168 iii. —.**—**RAM NARIAN GUNGA BISSEN v. LILADHUR LOWJEE** (1906), I. L. R. 33 Calc. 1237; 10 C. W. N. 814.—**IND.**

**2180 i. Refused.**—**KINNEEN v. PERSSE** (1858), 7 L. Ch. R. 438.—**IR.**

**2180 ii. —.**—**NORVALL v. CANADA SOUTHERN RY. CO.**, Cass. Dig. 35.—**CAN.**

#### PART IV. SECT. 19, SUB-SECT. 8.

**o. Regulations of 1895—Applicability of.**—An action of damages by a tenant against his landlord was referred.

On motion to have the authority of the ct. interposed to the award, defender objected that the referee had not allowed a re-hearing after issuing his notes, as required, or at least that he had granted it under such conditions as practically amounted to a refusal, & that the arbitrator had misunderstood the issues:—*Held*: the objections were irrelevant.—**BRACKINBRIGG v. MENZIES** (1841), 14 Sc. Jur. 109.—**SCOT.**

**p. Procedure on cross bills.**—Where one party exhibited a bill to be decreed to a matter about which an award had been made, without taking notice of the award, & then the first party filed a supplemental bill, stating & objecting to the award, & the other party exhibited a bill to carry the award into execution:—*Held*: both causes ought to be heard together, & the matter of the award not left open to each party to take his legal remedy thereon.—**HAMILTON v. STEPHENSON** (1702), Colles, 209.—**IR.**

**q. Entry of verdict after death of party.**—Verdict ordered to be entered up on an award after the death of one of the parties.—**CONOLLY v. ASHWORTH** (1834), 3 Ir. L. Rec. N. S. 40.—**IR.**

**r. Consent to enter up judgment.**—A consent to enter up judgment on the award of an arbitrator should not only provide that the award should be entered as the verdict of the jury, but should also provide specifically that final judgment should be entered up.—**RIDDICK v. KAVANAGH** (1855), 7 Ir. Jur. 160.—**IR.**

**s. Motion to enter up judgment—When necessary.**—Although a motion to confirm an award is unnecessary, yet, when the terms of the deed of submission are that the decision of the arbitrators should be made the judgment of the ct., a motion for an order to enter up judgment is necessary. In such a case, notice of motion need not be given.—**WILLIAMS v. BRUEN** (1839), 1 I. L. R. 344.—**IR.**



## SECT. 20.—COSTS.

## SUB-SECT. 1.—POWERS OF ARBITRATORS AND UMPIRE AS TO COSTS.

## A. Under Arbitration Act, 1889 (c. 49), Sched. I. (i.)

**2185. Application of Act.]**—In an arbn., commenced after the commencement of the above Act, under a submission entered into before that date, which is silent as to costs, the arbitrators have power to award costs. The whole Act, including the schedules, applies to arbn. commenced before the Act came into force in so far as the contract to refer is not inconsistent with such application.—*Re WILLIAMS & STEPNEY*, [1891] 2 Q. B. 257; 60 L. J. Q. B. 636; 65 L. T. 208; 39 W. R. 533; 7 T. L. R. 577, C. A.

*Annotation*:—**Expld. & Distd.** *Re Wilson & Eastern Counties Navigation & Transport Co.*, [1892] 1 Q. B. 81.

**2186. No power to award costs to wholly unsuccessful party—Public Health Act, 1875 (c. 55), s. 95.]**—A corpn. commenced proceedings against B. under the above sect. in respect of a nuisance,

t. ----.] *FEENEY v. DILLON* (1841), 3 L. R. 503.—**IR.**

u. — *Costs of motion.*]—Parties to an action agreed to refer the matters in dispute to arbn., & that judgment should be entered up for the sum awarded, but deft., after the making of the award, refused to sign a plea of confession for the amount awarded. The ct. ordered judgment to be entered up against him for that amount, & that he should pay the costs of the motion.—*FRENCH v. FARRELL* (1844), 6 L. L. R. 151.—**IR.**

v. *When motion to confirm award discharged.*]—An order to confirm an award was discharged, where it appeared that the arbitrators had included in it matters which were not submitted to them.—*Re WELLS & CALDWELL* (1873), 7 L. L. T. Jo. 448.—**IR.**

w. *Award may be registered.*]—An award is capable of registration.—*HUGHES v. WHITBY* (1872), 1 R. 7 Eq. 98.—**IR.**

x. *Act VIII. of 1859, s. 327—When applicable.*]—When complaint has been preferred to a criminal ct., & the magistrate has directed that the subject-matter of the complaint be referred to arbn., if the parties consent & proceed to such reference, the award may be enforced under the above Act.—*SHEO NUND RAI v. MAHANUND RAM* (1866), 1 Agra, 45.—**IND.**

y. *Under Civil Procedure Code (Act XIV. of 1882).*]—Where the agreement to refer is vague & indefinite, & does not clearly lay down the power of the arbitrator in dealing with the subject-matter in dispute, & where it is not possible to make out what powers were intended to be conferred upon the arbitrator, the award should not be allowed to be enforced under the provisions of ss. 525 & 526 of the above Act.—*ISSURI PERSHAD SINGH v. JANKEE LAD SINGH* (1888), 1 L. R. 16 Cal. 482.—**IND.**

z. *Indian Arbitration Act, 1899—Valid submission must be proved.*]—Although the above Act has made the procedure for the enforcement of an award simpler than the old practice of instituting suit for the purpose, it is still necessary to prove that the arbitrators acted under a valid submission before an award can be made a decree of ct. under the Act.—*HURDWARY MULL v. AHMED MUSAJI SELAJI* (1908), 13 C. W. N. 63.—**IND.**

a. *Right to appeal from order directing filing of award—Whether lost.*]—The right to appeal against an order directing an award made by arbitrators to be filed is not lost as soon as a decree is drawn up in accordance with the judgment

with the result that the High Ct. of Justice decided that B. was not liable & awarded him the costs of the proceedings. B. then claimed full compensation under s. 308 of the Act, & the matter went to arbn. B. recovered nothing, but the arbitrator ordered the corpn. to pay the costs of the arbn.:—*Held*: the arbitrator had no jurisdiction under s. 180 of the Act to award costs to a wholly unsuccessful party.—*Re BARNETT & ECCLES CORPN.* (1901), 65 J. P. 757; 44 Sol. Jo. 362.

**2187. Power to direct successful party to pay costs—Agricultural Holdings Act, 1908 (c. 64).**]—In an arbn. under the above Act, the arbitrator may in his discretion direct the successful party to pay the costs of the arbn.—*GRAY v. ASHBURTON (LORD)*, [1917] A. C. 26; 86 L. J. K. B. 224; 115 L. T. 729; 81 J. P. 17; 61 Sol. Jo. 129; 15 L. G. R. 9, H. L.; *reusg.* [1916] 2 K. B. 353, C. A., & *restg.* S. C. *sub nom.* *ASHBURTON (LORD) v. GRAY*, [1916] 1 K. B. 452.

*Annotation*:—**Refd.** *Ellesmere v. I. R. Comrs.* (1918), 34 T. L. R. 560.

pronounced on the award.—*SOUDAMINI GHOSH v. GOPAL CHANDRA GHOSH* (1914), 19 C. W. N. 948.—**IND.**

b. *Enforcement by summary application—When competent.*]—A proceeding to enforce an award by summary application must be taken after the time for moving against it has elapsed.—*MOORE v. BUCKNER* (1881), 28 Gr. 606.—**CAN.**

c. *When verdict may be entered.*]—Where a verdict is taken & the award not made until after the next term, plff. need not wait to enter his judgment until after the first four days of the term following the award.—*BLANCHARD v. SNIDER* (1868), 28 U. C. R. 210.—**CAN.**

d. *Amount awarded ordered to be paid into court.*]—Where in an arbn. between partners the managing partner conceals important matters so that the award is too favourable to himself, an injunction to restrain proceedings on a judgment on the award will be continued to the hearing, & the amount awarded will be ordered to be paid into ct.—*WILSON v. RICHARDSON* (1851), 2 Gr. 448.—**CAN.**

e. *C. S. U. C., c. 24, s. 19—Discretion of court.*]—On application for an order for payment under the above Act the ct. will exercise the same discretion as on a motion for attachment.—*WATSON v. GARRETT* (1860), 3 P. R. 70.—**CAN.**

f. — *Procedure under.*]—To obtain execution for money awarded under the above Act it is not sufficient to make the submission a rule of ct. The defaulter must be called upon to show cause why he should not pay, specifying the sum, & a rule absolute obtained.—*NIAGARA & DETROIT RIVERS RY. CO. v. BUCKWELL* (1860), 3 P. R. 82.—**CAN.**

g. *Arbitration Act, R. S. O., 1897 (c. 62), s. 13—Order necessary.*]—An order giving leave to enforce an award under the above sect. is necessary where the reference has been made out of ct.—*Re LLOYD & PEGG* (1903), 23 C. L. T. 171; 5 O. L. R. 389; 2 O. W. R. 103.—**CAN.**

h. — *Objections not available.*]—Objections properly the subject of a motion to set aside an award were refused to be considered upon an appeal from an order under the above Act giving leave to enforce an award.—*Re LLOYD & PEGG* (1903), 23 C. L. T. 171; 5 O. L. R. 389; 2 O. W. R. 103.—**CAN.**

k. — *Time for making application.*]—An application under the above Act for an order giving leave to enforce an award, need not be made within six weeks after the publication of the award.—*Re LLOYD & PEGG* (1903), 23 C. L. T. 171; 5 O. L. R. 389; 2 O. W. R. 103.—**CAN.**

l. — *Discretion of court.*]—Upon an application made under the above Act for leave to issue execution to enforce an award, the ct. has discretion to say that execution should not issue, & proceedings may be stayed to enable the objecting party to apply to extend the time for moving against the award.—*Re BAKER & KELLY* (1907), 9 O. W. R. 136.—**CAN.**

m. — *Appeal from order.*]—Upon appeal from an order granting one of the parties to an arbn. leave to enforce an award:—*Held*: the ct. could not entertain objections to the award based upon alleged misconduct of the arbitrators, applt.'s course in regard to such objections being to move to set aside the award.—*Re MITCHELL & MITCHELL* (1910), 14 W. L. R. 701.—**CAN.**

n. *4th R. S. (c. 109), s. 22.*]—Under the above Act a judge in equity may order that, in the event of a party to the submission refusing to execute a deed required to effectuate a sale directed by the arbitrators to be made, same shall be made by a master of the ct.—*Re FRASER v. PAINT* (1873), 3 R. & C. 10; R. E. D. 68.—**CAN.**

o. *King's Bench Act, Rules 773 & 774.*]—Rule 773 of the above Act provides a code of procedure only for the enforcement of awards, & r. 774 must be interpreted as if it read "The former practice relating to the enforcement of awards."—*JOHANNESSON v. GALBRAITH* (1906), 16 Man. L. R. 138.—**CAN.**

p. *Summary proceedings—When granted.*]—L. & G. formerly carried on business in co-partnership. They referred certain partnership disputes to arbn., & by the award G. was directed (*inter alia*) to retire a bill of exchange for £257 15s. 4d. Upon motion to make absolute a rule obtained by L. for the payment by G.:—*Held*: the ct. would not exercise its summary jurisdiction to compel payment of the sum of £257 15s. 4d., as L.'s claim was founded on the alleged default of G. to perform the award in not retiring the bill for that amount, & G. was entitled to have the verdict of a jury upon the facts upon which the claim depended.—*Re LOGAN v. GALT*, Mac. 505.—**N.Z.**

q. *Arbitration Act, 1890, s. 15—Motion for judgment.*]—Where a cause is ordered to be tried before an arbitrator agreed on by the parties under the above Act, the party in whose favour the award is given must move for judgment before it can be entered up.—*BELL v. FINN* (1896), 14 N. Z. L. R. 447.—**N.Z.**

r. *Arbitration Act, 1908, s. 22.*]—Where parties to an arbn. refuse to take up an award, an application under the above Act is the appropriate remedy.—*Re LYDERS v. FYFE & CUMING* (1909), 28 N. Z. L. R. 1000.—**N.Z.**

**Sect. 20.—Costs: Sub-sect. 1, B.]****B. Before Arbitration Act, 1889 (c. 49).**

**2188. Power to award costs—Order or submission silent.]**—An arbitrator may award costs without any express authority for that purpose.—*ROE v. D. WOOD v. DOE* (1788), 2 Term Rep. 644; 100 E. R. 347.

*Annotations:—***Refd.** *Whitehead v. Firth* (1810), 12 East, 166; *Duckworth v. Harrison* (1838), 4 M. & W. 432.

**2189. ——— Costs of reference.]**—Arbitrators cannot award the costs of reference, unless power is expressly given to them for that purpose.—*CANDLER v. FULLER* (1738), Willes, 62; 125 E. R. 1057.

*Annotation:—***Mentd.** *Lewis v. Rossiter* (1875), 23 W. R. 832.

**2190. ———.]**—A general reference of all disputes, differences, & demands between pltf. & deft. in an action does not confer on the arbitrator power to award the costs of the reference.—*STRUTT v. ROGERS* (1816), 7 Taunt. 213; 2 Marsh. 524; 129 E. R. 86.

*Annotations:—***Mentd.** *Kendrick v. Davis* (1837), Will. Woll. & Dav. 587; *Re Parkinson & Smith* (1861), 9 W. R. 340.

**2191. ——— Costs of cause.]**—Where a cause & all matters in difference were referred to an arbitrator, but nothing was said about costs:—**Held:** the arbitrator had power over the costs of the cause, but not those of the reference.—*FIRTH v. ROBINSON* (1823), 1 B. & C. 277; 1 L. J. O. S. K. B. 115; 107 E. R. 104.

*Annotations:—***Folld.** *R. v. Moate* (1832), 3 B. & Ad. 237; *Hayward v. Moss* (1885), 49 J. P. 248. **Refd.** *West London Extension Ry. Co. v. Fulham Union Assmt. Com. & Fulham Overseers* (1870), 22 L. T. 523.

**2192. ———.]**—Where an order of reference drawn up by consent provides that the costs of the action, & of the application to refer, made at chambers, are to abide the event of the award as if it were a verdict, but is silent as to the costs of the reference, the arbitrator has no power over the costs of the reference, but each party must pay his own costs.—*BULLEN v. KING* (1877), 36 L. T. 732.

**2193. ——— Costs of award.]**—If no directions

are given in the submission respecting the costs of an award, they are to be paid by both parties equally.—*GROVE v. COX* (1808), 1 Taunt. 165; 12 E. R. 795.

**2194. ——— Costs in cause up to payment into Court—Cause not referred.]**—After a payment of money into ct. in a cause, the parties agreed to refer the settlement of the accounts between them to arbn.:—**Held:** the arbitrators had no power over the costs in the cause up to the time of the payment into ct.—*STRATTON v. GREEN* (1832), Bing. 437; 1 Moo. & S. 668; 131 E. R. 462.

**2195. ——— Costs of reference & award.]**—Where an order of *Nisi Prius* referring a cause to arbn. is silent upon the subject of the costs of the reference & award, the arbitrator has no authority to adjudicate upon them, but each party must bear his own expenses of the reference, & the half of the award.—*TAYLOR v. GORDON (LADY)* (1833), Bing. 570; 1 Dowl. 720; 2 Moo. & S. 725; 13 E. R. 727.

**2196. ——— Common Law Procedure Act 1854, s. 3.]**—An arbitrator to whom a cause is referred before trial, under the above sect., has no power over the costs, if the order of reference is silent on the subject.—*LEGGO v. YOUNG* (1855), 1 C. B. 626; 24 L. J. C. P. 200; 139 E. R. 904; *supra nom.* *SEGO v. YOUNG*, 25 L. T. O. S. 182.

*Annotations:—***Expld.** *Bell v. Postlethwaite* (1855), 5 E. & L. 695. **Consd.** *Hodgkinson v. Fernie* (1857), 3 C. B. N. S. 189. **Dbtd.** *London Dock Co. v. Shadwell Parish* (1862), 1 New Rep. 91. **Expld.** *West London Ry. Co. v. Fulham Union* (1870), L. R. 5 Q. B. 361. **Folld.** *Wimshurst, Hollick v. Barrow Shipbuilding Co.* (1877), 2 Q. B. D. 335. **Refd.** *Holgate v. Killick* (1861), 7 H. & N. 418.

**2197. ———.]**—An arbitrator, to whom after issue joined, a cause was referred under the above sect., awarded costs, which, the order of reference being silent on the subject, on the authority of *Leggo v. Young* (No. 2196, *ante*), the master refused to tax. A rule *nisi* to tax them was granted.—*ROBINSON v. POSTLETHWAITE* (1855), 4 W. R. 16.

**2198. ———.]**—An arbitrator appointed under the above sect. has no power over the costs either of the cause, reference or award, unless the rule or order appointing the arbitrator gives it to him; & where the rule is silent, the successful

**PART IV. SECT. 20, SUB-SECT. 1.—B.**

**2188 i. Power to award costs—Order or submission silent.]**—*FUGE v. GEE* (1830), 4 Ir. L. Rec. 1st ser. 39.—**IR.**

**2188 ii. ———.]**—An arbiter has power to award expenses, without any special clause to that effect in the submission.—*ROBERTSON v. BROWN* (1836), 15 Sh. (Ct. of Sess.) 199.—**SCOT.**

**2188 iii. ———.]**—An arbiter is entitled to award expenses though no power to that effect be expressly given in the submission.—*FERRIER v. ALISON* (1843), 15 Sc. Jur. 227.—**SCOT.**

**2188 iv. ———.]**—In an action the parties consented that judgment should be entered for a certain sum, "subject to an award." Nothing was said about costs, & they were not provided for in any way. The arbitrator made his award: "I do award to pltf. the costs of this action, including the costs of the reference & award." Judgment was entered in accordance with this award:—**Held:** the arbitrator had no power over costs, & the award of costs must be struck out of the judgment.—*MACDONNELL v. BAIRD* (1858), 13 P. R. 331.—**CAN.**

**2188 v. ———.]**—The parties to a suit having referred the matters in dispute, the arbitrators, without being specially authorised to decide the question of costs, included in the award a direction that deft. should pay the costs of pltf.:—**Held:** the arbitrators had no implied power to deal with the question

of costs.—*DAGDUSA TILAKCHAND v. BHUKAN GOVIND SHET* (1884), 1 L. R. 9 Bom. 82.—**IND.**

**2188 vi. ———.]**—When the submission or order of reference is silent as to costs, arbitrators have no power to adjudicate upon them, but each party must bear his own costs, & half those of the award.—*Re HARDING & WREN* (1884), 4 O. R. 605.—**CAN.**

**2188 vii. ———.]**—In a policy one of the conditions was that in the case of any dispute or difference, it should be referred to arbn., & "Arbn. Act, 1889, & Arbn. Act (Scotland), 1894 (where applicable), & such Arbn. Acts as may be in force for the time being, shall apply to any such arbn.":—**Held:** in the case of an arbn. under the policy, C. L. P. (Ireland) Act, 1856, applied, & there being no express power in the policy to award the costs of the award & reference, there was no jurisdiction in the arbitrator to give them to the successful party, & the award, in so far as it awarded same, was void.—*LOWDEN v. ACCIDENT INSURANCE CO.* (1904), 43 L. L. T. 277.—**IR.**

**2188 viii. ——— Reference of "whole cause."]**—Where parties to an action have referred the "whole cause," the arbiter has power to find expenses without any special clause to that effect.—*FAIRLEY v. M'GOWN* (1836), 14 Sh. (Ct. of Sess.) 470.—**SCOT.**

**2188 ix. ——— Summons with conclusion for expenses referred.]**—An action

was referred to an arbiter, the summons of which contained a conclusion for expenses, & also the whole conclusion thereof & all defences thereto competent. The arbiter dealt with the matter of expenses:—**Held:** not *ultra fines compromissi*.—*PAUL v. HENDERSON* (1867), 5 Macph. (Ct. of Sess.) 613.—**SCOT.**

**2188 x. ——— Reference of action & all matters in difference.]**—Where an action & all matters in difference are referred, the arbitrators have power over the costs of the action.—*Re MEAKER & BROWN* (1878), 1 N. S. W. S. C. R. N. S. 59.—**AUS.**

**2188 xi. ——— Submission reserving any question as to legal liability.]**—A church was destroyed by fire, & a submission was entered into, in which it was provided that "the award made by them (the appraisers), or any two of them, shall be binding upon both parties as the amount of such damage to the insured property, but shall not determine any question touching the legal liability of the co.," etc. Two of the appraisers joined in an award giving the insured the full amount claimed, & ordered the co. to pay the costs of the reference & award. The co. refused to pay any costs over & above half the arbitrators' fees:—**Held:** R. S. O., 1887 (c. 167), s. 114, was applicable & costs were properly awarded under s. 114 (16).—*Re St. PHILIP'S CHURCH, WESTON & GLASGOW & LONDON INSURANCE CO.* (1889), 17 O. R. 95.—**CAN.**



party under such a reference can have no costs.—**BELL v. POSTLETHWAITE** (1855), 5 E. & B. 695; 25 L. J. Q. B. 63; 24 L. T. O. S. 256; 1 Jur. N. S. 1167; 4 W. R. 89; 119 E. R. 640.

*Annotations*:—**Expld.** West London Ry. Co. v. Fulham Union (1870), L. R. 5 Q. B. 361. **Folld.** Wilmshurst, Hollick v. Barrow Shipbuilding Co. (1877), 2 Q. B. D. 335. **Refd.** Smith v. L. & N. W. Ry. Co. (1854), Macr. 221.

#### 2199. Quarter Sessions Act, 1849 (c. 45).]

—On an appeal to quarter sessions it was ordered, under s. 13 of the above Act, that “the matter in dispute” should be referred to arbn. The arbitrator awarded that the appeal be dismissed, & that applts. should pay to resps. their costs of the appeal:—**Held**: as the order of reference was silent as to costs, the arbitrator had no power to award costs.—**WEST LONDON EXTENSION RY. CO. v. FULHAM UNION ASSESSMENT COMMITTEE** (1870), L. R. 5 Q. B. 361; 39 L. J. Q. B. 178; 22 L. T. 523; 34 J. P. 423.

*Annotations*:—**Mentd.** R. v. Middlesex JJ., West London Extension Ry. Co. v. Fulham Union Assmt. Com. (1871), L. R. 6 Q. B. 220; Southampton Gas Light & Coke Co. v. Southampton Grdns. (1877), 25 W. R. 671.

#### 2200. Reference to determine costs

**expenses.**]—An order by consent was made, in a suit brought by a landowner against a railway co., that the matters in dispute should be submitted to an arbitrator, who was also to determine the costs & expenses. The arbitrator sent in his certificate of costs, & the co. objected thereto & claimed to have such costs settled by the taxing master:—**Held**: the certificate was proper & must be enforced.—**ROWCLIFFE v. DEVON & SOMERSET RY. CO.** (1873), 21 W. R. 433.

**2201. — Costs of cause, reference, & award costs in the cause.**]—Where after writ in an action all matters in difference between the parties are referred to an arbitrator, & the order of reference contains a clause that “the costs of the said cause, & the costs of the reference & award, shall be costs in the cause,” the arbitrator has power to deal with all the costs.—**HAYWARD v. MOSS** (1885), 49 J. P. 248.

**2202. — Arbitrator authorised to tax costs—Refusal of court to refer to master.**]—Where an arbitrator authorised to tax costs in a cause has allowed an item, which it is insisted ought not to have been charged, the ct. will not refer the matter to the master.—**ANON.** (1819), 1 Chit. 38.

*Annotation*:—**Distd.** Kendrick v. Davis (1837), 5 Dowl. 693.

**2203. — No question of liability to be raised—No power to disallow costs.**]—By an order of *Nisi Prius*, it was referred to an arbitrator to settle the matters in difference between the parties, with power to have deft.’s bills of costs, the subject of a plea of set-off, taxed, but no question of liability to be raised. The arbitrator, on an objection raised against deft.’s right to claim his bills of costs, on the ground that deft. was not an attorney of the ct., in which the business had been done, refused to allow them, & his award was set aside by the ct. for an excess of jurisdiction in entertaining the question, liberty being given to the parties to go before

him again.—**HARRIES (HARRIS) v. THOMAS** (1836), 2 M. & W. 32; 2 Gale, 197; 6 L. J. Ex. 58; 150 E. R. 656.

*Annotations*:—**Folld.** Jones v. James, Jones v. Harris (1837), 6 L. J. Ch. 293. **Refd.** Bentley v. Dawes (1854), 10 Exch. 347. **Mentd.** R. v. Hardey (1850), 14 Q. B. 529; Maples v. Pepper (1856), 18 C. B. 177.

**2204. — Costs of suit & reference to be paid by party losing—No power to award otherwise.**]—By a submission it was agreed to refer an action & some cross-claims to arbn., the costs of the suit & of the reference to be paid by the party against whom the award was made. The arbitrator awarded that, at the time of the reference, there was due by deft. to pltf. a certain sum, which he directed to be paid, & he also directed that deft. should pay a certain sum for costs, on payment of which each party should execute a release of the matters referred:—**Held**: the arbitrator had no power to make the award as to the costs.—**KENDRICK v. DAVIES** (1837), 5 Dowl. 693; Will. Woll. & Dav. 376; 1 Jur. 673.

**2205. — Costs to abide event of cause—No power to order successful party to pay costs of special jury.**]—A special jury having been obtained on the motion of deft., the cause was referred, & by the order of reference, the costs of the cause were to abide the event, & the costs of the reference & of the special jury were left in the discretion of the arbitrator:—**Held**: the arbitrator could not, after directing a verdict for pltf., award that the latter should pay the costs of the special jury.—**FINLAYSON v. M’LEOD** (1818), 1 B. & Ald. 663; 106 E. R. 243.

*Annotation*:—**Refd.** *Re* Fearon & Flinn (1869), L. R. 5 C. P. 31.

**2206. — — — — —.**]—An order of reference, after providing that B., a third party, should be a party to the reference, directed that the costs of the cause should abide the event & that the costs of the reference & award should be in the discretion of the arbitrator. The arbitrator awarded that pltf. was entitled to 40s. damages from deft., that deft. should bear & pay one moiety of pltf.’s costs of the reference & award, that B. should pay the other moiety, & that B. should pay to deft. one moiety of deft.’s costs of the action, & one moiety of deft.’s costs of the reference, etc.:—**Held**: the arbitrator had jurisdiction to require B. to pay a portion of the costs of the action.—**STOCKLEY v. SHOPLAND** (1872), 26 L. T. 586.

**2207. — Costs to abide event of award.**]—A cause, & all matters in difference, including a suit in equity, were referred to an arbitrator, the costs of the cause & of the suit to abide the event of the award. The costs of the reference were to be in the discretion of the arbitrator. The arbitrator awarded on several of the issues in the cause for pltf. with £5 damages; on others, he awarded for deft., & so far as the suit applied to the latter issues, he decided for pltf., but awarded that deft. was entitled to relief in respect of the issues found for pltf., the costs of the suit & cause to be borne by the respective parties. He ordered that pltf. should not take out execution for his damages or

**2204 i. — Costs to be paid by party winning.**]—Where a reference was only to award damages & deft. agreed to pay the amount awarded, & it was provided that the costs of the arbitrator & award should be paid by the party entitled thereto, in whose favour the award should be made:—**Held**: the arbitrator had no power to order deft. to pay the costs.—**Re EGLESTON & TAYLOR** (1881), 45 U. C. R. 479.—**CAN.**

**2205 i. — Costs to abide event.**]—**MARTYN v. DICKSON** (1866), 2 C. L. J. N. S. 209.—**CAN.**

**2205 ii. — — — — — Verdict taken subject to being reduced.**]—Where a verdict is

taken, subject to be reduced, the costs to abide the event, the condition as to costs gives no authority by inference to deprive pltf. of them altogether, but applies only to the amount of costs to be taxed.—**SHAW v. TURTON** (1834), 4 O. S. 100.—**CAN.**

**2207 i. — Costs of reference, arbitration, & award to abide result of award.**]—By an order of reference, the arbitrator was empowered to certify & amend pleadings & proceedings, & otherwise as a judge at *Nisi Prius*, & costs of the reference, arbn. & award were to abide the result of the award:—**Held**: the arbitrator had no power to make any dispo-

sition of the costs.—**DEVANNEY v. DORR** (1883), 4 O. R. 206.—**CAN.**

**a. — Discretion over costs given by reference.**]—When the order of reference gives the arbitrator full discretion over costs he alone can fix the scale.—**BARRUT CHUNDER DOSS v. DAMJEE PITTUMBER** (1865), Bourke, 7; Cor. 150.—**IND.**

**b. — Costs to be in power of arbitrators.**]—An agreement that all costs shall be in the power of arbitrators inserted after the condition of the bond to perform an award must be read as part of it.—**TOWNSLEY v. WYTHES** (1858), 16 U. C. R. 139.—**CAN.**



## ARBITRATION.

### *Sect. 20.—Costs: Sub-sect. 1, B. & C.]*

costs, & that the costs of the reference should be borne by the respective parties:—*Held*: the arbitrator did not exceed his authority in staying pltf. from recovering his costs, because, although he thereby exercised a jurisdiction over the costs of the cause, it was the exercise of a power necessarily resulting from the nature of the reference.—*REEVES v. M'GREGOR* (1839), 9 Ad. & El. 576; 1 Per. & Dav. 372; 2 Will. Woll. & H. 127; 8 L. J. Q. B. 177; 112 E. R. 1330.

**2208. ——— No power to order otherwise.]—**Where by an agreement of reference after action brought, but before declaration, "all the costs are to abide the event of the award," the arbitrator has no power over the costs.—*BOODLE v. DAVIES* (1835), 3 Ad. & El. 200; 1 Har. & W. 420; 4 Nev. & M. K. B. 788; 14 L. J. Ch. 352; 111 E. R. 389.

*Annotations:—Distd.* Matlock Gas Light Co. v. Peters (1856), 6 E. & B. 215; Dunhill v. Moore (1867), 17 L. T. 148. *Refd.* Yates v. Knight (1835), 2 Scott, 470; Jones v. Powell (1838), 6 Dowl. 483; *Re Marsack & Webber* (1860), 2 E. & E. 637; Stevens v. Chapman (1871), L. R. 6 Exch. 213. *Mentd.* Allenby v. Proudlock (1835), 4 Dowl. 54; Gray v. Leaf (1840), 8 Dowl. 654; Dunn v. Walters (1842), 9 M. & W. 293; Staples v. Hay (1843), 1 Dow. & L. 711; Potter v. Waller (1848), 2 De G. & Sm. 410.

**2209. ——— Power to order successful party to pay.]—**Where after writ in an action "all matters in difference between the parties" are referred to an arbitrator, & the order of reference contains a clause that "the cost of the said cause, & the costs of the reference & award, shall be costs in the cause," the arbitrator may order successful pltf. to pay deft.'s costs.—*HAYWARD v. MOSS* (1885), 49 J. P. 248.

**2210. ———.]—**Matters in difference between A. & B. were by agreement referred to arbitrators or an umpire, the costs of the submission, reference, & award to be in their or his discretion. A. claimed about £30; B. denied that he was indebted in any sum. The arbitrators having differed, the umpire made his award in favour of A. for £6 5s. 2d., but directed him to pay B. his costs of the submission & of the reference & of the award, amounting to £13 4s. 3d.:—*Held*: the fact of the umpire having awarded that the successful party should pay these costs was no ground for setting his award aside.—*Re FEARON & FLINN* (1869), L. R. 5 C. P. 34.

*Annotation:—Refd.* Ashburton v. Gray, [1916] 1 K. B. 452.

**2211. ——— Special jury—No implied power to certify for.]—**An indictment removed into King's Bench by deft., & made a special jury cause by the

prosecutor, came on to be tried & was immediately referred. The order of reference stated that, if the arbitrator should be of opinion that deft. was guilty & the prosecutor entitled to costs, deft. agreed to pay the costs. The arbitrator did so find:—*Held*: the prosecutor could not recover the costs of the special jury, since the judge had not certified for those costs (pursuant to 6 Geo. 4, c. 50, s. 34), & the order of reference did not expressly give a power of doing so to the arbitrator.—*R. v. MOATE* (1832), 3 B. & Ad. 237; 1 L. J. K. B. 78; 110 E. R. 80.

**2212. ——— Cannot certify after award.]—**An arbitrator, to whom a cause is referred with all the powers of a judge at *Nisi Prius*, cannot give a certificate for the costs of a special jury, after he has made & published his award without providing for them therein.—*GEEVES v. GARTON* (1846), 15 M. & W. 186; 3 Dow. & L. 481; 15 L. J. Ex. 169; 6 L. T. O. S. 324; 10 Jur. 272; 153 E. R. 815.

**2213. No power to order security for costs.]—**An arbitrator under a submission by agreement out of ct. has no power to make an order for security for costs.—*Re UNIONE STEARINERIE LANZA & WEINER*, [1917] 2 K. B. 558; 117 L. T. 337; *sub nom.* LANZA v. WEINER, 86 L. J. K. B. 1236; 61 Sol. Jo. 526.

**Powers of arbitrator where award referred back.]—***See cases in Part III., Sect. 2, ante.*

**2214. Effect of invalid direction as to costs.]—**Arbitrators cannot award the costs of reference, unless power is expressly given to them for that purpose; but if in such a case they award pltf. his costs of suit & charges of arbn. to be taxed by the proper officer, & the officer only tax the former, the award will be good for the former & bad as to the latter.—*CANDLER v. FULLER* (1738), Willes, 62; 125 E. R. 1057.

*Annotation:—Refd.* Lewis v. Rossiter (1875), 23 W. R. 832.

**2215. ———.]—**Though arbitrators award the costs of the reference, which are not within the terms of the submission, that will not vitiate the award itself, but it will be good as to the remainder.—*HARTNELL v. HILL* (1801), For. 73; 145 E. R. 1117.

**2216. ———.]—**Several actions having arisen out of the same transaction were referred to arbn., & the arbitrators awarded deft. should pay pltf. £444, that five eighth parts of the costs of the several actions should be paid by pltf., & three eighths by deft., that certain sums already expended by either of them should be allowed as part payment of his proportion, & that when the sum of £444 & the costs, including those of the

**2209 i. ——— Power to order successful party to pay.]—**Where by the terms of a reference to arbn. all matters in difference are referred to the arbitrator, the ct. will not modify (s. 322), remit (s. 323), or set aside (s. 324) the award, on the ground that the arbitrator in his discretion has awarded damages to pltf., & at the same time made him pay all the costs.—*MOHENDROHATH BOSE v. NUSSEE MANGEE*, 1 Ind. Jur. N. S. 224.—**IND.**

**2214 i. Effect of invalid direction as to costs.]—**Arbitrators have no power to award costs, unless it is given to them by the deed of submission; but if they do so, it does not vitiate the award, but it is a mere nullity.—*WILSON v. DOOLAN* (1853), 5 Ir. Jur. 135.—**IR.**

**2214 ii. ———.]—**Where the costs of the cause, reference, & award were to abide the event of the cause, & the arbitrators assessed the costs of drawing up the award & their fees at a certain sum:—*Held*: merely assessing the amount was no ground for setting aside the award.—*BOYLE v. HUMPHREYS* (1854), 1 P. R. 187.—**CAN.**

**2214 iii. ———.]—**Where arbitrators without authority in the submission direct witnesses to be paid it will not vitiate the award.—*PURDY v. BURBRIDGE* (1857), 2 Thom. 150.—**CAN.**

**2214 iv. ———.]—**A cause was referred, costs to abide the event of the award. Deft. admitted that the sum claimed was due at the time of the arbn., but objected to pay the costs because the action was commenced before the credit expired, & the arbitrators having found this to be the fact, awarded the amount admitted to pltf., & directed that he should pay all the costs:—*Held*: the award had been made on conditions that deft. should not be subjected to costs, & the award was not sustainable.—*EMMS v. NEILL* (1857), 3 All. 438.—**CAN.**

**2214 v. ———.]—**Arbitrators were to have power to make an award concerning lands, & their powers extended to all accounts & differences between pltf. & deft. The arbitrators awarded (*inter alia*) that deft. should pay all costs of the reference & award:—*Held*: the part of the award directing payment of the costs of the reference & award was bad & might be abandoned.—*St. GEORGE'S*

*PARISH v. KING* (1878), 2 S. C. R. 143.—**CAN.**

**2214 vi. ———.]—**Where a criminal information & an action were both referred, & the umpire made distinct findings as to the costs of the two proceedings:—*Held*: the findings were separable, & the award was good as to the costs of the action, though bad as to the costs of the information.—*Re MEAKER & BROWN* (1878), 1 N. S. W. S. C. R. N. S. 59.—**AUS.**

**2214 vii. ———.]—**Where a submission or order of reference does not empower arbitrators to deal with the question of costs, an award giving costs to one party is not bad, if the amount of costs is severable from the rest of the award.—*Re BAILEY & HART* (1883), 9 V. L. R. 311.—**AUS.**

**2214 viii. ——— Legal incidence not changed.]—**By a reference the costs of the cause & award were to abide the event:—*Held*: specific directions given as to the costs in the award were unobjectionable, as in effect they directed only what would have been the result without them.—*JOHNSTON v. ANGLIN* (1869), 29 U. C. R. 272.—**CAN.**

arbn. & award, were paid, mutual releases should be given:—*Held*: if the arbitrators had exceeded their authority as to costs, it was not sufficient to invalidate the award.—*ITCHESON v. CARGEY* (1824), 2 Bing. 199; *M'Cle.* 367; 13 *Price*, 639; 9 *Moore*, C. P. 381; 130 *E. R.* 282. *Ex. Ch.*

*Annotations*:—*Folld.* *Kendrick v. Davies* (1837), 5 *Dowl.* 693. *Distd.* *Stone v. Phillips* (1837), 4 *Bing. N. C.* 37. *Refd.* *Re Marshall & Dresser* (1842) 3 *Q. B.* 878; *Harrison v. Lay* (1863), 13 *C. B. N. S.* 528. *Mentd.* *Plummer v. Lee* (1837), 2 *M. & W.* 495; *Perry v. Mitchell* (1844), 12 *M. & W.* 792; *Mays v. Cannell* (1854), 15 *C. B.* 107.

**2217.** ——.]—By a submission it was agreed to refer an action & some cross-claims to arbn., the costs of the suit & of the reference to be paid by the party against whom the award was made. The arbitrator awarded that, at the time of the reference, there was due by deft. to pltf. a certain sum which he directed to be paid, & he also directed that deft. should pay a certain sum for costs, on payment of which each party should execute a release of the matters referred:—*Held*: although the arbitrator had no power to make the award as to the costs, the award was not bad, though the payment of the costs was made a condition precedent to deft. obtaining his release.—*KENDRICK v. DAVIES* (1837), 5 *Dowl.* 693; *Will. Woll. & Dav.* 376; 1 *Jur.* 673.

**2218.** ——.]—By a deed of arbn. between A. & B., after reciting that B. had committed trespasses upon & worked the coal of certain mines belonging to A., it was referred to two arbitrators to award what amount should be paid by B. for these injuries, "the costs & charges of the agreement, & the costs, etc., of & attending or incident to the arbn. or award, including the payment to be made to the referees & their umpire," etc., "to be borne & paid by B., & to be awarded accordingly." The award found the amount to be paid by B. for the value of the injuries to be £888 5s. & that the costs incident, etc., to the award, "including the payment to be paid to us, the referees, amounting in the whole to the sum of £36 16s. 4d., should be paid by B. to C., at the office of," etc., "on the delivery of this our award." There was no mention made as to the costs of the agreement of reference. A rule having been obtained calling on B. to show cause why he should not pay the sum of £888 5s.:—*Held*: it was no answer that the costs of the agreement of reference were not included in the award, or that the costs of the reference & the award were awarded in one sum, or that they were awarded to a stranger, as the damages were clearly separable from the costs, & the award might be enforced as to the former, without reference to the latter.—*Re LLOYD & SPITTLE, Re ADDISON & SPITTLE* (1849), 6 *Dow. & L.* 531; 18 *L. J. Q. B.* 151; 13 *Jur.* 587.

**2219.** ——.]—An award directed a sum to be paid for costs, which the arbitrator had no power to do:—*Held*: this part of the award was bad, but, being separable, it did not vitiate the rest.—*ARMITAGE v. WALKER* (1855), 2 *K. & J.* 211; 26 *L. T. O. S.* 182; 20 *J. P.* 53; 2 *Jur. N. S.* 13; 69 *E. R.* 756.

*Annotations*:—*Mentd.* *Callaghan v. Dolwin* (1869), *L. R.* 4 *C. P.* 288; *Walker v. General Mutual Bldg. Soc.* (1887), 36 *Ch. D.* 777, *C. A.*; *Davies v. Second Chatham Permanent Benefit Bldg. Soc.*, *Mackenzie v. Everton & West Derby Permanent Benefit Bldg. Soc.* (1889), 61 *L. T.* 680. *See also cases in Sect. 12, ante.*

**2220.** ——. *Waiver.*]—Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between attorney & client. But pltf., waiving his costs, & having only demanded the principal sum awarded, took his attachment for that sum.—*WHITEHEAD v. FIRTH* (1810), 12 *East*, 166; 104 *E. R.* 65.

#### *C. Power to award Solicitor and Client Costs.*

**2221. Submission by bond.**]—Where the submission to an award is by bond merely, the arbitrators may award costs between attorney & client.—*HARTNELL v. HILL* (1801), *For.* 73; 145 *E. R.* 1117.

**2222.** ——.]—Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between attorney & client.—*WHITEHEAD v. FIRTH* (1810), 12 *East*, 166; 104 *E. R.* 65.

**2223. Reference by order of Nisi Prius.**]—By an order of *Nisi Prius* referring a case to arbn., it was ordered "that all matters in difference between the parties, together with the costs of this action & reference, be referred to the award of, etc." The arbitrator having awarded that deft. should pay the costs of the action, & that such costs should be taxed as between attorney & client:—*Held*: the award was wrong, for the words of the reference clearly meant costs in a technical sense, which were legal costs, & so much of the award as directed the master to tax the costs as between attorney & client should be set aside.—*MARDER v. COX* (1774), 1 *Cowp.* 127; 98 *E. R.* 1003.

*Annotation*:—*Refd.* *Secombe v. Babb* (1840), 6 *M. & W.* 129.

**2224. Cause referred—Costs in discretion.**]—A cause & all matters in difference were referred to two arbitrators, the costs of the action, reference & award, & the costs incident thereto, to be in the discretion of the arbitrators. They awarded that deft. should pay pltf. £50 towards the costs of the cause & reference, & that pltf. should pay his own & deft.'s costs in the cause & reference, to be taxed as between attorney & client:—*Held*: the award was bad, inasmuch as the order to tax costs as between attorney & client was an excess of authority, & so connected with the rest of the award that it could not be rejected as surplusage.—*SECCOMBE (SECKHAM) v. BABB* (1840), 6 *M. & W.* 129; 8 *Dowl.* 167; 9 *L. J. Ex.* 65; 4 *Jur.* 90; 151 *E. R.* 351.

*Annotations*:—*Distd.* *Re Fearon & Flinn* (1869), *L. R.* 5 *C. P.* 34. *Mentd.* *Rowbotham v. Wilson* (1857), 8 *E. & B.* 123; *Selby v. Whitbread*, [1917] 1 *K. B.* 736.

**2225.** ——.]—A cause & all matters in difference were referred to an arbitrator, all costs to be in his discretion:—*Held*: he could not award costs as between attorney & client.—*STANNIFORTH v. RYALL* (1844), 3 *L. T. O. S.* 100.

**2226. Chancery suit—Costs in discretion.**]—An arbitrator had power in a reference in a suit in *Ch.* to award costs:—*Held*: he might give costs as between solr. & client.—*MORDUE v. PALMER* (1870), 6 *Ch. App.* 22; 40 *L. J. Ch.* 8; 23 *L. T.* 752; 35 *J. P.* 196; 19 *W. R.* 86, *L.J.J.*

*Annotations*:—*Folld.* *Andrews v. Barnes* (1888), 39 *Ch. D.* 133, *C. A.* *Mentd.* *Turner v. Collins* (1871), *L. R.* 12 *Eq.* 438; *Re Stringer & Riley*, [1901] 1 *K. B.* 105.

**2227. Submission under Agricultural Holdings Act, 1883 (c. 61).**]—An umpire under the above Act cannot, under s. 20, award costs as between solr. & client.—*Re GRIFFITHS & MORRIS*, [1895] 1 *Q. B.* 866; 64 *L. J. Q. B.* 386; 43 *W. R.* 652; 15 *R.* 301; *sub nom. Re AGRICULTURAL HOLDINGS ACT, 1883, GRIFFITHS v. MORRIS*, 72 *L. T.* 290; 59 *J. P.* 134; 11 *T. L. R.* 235.

**2228. Award in excess of authority—Remedy.**]—The master having taxed costs as between attorney & client, pursuant to an award, which taxation, it was suggested, was, in this respect, an excess of authority in the arbitrator, the ct. will not, on motion, review the taxation, the proper proceeding being to move to set the award aside.—*BARTLE v. MUSGRAVE* (1841), 5 *Jur.* 1061.

*Annotation*:—*Distd.* *Re Fearon & Flinn* (1869), *L. R.* 5 *C. P.* 34.



*Sect. 20.—Costs: Sub-sect. 1. D. (a).]**D. Effect of Statutory Provisions as to Costs.**(a) County Court Acts.*

**2229. Amount awarded is "recovered" within County Courts Act, 1850 (c. 61).]**—Pltf. & deft. residing more than twenty miles apart, an action was brought in the superior ct. for a sum less than £20. It was referred to the master, the costs to abide the event. The master awarded 9s. 6d. to pltf.:—*Held*: pltf. had "recovered" that sum within the above Act, & was entitled to his costs.—*WEBB v. SANDERSON* (1863), 2 H. & C. 984, n.; 2 New Rep. 331; 8 L. T. 464; 11 W. R. 786; 159 E. R. 408.

**2230. Cause referred—Costs to abide event.]**—Where a cause was referred before trial, the costs of the cause to abide the event, & the arbitrator awarded in pltf.'s favour £3:—*Held*: County Cts. Act, 1850 (c. 61), s. 11, did not apply, & pltf. was entitled to the costs of the cause.—*JONES v. JONES* (1860), 7 C. B. N. S. 832; 29 L. J. C. P. 151; 1 L. T. 373; 6 Jur. N. S. 826; 8 W. R. 243; 141 E. R. 1042.

*Annotations*:—*Distd.* *Robertson v. Sterne* (1862), 13 C. B. N. S. 248. *Distd. & Expld.* *Kelcey v. Stupples* (1862), 1 H. & C. 576; *Smith v. Edge* (1863), 2 H. & C. 659. *Overd.* *Fergusson v. Davison* (1882), 8 Q. B. D. 470, C. A. In *Cowell v. Amman Colliery Co.* (*infra*), the judges of the Ct. of Queen's Bench did what was the practice of the judges in such an event, that is to say, they consulted the judges of the other cts., & having done so they came to the conclusion that in such a case as the present pltf. was deprived of his costs, & the case of *Jones v. Jones* was wrongly decided. I quite agree, & therefore, *Jones v. Jones* is overruled (*BRETT, L.J.*). *Refd.* *Cowell v. Amman Colliery Co.* (1865), 6 B. & S. 333.

**2231.** .]—By an order made by consent, an action was referred to an arbitrator, "the costs of the action, reference, & award to abide the event." The arbitrator awarded a sum of £19 2s. 7d., upon which an order was made for judgment for pltf. for that sum, without costs:—*Held*: pltf. had recovered in the action by judgment a sum not exceeding £20, & he was deprived of his costs of the action by County Cts. Act, 1867 (c. 142), s. 5, unless he got a certificate or order for costs under that sect. *Jones v. Jones* (No. 2230, *ante*) *overd.*—*FERGUSON v. DAVISON* (1882), 8 Q. B. D. 470; 51 L. J. Q. B. 266; 46 L. T. 191; 30 W. R. 462.

*Annotations*:—*Refd.* *Hyde v. Beardsley* (1886), 18 Q. B. D. 244; *Street v. Street*, [1900] 2 Q. B. 57, C. A.

**2232. ——— Slander.]**—An action for slander was, after issue joined, referred by agreement to arbn., the costs of the cause to abide the event of the award. The arbitrator found for pltf., with 20s. damages:—*Held*: pltf. was entitled to costs.—*FREAN v. SARGENT* (1863), 2 H. & C. 293; 2 New Rep. 363; 32 L. J. Ex. 281; 8 L. T. 467; 11 W. R. 808; 159 E. R. 122.

*Annotations*:—*Expld.* *Smith v. Edge* (1863), 2 H. & C. 659. *Consd.* *Cowell v. Amman Colliery Co.* (1865), 6 B. & S. 333. *Folld.* *Forshaw v. De Witt* (1871), 40 L. J. Ex. 153.

**2233.** .]—After issue joined a cause was referred to arbn., the costs of the cause to abide the event of the award. The arbitrator found that pltf. had sustained damages by reason of the breaches of contract alleged in the declaration, to the amount of 20s., & ordered defts. to pay that amount to pltf.:—*Held*: pltf. was deprived of his costs by County Cts. Act, 1850 (c. 61), s. 11.—*COWELL v. AMMAN (ABERDARE) COLLIERY CO., LTD.* (1865), 6 B. & S. 333; 6 New Rep. 254; 34 L. J. Q. B. 161; 12 L. T. 451; 30 J. P. 710; 11 Jur. N. S. 687; 13 W. R. 715; 122 E. R. 1218.

*Annotations*:—*Folld.* *Moore v. Watson* (1867), L. R. 2 C. P. 314. *Distd.* *Forshaw v. De Wette* (1871), L. R. 6 Exch. 200. *Folld.* *Neale v. Clarke* (1879), 4 Ex. D. 286. *Apprvd.*

*Fergusson v. Davison* (1882), 8 Q. B. D. 470. *Refd.* *Galatti v. Wakefield* (1878), 48 L. J. Q. B. 70, C. A.; *Hyde v. Beardsley* (1886), 18 Q. B. D. 244.

**2234. ———.]**—An action of contract was compulsorily referred to a master under C. L. P. Act, 1854, s. 3, & it was ordered that the costs of the cause should abide the event, & that the costs of the reference should be in the discretion of the master. The master awarded to pltf. a sum less than £20, & directed deft. to pay the costs of the reference:—*Held*: pltf. was not entitled to these costs, for they could only be recovered upon the judgment entered on the award, & (the judgment being for a sum not exceeding £20) County Cts. Act, 1850 (c. 61), s. 11, deprived pltf. of costs. *MOORE v. WATSON* (1867), L. R. 2 C. P. 314; L. J. C. P. 122; 15 L. T. 662; 15 W. R. 429.

*Annotations*:—*Expld. & Distd.* *Forshaw v. De Wette* (1871), L. R. 6 Exch. 200. *Distd.* *Parsons v. Tinling* (1877), 2 C. P. D. 119; *Bedwell v. Wood* (1877), 2 Q. B. D. 626. *Distd. & Dbtd.* *Galatti v. Wakefield* (1878), 4 Ex. D. 249, C. A. *Moore v. Watson* is quite distinguishable from the case before us; but I desire to add that, as at present advised, I do not agree with the decision (*BRAMWELL, L.J.*). *Consd.* *Neale v. Clarke* (1879), 4 Ex. D. 286. *Expld. & Distd.* *Fergusson v. Davison* (1882), 8 Q. B. D. 470, C. A. *N.F. Street v. Street*, [1900] 2 Q. B. 57, C. A. I disagree, with all respect to the distinguished judges who decided *Moore v. Watson*, with the view taken by them in that case, & agree with that expressed by *Bramwell, L.J.* in *Galatti v. Wakefield* (1878), 4 Ex. D. 249, C. A. (*ROMER, L.J.*).

**2235. ——— Defendant added after part of claim paid.]**—Pltf. sued L. for £365 for goods sold & delivered, & on the day after the writ was issued L. paid pltf. £319, which he accepted on account of his claim. After declaration L. pleaded in abatement the non-joinder of H., whereupon pltf. amended the writ & declaration under C. L. P. Act, 1852, s. 38, by adding the name of H. as joint contractor. Both defts. pleaded never indebted, & also a plea that after the writ in the action had been issued against deft. L., & before the action was commenced against the other deft. by amendment pursuant to the above sect., defts. satisfied pltf.'s claim by payment. The cause having been referred to an arbitrator, costs to abide the event, with power to the arbitrator to certify as a judge at *Nisi Prius*, the arbitrator by his award found that defts. were indebted to pltf. in £322, & that defts. did, as in their plea alleged, satisfy £319, part of such debt, by payment, & the arbitrator directed that the verdict should be entered for pltf. for £3, being the difference between the two sums of £322 & £319, & he gave no certificate as to costs:—*Held*: the only action in which pltf. recovered being the action against both defts., he was deprived of his costs by County Cts. Act, 1867 (c. 142), s. 5, inasmuch as he recovered in that action less than £20, & he was not allowed to tax his costs of the cause against deft. L. alone.—*BALMAIN v. LICKFOLD* (1875), L. R. 10 C. P. 203; 44 L. J. C. P. 94; 32 L. T. 67; 23 W. R. 310.

**2236. ——— Costs of reference & award in discretion.]**—When an action is referred by consent to arbn., upon the terms that the costs of the cause shall abide the event, & the costs of the award shall be in the discretion of the arbitrator, if the arbitrator decides in favour of pltf., he may lawfully direct deft. to pay the costs of the reference & award, although pltf. may be deprived of the costs of the cause under County Cts. Act, 1867, s. 5.—*GALATTI v. WAKEFIELD* (1878), 4 Ex. D. 249; 48 L. J. Q. B. 70; 40 L. T. 30, C. A.

*Annotation*:—*Folld.* *Street v. Street*, [1900] 2 Q. B. 57, C. A.

**2237. ——— Rules of Supreme Court, Ord. 65, r. 12.]**—An action on a partnership account was by consent referred to an arbitrator. The terms of reference were that "all matters in difference between the parties in the action" were to be referred, & that "the costs of the action" should abide the award. Subsequent to this order of



reference, the parties agreed to submit to the arbitrator a further matter of account outside the action. The arbitrator awarded £40 to pltf. on his claim, & found that a further sum of £14 2s. was due to him on the subsequent account:—*Held*: pltf. had recovered “in the action” less than £50, & came within the above rule.—*EMMETT & CO. v. HEYES* (1887), 36 W. R. 237.

**2238. ——— Costs of reference & award in discretion—Costs of reference on High Court scale.]**

—An action of contract was referred by order of a district registrar, on the ground that it involved matters of account, to an arbitrator agreed on by the parties, & the order of reference provided that the costs of the action should abide the event of the award, & the costs of the reference & award should be in the discretion of the arbitrator. The arbitrator awarded that an amount less than £50 was due from deft. to pltf., & that deft. should pay to pltf. his costs of the reference & award:—*Held*: pltf. was entitled to have the costs of the reference taxed on the High Ct. scale.—*STREET v. STREET*, [1900] 2 Q. B. 57; 69 L. J. Q. B. 574; 82 L. T. 648; 48 W. R. 450; 16 T. L. R. 307, C. A.

*Annotation*:—*Appld.* *Haycocks v. Mulholland*, [1904] 1 K. B. 145.

**2239. Cause & all matters referred—Costs to abide event.]**—A cause & all matters in difference were referred, & it was ordered that “the costs of the cause should abide the event of the reference, & that the costs of the reference & award should be in the discretion of the arbitrator.” As to the cause, the arbitrator awarded a verdict for pltf. for £259 1s.; as to the other matters in difference, he found that £242 13s. 10d. was due to deft. from pltf., & directed that this sum should be deducted from the damages & costs recoverable in the action, & that deft. should pay pltf. the balance:—*Held*: although the arbitrator had decided something in favour of each party, & although the difference between the two sums awarded did not exceed £20, the “event of the reference” was such as to entitle pltf. to his costs of the cause, & he was not deprived of them by County Cts. Act, 1867 (c. 142), s. 5.—*STEVENS v. CHAPMAN* (1871), L. R. 6 Exch. 213; 40 L. J. Ex. 123; 24 L. T. 578; 19 W. R. 958.

**2240. Reference to master—Rules of Supreme Court, Ord. 14, r. 7—Costs of action—County Courts Act, 1888 (c. 43), governs costs of action but not costs of reference.]**—Upon an application for judgment under Ord. 14 the action was referred to a master under r. 7, & he made an order, after the expiration of twenty-one days from service of the writ, that pltf. be at liberty to sign final judgment for a sum exceeding £20, but less than £50, with costs of the action, which he fixed at a specific sum, & with the costs of the reference & award to be taxed on the High Ct. scale, & he certified that the action was fit to be brought in the High Ct.:—*Held*: (1) as there had been no order extending the time—twenty-one days from the service of the writ—within which, by the proviso to County Cts. Act, 1888, s. 116, a pltf. who obtained judgment under Ord. 14 for upwards of £20 was entitled to costs on the High Ct. scale, pltf. was only entitled to costs of the action on the county ct. scale; (2) with respect to costs of the reference & award, the master must be deemed to be an arbitrator with the same power as an ordinary arbitrator had of awarding & certifying for costs, & his order in that respect was right.—*HAYCOCKS, LTD. v. MULHOLLAND*, [1904] 1 K. B. 145; 73 L. J. K. B. 125; 90 L. T. 88; 52 W. R. 400.

**2241. Reference to official referee — Rules of Supreme Court, Ord. 14, r. 1 — County Courts Act, 1888 (c. 43), s. 116, governs costs.]**—Pltf. brought an action in the High Ct. for £47 17s., the balance of an account for goods sold. Within

twenty-one days after service of the writ, pltf. took out a summons under the above rule, upon which the master made an order giving him liberty to sign judgment for £45, & giving deft. leave to defend as to the balance. Deft. paid the £45, & the matter was referred to an official referee, who found for pltf. for the balance claimed. Mathew, J. having ordered that pltf.’s costs should be taxed on the High Ct. scale up to the date of the order under Ord. 14, & on the county ct. scale after that date:—*Held*: such order was wrong, & pltf. was entitled under the proviso to the above sect. to have the whole of his costs taxed upon the High Ct. scale.—*BARKER v. HEMPSTEAD* (1889), 23 Q. B. D. 8; 60 L. T. 640; 37 W. R. 685; 5 T. L. R. 442.

**2242. Claim & counterclaim referred—Costs to follow event.]**—In an action for work & labour done & material supplied by pltf., defts. counterclaimed loss from breach of contract by pltf., & the cause & counterclaim were referred to arbn., costs of the cause & counterclaim to follow the event, costs of the reference & award to be in the discretion of the arbitrator. The arbitrator awarded that pltf. was entitled to recover £371 in respect of his claim, & that defts. were entitled to recover £375 in respect of their counterclaim, & he awarded that pltf. should pay to defts. the balance of £4, & that pltf. should bear the costs of the reference & award. The district registrar ordered judgment to be signed for defts. for the sum of £4, & for costs of the cause, counterclaim, reference, & award to be taxed:—*Held*: so much of the registrar’s order as related to costs must be struck out & the following inserted instead thereof: “the costs of & relating to pltf.’s claim & the proof thereof to be paid by defts., & the costs of & relating to defts.’ counterclaim & the proof thereof to be paid by pltf.”—*COLE, MARCHANT & CO. v. FIRTH* (1879), 4 Ex. D. 301; 40 L. T. 851.

*Annotations*:—*Folld.* *Neale v. Clarke* (1879), 4 Ex. D. 286; *Stooke v. Taylor* (1880), 5 Q. B. D. 569. *Refd.* *Myers v.* (1880), 49 L. J. Q. B. 266, C. A.

**2243. ——— Costs of issues.]**—Pltfs. claimed on a balance of accounts a sum of money exceeding £50. Defts. denied their indebtedness, & pleaded by way of set-off & counterclaim that pltfs. were indebted to them for money advanced & money due for work done & goods sold & delivered, & they claimed a balance on the accounts in their favour exceeding £50. The cause was referred to an arbitrator, costs to abide the event. The arbitrator found that defts. were indebted to pltfs. in a sum exceeding £50, & that pltfs. were indebted in like manner to defts. in a sum exceeding £50, but that a balance was due to pltfs. on the whole account of £11 10s. 3d.:—*Held*: (1) pltfs. & defts. were each entitled to the costs of the issues on which they had succeeded, on the ground that the relief sought could not be given in a county ct. (*KELLY, C.B.*); (2) pltfs. were entitled to their general costs of action (*HAWKINS, J.*).—*NEALE v. CLARKE* (1879), 4 Ex. D. 286; 41 L. T. 438.

*Annotations*:—*Consd.* *Stooke v. Taylor* (1880), 5 Q. B. D. 569; *Baines v. Bromley* (1880), 6 Q. B. D. 197.

**2244. ———.]**—An action was brought claiming £10 for rent, £100 as damages for breach of covenant in a lease of premises, & £30 for conversion of goods. Deft. set up a counterclaim for £100 damages for breach of covenant by pltf., & £15 for money due for the use & occupation of other premises. The action was referred to an arbitrator by an order made by consent upon the terms that “the costs of the action should abide the event of the award, & that the costs of the reference & award should be in the discretion of the arbitrator.” The arbitrator found that pltf. was entitled to £10 for rent, that deft. had broken

*Sect. 20.—Costs: Sub-sect. 1, D. (a), (b) & (c).]*

his covenant in the lease & had been guilty of the conversion charged, & he awarded that pltf. was entitled to recover in respect of such breach of covenant & conversion the sum of £25, making together £35 awarded to pltf.; that pltf. had broken his covenant, & that deft. was entitled to recover in respect of that breach £20; & upon the whole matter he found that pltf. was entitled to recover in the action £15 & no more:—*Held*: the provision in the order of reference as to costs did not alter the rights of the parties, & upon the true construction of Jud. Act, 1873 (c. 66), s. 67, pltf. was entitled to the costs on his claim, & deft. to his costs on the counterclaim.—*STOOKE v. TAYLOR* (1880), 5 Q. B. D. 569; 49 L. J. Q. B. 857; 43 L. T. 200; 44 J. P. 748; 29 W. R. 49.

*Annotations*:—*Consd.* Baines v. Bromley (1880), 6 Q. B. D. 197. *Follid.* Lund v. Campbell (1885), 14 Q. B. D. 821, C. A. *Refd.* Pearson v. Ripley (1884), 50 L. T. 629; Sharpe v. Haggith (1912), 106 L. T. 13, C. A. *Mentd.* Beddall v. Maitland (1881), 17 Ch. D. 174; Toke v. Andrews (1882), 8 Q. B. D. 428; Tagart v. Marcus (1888), 36 W. R. 469.

**2245.** ———. ]—In an action of contract deft. counterclaimed. By the award of a special referee it was found that pltf. were entitled on their claim to £13 12s. 6d., & that deft. was entitled on the counterclaim to £63 8s. 6d.:—*Held*: by reason of County Cts. Act, 1867 (c. 142), s. 5, pltf. were not entitled to the costs of the issues found for them on the claim.—*AHRBECKER v. FROST* (1886), 17 Q. B. D. 606; 55 L. J. Q. B. 477; 55 L. T. 264; 34 W. R. 789.

**2246. Verdict subject to reference—Costs to abide event—Set-off—Balance only recovered.]**—Where a cause, involving matters of account, is referred & a verdict taken subject to a reference, costs of the cause to abide the event, the arbitrator to have power over the verdict, pltf.'s right to costs depends on whether the sum awarded would have entitled him to costs if the jury had found a verdict for that sum.

To a declaration on the money counts deft. pleaded, as to part, never indebted, as to other part, set-off, & to the residue, payment of £14 5s. into ct. At the trial a verdict was entered for pltf. subject to a reference, power being reserved to the arbitrator to direct for whom & what amount the verdict should be finally entered, costs of the cause to abide the event of the award. The arbitrator by his award directed that the sum which he thereby found to be due to deft. on the set-off should be deducted from the sum which he found to be due to pltf. on the general issue, & that the balance (£2 16s. 1½d.) should be paid by deft. to pltf.:—*Held*: County Cts. Act, 1850 (c. 61), s. 11, operated to deprive pltf. of his costs.—*SMITH v. EDGE* (1863), 2 H. & C. 659; 3 New Rep. 158; 33 L. J. Ex. 9; 9 L. T. 445; 9 Jur. N. S. 1300; 12 W. R. 133; 159 E. R. 273.

*Annotations*:—*Apld.* Cowell v. Amman Colliery Co. (1865), 6 B. & S. 333. *Consd.* Hyde v. Beardsley (1886), 18 Q. B. D. 244. *Refd.* Galatti v. Wakefield (1878), 48 L. J. Q. B. 70, C. A.; Fergusson v. Davison (1882), 46 L. T. 191, C. A.

**2247. ——— Costs of cause—Costs of reference & award.]**—In an action of trover & of debt a verdict was taken for pltf. for the damages claimed, subject to a reference, “the costs of the cause to abide the event of the award, & the costs

of the reference & award to be in the discretion of the arbitrator.” The arbitrator awarded that the verdict should be entered for £2 10s. as to the claim in trover, & for £7 12s. 8d. as to the claim in debt, & directed deft. to pay the costs of the reference & award. He had the power of certifying for costs, but gave no certificate. The taxing officer declined to tax pltf. either his costs of the cause, or of the reference & award. On a rule directing him to tax both the costs of the cause & of the reference & award:—*Held*: pltf. was not entitled to the costs of the cause, but he was entitled to those of the reference & award, although he had recovered in the cause sums not exceeding £10 in tort, & £20 in contract.—*FORSHAW v. DE WETTE* (WITT) (1871), L. R. 6 Exch. 200; 40 L. J. Ex. 153; 24 L. T. 397; 19 W. R. 777.

*Annotations*:—*Consd.* Galatti v. Wakefield (1878), 4 Ex. D. 249, C. A.; Street v. Street, (1900) 2 Q. B. 57, C. A. *Mentd.* Fergusson v. Davison (1882), 51 L. J. Q. B. 266, C. A.

**2248. Trespass to realty.]**—An action of trespass, in which questions of title were involved, was commenced before Aug. 20, 1867, & a verdict was entered also before that date for pltf., subject to a reference. The award was made after Jan. 1, 1868, when County Cts. Act, 1867 (c. 142), came into operation, & the arbitrator directed the verdict to stand for pltf. for £5. Subsequently pltf. signed judgment, & obtained a judge's order for costs, & the master thereupon taxed his costs. On a motion to review the master's taxation:—*Held*: (1) Stat. of Gloucester (6 Edw. 1, c. 1) had not been repealed as to the classes of cases in which, under the former County Ct. Acts, pltf. was entitled to his costs on obtaining a judge's order, or fulfilling the other conditions contained in those Acts, but had as to those in which pltf. could in no way obtain his costs; (2) the effect of County Cts. Act, 1867, was to remove all such conditions in the former classes of cases without imposing any fresh ones as to actions commenced before the passing of that Act; (3) pltf. was entitled to his costs under Stat. of Gloucester, independently of the judge's order.—*MOUNT v. TAYLOR* (1868), L. R. 3 C. P. 645; 37 L. J. C. P. 325; 18 L. T. 476; 16 W. R. 866.

*Annotations*:—*Expld.* Ings v. L. & S. W. Ry. Co. (1868), 38 L. J. C. P. 8. *Mount v. Taylor* was commenced before County Cts. Act, 1867 (c. 142), was passed (BOVILL, C.J.). *Consd.* Levi v. Sanderson (1869), L. R. 4 Q. B. 330; Mirfin v. Attwood (1869), L. R. 4 Q. B. 333.

**2249. Application for costs—Time for.]**—After issue joined in an action of *assumpsit* commenced in the Ct. of Queen's Bench, the case was referred &, on June 9, 1852, an award was given for pltf. for less than £20. The parties dwelt more than twenty miles apart. A summons was afterwards taken out to show cause why pltf. should not have his costs, under County Cts. Act, 1850 (c. 61), s. 13:—*Held*: not too late.—*MORRIS v. BOSWORTH* (1853), 2 E. & B. 213; 22 L. J. Q. B. 276; 21 L. T. O. S. 115; 17 Jur. 438; 1 C. L. R. 438.

*Annotations*:—*Distd.* Cook v. Montague (1873), 21 W. R. 670. *Refd.* Reid v. Gardner (1853), 1 C. L. R. 469.

*(b) Other Statutory Provisions.*

**2250. Costs to abide event—Legal event—Subject to statutory provisions.]**—*SWINGLEHURST v. ALTHAM*, No. 2312, *post*.

**PART IV. SECT. 20, SUB-SECT. 1.—D. (b).**

*c. Effect of statutory provisions—C. S. J. C. (c. 54), s. 26.]*—In an award under the above Act arbitrators have no power to award as to costs. Where they do so that part of the award may be set aside.—*Re NORTHUMBERLAND &*

*DURHAM UNITED COUNTIES & COBBOURG TOWN* (1860), 20 U. C. R. 283.—*CAN.*

*d. ——— Consolidated Railway Act, 1879.]*—A co., having taken certain lands, made an offer to the owner in payment of same, which offer was not accepted, & the matter was referred to arbn. under the above Act. The co.

executed an agreement for a crossing over the land, in addition to the money payment. The amount of the award was less than the sum offered by the co., & both parties claimed to be entitled to the costs of the arbn., the co. because the award was less than their offer, & the owner because the value of the crossing was included in the sum



2251. No. 2313, *post*.

.]—WARD *v.* MALLINDER,

2252. ——— No. 2314, *post*.

.]—WILLIS *v.* OSBORNE,

**2253. Effect of statutory provisions—Costs to abide event.]**—An action on the case for diverting a watercourse was, after issues joined on pleas of not guilty, & denying pltf.'s right to & user of the water, referred by a judge's order to arbn., by which the costs of the suit were to abide the event of the award, but no power was given to the arbitrator to certify under 3 & 4 Vict. c. 24, s. 2. The arbitrator found all the issues for pltf., & assessed the damages on the first issue at 6*d.*:—*Held*: pltf. was entitled to full costs. — GRIFFITHS (GRIFFITH) *v.* THOMAS & EVANS (1846), 4 Dow. & L. 109; 15 L. J. Q. B. 336; 6 L. T. O. S. 86; 11 Jur. 17.

*Annotations*:—*Distd.* Cooper *v.* Pegg (1855), 16 C. l. 264. *Consd.* Wiggins *v.* Cook (1859), 6 C. B. N. S. 784. *Distd.* Kelcey *v.* Stupplos (1862), 1 H. & C. 576.

**2254. ———.]**—The declaration contained seven counts, one of which was a count in trover for two deeds & two authorities for the delivery of deeds. By an order of *Nisi Prius*, it was agreed that the record should be withdrawn, & the cause & all matters in difference be referred to an arbitrator, who was to have "all the powers as to certifying of a judge at *Nisi Prius*," the costs of the cause to abide the event of the award, & the costs of the reference & award to be in the discretion of the arbitrator. The arbitrator made his award in favour of pltf. as to the two authorities referred to in the count in trover, with one farthing damages, & found all the other issues for deft.; & he gave deft. the costs of the reference & award:—*Held*: as the event of the award was in favour of pltf., he was entitled to the costs of the cause, 3 & 4 Vict. c. 24, s. 2, being inapplicable, inasmuch as there was no verdict.—WIGENS (WIGANS) *v.* COOK (1859), 6 C. B. N. S. 784; 28 L. J. C. P. 312; 33 L. T. O. S. 224; 6 Jur. N. S. 72; 141 E. R. 659.

*Annotations*:—*Consd. & Apld.* Jones *v.* Jones (1860), 7 C. B. N. S. 832. *Distd.* Robertson *v.* Sterne (1862), 13 C. B. N. S. 248. *Refd.* Smith *v.* Edge (1863), 2 H. & C. 659.

**2255. ———.]**—A compulsory order of reference made by a judge, under C. L. P. Act, 1854, & containing a term that the costs of the cause to abide the event, does not prevent the operation of London Small Debts Act, 1852 (c. lxxvii.), which by s. 120 disentitles pltf., in such case, to costs, for pltf. having had, in an action of contract, awarded to him, upon a compulsory reference, a sum not exceeding £20, is held to be a pltf. who "recovers a sum not exceeding £20," within London Small Debts Act, 1852, & thereby becomes liable to be deprived of his costs by virtue of it.—ROBERTSON *v.*

STERNE (1862), 13 C. B. N. S. 248; 31 L. J. C. P. 362; 7 L. T. 462; 9 Jur. N. S. 332; 11 W. R. 94; 143 E. R. 99.

*Annotations*:—*Apld.* Parr *v.* Lillcrap (1862), 1 H. & C. 615. We are deciding in accordance with the opinion of the Ct. of Common Pleas in *Robertson v. Sterne*, which is at variance with that of Coleridge, J. in *Chambers v. Wiles* (1855), 24 L. J. Q. B. 267; but the former case was decided after full argument & upon consideration, while the latter was the decision of a single judge in refusing a rule *nisi* (POLLOCK, C.B.); *Boulding v. Tyler* (1863), 32 L. J. Q. B. 85. *Consd.* Smith *v.* Edge (1863), 2 H. & C. 659; *Cowell v. Amman Colliery Co.* (1865), 6 B. & S. 333; *Moore v. Watson* (1867), L. R. 2 C. P. 314. *Refd.* Frean *v.* Sargent (1863), 2 H. & C. 293.

**2256. ——— Verdict subject to reference—Statutory limitation prevails.]**—The first count charged defts. with damaging a party-wall by excavating it, & overloading it. Plea, as to the overloading, not guilty, & as to the excavating, payment of £30 into ct. Replication, damages *ultra*. At the trial, the verdict was entered for pltf., damages £2,000, costs 40*s.*, subject to the award of an arbitrator, to whom the cause was referred on the usual terms, but without power to certify for costs under 3 & 4 Vict. c. 24, s. 2, & he directed the verdict to be entered for pltf. on the first issue, with 20*s.* damages, & for deft. on the second:—*Held*: pltf. had recovered by verdict less than 40*s.* damages, & 3 & 4 Vict. c. 24, s. 2, applied, & deprived him of costs.—REID *v.* ASHBY (1853), 13 C. B. 897; 22 L. J. C. P. 215; 17 Jur. 859; 1 C. L. R. 451; 138 E. R. 1456.

**2257. ——— Applies to costs of cause—Award not equivalent to certificate.]**—By an order of reference in an action for an injury to pltf.'s reversion by making a drain into his premises, a verdict was directed to be entered for pltf., claim £500, costs 40*s.*, subject to the award of a barrister, the costs of the suit to abide the event of the award, & the costs of the reference & award to be in the discretion of the arbitrator. He found all the issues in the action in favour of pltf., except the first, & that he found partly for pltf. & partly for deft., & he further directed that the verdict entered for pltf. should stand, but that the damages should be reduced to one farthing, & he ordered deft. to pay pltf. £5:—*Held*: pltf. was not, in the absence of a certificate under 3 & 4 Vict. c. 24, s. 2, entitled to costs of the cause.—COOPER *v.* PEGG (1855), 16 C. B. 264; 24 L. J. C. P. 167; 25 L. T. O. S. 100; 3 C. L. R. 1261; 139 E. R. 758.

*Annotations*:—*Folld.* Smith *v.* Edge (1863), 9 L. T. 445. *Refd.* Wiggins *v.* Cook (1859), 6 C. B. N. S. 784.

#### (c) Certificates for costs.

**2258. Power to certify—Court or judge.]**—Pltf. sought to recover £119 on contract. Deft. paid into ct. £73, pleading *non assumpsit* & a set-off as to

awarded, which would make it greater than the offer:—*Held*: in the circumstances neither party was entitled to costs.—ONTARIO & QUEBEC RY. CO. *v.* PHILBRICK (1886), 12 S. C. R. 288.—CAN.

**e. ——— Railway Act of Canada.]**—The award of costs by arbitrators under the above Act does not invalidate the award where it simply follows the rule established by the Act itself.—PONTIAC PACIFIC JUNCTION RY. CO. & OTTAWA & GATINEAU RY. CO. *v.* COMMUNITY GENERAL HOSPITAL, ALMSHOUSE, & SEMINARY OF LEARNING OF THE SISTERS OF CHARITY AT OTTAWA (1901), Q. R. 20 S. C. 567.—CAN.

**f. ——— Appeal.]**—The costs of an appeal from an award of arbitrators are not governed by the provision as to the costs of the arbn. contained in s. 199 of the above Act, but by the rules relating to costs of appeals generally.—VANCOUVER, WESTMINSTER & YUKON RY. CO. *v.* SAM KEE (1906), 12 B. C. R. 1.—CAN.

**g. ——— Municipal Act, 1892, s. 385 et seq.]**—Where upon an arbn. under the above Act, the arbitrators made their award & directed that the costs should be paid by the land-owners, but did not fix the amount nor direct on what scale they should be taxed, as required by s. 399:—*Held*: upon a proper application the award would be referred back to the arbitrators to complete it in the matter of costs.—RE PRESTON & KLOTZ VILLAGE (1894), 16 P. R. 318.—CAN.

**h. ——— Municipal Act, R. S. O. (c. 223), s. 460.]**—An arbitrator under the above Act is given power by s. 460 "to award the payment by any of the parties to the other of the costs of the arbn. or of any portion thereof":—*Held*: the discretion thus given must be a legal discretion.—RE PATTULLO & ORANGEVILLE (1899), 19 C. L. T. 388; 31 O. R. 192.—CAN.

**k. ——— Municipal Arbitration Act, R. S. O., 1897 (c. 227).]**—Where a submission to arbn. under the above Act is

silent as to costs, s. 2 (6) of the Act applies, & empowers the arbitrator to deal with them.—DALTON *v.* TORONTO (1906), 8 O. W. R. 154; 12 O. L. R. 582.—CAN.

**l. ——— Tolls Road Expropriation Acts.]**—*Held*: under the above Acts where a toll road was expropriated, the county was a necessary party to the arbn. proceedings & was liable to the owners of the road for the costs thereof in case the road was not taken & paid for within one year.—BROCKVILLE & PRESCOTT RD. CO. *v.* LEEDS & GRENVILLE COUNTIES OF (1913), 25 O. W. R. 371; 5 O. W. N. 362.—CAN.

#### PART IV. SECT. 20, SUB-SECT. 1.—D. (c).

**2258 l. Power to certify—Court or judge.]**—A case was referred at trial & the award was to be entered as the verdict of the jury, & was found for deft. on the first count, & for pltf. on the second count:—*Held*: upon a motion for a certificate, in consequence of the



**Sect. 20.—Costs: Sub-sect. 1, D. (c); sub-sect. 2.]**

the residue. By an order of *Nisi Prius* the cause was referred. The arbitrator directed a verdict to be entered for pltf. for £8 5s. 8d.:—*Held*: the judge had power to certify that the cause was a fit one to be tried at *Nisi Prius*, so as to entitle pltf. to have his costs taxed upon the higher scale.

—**BROGGREF (BROGREFFE) v. HAWKE** (1837), 3 Bing. N. C. 880; 5 Scott, 148; 3 Hodg. 223; 6 L. J. C. P. 303; 132 E. R. 649.

**Annotation:—Consd. Astley v. Jay** (1839), 8 L. J. Q. B. 104.

**2259.** —.].—A cause was referred at *Nisi Prius*, & the order of reference contained a clause enabling the ct. to refer it back to the arbitrator. The arbitrator certified that less than £20 was due, & expressed an opinion that the cause was a proper one to be tried in the superior ct.:—*Held*: the ct. had no power to refer it back to the arbitrator to certify as to the propriety of its being tried in the superior ct., but the proper course was to lay the arbitrator's certificate before the judge at *Nisi Prius* who would then exercise his discretion.—**WEBBER v. LEE** (1844), 1 Dow. & L. 584; 2 L. T. O. S. 349.

**2260.** —.].—The ct., or a judge at chambers, has the power of certifying to give costs under County Cts. Act, 1850 (c. 61), s. 13, notwithstanding the power of certifying as a judge at *Nisi Prius* to give costs under s. 12 of that Act has, by an order of reference, been given to an arbitrator, who has failed to certify; the certificate under s. 13 being one which a judge at chambers or the ct. has power to give, & different from that which a judge at *Nisi Prius* is empowered to give under s. 12.—**SHARP v. EVELEIGH** (1851), 20 L. J. Ex. 282; 17 L. T. O. S. 246.

**2261.** —.].—At the trial of a cause, in which the county cts. had concurrent jurisdiction, a verdict was by consent entered for pltf. on three counts, with 40s. damages, subject to a reference of the cause to arbn., the costs to abide the event, & with power to the arbitrator to certify for costs. The arbitrator, without altering the amount of damages, left the verdict standing for pltf. on two only of the counts & certified for the costs of a special jury:—*Held*: notwithstanding there was no certificate that the cause was proper to be brought in a superior ct., pltf. should recover his costs.—**MUCKLESTONE v. GRIFFITH** (1853), 2 W. R. 104.

**2262.** —.].—**Discretion.**—Pltf. sought to recover £375 in an action for goods sold & delivered, in which there was a plea of set-off. By an order of *Nisi Prius*, the cause was referred with the same power to the arbitrator to certify as a judge would have had. The arbitrator found a balance due to pltf. of £1 5s., for which sum he gave his award. In these circumstances, pltf., finding that he was deprived of costs by County Cts. Act, 1850 (c. 61), s. 11, applied at chambers for, & obtained, an order under County Cts. Act, 1852 (c. 54), s. 4:—*Held*: it was discretionary with the ct. or a judge to make an order under the above Act of 1852, where the sum sought to be recovered originally exceeded £50 & had been reduced by a set-off below £20, & the order at chambers must stand.—

reference, the ct. had jurisdiction to grant the certificate, & it was a proper case for so doing.—**BENNETT v. SCOTT** (1862), 13 I. C. L. R. 467.—**IR.**

**2258 ii.** —.].—Where a cause is referred to arbn. by an order of *Nisi Prius*, the presiding judge has power to certify for costs under 30 Vict. c. 10, s. 21.—**PATTON v. HARDING** (1871), N. B. Dig. 198 (13).—**CAN.**

**2258 iii.** —.].—**When exercised.**—

An action of *assumpsit* for work & labour was referred to arbitrators, who awarded pltf. a sum less than \$200. On an application for a certificate for costs under Consol. Stat. (c. 51), s. 50:—*Held*: if upon the whole evidence there appeared reasonable ground for bringing the action in that ct., the amount of the award was not conclusive as to the amount of the demand, though the evidence as to the amount was conflicting, & a certificate should be granted.—

**RUMLEY (RUMELY) v. IRWIN** (1856), 18 C. B. 312; 25 L. J. C. P. 205 n.; 27 L. T. O. S. 69; 2 Jur. N. S. 450 n.; 139 E. R. 1390.

**2263.** —.].—**Arbitrator's opinion.**—An action for trespass to land was referred to an arbitrator with the powers of a judge at *Nisi Prius*, costs of the cause to abide the event. He awarded \$2 14s. to pltf. as damages, but did not certify for pltf.'s costs in the action:—*Held*: (1) the ct. had power, under County Cts. Act, 1867 (c. 142), to allow pltf. his costs; (2) the bare statement by the arbitrator, on a subsequent *ex p.* application, that he thought pltf. ought to have his costs was not sufficient by itself to induce the ct. to allow such costs, but in the circumstances the award ought to be sent back to the arbitrator that he might have an opportunity of certifying for costs.—**HARLAND v. NEWCASTLE-ON-TYNE CORPN.** (1869), L. R. 5 Q. B. 47; 39 L. J. Q. B. 67; 18 W. R. 165.

**2264.** —.].—**Judge's death.**—A certificate for full costs, where a cause is tried before a judge & less than £20 recovered, must be given by the judge himself, & if, from an unavoidable cause, as the judge's death, it cannot be obtained from him, the ct. cannot direct it to be entered on the *poslea*, although the cause was referred at *Nisi Prius* to an arbitrator, who, on giving his decision, stated that it was fit to be tried by a judge.—**ASTLEY v. JOY** (1839), 9 Ad. & El. 702; 1 Per. & Dav. 460; 2 Will. Woll. & H. 85; 8 L. J. Q. B. 104.

**2265.** —.].—**Rules of Supreme Court, Ord. 65, r. 12.**—Where an action of contract has been referred to arbn. under an order by consent providing that the costs of the action shall abide the event of the award, & the sum awarded to pltf. does not exceed £50, a judge at chambers has power under the above rule to order that the costs shall be taxed upon the scale applicable to actions of contract where the sum recovered exceeds £50.—**HYDE v. BEARDSLEY** (1886), 18 Q. B. D. 244; 56 L. J. Q. B. 81; 57 L. T. 802; 35 W. R. 140.

**2266.** —.].—**Master.**—**HAYCOCKS LTD. v. MULHOLLAND**, No. 2240, *ante*.

**2267.** —.].—**Arbitrator—Order giving power.**—Where an action of trespass was referred by order of *Nisi Prius*, which empowered the arbitrator to amend the pleadings, & to certify for costs, in the same manner as a judge at *Nisi Prius*, & the arbitrator awarded a verdict for pltf. with nominal damages, & certified in his award that the action was brought to try a right, etc.:—*Held*: he had power to do so, & pltf. was entitled thereon to his full costs.—**SPAIN v. CADELL** (1841), 8 M. & W. 129; 9 Dowl. 745; 10 L. J. Ex. 313; 5 Jur. 322; 151 E. R. 978.

**Annotations:—Apld. Perry v. Dunn** (1843), 1 L. T. O. S. 337. **Refd. Wignens v. Cook** (1859), 28 L. J. C. P. 312; **Bedwell v. Wood** (1877), 2 Q. B. D. 626.

**2268.** —.].—A case at *Nisi Prius* was referred to an arbitrator, but without any power to certify that it was a fit case to be tried at *Nisi Prius*. He awarded to pltf. \$10. The master taxed the costs on the lower scale. Subsequent to the award, pltf. became a bkpt., & his attorney, with a view to prove against the estate, & with the assent of the assignees, moved the ct. for a rule that the master should tax the costs on the higher

**SMITH v. MORRISSEY** (1880), 20 N. B. R. 1.—**CAN.**

**2267 i.** —.].—**Arbitrator—Not after award.**—In an action for unliquidated damages, a verdict was taken subject to a reference, with power to the referee to certify. The referee reduced the damages & made his award without certifying:—*Held*: he had no power to certify afterwards.—**SMITH v. FORBES** (1862), 8 U. C. L. J. 72.—**CAN.**

scale:—*Held*: as this was the first instance of the kind, the master ought to use a liberal discretion in taxing the costs, but in future, attornies ought to take care that arbitrators had the same power as a judge of certifying that the cause was fit to be tried at *Nisi Prius*.—*WALLEN v. SMITH* (1839), 5 M. & W. 159; 2 Horn & H. 1; 3 Jur. 752; *sub nom.* *WALLER v. SMITH*, 8 L. J. Ex. 164.

2269. ———.]—An action in contract for £50 3s. having been referred at *Nisi Prius* to an arbitrator, he awarded pltf. £15 12s. 6d. & certified "that there was sufficient reason for bringing the action in this ct." On taxation, the master, following the practice of the masters of the Ct. of Exch., taxed on the "lower scale":—*Held*: such practice was good.—*SMITH v. HAILEY* (1872), 42 L. J. Ex. 5; 27 L. T. 426; 21 W. R. 76.

2270. ———.]—*After time for making award.*—In an action for a sum exceeding £20 deft. pleaded (*inter alia*) a tender of £23 5s. 8d. & payment into ct. of the sum tendered. The case was referred to arbn., the arbitrator to have the same powers as a judge at *Nisi Prius*. The arbitrator found for deft. upon the plea of tender, & for pltf. on the other pleas, & directed a verdict to be entered for him for the sum of £2 10s. 5d. beyond the amount paid into ct. At the taxation of pltf.'s costs it was contended for deft. that they should be taxed on the lower scale, but, upon its being suggested that the arbitrator would give his certificate for the higher scale, the taxation was postponed, & the arbitrator gave his certificate accordingly, but at the time of his doing so his time for making his award had expired. The costs were subsequently taxed upon the higher scale. On a motion for a review of the master's taxation, on the ground that the costs should have been taxed upon the lower scale, as pltf. recovered less than £20:—*Held*: the taxation upon the higher scale was correct.—*COOCH v. MALTBY* (1854), 23 L. J. Q. B. 305; 23 L. T. O. S. 179; 2 W. R. 557; 2 C. L. R. 871.

*Annotation*:—*Dbtd.* *James v. Vane* (1860), 2 E. & E. 883.

2271. ———.]—*Omission to certify—Reference back.*—An arbitrator, to whom an action for a claim above £20 had been referred as a matter of account, awarded to pltf. a sum less than £20, & certified that the action was fit to be brought in a superior ct., but gave no other certificate. The master having taxed the costs on the lower scale, the arbitrator, on being applied to, on behalf of pltf., stated in effect that he intended by his certificate to give pltf. his costs. The ct. gave pltf. leave at his (ptf.'s) expense to refer the matter back to the arbitrator.—*CASWELL v. GROUCUTT (GROVATT)* (1862), 31 L. J. Ex. 361; 6 L. T. 290; 10 W. R. 91.

*Annotation*:—*Folld.* *Cross v. Cross* (1862), 13 C. B. N. S. 253.

2272. ———.]—Where an arbitrator had awarded pltf. less than £20 in an action of contract, but by inadvertence had omitted to certify that the cause was fit to be tried before a judge of a superior ct., the ct. allowed the matter to go back to the arbitrator for amendment at the expense of

ptlf.—*Cross v. Cross* (1862), 13 C. B. N. S. 253; 1 New Rep. 26; 143 E. R. 101.

2273. ———.]—*Whether after time for award.*—*Qu.*: whether an arbitrator, to whom a cause has been referred by the usual order of *Nisi Prius*, & who, after the time for making his award has expired, certifies that the cause is one proper to be tried in a superior ct., is *functus officio* when he gives the certificate.—*COOCH v. MALTBY* (1854), 23 L. J. Q. B. 305; 23 L. T. O. S. 146, 179; 2 W. R. 557; 2 C. L. R. 871.

*Annotation*:—*Mentd.* *James v. Vane* (1860), 2 E. & E. 883.

2274. ———.]—*Not after award taken up.*—An action having been referred, under C. L. P. Act, 1854, s. 3, to a master, "with all the powers of certifying of a judge at *Nisi Prius*, the costs of the cause & of the reference to be in the discretion of the master," the master made his award in favour of pltf. for a sum not exceeding £20, & directed that the costs of the cause & of the reference should be paid by deft. After the award had been taken up, the master endorsed on the award a certificate that there was sufficient reason for bringing the action in the superior ct.:—*Held*: the certificate was bad, the master being *functus officio* when it was given.—*BEDWELL v. WOOD* (1877), 2 Q. B. D. 626; 46 L. J. Q. B. 725; 36 L. T. 213, D. C.

2275. *Effect of refusal to certify — Power to certify—Arbitrator's refusal to certify.*—Where a cause is referred to arbn., & the order of reference gives to the arbitrator the same powers as a judge at *Nisi Prius*, & the arbitrator refuses to grant such a certificate, the ct. will not interpose to control his discretion.

Where an action on the case for injury to pltf.'s mill-stream, to which deft. had pleaded thirteen pleas denying various rights set up in the declaration, was referred, & the arbitrator found for pltf. on every issue, but awarded only a farthing damages, & refused an application, after the award was made, to grant a certificate for costs, the ct. refused to send back the award to the arbitrator, under a clause in the order of reference that, in the event of any dispute arising upon the award, it might be sent back to be reconsidered & amended.—*BURY v. DUNN* (1843), 1 Dow. & L. 141; *sub nom.* *PERRY v. DUNN*, 12 L. J. Q. B. 351; 1 L. T. O. S. 261, 337.

2276. *Certificate for costs—Award not equivalent to certificate.*—*SWINGLEHURST v. ALTHAM*, No. 2312, *post*.

2277. ———.] — *WARD v. MALLINDER*, No. 2313, *post*.

#### SUB-SECT. 2.—POWER OF COURT AS TO COSTS.

2278. *General rule.*—Where the ct. does not adjudicate upon the subject-matter of a suit, it will not deal with the question of costs, as it only deals with such questions when they are incidental to the subject-matter of the suit.—*ANDREWS v. MORGAN* (1854), 24 L. T. O. S. 172; 3 W. R. 145.

#### PART IV. SECT. 20, SUB-SECT. 2.

m. *Submission providing for payment by party guilty of misconduct.*—Where, owing to the misconduct of a party, arbitrators do not award, but an umpire does, costs will not be granted to the other party under a clause in the reference, "that if either party shall, by affected delay or otherwise wilfully, prevent the arbitrators or umpire from making their award, he shall pay such costs to the other as the ct. shall think reasonable & just."—*PROUDFOOT v. TROTTER* (1843), 1 U. C. R. 398. —*CAN.*

2275 i. *Effect of refusal to certify.*—After the entry of judgment by pltf., it is too late to ask to have the cause referred back to the arbitrators to enable them to certify, assuming (*sed. qu.*) that the omission to so certify is a ground.—*KEEP v. HAMMOND* (1863), 9 U. C. L. J. 157. —*CAN.*

2275 ii. ———.]—*Power to certify—Arbitrators' refusal to certify.*—A cause was referred at *Nisi Prius*, & a verdict taken subject to the award. Costs of the cause were to abide the event, & the arbitrators had power to certify for costs as the judge at the trial could have done. The award reduced the verdict to \$88, & directed that deft. should pay pltf.'s

costs according to the scale to be certified by the ct.:—*Held*: the arbitrators having express powers to certify, & having omitted to do so, a judge in chambers could not order full costs.—*CALDER v. GILBERT* (1863), 3 P. R. 127. —*CAN.*

2275 iii. ———.]—Where an order of reference gave the arbitrator "all the powers as to amendment & otherwise of a judge sitting at *Nisi Prius*":—*Held*: he could certify for costs, & not having done so, the judge in chambers refused an order for full costs to be taxed.—*LITTLE v. LINES* (1877), 7 P. R. 197. —*CAN.*



**Sect. 20.—Costs: Sub-sects. 2 & 3.]**

**2279. Order silent as to costs.]**—Where an action had been by consent of the parties at the trial referred as a matter of account to a master under C. L. P. Act, 1854, the order of reference being silent as to costs:—*Held*: as the proceedings were intentionally taken under the above Act, & not under Jud. Act, 1875, Ord. 65, the Act of 1875 did not apply, & the ct. had no jurisdiction to make any order as to costs.—*WIMSHURST, HOLICK & Co. v. BARROW SHIPBUILDING CO.* (1877), 2 Q. B. D. 335; 46 L. J. Q. B. 477; 25 W. R. 557.

*Annotations*:—*Consd. Penrice v. Williams* (1883), 23 Ch. D. 353. *Distd. Hyde v. Beardsley* (1886), 18 Q. B. D. 244.

**2280. Action stayed under Common Law Procedure Act, 1854, s. 11—Costs reserved.]**—Pltf. instituted a suit to take the accounts of a partnership between himself & deft., the terms of the partnership being that pltf. was to receive one-twelfth of the profits & to bear one-twelfth of the losses, & that deft. was to receive & bear the remaining eleven-twelfths. An order was made in the suit, under the above sect., that the matters in difference between the parties should be referred to arbn. & the proceedings in the suit stayed, the costs being reserved, & an award was made finding a considerable sum due to pltf.:—*Held*: the costs of both parties of the suit, reference, & award, ought to be taxed & paid as to one-twelfth thereof by pltf. & as to the eleven-twelfths by deft.—*NEWTON v. TAYLOR* (1874), L. R. 19 Eq. 14; 23 W. R. 330.

**2281. Security for costs—Assignment of claim.]**—An action to recover overcharges, alleged to have been made by a railway co. in respect of goods carried on their railway, coming on for trial, was referred to an arbitrator. The claims referred had been assigned to S., who was permitted by the arbitrator to attend the reference as being a person interested. Upon a motion for a rule calling upon the assignor to show cause why proceedings should not be stayed until he gave defts. security for costs, affidavits were produced to the effect that the

assignor was insolvent & that the action & reference were proceedings solely for the benefit of S.:—*Held*: (1) there was no reason for requiring security merely on the ground that the debt had been assigned to a third person; (2) the mere circumstance of the party who had a lien upon the proceeds of the action attending before the arbitrator to watch the proceedings did not cast upon him a liability which otherwise the law would not have not cast upon him; (3) the rule must be refused.—*PARKER v. GREAT WESTERN RY. CO.* (1850), 9 C. B. 766; 19 L. J. C. P. 335; 15 L. T. O. S. 253; 137 E. R. 1093.

**2282. Costs to follow verdict to be entered.]**—Where by a consent decree arbitrators were directed to return a general award on the whole declaration for a sum certain, & such award was thereby directed to be entered as a verdict whereon final judgment might be signed, & costs of the action, reference, & award were directed to follow the verdict so entered:—*Held*: (1) applts. having thereunder obtained a verdict for a portion of the sum claimed by them, which verdict carried costs as above directed, the ct. could not give resp. a verdict for the residue of the sum claimed, & then delegate to the taxing master the duty of ascertaining, by the evidence of the arbitrators & others, as to what parts of applts.' claim resp. had succeeded, with a view to the apportionment of costs; (2) such evidence would be inadmissible as tending to explain or contradict the award.—*O'ROURKE v. RAILWAYS COMRS.* (1890), 15 App. Cas. 371; 59 L. J. P. C. 72; 63 L. T. 66, P. C.

**Power to certify.]**—See Nos. 2258—2265, *ante*.

**SUB-SECT. 3.—CONSTRUCTION OF PARTICULAR PROVISIONS IN SUBMISSIONS, ORDERS AND AWARDS.**

**2283. "Costs"—Not solicitor & client costs.]**—Where an arbitrator under an order of *Nisi Prius* awards costs, it shall be understood as between party & party, not as between attorney & client,

**2280 i. Action stayed—Right to apply to judge in respect of costs.]**—After an action had been commenced on a policy the ct. made an order that the action should be stayed, pltf. to sign final judgment & proceed in the action for the amount which might be awarded him, together with the costs of the action, etc., & it was further ordered that either party, after the making of the award, might apply to a judge in chambers in respect of the payment of the costs of the reference & award. The arbitrators awarded to pltf. the full amount of his claim. On application to a judge, an order was made directing defts. to pay the costs of the reference & award. On appeal the ct. being equally divided, the judgment was affirmed.—*HUGHES v. HAND IN HAND INSURANCE CO.* (1885), 7 O. R. 615.—CAN.

**2280 ii. ———.]**—*HUGHES v. BRITISH AMERICA INSURANCE CO., HUGHES v. LONDON ASSURANCE CO.* (1885), 7 O. R. 465.—CAN.

**2280 iii. ——— Rule silent as to costs.]**—A co. obtained a stay of proceedings & reference, but the rule was silent as to costs of arbn. & award; an award was made in favour of pltf. with costs, & a summons was obtained for taxing costs:—*Held*: (1) the ct. could make an order as to costs of an arbn. & award as if it was a compulsory reference; (2) costs of reference & award should be in the discretion of the arbitrators.—*MURRAY v. LONDON ASSURANCE CO.* (1894), 7 Nfld. L. R. 730.—NFLD.

**2281 i. Security for costs.]**—The word "proceeding" in r. 1243 means a pro-

ceeding in ct. An appeal from an order dismissing a motion to set aside an award is not a "proceeding for the same cause" as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award, & although the costs of such appeal are unpaid, security for costs of the action will not be ordered.—*CAUGHELL v. BROWER* (1897), 17 P. R. 438.—CAN.

**n. Cause referred at Nisi Prius.]**—A cause having been referred by order at *Nisi Prius*, & a sum awarded within the county ct. jurisdiction, the ct., on affidavit, granted an order for full costs, under r. 9 of E. T., 11 Geo. 4.—*MORSE v. TRETZEL* (1855), 1 P. R. 375.—CAN.

**o. ———.]**—Where a case is referred & judgment on the award is to be entered, the judge may make an order for full costs, where pltf.'s demand is reduced by set-off, & such order may be made *ex p.*—*Ex p. SEELYE v. STYLES* (1855), 3 All. 246.—CAN.

**p. Costs of appeal from award.]**—Although C. S. C. (c. 66) directs that when the sum awarded for lands taken for a railway is less than that tendered, the costs shall be borne by the owners, the same rule does not apply as to the costs of an appeal to the ct., they being then in the discretion of the ct.—*Re CREDIT VALLEY RY. CO. & SPRAGGE* (1876), 24 Gr. 231.—CAN.

**q. Costs of enforcing award by bill.]**—It not appearing that there was any good reason for filing a bill instead of proceeding to enforce an award in the usual way, the ct. refused to pltf. any

costs other than such as he would have been entitled to had he proceeded to enforce the award under Administration of Justice Act.—*MOORE v. BUCKNER* (1881), 28 Gr. 606.—CAN.

**r. Costs of motion for leave to enter judgment on award.]**—Costs of a motion for leave to enter up judgment on an award under a rule of reference in the cause will not be allowed, such motion being unnecessary.—*GRAHAM v. GRAHAM* (1856), 2 Thom. 77.—CAN.

**s. Costs when award impugned by both sides.]**—Where both parties attacked an award in an arbn. under Railway Act & conceded that it could not stand owing to the misconduct of the arbitrators:—*Held*: the ct. had no jurisdiction to award costs.—*Re WINDATT & GEORGIAN BAY & SEABOARD RY. CO.* (1912), 23 O. W. R. 113; 4 O. W. N. 828.—CAN.

**t. No power to order costs to be deducted from sum awarded.]**—A judge sitting in chambers has no jurisdiction to order the costs of the successful party in an arbn. proceeding under B. C. Acts, 1873 (No. 20), & 1892 (c. 64), s. 3 (1), to be deducted from the amount awarded by the arbitrators.—*Re DWYER & VICTORIAN WATERWORKS ARBITRATION*, (1898), 6 B. C. R. 165.—CAN.

**PART IV. SECT. 20, SUB-SECT. 3.**

**2283 i. "Costs"—Not solicitor & client costs—"Full costs."]**—In expropriation cases the costs should be taxed liberally in favour of the proprietor; but where the stats. mention "costs" only, & not



unless it be so awarded.—*PRATT v. SALT* (1735), *Lee temp. Hard.* 161 ; 95 E. R. 103.

*See, also*, Nos. 2221—2228, *ante*.

**2284. — Not costs of reference.]**—The general term “costs” in a rule of reference does not include the costs of that reference.—*BRADLEY v. TUNSTOW* (1797), 1 Bos. & P. 34 ; 126 E. R. 763.

**2285. — Includes costs of cause & reference.]**—Where, by the rule of reference the costs are to abide the event of an award, that includes the costs of the reference as well as of the cause.—*WOOD v. O’KELLY* (1808), 9 East, 436 ; 103 E. R. 639.

*Annotation* :—*N.F. R. v. Moate* (1832), 3 B. & Ad. 237.

**2286. Not costs of reference & award.]**—An indictment removed into King’s Bench by deft., & made a special jury cause by the prosecutor, came on to be tried & was immediately referred. The order of reference stated that if the arbitrator should be of opinion that deft. was guilty & the prosecutor entitled to costs, deft. agreed to pay the costs. The arbitrator did so find :—*Held* : the general term “costs” in the order did not include those of the reference & award.—*R. v. MOATE* (1832), 3 B. & Ad. 237 ; 1 L. J. K. B. 78 ; 110 E. R. 89.

**2287. — Not costs of trial.]**—After a verdict for pltf., deft. obtained a rule for a new trial, which was made absolute, no mention being made of costs. The parties then agreed to a reference, & the order of reference stipulated that the costs were to abide the event. The arbitrator having decided the cause in favour of deft. :—*Held* : deft. was not entitled to the costs of the trial.—*THOMAS v. HAWKES* (1841), 9 M. & W. 53 ; 11 L. J. Ex. 54 ; 5 Jur. 1115.

*Annotation* :—*Distd. Tobin v. Crawford* (1842), 10 M. & W. 602.

**2288. — Same costs as would be obtained on new trial.]**—Where at the trial a cause is referred on payment of costs, that means such costs as would be paid by the party on obtaining a new trial on those terms.—*BROAD v. SLOGGATT* (1856), 4 W. R. 561.

**2289. “Costs sustained in action” — Not costs of reference.]**—An award of “costs sustained in the action” does not include the costs of the reference.—*BROWNIE v. MARSDEN* (1789), 1 Hy. Bl. 223 ; 126 E. R. 129.

**2290. “Costs of action” — Includes costs of reference.]**—An action was referred to a special referee with the full powers of a judge of the High Ct., & the referee directed that defts. recover against pltf. the costs of the action & of the award :—*Held* : the costs of the action included the costs of the reference.—*PATTEN v. WEST OF ENGLAND*

“full costs,” costs as between solr. & client are not intended.—*Itc BRONSON & CANADA ATLANTIC RY. Co.* (1890), 13 P. R. 440.—CAN.

**2284 i. — Not costs of reference.]**—Dft. gave a plea of confession for £100, & it was consented (which consent was made a rule of ct.) that the amount of damage sustained by pltf. should be referred to arbn., & that the arbitrators should be at liberty to award the costs in the cause as they should think fit. The arbitrators awarded pltf. £12 damages, & 6d. costs :—*Held* : this did not carry the costs of the reference.—*LYNCH v. ARMSTRONG* (1835) 1 Jo. Ex. Ir. 281.—IR.

u. “Full costs” — Not full costs of suit.]—A certificate for full costs, signed by arbitrators after they have made their award & have finally separated, will not entitle pltf. to full costs of suit.—*KEEP v. HAMMOND* (1863), 9 U. C. L. J. 157.—CAN.

v. “Costs of said action & of afore-

said reference” — Full costs.] — An award as to costs was as follows : “I award that deft. shall pay to pltf. their costs of the said action & of the aforesaid reference” :—*Held* : pltf. were entitled, under the award, to their full costs, although the sum awarded as damages was only £1.—*CLEARY v. CLEARY* (1860), 10 I. C. L. R. 329.—IR.

w. “Costs in said actions” — Party & party costs only.] — Actions for trespass & ejectment concerned a disputed boundary between the lands of the parties. The question of the boundary was referred to arbn., “including the disposition of costs in the said actions.” The arbitrators totalled the costs in the two actions & in their award directed them to be paid in certain proportions :—*Held* : the words of the submission in reference to costs meant clearly “party & party costs.”—*MESSINGER v. HICKS* (1906), 42 N. S. L. R. 13 ; 3 E. L. R. 230.—CAN.

x. “Costs of suit.”] — *Held* : the words “costs of the suit,” as used in an

*IRON, TIMBER & CHARCOAL Co.*, [1894] 2 Q. B. 159 ; 63 L. J. Q. B. 757 ; 70 L. T. 908 ; 58 J. P. 400 ; 42 W. R. 522 ; 10 T. L. R. 462 ; 10 R. 288, D. C.

**2291. — Costs of inquiries.]**—By a consent order made in two actions by pltf. against defts. for damages for subsidence of land an inquiry as to damages before an official referee was directed in both actions, the costs of such inquiries to be in the discretion of the official referee. A large amount for costs was incurred in carrying out orders made by the official referee for inspection & particulars, but subsequently a compromise was arranged & an agreement was executed, under which all proceedings in the two actions were stayed, & defts. agreed to pay pltf.’ costs of the actions :—*Held* : in the circumstances pltf.’ costs of the actions included their costs of the inquiries so far as they had proceeded.—*STOKE-UPON-TRENT CORPN. v. STAFFORDSHIRE COAL & IRON Co.* (1916), 85 L. J. Ch. 812 ; 115 L. T. 621 ; 80 J. P. 273.

**2292. “All costs incident to indictment & subsequent proceedings thereon” — Costs previous to reference.]**—Where a ct. of sessions referred an indictment for an assault to an arbitrator, & empowered him to settle “all costs incident to the indictment & subsequent proceedings thereon” :—*Held* : such arbitrator did not exceed his authority by awarding the previous as well as subsequent costs.—*BAKER v. TOWNSEND* (1817), 1 Moore, C. P. 120 ; 7 Taunt. 422 ; 129 E. R. 169.

*Annotations* :—*Appld. R. v. Hardey* (1850), 14 Q. B. 529. *Refd. Koir v. Leeman* (1846), 9 Q. B. 371.

**2293. “Costs in cause” — Costs of witnesses.]**—In trover a verdict was taken for pltf. to the full amount of the goods converted, pltf. consenting to take them back in reduction of damages, upon its being referred to an arbitrator by order of *Nisi Prius* to ascertain the amount of deterioration, which amount, with the costs in the cause, were to be paid to pltf. :—*Held* : the expense of witnesses attending the arbitrator were costs in the cause.—*TREGONING v. ATTENBOROUGH* (1831), 7 Bing. 733 ; 1 Dowl. 225 ; 5 Moo. & P. 453 ; 131 E. R. 283.

*Annotations* :—*Distd. Taylor v. Gordon* (1833), 9 Bing. 570. *Refd. Sims v. Edwards* (1856), 17 C. B. 527.

**2294. — Not costs of reference.]**—Costs of an arbn. under an order of *Nisi Prius* are not “costs in the cause.”—*TAYLOR v. GORDON (LADY)* (1833), 9 Bing. 570 ; 1 Dowl. 720 ; 2 Moo. & S. 725 ; 131 E. R. 727.

**2295. — Includes costs of rule to remit.]**—Where a cause was referred at *Nisi Prius* to an arbitrator, & after the award a rule was obtained to refer it back to the arbitrator to reduce the damages, or enter a verdict for deft., on which the

award, had no reference to any particular scale of taxation, & so could not *per se* be relied upon as entitling pltf. to full costs of suit in a case where the amount awarded was within the jurisdiction of an inferior ct.—*KEEP v. HAMMOND* (1863), 9 U. C. L. J. 157.—CAN.

**2298 i. “Costs in cause” — Includes costs of reference & award.]**—When the cause of action is referred to an arbitrator, whose award is directed to be entered as the verdict of the jury, in addition to the ordinary costs of the action, the successful party is entitled to the costs of the reference & award, as costs in the cause, although the order of reference is silent as to the costs.—*ROGERS v. O’GRADY* (1835), 3 Ir. L. Rec. N. S. 248.—IR.

z. — Costs of showing cause against rule to set aside.]—The costs of showing cause against a rule for setting aside are costs in the cause, although no mention of them is made in the rule.—*ESSE : COUNTY v. PARKE* (1862), 12 Q. P. 159.—CAN.

**Sect. 20.—Costs: Sub-sects. 3 & 4.]**

ct. gave judgment that the verdict ought to be reduced:—*Held*: the costs of the rule were properly taxed as "costs in the cause."—*GOODALL v. RAY* (1835), 4 Dowl. 1; 1 Har. & W. 333.

**2296. — Not costs of abortive reference.]**—Where a cause was referred before trial, & an arbn. bond entered into, but which could not be made a rule of ct., & the reference proving abortive, the cause was afterwards tried:—*Held*: the successful party was not entitled to the costs of the abortive reference as costs in the cause.—*DOE d. DAVIES (DAVIS) v. MORGAN* (1838), 4 M. & W. 171; 2 Jur. 684; 150 E. R. 1389.

**2297. — Costs incurred up to time of reference.]**—A cause, & all matters in difference, having been referred to an arbitrator, the costs in the cause to abide the event, & the costs of the reference & award to be in the discretion of the arbitrator, the arbitrator found all the issues in favour of pltf.; he also found that there were no other matters in difference than those involved in the cause, & directed the costs of the reference to be borne by each party in equal moieties:—*Held*: pltf. was not entitled to all the costs of counsel, attornies, & witnesses attending before the arbitrator, the same being costs of the reference & not in the cause, as the costs in the cause were those which were incurred up to the time of the reference.—*BROWN v. NELSON* (1844), 13 M. & W. 397; 2 Dow. & L. 405; 1 New Pract. Cas. 172; 14 L. J. Ex. 62; 4 L. T. O. S. 139; 153 E. R. 165.

*Annotation*:—*Reid. Edwards v. G. W. Ry. Co.* (1852), 12 C. B. 419.

**2298. Includes costs of reference.]**—Where a verdict is taken, subject to a reference of the action to an arbitrator, who is to certify for whom & for what amount the verdict shall be entered, & the costs of the cause & reference are to abide the event, the costs of the reference are costs in the cause, & follow the legal event of the verdict.—*DEERE v. KIRKHOUSE* (1850), 20 L. J. Q. B. 195.

*Annotation*:—*Reid. Stephens v. Russell* (1857), 28 L. T. O. S. 324.

**2299. Costs of settling special case.]**—In an action by a carrier against a railway co. to recover back excessive & unequal charges made upon him for the conveyance of his goods, a verdict was entered for pltf., for £10,000, subject to a special case to be settled by a barrister, who, in the event of the ct. deciding in favour of pltf., was by the order of reference empowered to direct for what amount the verdict should be entered, & to whom the cause & all matters in difference between the parties were referred, subject to the special case, the costs "of the action" to abide the event of the award, & the costs "of & incident to the reference & award" to be in the discretion of the arbitrator. The special case, as settled by the referee, divided pltf.'s claim into six several heads, & the ct. having decided in pltf.'s favour upon four of them, & for defts. on the rest of the case, the matter went back to the arbitrator, who ultimately directed

**2301 i. "Costs of cause" — Whole costs of plaintiff & defen. ant.]**—The phrase "costs of the cause" generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award as follows: "We also order & award that pltf. & defts. shall each pay half the costs of the cause, & that defts. shall pay all the costs of the reference & award, our costs of which reference & award as arbitrators we assess at the sum of \$201.50":—*Held*: "costs of the cause" meant the whole costs of both pltf. & defts.—*SCOTT v. GRAND TRUNK RY. Co.* (1864), 10 U. C. L. J. 72.—*CAN.*

**2301 ii. — Includes costs of reference.]**—It having been agreed on at the trial that if certain facts left to the jury should be found for pltf., the matters of account were to be referred, no mention having been made as to costs, the jury found for pltf.:—*Held*: the costs of reference were costs of the cause.—*RUTAN v. BOULTON* (1861), 10 C. P. 417.—*CAN.*

**2304 i. "Costs of reference" — Includes costs of party attending master.]**—When a pltf. obtains a reference & is ordered to pay the costs of it, the costs of the reference include the costs which the other party is put to by attendances,

that the verdict should be entered for pltf. for £3,115, & that so much of the issues as related to that sum should be found for pltf., & the residue thereof for defts., & he directed that all the costs of & incident to the reference & award should be paid by defts.:—*Held*: the costs of the attendances before the referee to settle the special case were costs in the cause, & the master was justified in apportioning them according to the decision of the ct. upon the several heads of claim in the special case.—*EDWARDS v. GREAT WESTERN RY. Co.* (1852), 12 C. B. 419; 19 L. T. O. S. 204; 138 E. R. 969.

**2300. — Verdict subject to reference—Costs of reference.]**—Where a verdict is taken for pltf. for a given sum, subject to a reference to an arbitrator, who is to reduce it to such amount as he may think proper, & the arbitrator by a formal award directs the verdict to be reduced by a nominal sum, his determination, though in form of an award, is in substance a certificate, & pltf. is entitled to the expenses incurred before him, as costs in the cause.—*SIM v. EDWARDS* (1856), 17 C. B. 527; 25 L. J. C. P. 175; 139 E. R. 1181.

*See, also, cases in Sect. 11, ante.*

**2301. "Costs of cause" — Includes costs of reference.]**—An action for diverting a watercourse was referred, with all matters in difference, to an arbitrator, with power to determine the cause between the parties, the costs of the cause to abide the event. He awarded that a nonsuit should be entered, on the ground that deft. was not proved to have diverted the water, but decided that pltf. had the right to the water:—*Held*: deft. was entitled to recover the costs of all his witnesses, as well before the arbitrator as at the trial, including as well those called to prove his right to the water as those adduced to disprove his having diverted it.—*RATCLIFFE v. HALL* (1835), 2 Cr. M. & R. 258; 5 Tyr. 770; 3 Dowl. 802; 1 Gale, 140; 4 L. J. Ex. 191; 150 E. R. 113.

*Annotation*:—*Reid. Hunter v. Liddell* (1851), 20 L. J. Q. B. 200.

**2302. — Costs of first trial.]**—A verdict having been found for deft., & a rule for a new trial obtained, the cause was referred to a barrister, & the costs of the cause were to be in his discretion. He found that pltf. were entitled to recover, & ordered defts. to pay the costs of the cause:—*Held*: pltf. were not entitled to the costs of the first trial.—*RIGBY v. OKELL (O'RELL)* (1827), 7 B. & C. 57; 5 L. J. O. S. K. B. 357; 108 E. R. 646.

**2303. "Costs of arbitration."]**—The expression "costs of arbn. to abide the event" means such costs as might have been lost or gained upon verdict.—*ANON.* (1774), Lofft, 391; 98 E. R. 710.

**2304. "Costs of reference" — Cost of witnesses.]**—If a witness attends at the reference his expenses will be costs of the reference, & not of the cause.—*FRYER v. STURT* (1855), 16 C. B. 218; 24 L. J. C. P. 154; 25 L. T. O. S. 100; 139 E. R. 740.

*Annotation*:—*Reid. Standeven v. Murgatroyd* (1858), 3 H. & N. 570.

etc., before the master.—*CONCANNON v. RUSSELL* (1823), 2 Mol. 466.—*IR.*

**2304 ii. — Counsel.]**—The expenses of counsel attending before an arbitrator must be considered a part of the costs of the reference, & not part of the costs of the cause.—*MILMORE v. FREEZE* (1878), 1 P. & B. 705.—*CAN.*

**2304 iii. "Costs of & incidental to reference" — Costs of motions for appointment of referee included.]**—*CANADIAN PACIFIC RY. Co. v. WALKERTON* (1913), 24 O. W. R. 50; 4 O. W. N. 756; 10 D. L. R. 347.—*CAN.*

a. "Costs of submission & award"



**2305. Costs of second trial.]**—Pltf. obtained a verdict, which was afterwards set aside on the ground of misdirection, & a new trial granted, the costs to abide the event. On the second trial, the cause was referred, & the arbitrator ultimately directed that the verdict should be entered for deft., each party paying his own costs of reference:—*Held*: deft. was only entitled to the costs of the second trial, as it was only where the same party succeeded on both trials that he was entitled to the costs of both.—*SHERLOCK v. BARNED (BARNARD)* (1831), 8 Bing. 21; 1 Moo. & S. 58; 1 L. J. C. P. 11; 131 E. R. 308.

**2306. — Includes costs of award.]**—Power in a submission to arbn. over the "cost of the reference" includes power to award the costs of the award.—*Re WALKER & BROWN* (1882), 9 Q. B. D. 434; 51 L. J. Q. B. 424; 30 W. R. 703.

*Annotation*:—*Reid. Re Autothreptic Steam Boiler Co.* (1888), 21 Q. B. D. 182.

**2307. — Costs of settling submission.]**—Where upon a reference by consent, but not in a cause, the costs of the reference are left in the discretion of the arbitrator, the costs of negotiating & settling the terms of the submission may be allowed on taxation as "costs of the reference."—*Re AUTOTHREPTIC STEAM BOILER CO., LTD., & TOWNSEND, HOOK & Co.* (1888), 21 Q. B. D. 182; 57 L. J. Q. B. 488; 59 L. T. 632; 37 W. R. 15.

**2308. "Costs of umpirage" — Arbitrator's charges.]**—By an agreement of reference matters were referred to two arbitrators, & if they failed to make an award within a limited time, to an umpire. The costs of the reference & award & umpirage were to be in the discretion of the arbitrators & umpire respectively. The parties agreed that the umpire should sit with the arbitrators, so that, if they did not make an award, it would not be necessary for him to re-hear the evidence. The arbitrators did not conclude the reference within the time limited. The parties then further agreed that the arbitrators should sit with the umpire, & assist him in taking the evidence, which they did. The award ordered the losing party to pay to the other the costs "of the umpirage & of this my award," & that each party should "pay their own costs of the reference other than the costs of my umpirage & of this my award." The umpire included the charges of the two arbitrators in his costs of umpirage & award, & the same were paid by the successful party on taking up the award:—*Held*: the charges of the arbitrators were costs of the umpirage, & not costs of the reference, & the successful party was entitled to have such amount as was duly charged by the arbitrators, & paid by him on taking up the award, allowed on the taxation of costs, & to have the same repaid to him by his opponent.—*ELLISON v. ACKROYD* (1850), 1 L. M. & P. 806; 20 L. J. Q. B. 193; 16 L. T. O. S. 346.

**2309. "Usual terms."]**—In an action upon a charterparty, a verdict was taken at *Nisi Prius* for pltf., the damages being referred to an arbitrator on the "usual terms as to costs." The order

of submission originally contained the printed clauses in an ordinary reference of a cause, viz., costs of the cause to abide the event, costs of the reference to be in the discretion of the arbitrator. Those clauses were struck out at chambers upon pltf.'s application, & several meetings took place before the arbitrator, who held that he had, under the terms of the amended order, no discretion over the costs of the reference. Deft. then applied to the ct. to add the second of the above clauses to the submission:—*Held*: the usual terms as to costs upon a reference of damages included a discretion to the arbitrator concerning the costs of the reference, & deft. was entitled to have that term added to the order of submission.—*MOREL v. BYRNE* (1873), 28 L. T. 627; 21 W. R. 673.

**2310. Renewal of lease at cost of lessee—Costs of reference & award included.]**—Where a lease contains a covenant "that the lessors, their heirs or assigns, will at any time during the term, upon the request & at the costs of the lessee, his exors., & administrators or assigns, & on payment by him or them of a fine calculated according to the table hereunder written upon the number of years of the term which have expired & the full improved annual value of the premises at the time of such renewal (such value to be determined by the surveyor or at the option of the lessee by the award of two referees or their umpire), renew or cause to be renewed the lease for a further term, at the like rent & subject to the like covenants & conditions as are herein reserved & contained, including this present covenant for renewal," the costs of renewal include the costs of an arbn. properly entered upon for the purpose of determining the fine payable by the lessee.—*FITZSIMMONS v. MOSTYN (LORD)*, [1904] A. C. 46; 73 L. J. K. B. 72; 89 L. T. 616; 52 W. R. 337; 20 T. L. R. 134, H. L.

*Annotation*:—*Mentd. Re Baylis* (1907), 96 L. T. 812.

#### SUB-SECT. 4.—"COSTS TO ABIDE EVENT."

**2311. Meaning generally.]**—The expression "costs of arbn. to abide the event" means the cost of the cause to abide the event in such manner as they would have done on verdict.—*ANON.* (1774), 10ff, 391; 98 E. R. 710.

**2312. What is the "event" — Legal event.]**—Where a cause has been referred by a rule of *Nisi Prius*, & the costs directed to abide the event, that must be taken to mean the legal event.—*SWINGLEHURST v. ALTHAM* (1789), 3 Term Rep. 138; 100 E. R. 497.

*Annotations*:—*Expld. Anon.* (1804), 1 Smith, K. B. 426. *Folld. Ward v. Mallinder* (1804), 2 Smith, K. B. 63.

**2313. .]**—Where a verdict has been taken for £10 in trespass, subject to an award of damages & the costs to abide the event, if the arbitrator find less than 40s. damages, pltf. cannot have his costs, though it be also found that the

—*Includes costs of reference.]*—By a submission the costs of the "reference & award" were to be in the discretion of the arbitrators & they directed that defts. should pay the costs of the "submission & award":—*Held*: the award was final, for the costs of the submission included the costs of the reference.—*ELLWOOD v. MIDDLESEX COUNTY* (1859), 19 U. C. R. 25.—*CAN.*

**2309 i. "Usual costs" — Includes costs of reference & award.]**—On a motion to set aside a verdict for pltf., the cause, by consent, was referred to an arbitrator, who awarded in favour of deft., with the

usual costs:—*Held*: deft. was entitled to the costs of the reference & award.—*DANIEL v. MAHER* (1832), Hayes, 366.—*IR.*

**2310 i. Renewal of lease at cost of lessee — Costs of arbitration not included.]**—It was provided in a lease that if the lessee should desire a renewal for a further term & give a defined notice, containing the name of an arbitrator, the lessors, at the expense of the lessee, should execute a new lease at such increased yearly rent as might be determined by the award of three arbitrators or a majority of them:—*Held*: the costs of the arbn. were not

provided for by the clause, & each party must bear his own costs of the reference.—*SMITH v. FLEMING* (1888), 12 P. R. 520, 657.—*CAN.*

#### PART IV. SECT. 20, SUB-SECT. 4.

**2312 i. What is the "event" — Legal event.]**—A submission provided that the costs of the action & incident to the consent & award to be made thereon & of the arbn. should abide the result of the award:—*Held*: the right to full costs should follow the legal result, independently of the amount recovered.—*OWENS v. VAMHOMRIGH* (1861), 14 I. C. L. R. 362.—*IR.*



**Sect. 20.—Costs: Sub-sect. 4.]**

trespass was wilful, & that deft. should pay pltf. his costs, for costs being directed to abide the event means the legal event.—WARD v. MALLINDER (1804), 5 East, 489; 2 Smith, K. B. 63; 102 E. R. 1157.

**2314.** ———.]—When a cause has been referred to arbn., & the costs are directed to abide the event, that must be taken to mean the legal event.

An arbitrator found that deft. had trespassed, but awarded no damages & directed both parties to pay their own costs:—*Held*: pltf. was entitled to no costs.—WILLIS v. OSBORNE (1819), 1 Chit. 183.

**2315.** ——— **When action only referred—Specific performance awarded.]**—Where a cause is referred to an arbitrator, & the costs are to abide the event, & the arbitrator awards a specific performance of something to be done, which proves that the event, in fact, is in favour of pltf., he is entitled to costs, although the arbitrator does not award a verdict to be entered in form.—ANON. (1804), 1 Smith, K. B. 426.

**2316.** ——— **Award substantially in favour of one party.]**—Where an action of *assumpsit* was referred to arbn., the costs to abide the "event," & the arbitrator ordered deft. to pay pltf. 12s., "by reason of the detention of pltf.'s debt," but without specifying any debt:—*Held*: this was an "event" of the arbn. in pltf.'s favour, sufficient to entitle him to costs.—GREEN v. RICHARDS (1828), 6 L. J. O. S. K. B. 130.

**2317.** ———.]—Upon the reference, by a judge's order, of an action for several breaches of a farming agreement, after plea, & before issue joined, it was ordered that the costs of the reference should abide the event. The arbitrators found, as to one breach, that pltf. had sustained damages to the extent of 16s., & on all other points substantially in deft.'s favour:—*Held*: pltf. was not entitled to any costs of the reference, as the event was not in his favour, & there being no issues, the costs were not apportionable.—KELCEY v. STUPPLES (1862), 1 H. & C. 576; 1 New Rep. 104; 32 L. J. Ex. 6; 7 L. T. 389; 9 Jur. N. S. 256; 11 W. R. 121; 158 E. R. 1013.

**Annotations:—***Distd.* Parsons v. Tinling (1877), 2 C. P. D. 119. *Mentd.* Smith v. Edge (1863), 3 New Rep. 158.

**2318. When money paid into court.]**

In an action for work, labour, & materials, the writ claimed a balance of £373. Deft. paid £200 into ct. under R. S. C., Ord. 30, r. 1, & gave notice that "that sum is enough to satisfy pltf.'s claim." Pltf. took it out under r. 3, but did not give the notice under r. 4, or any other notice. The cause was afterwards referred, under C. L. P. Act, 1854, to the certificate of an arbitrator, "the costs of the cause to abide the event." No pleadings were ever delivered on either side. The arbitrator, after hearing the parties, gave his certificate that the £200 paid into ct. was enough to satisfy pltf.'s claim. The master having taxed pltf.'s costs against deft. up to the time of their taking the money out of ct., & having from that point taxed deft.'s costs against pltf.:—*Held*: as the £200 had been paid in generally, & the event of the reference was that pltf. recovered nothing beyond the amount paid into ct., pltf. were not entitled to any costs, & deft. was entitled to her costs of suit from the commencement.—LANGRIDGE v. CAMPBELL (1877), 2 Ex. D. 281; 46 L. J. Q. B. 277; 36 L. T. 64; 25 W. R. 351.

**Annotations:—***Expld.* Buckton v. Higgs (1879), 4 Ex. D. 174. *Consd.* Suckling v. Gabb (1887), 36 W. R. 175.

**2319.** ———.]—Where deft. paid a sum of money into ct. in satisfaction of pltf.'s claim & the issues were afterwards referred to an official

referee, who reported that the sum paid in was sufficient, the ct. in its discretion allowed pltf. his costs up to the time of the payment into ct.—BUCKTON v. HIGGS (1879), 4 Ex. D. 174; 40 L. T. 755; 27 W. R. 803.

**Annotations:—***Folld.* The William Symington (1884), 10 P. D. 1; *Suckling v. Gabb* (1887), 36 W. R. 175.

**2320.** ——— **Award in favour of defendant on bad plea.]**—To a declaration on a special contract, deft. pleaded several pleas going to the whole cause of action, one of which raised an immaterial issue. The cause was referred, on the terms of the costs abiding the event, & of the parties being bound not to sue out a writ of error. The arbitrator found the immaterial issue for deft., & the others for pltf., with £5 damages:—*Held*: the final event of the record was in favour of deft., & he was entitled to the costs, as the arbitrator had no power to award judgment *non obstante veredicto*, & no writ of error could be brought.—LINEGAR (LINNEGAN) v. PEARCE (1854), 9 Exch. 417; 23 L. J. Ex. 225; 2 W. R. 227; 2 C. L. R. 1251; 156 E. R. 178.

**2321.** ——— **Several issues.]**—A cause was referred before the issue was made up, the costs of the cause to abide the event of the award. The arbitrator found that pltf. had sustained damages to a certain amount upon one of the breaches of covenant specified in his particulars, & as to the rest, that he had no cause of action against deft.:—*Held*: deft. was entitled to the costs of those issues that were found for him, although the cause was not in strictness at issue.—DAUBUZ v. RICKMAN (1835), 4 Dowl. 129; 1 Hodg. 75; 1 Scott, 564.

**2322.** ———.]—Where an action is referred, the costs of the cause, of the reference & of the award to abide the event, the event is in favour of the party for whom judgment would have been entered, if the action had been tried at law with the same event, & he is entitled to the general costs, but the other party is entitled to the costs of issues on which he has succeeded.—GOUTARD v. CARR (1883), 13 Q. B. D. 598, n.; 53 L. J. Q. B. 55; 32 W. R. 242; 33 W. R. 295 n., C. A.

**Annotations:—***Consd.* Wheeler v. United Telephone Co. (1884), 13 Q. B. D. 597, C. A. *Expld.* Suckling v. Gabb (1887), 36 W. R. 175. *Refd.* Pearson v. Ripley (1884), 50 L. T. 629. *Mentd.* Whitmarsh v. Monro (1885), 1 T. L. R. 557, C. A.; Wood v. Leatham (1892), 61 L. J. Q. B. 215.

**2323.** ——— **Action & other matters referred—Action found in favour of one party, matters for other.]**—Parties in a cause referred all matters in difference to an arbitrator, with power to him to direct a verdict or nonsuit, & to order deft., although there should be a nonsuit or a verdict for him, to pay any money, or do any other act which should be just & equitable, the costs of the suit & the costs of the reference to abide & follow the event of the award. The arbitrator directed a nonsuit, but awarded that deft. ought to pay pltf. £25 & ordered him to do so:—*Held*: deft. was entitled to his costs of the suit, & pltf. to those of the reference.—CHITTENDEN v. WALKER (1835), 3 Ad. & El. 691; 111 E. R. 576.

**2324.** ——— **Substantial balance in favour of one.]**—Where, by an order of reference, the costs of the award & of the reference are to abide the event of the award, if the award be partly in favour of one party & partly in favour of the other, though there be a substantial balance in favour of one, each party has to pay his own costs.

An action & all matters in difference were referred, the costs of reference & award to abide the event of the award. The arbitrator found for pltf. in the action for £80, & for deft. for the matters in difference for £6, & directed deft. to pay the balance to pltf.:—*Held*: pltf. was not entitled

to the costs.—**GRIBBLE v. BUCHANAN** (1856), 18 C. B. 691; 26 L. J. C. P. 24; 139 E. R. 1542.

*Annotations* :—**Consd.** Reynolds v. Harris (1858), 3 C. B. N. S. 267. **Expld.** Stevens v. Chapman (1871), L. R. 6 Exch. 213. **N.F.** Hawke v. Brear (1885), 14 Q. B. D. 841. **Refd.** Re Marsack & Webber (1860), 2 E. & E. 637.

**2325.** —. ]—By order of *Nisi Prius*, a cause & all matters in difference were referred to an arbitrator, who was empowered to direct a verdict for pltf., or deft., or a nonsuit, the costs of the action to abide the event of the award. The arbitrator directed that a verdict should stand for pltf. for substantial damages which he adjudged to be due from deft. to pltf., & that certain lamps, in respect of which pltf. made a claim for damages in the declaration, should be delivered up to deft. :—**Held** : pltf. was entitled to the costs of the action.—**MATLOCK GAS LIGHT & COKE CO. v. PETERS** (1856), 6 E. & B. 215; 25 L. J. Q. B. 273; 27 L. T. O. S. 64; 2 Jur. N. S. 377; 119 E. R. 844.

*Annotation* :—**Fold.** Reynolds v. Harris (1858), 3 C. B. N. S. 267.

**2326.** — — — — — **Event construed distributively.** ]—An action & all matters in difference were referred, the costs of the cause, reference, & award to abide the event :—**Held** : (1) the word “event” must be construed distributively; (2) upon an award by which the arbitrator decided in pltf.’s favour upon the claim in the action, but in deft.’s favour upon a matter in difference not raised in the action, pltf. was entitled to the costs of the action, & deft. to the costs of the matter on which he had succeeded.—**HAWKE v. BREAR** (1885), 14 Q. B. D. 841; 54 L. J. Q. B. 315; 52 L. T. 432; 33 W. R. 613; 1 T. L. R. 390.

**2327.** — — — — — **Reference of all matters in difference in cause.** ]—Upon a reference of all matters in difference in a cause, “the costs of the cause, & also the costs of the order & of the reference & award, to abide the event of the award,” with power to the arbitrator to direct how the verdict in the cause should be entered, the costs of the cause follow the event of the cause as decided by the award.—**REYNOLDS v. HARRIS** (1858), 3 C. B. N. S. 267; 28 L. J. C. P. 26; 30 L. T. O. S. 275; 5 Jur. N. S. 365; 140 E. R. 743.

*Annotations* :—**Refd.** Calvert v. Seinde Ry. Co. (1865), 18 C. B. N. S. 306; Brown v. Houston, [1901] 2 K. B. 855, C. A.

**2328.** — — — — — **Cross-claims—Balance in favour of one party.** ]—An action consisting of several cross-claims was referred to an arbitrator, who awarded some of the matters in dispute in favour of pltf., but adjudged him on the whole to pay £40 to deft. As by the submission the costs of the cause & the reference were to abide the event, the master on taxation decided that the costs of the reference as well as of the cause must be paid by pltf. :—**Held** : the master should not review his taxation, there being no such event of the reference in favour of pltf. as to exempt him from payment of deft.’s shares of the reference.—**DUNHILL v. MOORE** (1867), 17 L. T. 148.

**2329.** — — — — — ]—An action upon money counts & for trover was referred to a master, “costs of the cause, reference, & award to abide the event.” It was awarded that deft. had proved a set-off of an equal amount to pltf.’s claim in the money counts, £37 10s., & that pltf. owed deft. £2 10s. Upon the trover count pltf. was awarded £43 7s. 7d. The master gave to pltf. the costs of action, to deft. the costs of proving his plea of set-off, but to neither party the costs of the reference & award. The ct. refused to review this taxation of costs.—**WOODHAMS v. WOODHAMS** (1871), 25 L. T. 460.

**2330.** — — — — — **Claim & counter-claim.** ]—Pltf. claimed on a balance of accounts a sum of money

exceeding £50. Deft. pleaded a set-off, & also made a counter-claim for goods supplied to the amount of about £24. The action was referred to a master, the costs of the action to abide the event. The master certified that there was due from deft. to pltf. on the claim £16, & from pltf. to deft. on the counter-claim £23, & that the balance due from pltf. to deft. was £7 :—**Held** : deft. was entitled to his costs.—**CHATFIELD v. SEDGWICK** (1879), 4 C. P. D. 459; 27 W. R. 790, C. A.

*Annotations* :—**Consd.** Stooke v. Taylor (1880), 5 Q. B. D. 569. **Distd.** Pearson v. Ripley (1884), 32 W. R. 463. **Consd.** Lund v. Campbell (1885), 14 Q. B. D. 821, C. A. **Expld.** Lewin v. Trimming (1888), 21 Q. B. D. 230. **Consd.** Solomon v. Mulliner & Motor Carriage Supply Co., [1901] 1 K. B. 76, C. A. **Refd.** Myers v. Defries (1880), 42 L. T. 137, C. A.

**2331.** — — — — — **An action was brought claiming £10 for rent, £100 as damages for breach of covenant in a lease of premises, & £30 for conversion of pltf.’s goods.** Deft. set up a counterclaim for £100 damages for breach of covenant by pltf. & £15 for money due for the use & occupation of other premises. The action was referred to an arbitrator upon the terms that “the costs of the action should abide the event of the award, & that the costs of the reference & award should be in the discretion of the arbitrator.” The arbitrator found that pltf. was entitled to £35, & that deft. was entitled to recover £20, & upon the whole matter he found that pltf. was entitled to recover in the action £15 & no more :—**Held** : the provision in the order of reference as to costs did not alter the rights of the parties, & upon the true construction of Jud. Act, 1873 (c. 66), s. 67, pltf. was entitled to the costs on his claim, & deft. to his costs on the counter-claim.—**STOKE v. TAYLOR** (1880), 5 Q. B. D. 569; 49 L. J. Q. B. 857; 43 L. T. 200; 44 J. P. 748; 29 W. R. 49.

*Annotations* :—**Consd.** Lund v. Campbell (1885), 14 Q. B. D. 821, C. A. **Refd.** Baines v. Bromley (1880), 6 Q. B. D. 197; Pearson v. Ripley (1884), 50 L. T. 629. **Mentd.** Beddall v. Maitland (1881), 17 Ch. D. 174; Toke v. Andrews (1882), 8 Q. B. D. 428; Tagart v. Marcus (1888), 36 W. R. 469; Sharpe v. Haggith (1912), 106 L. T. 13, C. A.

**2332.** — — — — — ]—Pltf., who had built two houses for deft., sued for £169 16s., the balance of the price, & for other small items. Deft. counter-claimed £1,200 for penalties for delay, & for damages arising from bad work. The cause, with all matters in difference, was referred to an arbitrator, upon the terms (*inter alia*) that the costs of action, reference, & award, should follow the event, unless the arbitrator should otherwise order. The arbitrator by an award, silent as to costs, awarded £3 2s. 6d. to deft. in respect of the action & matters in difference :—**Held** : the word “event” ought to be construed distributively, & the award remitted to the arbitrator to find specific issues.—**ELLIS v. DESILVA** (1881), 6 Q. B. D. 521; 50 L. J. Q. B. 328; 44 L. T. 209; 29 W. R. 493, C. A.

*Annotations* :—**Consd. & Apld.** Lund v. Campbell (1885), 14 Q. B. D. 821, C. A. **Apld.** Hawke v. Brear (1885), 14 Q. B. D. 841. **Refd.** Goutard v. Carr (1883), 53 L. J. Q. B. 55, C. A. **Mentd.** Pearson v. Ripley (1884), 50 L. T. 629; Slatford v. Erlebach (1911), 81 L. J. K. B. 372, C. A.

**2333.** — — — — — ]—Pltf.’s claim being for the balance of the contract price of work done, defts. by way of set-off & counter-claim claimed in respect of the inferiority & defective character of the work. The action being referred for trial to an official referee, he found by his report that a balance of £32 18s. 6d. remained due to pltf. on his claim in respect of the contract price of the work, & that £34 10s. 6d. was due to defts. on their counter-claim :—**Held** : the proper judgment on these findings was that defts. recover the balance of £1 12s. & the costs of the action, on the ground, either that the inferiority of the work, though pleaded by way of a counter-claim in form, in



**Sect. 20.—Costs: Sub-sects. 4 & 5.]**

reality amounted to a defence, or that, even if pltf. were technically entitled by the findings to the costs of the action, the ct. ought to interfere under R. S. C., 1875, Ord. 55, r. 1, & give the costs to defts., who had substantially succeeded in the action.—*LOWE v. HOLME* (1883), 10 Q. B. D. 286; 52 L. J. Q. B. 270; 31 W. R. 400.

**Annotations:—***Reid. Lund v. Campbell* (1885), 14 Q. B. D. 821, C. A.; *Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500, C. A.

**2384.** .].—Where an action is referred to an arbitrator, "the costs of the cause, of the reference, & of the award to abide the event," & pltf. is successful on his claim, & deft. on his counter-claim, the amount recovered by pltf. exceeding the amount recovered by deft. on his counter-claim, deft. is entitled to the costs of the issues on which he is successful, notwithstanding that the subject-matter of the claim & counter-claim is the same.—*PEARSON v. RIPLEY* (1884), 50 L. T. 629; 32 W. R. 463.

**2385.** ———.].—On a reference to arbn., the costs "to abide the event," the word "event" means the event of the whole action, & where pltf. is substantially successful in the action he is entitled to the general costs of the action, & deft. only to the costs of those issues on which he has been successful, notwithstanding that on the reference deft. has recovered more upon his counter-claim than pltf. on his claim, & that the success of pltf. on the whole action is due to deft. having paid money into ct. prior to the reference.

In an action to recover £417 for work & labour done, deft. paid into ct. £178, & as to the residue pleaded negligence & disobedience to orders as a defence, & also counterclaimed for £500 damages in respect thereof. The action being referred, "the costs of the cause to abide the event," the arbitrator awarded pltf. £7 beyond the amount paid into ct., & awarded deft. £18 on his counter-claim. A judge at chambers having ordered that pltf. should tax the costs of the action up to & inclusive of the payment of the £178 into ct., & the costs of taking it out, & also the costs of the issues on which he had succeeded, & that deft. should tax the costs of the issues other than those provided for:—*Held*: as pltf. had been substantially successful in the action, the proper order was that pltf. should tax the general costs of the action & deft. the costs of those issues raised by his counter-claim on which he had been successful.—*WARING v. PEARMAN* (1884), 50 L. T. 633; 32 W. R. 429.

**2386.** ———.].—Pltf.'s claim was for goods sold & delivered, & for commission, & defts. counter-claimed for money had & received by pltf. on account of defts., & for work & labour done. The action was referred to an arbitrator under an order of reference which provided that "the costs of the cause, & the costs of the reference & award, shall abide the event." By his award the arbitrator found the issues on the claim in favour of pltf., & the issues on the counter-claim in favour of defts. After deducting the sum awarded to pltf. from the sum awarded to defts., a balance remained due to defts.:—*Held*: the word "event" must be construed distributively, & judgment must be entered for defts., who were entitled to the costs of the action, reference, & award, but pltf. was entitled to the costs of the issues found in his favour.—*LUND v. CAMPBELL* (1885), 14 Q. B. D. 821; 54 L. J. Q. B. 281; 53 L. T. 900; 33 W. R. 510; 1 T. L. R. 341, C. A.

**Annotations:—***Consd. Ahrbecker v. Frost* (1886), 17 Q. B. D. 606. *Reid. Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500, C. A.

**2387. Where there is no event for purpose of costs**

—Award that goods be delivered by one party on payment by other.].—Where, upon reference of a cause to arbn., the costs of the suit & of the reference & award were to abide the event of the award, & the arbitrator directed that deft. should deliver certain goods to pltf., & pltf. pay a certain sum to deft., upon which payment proceedings in the suit should cease, & each give the other a general release:—*Held*: the event was that each party should pay his own costs.—*YATES v. KNIGHT* (1835), 2 Bing. N. C. 277; 1 Hodg. 368; 2 Scott, 470; 5 L. J. C. P. 12; 132 E. R. 109.

**Annotations:—***Distd. Matlock Gas Light Co. v. Peters* (1856), 6 E. & B. 215. *Reid. Wynne v. Edwards* (1844), 12 M. & W. 708; *Re Marsack & Webber* (1860), 2 E. & E. 637.

**2388. Court unable to say award in favour of either party.].—**Where a cause & all matters in difference are referred to arbn., with a direction that the costs of the action, reference, & award, shall abide the event of such award, & the arbitrator awards some things in favour of each party, so that the ct. cannot say upon the whole that the award is in favour of either, no order can be made as to any part of the costs, although the action was in trespass, & the arbitrator finds that trespasses were committed.

The costs of the action were to abide the event of the award. There has been no event of the award for this purpose (*per CUR.*).—*BOODLE v. DAVIES* (1835), 3 Ad. & El. 200; 1 Har. & W. 420; 4 Nev. & M. K. B. 788; 111 E. R. 389.

**Annotations:—***Consd. Yates v. Knight* (1835), 2 Scott, 470. *Distd. Matlock Gas Light Co. v. Peters* (1856), 6 E. & B. 215. *Consd. & Expld. Re Marsack & Webber* (1860), 2 E. & E. 637. *Consd. Dunhill v. Moore* (1867), 17 L. T. 148. *Expld. Stevens v. Chapman* (1871), L. R. 6 Exch. 213. *Mentd. Allenby v. Prondlock* (1835), 1 Har. & W. 357; *Jones v. Powell* (1838), 1 Will. Woll. & H. 60; *Gray v. Leaf* (1840), 8 Dowl. 654; *Dunn v. Warlters* (1842), 9 M. & W. 293; *Staples v. Hay* (1843), 1 Dow. & L. 711.

**2389. — Whether event to be construed as events.].—**W. & M. entered into an agreement as to carrying on business together. Differences arose, & M. brought an action against W. (*inter alia*) for fraudulent misrepresentations by which M. was induced to enter into the agreement. After issue joined, it was agreed to refer all disputes, differences & accounts respecting the original agreement, to arbn., the action to be discontinued, "the costs of the reference & award, including such costs as might be taxed of the action, to abide the event of the arbn." The arbitrator awarded that W. was not guilty of the charges of fraud, & that he was indebted to M. in a certain sum on the accounts:—*Held*: neither party was entitled to any costs; (1) on the ground that where two parties agreed to refer several disputes, "the costs of the reference & award to abide the event of the award," the costs were not distributable, & neither party was entitled to costs unless the event of the award was altogether in favour of one party (*WIGHTMAN, CROMPTON & HILL, JJ.*); (2) inasmuch as the different matters in dispute were all connected & founded on one original subject-matter, without deciding whether or not, if the matters referred had been distinct & separate, "event" might be construed "events," so as to make the costs distributable (*COCKBURN, C.J.*).—*Re MARSACK & WEBBER* (1860), 2 E. & E. 637; 29 L. J. Q. B. 109; 2 L. T. 54; 6 Jur. N. S. 507; 8 W. R. 306; 121 E. R. 239.

**2340. — Two plaintiffs joined in one action—Award for one plaintiff & against other.].—**Two pltf. joined in one action, claiming for separate & distinct causes of action. The case was referred, with power to the arbitrator to enter judgment, the costs of the cause to abide the event. The arbitrator found in favour of one pltf. & against the other, & entered judgment accordingly. On an application to review taxation of costs:—*Held*:



the successful pltf. was entitled to recover from deft. the whole of his general costs of the action, & deft. was only entitled to recover from the unsuccessful pltf. the costs occasioned by joining such pltf.—*GORT (VISCOUNT) v. ROWNEY* (1886), 17 Q. B. D. 625; 55 L. J. Q. B. 541; 54 L. T. 817; 34 W. R. 696; 2 T. L. R. 782, C. A.

*Annotations* :—*Folld. Arnison v. Smith* (1889), 41 Ch. D. 348, C. A. *Reid. Hannay v. Smurthwaite*, [1893] 2 Q. B. 412, C. A.; *Sandes v. Wildsmith*, [1893] 1 Q. B. 771; *Smurthwaite v. Hannay*, [1894] A. C. 494, H. L.

**2341. Not double costs** — 11 Geo. 2, c. 19, s. 22.] — Where in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbn., the costs to abide the event, & the arbitrator afterwards awarded in favour of deft. :—*Held* : he was not entitled to double costs under the above sect.—*GURNEY v. BULLER* (1818), 1 B. & Ald. 670; 106 E. R. 246.

**2342. Effect of arrest of judgment.**—By order of *Nisi Prius* a cause was referred to an arbitrator with power to state a special case, “the costs of the reference, award, & special case, to be costs in the cause, & abide the event thereof.” The arbitrator stated a special case upon which the Ct. of Exch. found all the issues for pltf. The Ct. of Exch. Chamber affirmed the finding of the issues, but arrested the judgment, on account of the defect of the declaration :—*Held* : neither party was entitled to the general costs of the cause or any costs in error, but under C. L. P. Act, 1852, s. 145, pltf. was entitled to the costs of the issues, & by the terms of the order of inference, he was also entitled to the costs of the reference award, & special case.—*WHALEY v. LAING* (1860), 5 H. & N. 480; 29 L. J. Ex. 313; 2 L. T. 158; 8 W. R. 439; 157 E. R. 1269.

**2343. Evidence that party entitled to costs** — *Master's allocatur insufficient.*—Where costs are directed to abide the event of an award, the master's *allocatur* is insufficient to satisfy the ct. that a party is entitled to the costs, but he must show that an award has been made & the event of it.—*SPIVEY v. WEBSTER* (1832), 2 L. J. Ex. 38.

#### SUB-SECT. 5.—THE AWARD AS TO COSTS.

**2344. Whether award must deal with costs** — *Costs in discretion.*—An agreement of reference provided “that the costs of the agreement, & of the reference & award, should be in the discretion of the arbitrator & be defrayed as he should direct.” The arbitrator awarded that deft. should pay a certain sum to pltf., but made no mention of costs :—*Held* : the award was bad. — *RICHARDSON v. WORSLEY* (1850), 5 Exch. 613; 19 L. J. Ex. 317; 15 L. T. O. S. 282; 155 E. R. 268.

*Annotation* :—*Reid. Re Laing & Todd* (1853), 13 C. B. 276.

*See, also*, No. 2618, *post*.

**2345. — Costs to abide event** — *No specific direction necessary.*—Where a cause is referred to

an arbitrator & the costs are to abide the event, & the arbitrator awards a specific performance of something to be done, which proves that the event in fact is in favour of pltf., he is entitled to costs, although the arbitrator does not award a verdict to be entered in form.—*ANON.* (1804), 1 Smith, K. B. 426.

**2346. — — — — —.**—Two causes & all matters in difference were referred to arbn., the costs of the cause & those of the reference to abide the event :—*Held* : an award of a sum of money to pltf. in the first, in satisfaction of all matters in difference between them up to the time of the reference, & also to pltf. in the second, in satisfaction of all damage which he had sustained, was final, though the arbitrator made no adjudication as to the costs.—*JUPP v. GRAYSON, GRAYSON v. JUPP* (1834), 1 Cr. M. & R. 523; 3 Dowl. 199; 5 Tyr. 150; 4 L. J. Ex. 8; 149 E. R. 1188.

**2347. — — — — —.**—A cause, in which there were several issues, was referred to arbn., the costs to abide the event. The arbitrator awarded on each issue separately, & partly for each party, but gave no direction for entering a verdict or a *nolle prosequi* :—*Held* : the award was sufficiently final, so that the costs could be taxed.—*CLARKE v. OWEN* (1836), 2 Har. & W. 324.

**2348. — — — — —.**—An action on three bills of exchange, & an account stated, in which issue had been joined on several pleas, was referred, together with all other matters in difference, the costs of the cause & of the reference to abide the result of the award. The arbitrator, after disposing of the first count & the plea to it, stated that deft. was indebted to pltf. in a sum of money on the last three counts, but on account of all matters referred, including that sum, pltf. was indebted to deft. in £17 7s. 5d., & this he directed to be paid to deft. :—*Held* : the costs were determined by the finding of the balance, & no more specific finding on the issues in the action was necessary.—*HEMSWORTH v. BRIAN* (1845), 1 C. B. 131; 2 Dow. & L. 844; 14 L. J. C. P. 134; 4 L. T. O. S. 315; 135 E. R. 486.

*Annotation* :—*Reid. Rule v. Bryde* (1847), 1 Exch. 151.

**2349. Separate submissions.**—Where the costs of the cause, & of the special jury, are distinctly & separately submitted to the discretion of arbitrators, they must distinctly adjudicate upon each, otherwise the award is bad.—*GEORGE v. LOUSLEY* (1806), 8 East, 13; 103 E. R. 249.

*Annotations* :—*Reid. Re Coombs* (1850), 4 Exch. 839; *Richardson v. Worsley* (1850), 5 Exch. 613. *Mentd.* *Wohlenberg v. Lageman* (1815), 6 Taunt. 251; *Smith v. Reeves* (1836), 2 Har. & W. 306.

**2350. Effect of silence.**—An arbitrator stated a special case, & directed that if any of his alternative awards in favour of claimants were upheld by the ct., the parties to the arbn. were to pay the costs of & incidental to the arbn. in certain proportions. The ct. decided that claimants had no right to the return of any money, & allowing the appeal of the corpn. with costs, remitted the case to the arbitrator for him to deal with the costs of & incidental

#### PART IV. SECT. 20, SUB-SECT. 5.

**2344 i. Whether award must deal with costs**—*Costs in discretion.*—By a submission parties referred all the matters in difference, etc., the costs of the cause, & of the reference, or any matter relative thereto, to be in the discretion of the arbitrators. The arbitrators made an award in favour of deft., but said nothing as to costs :—*Held* : the award must be set aside.—*TORY v. GUYSBORO MUNICIPALITY* (1884), 5 R. & G. 32.—CAN.

**2350 i. Effect of silence.**—Where an action is commenced in the King's Bench,

& arbitrators upon a reference award damages under the jurisdiction of the district ct., pltf. is not deprived of costs.—*LANG v. HALL* (1825), Tay, 215.—CAN.

**2350 ii. — — — — —.**—The costs of arbn. held to follow the award as of course.—*DALY v. KELLY* (1829), 2 Ir. L. Rec. 1st ser. 252.—IR.

**2350 iii. — — — — —.**—Where the costs of the reference are in the discretion of arbitrators, & the award says nothing about them, each party pays his own costs of reference, & the costs of the award are to

be borne equally.—*GLEN v. GRAND TRUNK R. W. Co.* (1859), 2 P. R. 377.—CAN.

**2350 iv. — — — — —.**—Pltf. brought an action of trespass claiming damages for interference with a stream of water, & seeking an injunction. The case was referred to arbn. The umpire awarded £2 damages, directed certain works to be carried out at the joint expense, & found that deft. should be restrained from interfering with the works when completed. No order was obtained declaring pltf. entitled to his costs :—*Held* : pltf. was not entitled to the costs

**Sect. 20.—Costs: Sub-sects. 5 & 6.]**

to the arbn. The arbitrator having died, a summons was taken out by the corpn. to tax those costs according to the award:—*Held*: either intentionally or *per incuriam*, no costs were given in the award in the events which had happened, & there could be no order to tax under the award.—*Re STANLEY BROTHERS, LTD. & NUNEATON CORPN.* (1914), 59 Sol. Jo. 104.

**2351.** —.—.]—Where an arbitrator had not dealt with costs in any manner:—*Held*: the successful party was not entitled to them.—*CATLING v. GREAT NORTHERN RY. CO.* (1869), 21 L. T. 769; 18 W. R. 121, C. A.

*Annotation*:—*Mentd.* Rhys v. Dare Valley Ry. Co. (1874), 23 W. R. 23.

**2352.** **Costs in discretion — Act of 1889, s. 15 (2).**—Costs left to the discretion of the arbitrator, but not dealt with by him, only follow the event when the matter is referred by the ct. under s. 14 of the above Act, & not when the action is stayed & arbn. is directed by the ct. under the submission of the parties, for to such a reference s. 15 (2) does not apply.—*WARBURG & CO. v. MCKERROW & CO.* (1904), 90 L. T. 644.

**2353.** —.— **Award equivalent to verdict of jury.**—Where an action is referred to an arbitrator under the Act of 1889, s. 14, by an order which is silent as to costs, & the arbitrator makes an award which does not deal with costs, the costs of the action, reference, & award follow the event, inasmuch as under s. 15 (2) of the Act the award is equivalent to the verdict of a jury.—*CARR BROTHERS v. DOUGHERTY* (1898), 67 L. J. Q. B. 371; 14 T. L. R. 237.

*See, also*, Nos. 1705, 1706, *ante*.

**2354.** —.— **Judgment silent as to issues.**—Pltf. brought an action against deft. on a building contract claiming £427 9s. 3d. as the balance due to him thereunder. Deft. pleaded that the work done by pltf. under the contract was unsatisfactory & of inferior quality, so that no balance was due thereunder, & that the claim was barred by Stat. of Limitations. The action having been referred, the official referee found that £247 7s. was due from deft. to pltf., but that pltf.'s right to recover the amount was barred by Stat. of Limitations, & pursuant to his direction, judgment was entered for deft., with his costs of the action except so far as these had been increased by the defence other than Stat. of Limitations:—*Held*: (1) the question as to the existence & amount of the debt due under the contract was an "issue," & the finding of the official referee was an "event," within R. S. O., Ord. 65, r. 1, & the mere fact that the judgment did not state that pltf. was entitled to the costs of that issue on which he succeeded did not imply that it did "for good cause otherwise order" within that rule; (2) pltf. was entitled to his costs of that issue.—*SLATFORD v. ERLEBACH*,

of the action.—*MAHOOD v. TODD* (1896), 30 I. L. T. 86.—*IR.*

**2350 v.** —.— **Costs to abide event.**—Where a cause was referred, costs to abide the event, & the arbitrators having made no award the parties agreed to refer the cause to any judge who should first come to P., & such judge awarded that pltf. had no cause of action, & that judgment should be entered for deft.:—*Held*: deft. might maintain *assumpsit* for the taxed costs of the cause, & was not obliged to enter judgment.—*HALE v. MATTHISON* (1833), 3 O. S. 78.—*CAN.*

**2350 vi.** —.— **Verdict taken with costs.**—A case was referred to arbn., it having been consented by the parties that a

verdict should be taken for pltf. for the sum claimed by him, with costs, subject to be reduced or turned into a verdict for deft., with costs, according to the finding or award of the arbitrators. The award reduced the amount of the verdict, but was silent on the subject of costs:—*Held*: pltf. was entitled to the costs of the reference & award, in addition to the costs of the action.—*FAIRWEATHER v. KINGSTON (EARL OF)* (1844), 9 I. L. R. 268.—*IR.*

**2350 vii.** —.— **Verdict subject to reference.**—A verdict was taken for pltf. by consent, subject to the award of three of the jury, who, by their award, reduced the amount of the verdict. No provision was made as to the costs of the reference:—*Held*: the costs of the reference followed the verdict.—*HOLMES*

[1912] 3 K. B. 155; 81 L. J. K. B. 372; 106 L. T. 61, C. A.

*Annotations*:—*Distd.* *Ingram & Royle v. Services Maritimes Du Treport*, [1914] 3 K. B. 28, C. A.; *Howell v. Dering*, [1915] 1 K. B. 54, C. A. *Consd.* *Reid, Hewitt v. Joseph*, [1918] A. C. 717, H. L. *Reid.* *Bush v. Rogers*, [1915] 1 K. B. 707, C. A.; *Quirk v. Thomas*, [1916] 1 K. B. 516, C. A.; *Yorke v. Yorkshire Insee.*, [1918] 1 K. B. 662.

*See, also*, Nos. 2311—2340, *ante*.

**2355.** **Sufficiency of award as to costs—Several suits—Costs to successful party in each.**—Where several causes are referred & "the costs of the several actions, & of all matters & things relating thereto, shall abide the event of the award," & the arbitrator directs the costs of each action to be paid to the successful party in each suit, the award is good, although the same party has not succeeded in all the actions.—*JONES v. POWELL* (1838), 6 Dowl. 483; 1 Will. Woll. & H. 60.

**2356.** —.— **Award not disposing of costs of submission.**—A dispute between A. & B., two ship-owners, as to a collision, was by agreement referred, the agreement providing that "all such disputes & differences, claims, demands, & damages in respect thereof, should be referred to the arbitrators," & that "all the costs & charges in & about the submission, the reference, & award, should be in the discretion of the arbitrators." The arbitrators ordered that A. should pay "the damages & costs incurred by B. in consequence of the collision, £72 6s.," that "the arbitrators' charges & expenses attending the reference, amounting to £62 14s. 10d. should be borne in equal proportion by A. & B., & that the sums of £72 6s. & £62 14s. 10d., making together £135 0s. 10d. should be paid, within ten days from the execution of the award":—*Semle*: the award did not sufficiently dispose of "the costs & charges in & about the submission, reference, & award."—*Re LAING & TODD* (1853), 13 C. B. 276; 138 E. R. 1204.

**2357.** —.— **Costs in discretion—Party through whom default—Not final.**—By agreement in writing, certain disputes were referred to arbn., "the costs of the submission, reference, award, & making the submission a rule of ct., to be in the discretion of the arbitrators." The arbitrators awarded that the costs of the submission, reference, & award should be borne by the parties in equal proportions, & that the costs of making the submission a rule of ct. should be paid by such of the parties through whose default, in the performance of the award, same should become necessary:—*Held*: the award was not final or certain as to the costs of making the submission a rule of ct., & was bad.—*Re SMITH & WILSON* (1848), 2 Exch. 327; 18 L. J. Ex. 320; 154 E. R. 518.

*Annotation*:—*Apld.* *Williams v. Wilson* (1853), 9 Exch. 90.

**2358.** —.— **Party disobeying to pay costs—Uncertainty.**—By an agreement of reference entered into by A., B., C., & D., certain matters in difference

*v. BROPHY* (1825), Sm. & Bat. 382.—*IR.*

**2355 i.** **Sufficiency of award as to costs—Alleged uncertainty.**—Parties referred an action, & agreed that the costs of the cause & of the reference should be in the discretion of the arbitrators. The arbitrators awarded that deft. should pay pltf. £1,000 in full adjustment of all matters in difference, that deft. should pay pltf. £12, the costs of the reference, & that on payment of these two sums, the parties should be *ipso facto* mutually discharged from all claims & demands which they had against each other:—*Held*: the award was reasonably certain, & in effect decided that each party should pay his own costs of the action.—*ADAM v. CARTER* (1864), 6 All. 49.—*CAN.*



were referred to arbn., & the arbitrators were thereby empowered to make the award notwithstanding the death of any of the parties, " & the submission of reference might be made a rule of ct. at the instance of either of the parties to the reference, & the costs of the agreement, & of the reference, & of the arbitrators & award, & of the making of the submission a rule of ct., should be in the discretion of the arbitrators." B. died before the making of the award. The arbitrators, by their award, found that a sum of money was due from B. in his lifetime to A., & was then still due, & they awarded & directed the personal representatives of B. (defts.) to pay same within seven days, that the costs of the agreement of reference, of the arbitrators & of the award should be borne & paid equally by B.'s personal representatives & by A., & that "the costs & charges of making such submission a rule of ct. should be paid & borne by the party disobeying the award & obliging the same to be made a rule of ct.":—*Held*: the clause by which the arbitrators directed the party disobeying the award to pay the costs was uncertain & vitiated the whole award.—*WILLIAMS v. WILSON* (1853), 9 Exch. 90; 23 L. J. Ex. 17; 21 L. T. O. S. 229; 1 C. L. R. 921; 156 E. R. 38.

**2359. — Award of two-thirds—No rule for computation.]**—A declaration alleged (*inter alia*) that a reference was made of disputes to A., who ordered, as to the costs, that two-thirds should be paid by defts., & one-third by pltf. Breach, that two-thirds of the costs of the arbn. amounted to £500 & that defts. had not paid two-thirds of the costs:—*Held*: the breach was bad, as the deed left it quite uncertain & ambiguous by what rule the costs were to be computed.—*KIRK v. UNWIN* (1851), 6 Exch. 908; 20 L. J. Ex. 345; 18 L. T. O. S. 64; 155 E. R. 815.

**2360. — Equal proportions — Sufficient.]**—Where an agreement of reference provided that the arbitrator should by his award direct by whom, to whom, & in what proportions & manner the costs of the award & the compensation to the arbitrator should be paid, & the award directed same to be paid by A., B., & C. in equal proportions:—*Held*: the award was good, although it did not otherwise show by whom, to whom, or in what manner these costs were to be paid, as it sufficiently indicated that each of the three parties was to pay one-third of them to the arbitrator.—*Re YOUNG & BULMAN* (1853), 13 C. B. 623; 22 L. J. C. P. 160; 138 E. R. 1344.

**2361. — Uncertainty as to what costs included.]**—Matters in difference between A. & B. were by agreement referred to arbitrators or an umpire, the costs of the submission, reference & award to be in their or his discretion. A. claimed about £30; B. denied that he was indebted in any sum. The arbitrators having differed, the umpire made his award in favour of A. for £6 5s. 2d., but directed him to pay B. his costs of the submission, & of the reference & of the award, amounting to £13 4s. 3d.:—*Semle*: there was such ambiguity in the award as to what costs were intended as would have induced the ct. to send the matter back to the umpire, if asked to do so.—*Re FEARON & FLINN* (1889), L. R. 5 C. P. 34.

**2362. Amount of costs—Power to fix.]**—If the

**2364 i. Amount of costs — Whether award must fix.]**—When costs of the reference are in the discretion of the arbitrators, it is the usual & most proper practice for the arbitrators to fix a specific sum to be paid for such costs.—*LAURIE v. RUSSELL* (1852), 1 P. R. 65.—CAN.

**2364 ii. — Parol submission.]**—A clause in an insurance policy provided that any claim should be referred to

arbn.; there was an award of a sum in satisfaction of the claim, together with whatever costs might have arisen in the case up to that date, but without specifying any sum as awarded for such costs. The arbitrators were appointed by parol:—*Held*: bad for uncertainty, because as the submission was by parol, & incapable of being made a rule of ct., the costs awarded could not be ascertained by taxation, & were left unascertained by the award itself.—*RAULSTONE v. ALLIANCE INSURANCE CO.* (1879), 4 L. R. 1r. 547.—IR.

**2364 iii. — Procedure when excessive.]**—Extravagance in the amount of costs allowed under a submission, which provides that costs shall be in the discretion of the arbitrators, must be objected to by motion.—*TOWSLEY v. WYTHES* (1858), 16 U. C. R. 139.—CAN.

submission to arbn. leave the costs in the discretion of the arbitrators, who have power to choose an umpire, the award is good if the amount of the costs is settled by the umpire.—*TAYLOR v. DUTTON* (1823), 1 L. J. O. S. K. B. 158.

**2363. — —.]**—If, by the submission, the costs of an arbn. are to abide the event, it is an excess of jurisdiction for the arbitrator to determine their amount.

The provision in the submission as to the costs is, in substance, that they shall abide the event of the award; the arbitrator has no direct power over them, & he has clearly exceeded his jurisdiction in awarding that a certain sum shall be paid on that account (*COLERIDGE, J.*).—*KENDRICK v. DAVIES* (1837), 5 Dowl. 693; Will. Woll. & Dav. 376; 1 Jur. 673.

*See, also, cases in Part II., Sect. 5, ante.*

**2364. — Whether award must fix.]**—whether an award upon the reference of an action, directing the payment of costs of the award, without fixing the amount thereof, is bad in that point for uncertainty, or whether the amount may not be taxed by the officer of the ct.—*BARRETT v. PARRY* (1812), 4 Taunt. 658; 128 E. R. 489.

**2365. — —.]**—If an award is not made a rule of ct., it must state the amount of costs, but this is not necessary when it is made a rule of ct., as the costs in that case may be taxed, even when the amount is named in the award.—*HILL v. FISHER* (1843), 2 L. T. O. S. 124.

**2366. — Submission to ascertain.]**—Where by an order of *Nisi Prius*, a cause was referred, the costs of the cause to abide the event, & the costs of the reference & award to be in the discretion of the arbitrator, "who shall ascertain the same":—*Held*: the arbitrator was bound to ascertain & determine the amount of the costs of the reference & award.—*MORGAN v. SMITH* (1842), 9 M. & W. 427; 1 Dowl. N. S. 617; 11 L. J. Ex. 379; 152 E. R. 181.

*Annotations:—Apld. Ross v. York, Newcastle & Berwick Ry. Co.* (1849), 5 Dow. & L. 695. *Refd. Grenfell v. Edgcombe* (1845), 7 Q. B. 661; *Holdsworth v. Barsham* (1862), 2 B. & S. 480. *Mentd. Re Lloyd & Spittle, Re Addison & Spittle* (1849), 18 L. J. Q. B. 151; *Re Smith v. Reece, Re Reece v. Smith* (1850), 14 Jur. 483.

**2367. Award of gross sum.]**—An award of a gross sum for costs of two actions, the reference & the award, is bad.—*TAYLOR v. BROOKE* (1846), 7 L. T. O. S. 109.

**2368. — Taxation if not fixed by award.]**—Under the Act of 1889, s. 2, the amount of the costs must be stated in the award, otherwise the costs (including the arbitrator's fees, etc.), are liable to taxation in the ordinary course.—*Re PREBBLE & ROBINSON*, [1892] 2 Q. B. 602; 67 L. T. 267; 57 J. P. 54; 41 W. R. 30; 36 Sol. Jo. 744.

*Annotation:—Refd. Re Cannings & Middlesex County Council*, [1907] 1 K. B. 51, C. A.

**Effect of invalid direction as to costs.]**—*See* Nos. 2214—2220, *ante*.

#### SUB-SECT. 6.—WHAT COSTS ALLOWED—TAXATION.

**2369. Power of arbitrator to direct taxation.]**—An award that deft. shall pay such costs as are taxed



**Sect. 20.—Costs: Sub-sect. 6.]**

by the prothonotary of the ct. in which the action is good.—*WORRELL v. ATWORTH* (1668), 1 Sid. 358; 82 E. R. 1155.

*Annotation:—Reid.* Phillips v. Knightley (1731), 2 Stra. 903.

**2370.** —.]—An award ordered a party to pay such costs as the master should or ought to tax:—*Held*: this award was not void for uncertainty.—*EASTLAND v. FRANKS* (undated), cited in 1 Barn. K. B. at p. 463; 94 E. R. 312.

*Annotation:—Mentd.* Phillips v. Knightley (1731), 1 Barn. K. B. 463.

**2371.** —.]—An award to pay costs to be taxed by one not an officer for that purpose is ill.—*NOTT v. LONG* (1735), Lee temp. Hard. 181; 95 E. R. 117; *sub nom.* *KNOTT v. LONG*, 2 Stra. 1025.

**2372.** —.]—Strictly an arbitrator cannot in any instance delegate his power; but this does not prevent him from referring costs to the proper officer for taxation.—*LINGOOD v. EADE* (1742), 2 Atk. 501; 26 E. R. 702.

**2373.** —.]—An award that costs be taxed by the proper officer is good.—*FURNIS v. HALLOM* (1749), Barnes, 166; 94 E. R. 859.

**2374.** — **No cause pending.**—Upon a reference by a judge's order, where the costs of the reference & award are to be in the discretion of the arbitrator, & the order contains the usual clause that the order may be made a rule of ct., & the order is afterwards made a rule of ct., & the arbitrator awards the costs to be paid by one of the parties, to be taxed by an officer of the ct., the award is good, although no cause was pending at the time of the order of reference.—*BHEAR v. HARRADINE* (1852), 7 Exch. 269; 21 L. J. Ex. 127; 18 L. T. O. S. 228, 261; 155 E. R. 947.

*Annotation:—Apld.* Malvern U. D. C. v. Malvern Link Gas Co. (1900), 83 L. T. 326, C. A.

**2375. Power of court to order taxation.**—Where the award is only in general that the party shall be indemnified from the costs of such a suit, the ct. may order the officer to tax them.—*EASTLAND v. FRANKS* (undated), cited in 1 Barn. K. B. at p. 463; 94 E. R. 312.

*Annotation:—Apld.* Phillips v. Knightley (1731), 1 Barn. K. B. 463.

**2376.** —.] — An arbitrator awarded that pltf. had no cause of action, & that a verdict should be entered for deft., & then, by mistake, directed that the costs of the reference & award should be paid by deft., meaning pltf. Pltf. moved the ct. for a taxation of his costs as adjudged, or that the award which had been executed in duplicate, & one copy afterwards corrected by the arbitrator, might be set aside. Deft. not agreeing to this latter proposal, the ct. ordered a taxation.—*WARD v. DEAN* (1832), 3 B. & Ad. 234; 110 E. R. 87.

*Annotations:—Folld.* Moore v. Butlin (1837), 7 Ad. & El. 595. *Apld.* Mordue v. Palmer (1870), 6 Ch. App. 22.

**PART IV. SECT. 20, SUB-SECT. 6.**

**2375 i. Power of court to order taxation.**—In a cause in the Ct. of Common Pleas, & a cross cause in the Ct. of Exch., the matter was referred at *Nisi Prius* by a consent which was made a rule of that ct., & judgment was entered in the Ct. of Common Pleas. The latter ct. ordered the proper officer to tax the costs of the cause & of the reference, although the consent had never been made a rule of that ct.—*MORAN v. TROY* (1841), 3 I. L. R. 468.—IR.

**2375 ii.** — *Dominion Railway Act*, R. S. C. (c. 109), s. 8 (22).—By the above Act the costs of an arbn. as to the value of land expropriated for a railway may be taxed by the judge. The judge, by an order not appealed

against, referred the taxation to a taxing officer:—*Held*: the question whether the judge had power to delegate the taxation could not be raised, & an appeal lay from the taxing officer to the judge. *Qu.*: whether "the judge" named in s. 8 (22) could delegate the taxation of costs.—*Re McRAE & ONTARIO & QUEBEC RY. CO.* (1887), 12 P. R. 282, 327.—CAN.

**b. Right to taxation.**—The taxing officer should tax the costs of a submission without further order of the ct., if such costs are provided for in the submission.—*M'DONAGH v. MOORE* (1831), 4 Ir. L. Rec. 1st ser. 106.—IR.

**c.** —.]—*Held*: where it did not appear that the arbitrator might have been biased or affected in any degree by his employment, an interlocutory in-

**2377.** —.]—A bill of costs between solr. & client, where the amount of it has been ascertained by an arbitrator, under an agreement for a reference, cannot afterwards be referred to the master for taxation, the award of the arbitrator being final as between the parties.—*MARRIE v. CAMAC* (1833), 2 L. J. Ch. 120.

**2378.** — **Reference under Public Health Act, 1875 (c. 55), ss. 179 & 180—Right to taxation—Action not necessary.**—Two local authorities, whose districts were adjacent, agreed to carry out a joint sewerage scheme by an agreement, in which it was stipulated that all disputes as to the matters comprised therein should be settled by arbn. in the manner provided by Public Health Act, 1875 (c. 55), ss. 179, 180. An award having been given in an arbn. which arose out of the agreement, which awarded that one of the authorities should pay to the other the costs of the reference & award, without stating the amount of such costs:—*Held*: as the submission to arbn. had been made a rule of ct. the taxing master was bound to tax the costs upon the application of the successful parties, & it was not obligatory on them to bring an action upon the award in order to do so.—*CHESTERFIELD CORPN. & BRAMP-TON LOCAL BOARD* (1886), 50 J. P. 824.

**2379. Proceedings to obtain taxation—On whom duty incumbent.**—If arbitrators award deft. to pay pltf. his costs of suit to be taxed by the proper officer before a particular day, it is the business of deft. to have them taxed before that day.—*CANDLER v. FULLER* (1738), Willes, 62; 125 E. R. 1057.

*Annotation:—Reid.* Lewis v. Rossiter (1875), 23 W. R. 832.

**2380. At what time.**—A cause & all matters in difference between the parties were referred by agreement, the costs of the cause to abide the event of the award, & the costs of & relating to the reference & award to be in the discretion of the arbitrator. The award directed that deft. should pay to pltf. a certain sum as damages in the action & a further sum in respect of the matters in difference, & also the costs of the reference & award:—*Held*: pltf. was entitled to have the costs taxed immediately, & was not bound to wait until the time for moving to set aside the award should have expired.—*LITTLE v. NEWTON* (1840), 1 Man. & G. 976; 2 Scott, N. R. 159; 133 E. R. 627.

*Annotations:—Distd. & Expld.* Jones v. Ives (1850), 10 C. B. 429. *Reid.* Hare v. Fleay (1851), 11 C. B. 472.

**2381. Compelling production of award.**—In a case where pltf. had got possession of the award, & refused to produce it, & the master refused to proceed to tax without it, the ct. granted a rule to show cause why pltf. should not produce the award before the master, or the master proceed without it.—*GEAR v. FINDEN* (1844), 4 L. T. O. S. 99.

junction restraining the taxation of costs under the award should not be granted.—*ROWAND v. RAILWAY COMRS.* (1890), 6 Man. L. R. 401.—CAN.

**d.** —.] — Where the arbitrators having authority so to do awarded costs, & their award had not been moved against:—*Held*: it was the duty of the taxing officer to tax costs.—*Re SMITH & TORONTO CITY* (1890), 13 P. R. 479.—CAN.

**e.** — **Refusal to tax.**—A cause was referred, costs of the cause to abide the event, & costs of the reference in the discretion of the arbitrator, & \$4 was awarded to pltf. The taxing officer refused to tax only division of costs subsequent to the award, & his decision was upheld.—*FLEURYNOCK v. CLIFTON* (1859), 3 P. R. 216.—CAN.

**Special order to tax unnecessary.**

In an arbn. under Public Health Act, 1875 (c. 55), s. 155, the umpire made an award in favour of claimant, & directed the corpn. to pay the costs of the reference & award:—*Held*: the common law procedure should apply to the taxation of costs under an award in the Ch. Div., & a special order to tax the costs was not necessary.—*Re CLARK & BATH CORPN.*, [1884] W. N. 127.

**2383. Power to tax—Two defendants—One not attending.**—By an order of reference, costs were to abide the event. There were two defts., one of whom did not attend before the arbitrator, or take any part in the proceedings before him. The master taxed the whole costs of the cause & the reference in one sum to the other deft., by whom payment was demanded of pltf. The ct. refused to grant an attachment for non-payment of those costs. *Qu.*: whether the master had power to tax costs for the two defts. separately.—*DICKINS v. JARVIS* (1826), 5 B. & C. 528; 108 E. R. 197; *sub nom.* *DICKINS v. SMITH*, 8 Dow. & Ry. K. B. 285.

*Annotations*:—*Mentd.* *Smith v. Reeves* (1837), 5 Dowl. 513; *Barton v. Ranson* (1838), 1 Horn & H. 11.

**2384. On what scale—Arbitrator with power to certify—No certificate obtained.**—In an action to recover the sum of £5 for a fine alleged to be payable to the lord of a manor on the admittance of deft. as tenant in remainder in fee to certain copyhold premises, a verdict was taken, subject to the opinion of the ct. upon a special case, & it was referred to a barrister to ascertain & state the amount of the annual value of the premises, & any deductions proper to be made in respect thereof, the arbitrator to have power to certify that the cause was proper to be tried before a judge of a superior ct. & not before the sheriff. Upon a special case, the decision of the ct. was in favour of deft., but no certificate was obtained from the arbitrator. The master having taxed the costs upon the full scale:—*Held*: he had acted within his authority, & exercised a proper discretion.—*RICHARDSON v. KENSIT* (1843), 6 Man. & G. 712; 7 Scott, N. R. 455; 13 L. J. C. P. 17; 2 L. T. O. S. 122; 7 Jur. 1062; 134 E. R. 1079.

**2383 i. Power to tax—Railway Act, s. 11.**—Costs of an arbn. under the above Act can be taxed only by the county ct. judge; & charges in the bill for business done in another ct. auxiliary to the arbn., such as procuring an order for the attendance of witnesses, will not authorise a reference to the master. *Qu.*: whether such order can properly be granted in such arbn.—*Re McDERMOTT*, 3 Ont. Dig. 5993.—CAN.

**2383 ii. — Deputy clerk of Crown.**—A taxation by a deputy clerk of the Crown of costs under an award, on a reference to arbn. of two causes in different cts., together with all matters in difference, is not a nullity, as being beyond his jurisdiction, & probably not even an irregularity.—*Re HOTCHKISS & HALL* (1871), 5 P. R. 423.—CAN.

**2384 i. On what scale—Summary costs.**—Where a cause was referred to arbn., the award to be entered as a verdict, & an award was made in favour of pltf. for £3, he was allowed summary costs, it appearing by affidavit that his account, as allowed by the arbitrators, was about £20, & was reduced by deft.'s account—notice of set-off having been given in the action, & it not being clearly shown that deft.'s account was a payment.—*DOYLE v. DOUGAN* (1840), 1 Kerr. 161.—CAN.

**2384 ii. — Full costs.**—All matters in difference in a cause, & in a building agreement, were referred, costs of the cause & reference to abide the event. The award, after disposing of the issues in pltf.'s favour, assessed his damages & also pltf.'s costs & charges at £52 16s. 7d.

The costs of the reference & award were then fixed by the award at £20. The costs of the suit were afterwards taxed without notice to deft.:—*Held*: as no verdict had been taken, pltf. was entitled to full costs.—*JONES v. REID* (1853), 1 P. R. 247.—CAN.

**2384 iii.** —Where the transactions amounted to about \$1,100 on one side, & about \$800 on the other, & deft. paid into ct. \$176, & pltf. recovered \$102.30 by the award:—*Held*: full costs should be allowed to pltf.—*JONES v. HEWSON* (1866), 2 C. L. J. O. S. 107.—CAN.

**2384 iv. — Common Law Procedure Act, 1853, s. 243.**—A cause was referred by consent, after the jury were sworn, to three arbitrators, to whom no power to certify for costs was reserved. The arbitrators found for defts. on one plea, & for pltf. upon another with 50s. damages. On an application by pltf. under s. 97 of C. L. P. Act, 1856, the ct. held there had been no trial within s. 97. Pltf. applied that the taxation of his costs might be reviewed & full costs allowed under s. 243 of C. L. P. Act, 1853:—*Held*: the two sects. in the two C. L. P. Acts being in *pari materia* there had been no trial within the 103rd General Ord. made under the above Act.—*BENNETT v. SCOTT* (1863), 8 Ir. Jur. 206.—IR.

**2384 v. — Cause referred—Costs to abide event.**—Where a cause is referred, costs to abide the event, pltf. is not entitled to full costs if he is awarded anything, but to such costs only as he could

**2385. — Arbitrator without power to certify.**

Cross actions & all matters in difference were referred to an arbitrator by a judge's order, which directed that the costs of one of the actions, & of the reference, should abide the event, & that the costs of the other should be in the discretion of the arbitrator. No power was given to give any certificate. The arbitrator having awarded £17 3s. to pltf., in one of the actions, & that each party should bear his own costs of the other action:—*Held*: the master ought to have taxed the costs on the reduced scale, although the unsuccessful party had resisted effectually a summons to try his action before the sheriff, on the ground that he claimed more than £20.—*ELLEMAN (ELLIMAN) v. WILLIAMS* (1844), 2 Dow. & L. 46; 13 L. J. Q. B. 219; 3 L. T. O. S. 106; 8 Jur. 515.

*Annotation*:—*Distd.* *Holland v. Vincent* (1853), 17 Jur. 1059.

**2386. — Directions to masters of Hilary Term, 16 Viet.—Application where less than £20 recovered.**—Where less than £20 is recovered by the award of an arbitrator, the costs of the reference are not within the above directions, so as to enable them to be taxed on the lower scale.—*HOLLAND v. VINCENT* (1853), 9 Exch. 274; 23 L. J. Ex. 78; 17 Jur. 1059; 2 W. R. 96; 2 C. L. R. 407; 156 E. R. 117.

*Annotations*:—*Refd.* *Nicholson v. Sykes* (1854), 9 Exch. 357; *Street v. Street*, [1900] 2 Q. B. 57, C. A.

**2387. — Cause referred at Nisi Prius—Lands Clauses Consolidation Act, 1845 (c. 18).**—An action of trespass was referred, by consent, at *Nisi Prius*, & by an order of *Nisi Prius*, drawn up in the usual form, the verdict was, by consent, entered for pltf., with damages 40s., costs 40s., & by the like consent, it was also ordered that the costs of the reference & award should be paid by defts. The award having been made, the master taxed the costs of the action as between party & party on the ordinary scale, & then proceeded to tax the costs of the reference & award on the same scale, but pltf. objecting that the proceedings on the reference were virtually under the above Act, & that the costs ought to be taxed on the scale usually allowed

have claimed if he had recovered the same amount.—*WATSON v. GARRETT* (1860), 3 P. R. 70.—CAN.

**2384 vi. — Case not within R. S. C. 155.**—Two actions were referred, no verdict being taken, costs to abide the event. In one the arbitrator found £20, in the other £10. Pltf. proceeded by attachment on the award:—*Held*: he was entitled to full costs without a certificate.—*COCHRANE v. SCOTT, COCHRANE v. CROSS* (1859), 3 P. R. 32.—CAN.

**2384 vii. — Case within R. S. C. 155.**—A cause was referred, before trial, by judge's order, costs to abide the event, & the arbitrator awarded £9 3s. 9d., the claim being originally of the jurisdiction of the county ct., & reduced by set-off. Pltf. applied for full costs, on affidavit showing that he intended to enforce his award by rule of ct. & execution under C. S. U. C. (c. 24), s. 19:—*Held*: he must be considered as obtaining final judgment without trial, & the case came within the above rule.—*WATSON v. GARRETT* (1860), 3 P. R. 70.—CAN.

**2384 viii. — Parties contracting out of Common Law Procedure Act, 1856, s. 97.**—In an action the matters in dispute were referred to arbn. under a consent, which specifically dealt with the question of costs in each event. The parties lived within the same civil bill jurisdiction. The arbitrators awarded \$15 to pltf. The taxing master had given pltf. all his costs:—*Held*: the taxing master had acted properly as the parties had contracted themselves out of the above Act.—*LANG v. EAKIN* (1867), 1 I. L. T. Jo. 631.—IR.



**Sect. 20.—Costs: Sub-sect. 6.]**

in proceedings under that Act, the master adjourned the taxation to enable plffs. to apply to the ct.:—*Held*: the costs defts. had stipulated to pay, & which they were bound to pay under the order of *Nisi Prius*, were ordinary costs as between party & party, & ought to be taxed on such & on no other scale.—*ECCLES v. BLACKBURN CORPN.* (1861), 30 L. J. Ex. 358.

**2388. — Agreement to pay all costs, charges, etc.—Solicitor & client costs.]**—By an agreement, which it was agreed should be “deemed a ‘submission’ within the Act of 1899,” a district council agreed to pay all the costs, charges, & expenses of a gas co. preliminary & incidental to the negotiation for the sale of their undertaking, & the arbn. fixing the price, same to be taxed in case the parties differed. An award was made which did not deal with costs. The costs were taxed by a master, who allowed costs upon a scale lower than the scale as between solr. & client:—*Held*: there was jurisdiction to review the taxation of the master, & the co. was entitled to costs as between solr. & client.—*MALVERN URBAN DISTRICT COUNCIL v. MALVERN LINK GAS CO.* (1900), 83 L. T. 326, C. A.

**2389. What costs allowed—Costs of trial.]**—In an action brought to recover the balance of an account, the parties agreed that the amount should be referred to two arbitrators, who, in settling the balance due, were to be guided by the decision of a jury, in regard of a certain cargo of cotton shipped by plffs., the costs of which formed one of the items. The jury found that plffs. were not entitled to charge defts. with the costs of the cotton; & the arbitrators, after excluding such costs pursuant to the verdict, found a certain sum to be due to plffs. The prothonotary, on taxation, refused to allow plffs. the costs of the trial which applied to the cotton:—*Held*: he was right in so doing.—*FAIRLIE v. PARKER* (1828), 1 Moo. & P. 438; 6 L. J. O. S. C. P. 105.

*Annotation*:—*Reid*. *Bridges v. Fisher* (1835), 4 L. J. C. P. 117.

**2390. — Where two trials—Costs of former trial.]**—If a cause come on for trial & be referred, & the arbitrator's award in favour of pltf. should be afterwards set aside, so that the cause be in consequence subsequently tried, pltf., if he should also succeed on that occasion, will be allowed the costs of the former trial.—*POOLE v. SELWOOD* (1815), 1 Price, 310; 145 E. R. 1413.

*Annotations*:—*Consd.* *Payne v. Bailey* (1822), 7 Moore, O. P. 147. *Distd.* *Wood v. Duncan* (1839), 5 M. & W. 87. *Expld.* *Brown v. Clarke* (1843), 13 L. J. Ex. 36.

**2395 i. What costs allowed—Counsel's fees for examination of havers.]**—In taxing an account the expense of counsel attending an examination of havers. previous to a trial in an action afterwards referred, is not allowed except in particular cases.—*FAIRLEY v. M'GOWN* (1836), 14 Sh. (Ct. of Sess.) 470.—*SCOT*.

**2395 ii. — Counsel's fees for settling submission.]**—Upon the taxation of costs as between party & party, there is not any principle against the allowance of fees to counsel for settling deeds of submission to arbn. in cases of importance.—*BOOTH v. BOOTH* (1848), 11 I. L. R. 315.—*IR*.

**2395 iii. — Counsel's fee.]**—It is in the discretion of the judge whether or not to allow a counsel fee to the successful party where a cause is referred to arbn., & the ct. will not interfere with the exercise of that discretion.—*MILMORR v. FREEZE* (1878), 1 P. & B. 705.—*CAN*.

**2395 iv. — .]**—In taxing the costs of an arbn. upon the county ct. scale, no larger fee for attendance of counsel before the arbitrators than \$25 can be

allowed, even though the attendance is for several days.—*Re MONTAGUE & ALDBOROUGH TOWNSHIP* (1887), 12 P. R. 141.—*CAN*.

**2395 v. — Increased counsel's fees.]**—The taxing officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbn., where there is no cause in ct., & a reference to a local officer to tax costs has been made under R. S. O., 1887 (c. 53), s. 24.—*Re MCKEEN & SOUTH GOWER TOWNSHIP* (1888), 12 P. R. 553.—*CAN*.

**2395 vi. — Two counsel.]**—In taxing the costs of an arbn., a taxing officer has jurisdiction, in his discretion to allow a second counsel fee.—*Re POLLOCK & TORONTO CITY* (1893), 15 P. R. 355.—*CAN*.

**i. — Accountant.]**—Parties in a submission are liable for the expense of employing an accountant to whom the arbiter has remitted books, etc., to draw out a state of accounts.—*M'LEOD v. BISSET* (1825), 4 Sh. (Ct. of Sess.) 330.—*SCOT*.

**2391. — .]**—A juror was withdrawn for the purpose of referring a cause to arbn.; the arbitrator, being unable to decide on the conflicting evidence, made no award, & the cause was taken down a second time for trial:—*Held*: the party ultimately prevailing was not entitled to the costs of the first trial.—*THOMAS v. LEWIS* (1837), Will. Woll. & Dav. 67.

**2392. — .]**—Where a cause was referred at *Nisi Prius*, & the award set aside, & a second trial had, the party successful at the second trial was held not to be entitled to the costs of the first.—*WOOD v. DUNCAN* (1839), 7 Dowl. 344; 5 M. & W. 87; 8 L. J. Ex. 224; 3 J. P. 339; 3 Jur. 582; 151 E. R. 38.

*Annotations*:—*Reid*. *Brown v. Clarke* (1843), 12 M. & W. 25; *Wall v. L. & S. W. Ry. Co.* (1856), 26 L. T. O. S. 225.

**2393. Costs of both trials.]**—Pltf. obtained a verdict, subject to the award of an arbitrator. The arbitrator having made a material mistake in his award, & deft. having refused to refer matters back, the ct. set aside the verdict, & discharged the rule for reference. Pltf. took the cause down to trial a second time, & a second time obtained a verdict:—*Held*: he was entitled to the costs of both trials.—*PAYNE v. BAILEY* (1822), 3 Brod. & Bing. 304; 7 Moore, C. P. 147; 129 E. R. 1302.

*Annotation*:—*Distd.* *Wood v. Duncan* (1839), 5 M. & W. 87. *Payne v. Bailey* is no authority at all; but if it were any, it is rather the other way, because there the ct. said they did not wish their decision to be considered as a precedent, but as an exception to the general rule (LORD ABINGER, C.B.).

**2394. Not costs on count for penalty under 2 & 3 Edw. 6, c. 13.]**—In an action for the penalty of 2 & 3 Edw. 6, c. 13, for not setting out tithes, with a count in the declaration for the single value, after a demurrer to the declaration the parties submitted to arbn., & the arbitrator awarded the single value to be less than 20 nobles (£6 13s. 4d.):—*Held*: pltf. not entitled to costs on the counts for the penalty, under 8 & 9 Will. 3, c. 11, s. 5, the value not having been found by a jury, but the ct. would allow him to have the costs taxed on the count for the single value.—*BARNARD v. MOSS* (1789), 1 Hy. Bl. 107; 126 E. R. 64.

**2395. — Two counsel.]**—The master has discretion to allow two counsel's fees in an arbn.—*BRYSON'S EXECUTORS v. NATIONAL PROVIDENT INSTITUTION* (undated), cited 8 C. B. N. S. at p. 274; 141 E. R. 1171.

*Annotation*:—*Apld.* *Sinclair v. G. E. Ry. Co.* (1870), 18 W. R. 491.

**g. — Remuneration of arbitrator.]**—When a special jury case is referred at *Nisi Prius*, & the consent contains no provision for the costs of the special jury, no allowance can be made, in the taxation of costs, for the remuneration to the arbitrator.—*LABERTOUCHE v. MURRAY* (1830), 2 Hud. & B. 541.—*IR*.

**h. — Travelling expenses.]**—Items in respect of the loss of time in travelling & travelling expenses of an arbitrator may be disallowed on taxation of costs of an arbn.—*Re HILLYARD & ROYAL INSURANCE CO.* (1887), 12 P. R. 285.—*CAN*.

**i. — Costs of cause referred when reference abortive.]**—Where a cause went off at *Nisi Prius* upon a reference, & the arbitrators never made any award, in consequence of pltf.'s default, & the cause having gone down to trial a second time, pltf. had a verdict:—*Held*: pltf. not entitled to the costs incurred in bringing down the record to trial at the first assizes.—*CREAN v. CREAN* (1823), 2 Fox & S. Ir. 10.—*IR*.

**j. — .]**—If a cause at *Nisi*



**2396.** —.].—Although there is no inflexible rule to restrain the master from allowing more than one counsel on a reference, such allowance is not to be encouraged; & where the master has disallowed a second counsel, the ct. will not interfere.—*HAWKINS v. RIGBY* (1860), 8 C. B. N. S. 271; 29 L. J. C. P. 228; 2 L. T. 243; 6 Jur. N. S. 1208; 141 E. R. 1169.

*Annotations* :—*Consd. & Expld.* *Sinclair v. G. E. Ry. Co.* (1870), L. R. 5 C. P. 135. Having been a party to the decision in *Hawkins v. Rigby*, I may be allowed to say that I think that case ought not to be understood as allowing the master no discretion in this matter (BYLES, J.). *Mentd.* *Nolan v. Copeman* (1873), 42 L. J. Q. B. 44.

**2397.** —.].—The master, on the taxation of the costs of a reference which involved a large sum of money & a long & complicated inquiry, allowed the fees of one only of two counsel retained by pltf., assuming that there was an inflexible rule that only one counsel should be allowed :—*Held* : the master should review his taxation in order that he might have an opportunity of exercising his discretion in the matter.—*SINCLAIR v. GREAT EASTERN RY. CO.* (1870), L. R. 5 C. P. 135; 39 L. J. C. P. 165; 21 L. T. 752; 18 W. R. 491.

*Annotation* :—*Refd.* *Benton v. Lever* (1885), 1 T. L. R. 499.

**2398.** —.].—Where a master on the taxation of the costs of a reference involving a large sum of money, but no complicated questions of law or fact, allowed the fees of one only of two counsel retained by pltf., the ct. refused to order a review of the taxation, on the ground that the master had been right in taking into consideration the undue length to which the reference had been carried, & had properly used his discretion in allowing the fees of one counsel only.—*BENTON v. LEVER & CO.* (1885), 1 T. L. R. 499.

**2399.** —.].—There is no universal rule that in an arbn. the fees of one counsel only can be allowed.—*ORIENT STEAM NAVIGATION CO. v. OCEAN MARINE INSURANCE CO.* (1887), 35 W. R. 771; 3 T. L. R. 778.

**2400.** —.].—In proceedings before an arbitrator, as a general rule, the fees of only one counsel will be allowed. If the fees of counsel on one side are increased to make them equal to fees paid to counsel on the other side, such increase will not be allowed on taxation.—*DREW v. JOSOLYNE* (1888), 4 T. L. R. 717.

**2401.** —.].—*Witnesses—Different actions, same reference, same witnesses.*—Where, in three actions brought by same pltf. against same deft., & referred to arbn., the costs of the reference were awarded to be equally borne by the parties, & the master, on taxation, allowed deft., as costs of reference, two distinct sums, for the attendance, loss of time, & travelling expenses of the same witnesses, in two different actions, a rule nisi for reviewing the taxation was discharged without costs, it not being alleged that the two former sums were allowed for attendance, etc., in one day, & no objection having been made at the taxation.—*UTTING v. EVANS* (1824), M'Cle. 12; 148 E. R. 6.

**2402.** —.].—*After examination & cross-examination.*—*Semble* : a party is not entitled to costs for the attendance of a witness in an arbn. after he has been examined & cross-examined, provided he is not recalled & was easily accessible if it had been desired to recall him.—*WAY v. HENNETT* (1853), 22 L. T. O. S. 121; 2 C. L. R. 709.

**2403.** —.].—*Rejected witnesses.*—On taxa-

tion of costs, it is a general rule to disallow the expenses of a witness rejected by an arbitrator, as between party & party.

A case on being called on for trial was referred, & a witness, who attended at the place of trial & afterwards before the arbitrator on the reference, was rejected by the arbitrator :—*Held* : the master had rightly disallowed his expenses, as between party & party.—*GALLOWAY v. KEYWORTH (HEYWORTH)* (1854), 15 C. B. 228; 23 L. J. C. P. 218; 23 L. T. O. S. 129; 2 C. L. R. 860; 139 E. R. 408.

*Annotation* :—*Refd.* *Behren v. Bromer* (1854), 3 C. L. R. 40

**2404.** —.].—*Travelling expenses of.*—*Held* : a sum ought not to be allowed to witnesses on a reference for travelling expenses, unless it had been paid to them, & not if it was shown before the master that their actual expenses were less.—*RATCLIFFE v. HALL* (1835), 5 Tyr. 770.

**2405.** —.].—*Non-arrival till after cause referred.*—If a witness does not arrive at an assize town until after the cause, for which he has been subpoenaed, has been referred to arbn., his expenses will not be allowed as "costs in the cause."—*FRYER v. STURT* (1855), 16 C. B. 218; 24 L. J. C. P. 154; 25 L. T. O. S. 100; 139 E. R. 740.

**2406.** —.].—*Expert witness—Surveyor—Basis of fee.*—Surveyors examined as expert witnesses should be paid according to the work actually done by them, & not by a percentage on the amount in dispute.—*DREW v. JOSOLYNE* (1888), 4 T. L. R. 717.

**2407.** —.].—*Order to pay half costs—Solicitor's travelling expenses.*—Three actions by same pltf. were referred, the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that each party should pay half the costs of the reference. One attorney attended for all defts., & the master allowed him one-third of his travelling expenses :—*Held* : the taxation was wrong, & the master should have calculated the costs on both sides, & then have divided them.—*DAY v. NORRIS* (1841), 11 L. J. Ex. 62.

**2408.** —.].—*Shorthand writer.*—The successful party on an arbn., which lasted several days, having only one counsel, employed a shorthand writer to take notes :—*Held* : the master was right in not allowing any part of the expense.—*CROOMES v. GORE, CROOMES v. EASTON* (1856), 1 H. & N. 14; 4 W. R. 462; 156 E. R. 1098.

*Annotations* :—*Folld.* *Wells v. Mitcham & Wimbledon District Gas Light Co.* (1878), 4 Ex. D. 1; *Re Autothropic Steam Boiler Co. & Townsend, Hook* (1888), 59 L. T. 632. *Refd.* *Sinclair v. G. E. Ry. Co.* (1870), L. R. 5 C. P. 135.

**2409.** —.].—*Preliminary examination of books by accountant Attendance of party's solicitor.*—Where an arbitrator, pursuant to a power reserved to him by the order of reference, directed an inspection of deft.'s books by an accountant, & the master, on taxation of pltf.'s costs, disallowed the attendance of pltf.'s attorney on those occasions, the ct. made a rule for a review, the arbitrator reporting that the general expenses of the reference were thereby much diminished.—*HAWKINS v. RIGBY* (1860), 8 C. B. N. S. 271; 29 L. J. C. P. 228; 2 L. T. 243; 6 Jur. N. S. 1208; 141 E. R. 1169.

*Annotations* :—*Expld.* *Sinclair v. G. E. Ry. Co.* (1870), L. R. 5 C. P. 135; *Nolan v. Copeman* (1873), 42 L. J. Q. B. 44.

**2410.** —.].—An action involving long accounts between pltf. & deft. was referred; & it

*Prius* has been referred to arbn., & in consequence of any default the proceedings on the arbn. are nugatory, the party ultimately successful cannot recover the costs of the abortive proceedings, unless such have been expressly provided for by the deed of submission.—*O'DRISCOLL v.*

*MACARTNEY* (1845), 9 I. L. R. 570.—*IR.*

*k.* —.].—*Of ultra vires inquiry brought by party against whom costs awarded.*—Where, in the course of an arbn. between A. & B., A. brought forward a point outside the submission

which the arbitrator decided against him, & awarded the whole of the expenses to B. :—*Held* : the award of these expenses could not be objected to by A., as he had been the cause of the point being discussed in the arbn.—*FERRIER v. ALISON* (1843), 15 Sc. Jur. 227.—*SCOT.*

**Sect. 20.—Costs: Sub-sects. 6 & 7.]**

was ordered that pltf., by an accountant to be named by the arbitrator, should have inspection of, & take extracts from, deft.'s books. An accountant was named, & he was engaged many days over the books, & afterwards gave evidence before the arbitrator. The award was made in pltf.'s favour, with the costs of the action, reference, & award:—*Held*: pltf. was not entitled to the costs of the preliminary examination of the books by the accountant.—*NOLAN v. COPEMAN* (1873), L. R. 8 Q. B. 84; 42 L. J. Q. B. 44; 27 L. T. 789; 21 W. R. 263.

**2411. — Copies of shorthand-writers' notes.]—**Where an action is referred, the cost of brief copies of the transcript of shorthand-writers' notes of each day's proceedings in the reference, made for the use of counsel, will not, in the absence of any order & of agreement between the parties, be allowed on taxation.—*WELLS v. MITCHAM & WIMBLEDON DISTRICT GAS LIGHT CO.* (1878), 4 Ex. D. 1; 48 L. J. Q. B. 75; 39 L. T. 667; 27 W. R. 112.

*Annotation*:—*Folld. Re Autothreptic Steam Boiler Co. & Townsend, Hook* (1888), 59 L. T. 632.

**2412. — Legal assessor, copies of evidence, costs of inspection & production of documents, etc.]—**A master, on taxation, disallowed more than half the fees paid by the successful party to an arbn., on taking up the award, & the whole of the fees charged by the arbitrator for a legal assessor, to whose appointment the parties had neither consented nor objected, & a charge made for copies of evidence which could not have been taken by counsel, he being alone in the case, & one for copies of original documents put in by the unsuccessful party, & further, the cost of affidavit of increase. The master had, however, allowed to the successful party the costs of inspection & production of documents:—*Held*: these matters were all in the discretion of the master, & the ct. ought not to order him to review his taxation as to any one of them, even though it were shown that as to the lay arbitrator's fees he had failed to take any steps to ascertain what would have been a fair charge for him to have made for his services.—*Re WESTWOOD, BAILLIE & CO. & CAPE OF GOOD HOPE GOVERNMENT* (1886), 2 T. L. R. 667.

**2413 i. Form of allocatur.]—**An *allocatur*:—*Held*: not objectionable as improperly embracing a moiety of the costs of reference.—*HEATHERS v. WARDMAN* (1847), 4 U. C. R. 173.—*CAN.*

**2414 i. Review of taxation.]—**A cause having been referred, it was agreed that the arbitrators should award costs in favour of whom the award should be made, if they saw fit. The arbitrators awarded £50 to pltf., together with their costs, when ascertained between party & party, by the proper officer. The officer having refused to allow pltf. the costs of the reference, he was directed, upon motion, to allow those costs.—*FISHER v. GRAHAM* (1825), Sm. & Bat. 229.—*IR.*

**2414 ii. —.]—**A cause having been referred, it was agreed that the costs in the cause, with the costs of the deed of submission & subsequent proceedings, should abide the event of the award, & if no award should be made, that all the costs aforesaid should be allowed to the party who should ultimately obtain judgment or a verdict. Pltf. entered a rule for liberty to discontinue upon payment of costs. The officer refused, upon the taxation of the costs, to allow defts. the costs of the reference, there having been no judgment or verdict. Upon motion that the taxing officer should tax to defts. the costs of the reference & proceedings in the cause, the ct. ordered

that the taxing officer should tax the costs as between party & party, but the decision of the officer having been in favour of pltf., no costs of the motion were given.—*TISDALL v. TAAFFE* (1825), Sm. & Bat. 206.—*IR.*

**2414 iii. —.]—**A reference to arbn. made after action provided "that the costs of the action, & of the reference, & of the award so to be made in pursuance thereof, & all other costs & charges properly incidental thereto, should follow & be added to the sum awarded when taxed." Each party had paid his own arbitrator & half the umpire's fee, & the taxing master had refused to allow these fees to the party in whose favour the sum was awarded:—*Held*: these items were not chargeable against the defeated party, there being no express agreement as to them.—*DEANE v. GREAT SOUTHERN & WESTERN RY. CO.* (1851), 3 Ir. Jur. 392.—*IR.*

**2414 iv. —.]—**An order of reference made at *Nisi Prius* provided that the costs of the arbn. should be taxed by the clerk as costs in the cause:—*Held*: the ct. had no power to review the clerk's allowance of the costs of the arbitrator.—*SNOWBALL v. MUIRHEAD* (1883), 22 N. B. R. 561.—*CAN.*

**2414 v. —.]—**Judgment was entered for deft. in the county ct., with the general costs in the cause, on an award made in his favour by arbitrators. Pltf.

Power of arbitrator to make use of assistance in making his award, *see* Nos. 874—878, *ante*.

**2413. Form of allocatur.]—**Where an arbitrator directs that one-third of the costs of the reference shall be borne by pltf., & the other two-thirds by deft., the *allocatur* should direct deft. to pay pltf. two-thirds of the costs incurred by pltf., less one-third of the costs which have been incurred by deft.—*WALTON v. INGRAM* (1841), 10 L. J. C. P. 188; 5 Jur. 462.

**2414. Review of taxation.]—**A cause was referred to arbn., the submission to be made a rule of the King's Bench. The arbitrator awarded costs to be taxed by the master of the Ct. of Exch. By collusion between the two attorneys, the costs were taxed at an immoderate sum:—*Held*: (1) the Ct. of Exch. could not order the taxation to be reviewed, as the reference to the master was not made by the ct., & he did not act in it as the officer of the ct., who had no jurisdiction over him; (2) if it were a ground for setting aside the award, that was for the consideration of the Ct. of King's Bench.—*CHAPMAN v. LANSDOWN* (1794), 1 Anst. 273; 145 E. R. 870.

**2415. —.]—**The ct. will not require the master to review his taxation unless they see clearly that he has come to a wrong conclusion in that which he has done.

A cause was referred to the decision of an arbitrator, the costs of the cause to abide the event of the award, but it was doubtful on the face of the award whether the arbitrator intended to find for pltf. generally, including the issues joined on a special count, or on the general count only. The master, having heard a statement of the facts & evidence submitted to the arbitrator, came to the conclusion that the arbitrator intended to find generally for pltf., & taxed the costs accordingly. The ct. refused to send back the case for a review of the taxation.—*RENNIE v. MILLS* (1830), 5 Bing. N. C. 249; 7 Dowl. 295; 1 Arn. 534; 7 Scott, 276; 8 L. J. C. P. 148; 132 E. R. 1101.

*Annotation*:—*Distd. Gisborne v. Hart* (1839), 8 L. J. Ex. 197.

**SUB-SECT. 7.—RECOVERY OF COSTS.**

**2416. By action—Before amount ascertained.]—**In an arbn. under Public Health Act, 1848 (c. 63),

was allowed the costs of certain issues found in his favour. The judge allowed an appeal on the two points, (1) as to whether pltf. should have been allowed costs, & (2) whether the amount allowed was excessive:—*Held*: what & how much the judge should allow was entirely a matter of discretion, & appeal dismissed.—*BONNETT v. CHESLEY* (1886), 7 R. & G. 184; 7 C. L. T. 249.—*CAN.*

**2414 vi. —.]—**The amount to be allowed *per diem* to arbitrators & counsel is a matter peculiarly within the province of the taxing officer, & his decision should not be interfered with.—*Re HILLYARD & ROYAL INSURANCE CO.* (1887), 12 P. R. 285.—*CAN.*

**2414 vii. —.]—***NATIONAL GAS ENGINE CO. v. DOLPHIN'S BARN BRICK CO.* (1910), 44 I. L. T. 248.—*IR.*

**PART IV. SECT. 20, SUB-SECT. 7.**

**1. Attachment.]—**The costs of the cause were to abide the event, but no authority was given to direct a verdict, & the award was silent as to costs:—*Held*: attachment was the remedy for their recovery.—*SHIPMAN v. SHIPMAN* (1859), 2 P. R. 393.—*CAN.*

**2416 i. By action.]—**Under 16 Vlot. c. 99, s. 5, if a greater sum be awarded for land taken by Great Western Ry.



the umpire awarded that the costs of the reference should be paid by the Local Board of Health:—*Held*:—*pltf.* was entitled to maintain an action for the costs before they had been taxed.—*HOLDSWORTH v. WILSON (LATE BARSHAM) (1863)*, 4 B. & S. 1; 32 L. J. Q. B. 289; 8 L. T. 434; 10 Jur. N. S. 171; 11 W. R. 733; 122 E. R. 360; *sub nom. WILSON (LATE BARSHAM) v. HOLDSWORTH*, 2 New Rep. 190.

*Annotations*:—*Consd.* *Sharpe v. Met. Dist. Ry. Co. (1879)*, 4 Q. B. D. 645, C. A. *Apprvd.* *Met. Dist. Ry. Co. v. Sharpe (1880)*, 5 App. Cas. 425, H. L. *Refd.* *Chesterfield Corpn. & Brampton L. B. (1886)*, 50 J. P. 824; *West Ham Grdns. v. St. Matthew, Bethnal Green, [1896]* A. C. 477, H. L.; *Simpson v. I. R. Comrs., [1914]* 2 K. B. 842. *Mentd.* *Re Pulien & Liverpool Corpn. (1882)*, 51 L. J. Q. B. 285.

**2417.** —.]—A declaration on an award alleged a direction that the costs of the action, reference, & award should be paid by *deft.* Breach, non-payment. Plea, that they were not before action ascertained or taxed:—*Held*: the plea was bad.—*LEWIS v. ROSSITER (1875)*, 44 L. J. Ex. 136; 33 L. T. 260; 23 W. R. 832.

*Annotations*:—*Refd.* *Met. Dist. Ry. Co. v. Sharpe (1880)*, 5 App. Cas. 425, H. L. *Mentd.* *Selby v. Whitbread, [1917]* 1 K. B. 736.

**2418.** —.]—A special Act, which incorporated Lands Clauses (Consolidation) Act, 1845 (c. 18), “except where expressly varied” by the special Act, varied the mode of appointment of the arbitrators, & contained no directions as to costs. In a case in which an arbitrator under the special Act awarded compensation to *deft.*, but said nothing about costs:—*Held*: taxation was not a condition precedent to the right to maintain an action for costs, & such an action could be maintained, although the costs had not been taxed.—*METROPOLITAN DISTRICT RY. CO. v. SHARPE (1880)*, 5 App. Cas. 425; 50 L. J. Q. B. 14; 43 L. T. 130; 44 J. P. 716; 28 W. R. 617, H. L.

*Annotations*:—*Consd.* *G. W. Ry. Co. v. Swindon & Cheltenham Extension Ry. Co. (1882)*, 22 Ch. D. 677, C. A. *Distd.* *Capell v. G. W. Ry. Co. (1883)*, 11 Q. B. D. 345, C. A. *Consd.* *West Ham Grdns. v. St. Matthew, Bethnal Green, [1896]* A. C. 477, H. L. *Refd.* *Shrewsbury v. Wirral Railways Com., [1895]* 2 Ch. 812, C. A.; *Fletcher v. Birkenhead Corpn., [1906]* 1 K. B. 605.

**2419. On motion—Where ambiguity on face.**—An award will not be enforced on motion, if there be an ambiguity on the face of it as to the precise amount of costs to be paid.

An award can be enforced by a rule only where it is distinct & precise. I cannot grant one in this case, as the arbitrator has not stated for certain what sum is to be paid for costs. He ought to have said the total costs are so much, & the proportion to be paid by *pltf.*, viz., two-thirds, so much. *Pltf.*, in these circumstances, cannot avail himself of this summary remedy, but must be left to his action (*ERLE, J.*)—*SPOONER v. PAYNE (1847)*, 11 Jur. 242.

**2420. Signing judgment for costs.**—An order of reference directed that the party, in whose favour the award should be made, should be at liberty to sign final judgment “for the amount payable thereunder,” & tax his costs, etc.:—*Held*: the award being in favour of *deft.*, he might sign judgment for his costs.—*MAGGS v. YOSTON (YAUSTON,*

*YORSTON) (1838)*, 6 Dowl. 481; 1 Will. Woll. & H. 185; 2 Jur. 744.

*See, also, cases in Sect. 19, Sub-sect. 3, ante.*

**2421. — Not until expiration of time for setting aside.**—A cause & all matters in difference between the parties were referred by an order of *Nisi Prius*, by which a verdict was taken for *pltf.*, subject to an award, the costs of the cause to abide the event, & the costs of the reference & award to be in the discretion of the arbitrator. The arbitrator by his award ordered that the verdict entered for *pltf.* should stand, & directed that *deft.* should pay to *pltf.* the costs of the reference & award:—*Held*: *pltf.* was not entitled to have an *allocatur* for the costs, or to sign judgment, until the expiration of the proper time for moving to set aside the award.—*JONES v. IVES (1850)*, 10 C. B. 429; 1 L. M. & P. 689; 20 L. J. C. P. 69; 16 L. T. O. S. 151; 15 Jur. 107; 138 E. R. 172.

*Annotations*:—*Distd.* *Haro v. Fleay (1851)*, 11 C. B. 472. *Refd.* *Heathcote v. Wing (1855)*, 11 Exch. 355; *O'Toole v. Pott (1857)*, 7 E. & B. 102.

**2422. — Not before final award.**—A cause & all matters in difference between *pltf.* & *defts.* were, by an order of *Nisi Prius* & a subsequent rule of ct., referred to an arbitrator, the costs of the cause to abide the event, & those of the reference & award to be in the discretion of the arbitrator, who was to be at liberty to make two several awards at different times, by the first of which he was to raise questions of law for the opinion of the ct.; & it was by the rule of ct. ordered “that neither party should enforce payment of anything which might be found due by the arbitrator, under the first award, until the arbitrator should have made his final award.” The arbitrator stated a case for the opinion of the ct., & in the result, *pltf.* became entitled to £2,272 2s. damages. *Defts.* afterwards obtained an Act of Parliament for regulating their affairs, & under that Act *pltf.* received an allotment of shares in lieu of the damages so awarded to him. It having become unnecessary & impracticable to proceed further with the reference, no second award was ever made. *Pltf.*, however, signed judgment, & issued an execution against *defts.* thereon for the costs of the action:—*Held*: in the absence of a final award, *pltf.* was by the rule of ct. precluded from enforcing his remedy for such costs, & the judgment must be set aside with costs.—*WOOD v. COPPER MINERS IN ENGLAND CO. (1854)*, 15 C. B. 464; 24 L. J. O. P. 34; 24 L. T. O. S. 75; 3 C. L. R. 43; 139 E. R. 506.

**2423. Execution—Stay as to debt—Execution for costs.**—By rule of ct. a cause & all matters in difference were referred to an arbitrator, & the costs of the cause were to abide the event. The arbitrator directed the verdict to be entered for *pltf.*, but that they should not take out execution for the debt until they had paid a larger sum due to *deft.*:—*Held*: *pltf.*'s attorney might still take out execution for the costs.—*HIGHGATE ARCHWAY CO. v. NASH (1819)*, 2 B. & Ald. 597; 1 Chit. 325; 106 E. R. 484.

*Annotations*:—*Refd.* *Donlan v. Brett (1834)*, 2 Ad. & El. 344; *Cooper v. Pegg (1855)*, 3 W. R. 456.

**2424. Where each party to pay proportion — One paying whole.**—If an arbitrator award that each

Co. than that tendered by them, “the co. shall pay all costs & charges attending such arbn.” but no provision is made for their recovery:—*Semble*: the only remedy is by an action of debt on the stat.—*Re FOSTER & GREAT WESTERN RY. CO. (1872)*, 32 U. C. R. 503.—*CAN.*

*m. Not by indorsement on writ of summons—Costs untaxed.*—Costs of an arbn. incurred by a party thereto, if untaxed, do not form a liquidated amount, & cannot be the subject of a

special indorsement upon a writ of summons. Judgment for default of appearance upon a specially indorsed writ in an action upon an award (of which notice had not been given to *deft.*) allowed to stand to the extent of the amount awarded & the amount paid as fees to the arbitrators, without prejudice to any motion by *deft.* against the award. Rule 575 applied.—*HUYCK v. WILSON (1898)*, 18 P. R. 44.—*CAN.*

**2424 i. Where each party to pay proportion—One paying whole.**—A landlord &

tenant agreed to refer the adjustment of the terms of a lease; the clerk to the reference refused to give up the decree until an account was paid, which included a reasonable remuneration to the referees & himself, & one of the parties paid it:—*Held*: the party paying was entitled to relief, to the extent of one half thereof, against the other party.—*JOLLY v. YOUNG (1834)*, 13 Sh. (Gt. of Sess.) 188.—*SCOT.*

**2424 ii. — — — — —**—At the close of a reference one of the parties paid a fee



**Sect. 20.—Costs: Sub-sects. 7 & 8. Part V. Sect. 1:**  
**Sub-sect. 1.]**

party shall pay a moiety of the costs of the arbn. & of making the submission a rule of ct., & one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment against the other party if he refuse to pay his moiety.—*HICKS v. RICHARDSON* (1797), 1 Bos. & P. 93; 126 E. R. 796.

**Annotations:—***Distd.* *Burroughes v. Clarke* (1831), 1 Dowl. 48. *Appld.* *Dees v. Great North of England Ry. Co.* (1846), 7 L. T. O. S. 406. *Refd.* *Stokes v. Lewis* (1804), 2 Smith, K. B. 12; *Bates v. Townley* (1848), 2 Exch. 152.

**2425.** —.].—Where an arbitrator awarded a sum, together with costs of the award, to be paid, not exceeding a certain sum, between the parties, the party to whom the money was awarded was allowed, upon taking out the award & paying the whole costs, to have an attachment against deft. for the sum awarded & his share of the costs.—*STOKES v. LEWIS* (1804), 2 Smith, K. B. 12.

**2426.** —.].—**No provision in award.]**—Where it is part of a submission to arbn. that each party shall pay half the costs of the arbn. & award, & one of the parties has paid the whole costs, he may recover the share payable by the other party from him, & it is immaterial that there is no provision allowing for the payment of the whole of the costs by one of the parties in the first instance.—*Re POWELL & GWYER* (1840), Woll. 23.

**2427.** —.].—**Amount not recoverable as money paid.]**—Arbitrators awarded that the costs of the reference & award, including compensation to the arbitrators, should be borne, as to one moiety thereof by pltf., & as to the other moiety by defts. Pltf. took up the award, & paid the whole costs of it:—*Held*: he could not recover a moiety of the costs as money paid for the use of defts.—*BATES v. TOWNLEY* (1848), 2 Exch. 152; 19 L. J. Ex. 399; 10 L. T. O. S. 376; 12 Jur. 606; 154 E. R. 444.

**Annotations:—***Refd.* *Re Coombs* (1850), 4 Exch. 839; *Crampton & Holt v. Ridley* (1887), 20 Q. B. D. 48.

**2428.** —.].—**Amount recoverable.]**—Where two parties employ an arbitrator, & one pays the arbitrator's fees to enable him to take up the award (there being no event of the award to entitle either party to costs), the party so paying is entitled to recover from the other a moiety of the sum paid as money paid to his use.—*MARSACK v. WEBBER* (1860), 6 H. & N. 1; 4 L. T. 553; 158 E. R. 1.

**Annotation:—***Refd.* *Kennedy v. Broun* (1863), 13 C. B. N. S. 677.

**SUB-SECT. 8.—SET-OFF OF COSTS.**

*See, generally, PRACTICE & PROCEDURE; SET-OFF & COUNTERCLAIM; SOLICITORS.*

**2429. Power to direct set-off.]**—An arbitrator under a rule of reference, which directs that the costs of the cause shall abide the event, has no

power to direct those costs to be set off against the costs in a prior cause, although all matters in difference are referred.—*UNSTED v. KIDD* (1819), 1 Chit. 526.

**2430. Cross claims—Action & other matters—Debt against costs—Solicitor's lien.]**—An action, & all matters in difference between the parties, were referred to arbn. The arbitrator awarded that pltf. had no cause of action in the suit, & directed him to pay to deft. the costs of the action. He further awarded that deft. should pay pltf. a certain sum in respect of a claim unconnected with the action. On an application to set off the sum awarded to pltf. against deft.'s costs of the action:—*Held*: this could only be done subject to the lien of deft.'s attorney for his costs.—*CADLE v. SMART* (1836), Tyr. & Gr. 475.

**2431.** —.].—On a reference to arbn. of an action of ejectment & all matters in difference between the parties, the arbitrator directed that a sum of £50 should be paid by the lessor of pltf. to defts. by way of compensation for certain buildings erected by them, & that a verdict should be entered for the former. On motion, the ct. directed the sum awarded to defts. to be set off against the costs of the lessor of pltf., saving the lien of their attorney.—*DOE d. SWINTON v. SINCLAIR* (1836), 5 Dowl. 26; 2 Hodg. 111; 3 Scott, 42; 5 L. J. C. P. 184.

**2432.** —.].—A cause & all matters in difference between A. & B. were referred to an arbitrator, who was to have power to direct the verdict to be entered for A. or for B., the costs of the suit to abide the event of the award, & the costs of the reference & award to be in the discretion of the arbitrator. The arbitrator, by his award, directed a verdict to be entered for B., & awarded that £303 15s. was due from B. to A. in respect of the matters in difference, which sum he ordered to be paid by B. to A. on a given day:—*Held*: B. was entitled to deduct from the sum so awarded to be paid by him the amount of his taxed costs of the cause, without regard to the lien of A.'s attorney for his costs of the cause & of the reference.—*DUNN v. WEST* (1850), 10 C. B. 420; 1 L. M. & P. 608; 20 L. J. C. P. 1; 16 L. T. O. S. 150; 15 Jur. 88; 138 E. R. 168.

**Annotations:—***Distd.* *Little v. Philpotts* (1862), 2 B. & S. 383. *Mentd.* *Scott v. De Richebourg* (1851), 15 Jur. 882.

**2433. Separate actions—Solicitor's lien.]**—A cause & another cause between the same parties then pending in a county ct., & all matters in difference between the parties to those causes, were by consent referred to a barrister, the costs of the causes respectively, & of the rule, to abide the event, & the costs of the reference & the award to be in the discretion of the arbitrator, the attorney for pltf. in both actions being the same. The arbitrator decided the first cause in favour of deft. & the cause in the county ct. in favour of pltf., with damages £45 10s. 6d., & gave pltf. the costs of the reference, & divided the costs of his award:—*Held*: the costs of the first cause, & of the rule, could not be set off against the money & costs payable to pltf. in the other cause, to the prejudice of the lien of

to the arbiter, which was reasonable in amount, & was said to have been paid in circumstances which implied acquiescence by the other party in the payment:—*Held*: the first party was entitled to relief, to the extent of one half of the fee, from the second.—*EDINBURGH OIL, GAS, LIGHT CO. v. BAILLIE (SIR WILLIAM), ETC., CLYNES, TRUSTEES* (1835), 13 Sh. (Ct. of Sess.) 1.—*SCOT.*

**2424 iii.** —.].—Circumstances in which it was held that one of the parties, who had paid a fee of thirty

guineas to a professional arbitrator, was entitled to recover half thereof from the other party.—*HENDERSON v. PAUL* (1867), 5 Macph. (Ct. of Sess.) 628.—*SCOT.*

**2424 iv.** —.].—Where it was determined that neither party was entitled to the costs of an arbn., but the co., in order to take up the award, paid the whole of the arbitrators' fees:—*Held*: a summary order could not be made to recoup the co. for one-half the fees out of the moneys payable to the landowner, & such order must be refused

without prejudice to an action for the same purpose.—*Re PHILBRICK & ONTARIO & QUEBEC RY. CO.* (1886), 11 P. R. 373.—*CAN.*

**2424 v.** —.].—*Award subsequently set aside.]*—One of the parties to a submission, who has paid the costs of the award which is afterwards set aside, can recover the half of what he has paid from the other party to the submission.—*LYDERS v. RESIDENTIAL COLLEGE COMMITTEE* (1910), 30 N. Z. L. R. 72.—*N.Z.*

pltf.'s attorney, as they were not "interlocutory costs in the same suit, awarded to the adverse party," within Reg. Gen. Hil., 2 Will. 4, r. 93.—*LITTLE v. PHILPOTTS* (1862), 2 B. & S. 383; 31 L. J. Q. B. 125; 8 Jur. N. S. 1175; 121 E. R. 1116.

**2434. Debt against costs—Solicitor's lien.]**—Under an award in an action, pltf. was ordered to pay a sum of money to deft., & deft. was ordered to pay pltf. certain costs which were to be taxed:—*Held*: deft. could set off the debt against the taxed costs, & the right of set-off was paramount to the ordinary lien of pltf.'s solr. for the same costs.—*PRINGLE v. GLOAG* (1879), 10 Ch. D. 676; 48 L. J. Ch. 380; 40 L. T. 512; 27 W. R. 574.

*Annotations*:—*Distd. Re Harrauld, Wilde v. Walford* (1883), 52 L. J. Ch. 435. *Reid. Edwards v. Hope* (1885), 14

Q. B. D. 922. *Mentd. Puddephatt v. Leith*, [1916] 2 Ch. 168.

**2435. Debt not due.]**—An arbitrator, to whom all matters in difference between pltf. & defts. were referred, directed a verdict to be entered for pltf. in an action of trespass brought by him against defts., with 40s. damages, & found that £101 was due from the former to the latter, for goods sold, which sum he directed pltf. to pay defts. within two months next after the date of the award, & pltf.'s costs of his action were taxed at £102:—*Held*: defts. could not set off the sum directed to be paid to them by pltf. against such taxed costs, the time allowed for the payment of such sum not having expired when the application was made.—*YOUNG v. GYE* (1825), 10 Moore, C. P. 198; 3 L. J. O. S. C. P. 108.

## Part V.—References by Order of Court.

### SECT. 1.—REFERENCES FOR INQUIRY AND REPORT.

See Arbitration Act, 1889, s. 13.

#### SUB-SECT. 1.—IN GENERAL.

**2436. Infringement of copyright.]**—Where the question was whether certain works were an infringement of copyright, or a genuine abridgment:—*Held*: the ct. was not under an indispensable obligation to send all facts to a jury, but might refer the matter to competent persons for their opinion.—*GYLES v. WILCOX* (1740), 2 Atk. 141; *Barn. Ch.* 368; 26 E. R. 489.

*Annotation*:—*Mentd. Tonson v. Walker* (1752), 3 Swan. 671 (App.).

**2437. To ascertain effect of acts against which injunction sought.]**—Where the evidence was conflicting, on a motion for an injunction to restrain a railway co. from preventing pltf. navigating a canal with a steamboat, the ct. directed experiments to be made by a civil engineer to ascertain the effect of steam navigation on the canal.—*CASE v. MIDLAND RY. CO.* (1859), 27 Beav. 247; 28 L. J. Ch. 727; 33 L. T. O. S. 39; 5 Jur. N. S. 1017; 54 E. R. 96.

**2438. Inquiry as to damages—Examination of witnesses necessary—Specific performance.]**—In an action for specific performance, where, on an inquiry as to damages, it was necessary to examine witnesses, the inquiry was referred to an official referee.—*STAFFORD v. COXON* (1877), 25 W. R. 788.

**2439. Any question arising in cause.]**—Any question arising in a cause may be referred by the ct. or judge for inquiry or report to an official or special referee, whose duty it is not to determine any question in issue, whether of fact or of law, but to find the materials upon which the ct. is to act.—*BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN* (1883), 24 Ch. D. 156; 52 L. J. Ch. 704; 48

L. T. 822; 31 W. R. 913; *affd.* on another point (1887), 12 App. Cas. 710, H. L.

*Annotations*:—*N.F. Cole v. Saqui & Lawrence* (1888), 40 Ch. D. 132, C. A. *Mentd. Easterbrook v. G. W. Ry. Co.* (1885), 2 R. P. C. 201; *Haslam Foundry & Engineering Co. v. Hall* (1887), 4 T. L. R. 154; *Siddell v. Vickers Sons* (1887), 4 T. L. R. 191; *Edison & Swan United Electric Light Co. v. Holland* (1889), 5 T. L. R. 294, C. A.; *Malan v. Young* (1889), 6 T. L. R. 38; *Vickers, Sons v. Siddell* (1890), 7 R. P. C. 292; *Lane-Fox v. Kensington & Knightsbridge Electric Lighting Co.*, [1892] 3 Ch. 424, C. A.; *Re Martin-dale*, [1894] 3 Ch. 193; *Atkins & Applegarth v. Castner-Kellner Alkali Co.* (1901), 18 R. P. C. 281; *Scott v. Scott*, [1913] A. C. 417, H. L.; *Osram Lamp Works v. Pope's Electric Lamp Co.* (1917), 34 R. P. C. 369.

**2440. — Questions which must arise.]—Held**: "any question arising" in Jud. Act, 1873 (c. 66), s. 56, meant any question which must necessarily arise.—*WEED v. WARD* (1889), 40 Ch. D. 555; 58 L. J. Ch. 454; 60 L. T. 208; 37 W. R. 406, C. A. *Annotation*:—*Reid. Hurlbatt v. Barnett* (1893), 1 Q. B. 77, C. A.

**2441. On motion for judgment—Default in pleading.]**—Upon motion for judgment under R. S. C., Ord. 27, r. 11, upon default in delivery of defence, the ct. may order interlocutory judgment to be entered, & may refer the whole claim to an official referee to ascertain & report to the ct. the amount due to pltf.—*CHARLES v. SHEPHERD*, [1892] 2 Q. B. 622; 61 L. J. Q. B. 768; 67 L. T. 67; 8 T. L. R. 651, C. A.

**2442. Under Judicature Act, 1873 (c. 66), s. 56.]**—The ct. or a judge has no power under the above Act, ss. 56 & 57, to refer the whole action for trial to an official or special referee. Under s. 57 the ct. may, by consent, refer any question or issue of fact in an action to an official or special referee for trial, but their power of compulsory reference for trial under that sect. is confined to questions or issues in an action requiring prolonged examination of documents or local investigation, or questions of account, & any other matters so involved with such issues as to be incapable of being tried separately.

#### PART V. SECT. 1, SUB-SECT. 1.

**a. Jurisdiction of master in chambers.]—Held**: the master in chambers had no jurisdiction to order a reference under Ontario Jud. Act, s. 47.—*UNION LOAN & SAVINGS Co. v. BOOMER* (1885), 10 P. R. 630.—CAN.

**b. What lands included in mortgage.]**—Where a receiver was appointed on a petition of mtgee., one & a half year's interest being due, & the receiver was limited by consent to certain lands charged with an annuity, a reference was directed to the master to inquire whether there were lands comprised in

the mtgc. besides those in the consent order to which the receiver could be extended.—*FITZGERALD v. HAMILTON*, 1 Ir. L. Rec. 1st ser. 294.—IR.

**c. Administration of will for benefit of minors.]**—Where freehold property was bequeathed to minors, & being building lots was quite unproductive from there being no leasing power given in the will, a reference was directed to inquire whether it would be for the benefit of the minors to apply for an Act of Parliament to authorise the execution of leases.—*RUSSELL v. RUSSELL*, 1 Ir. L. Rec. 1st ser. 471.—IR.

**d. Equivocal terms in will.]**—If an expression used by testator, by reason of external circumstances, becomes equivocal, a reference may be directed to the master to inquire & report.—*WARREN v. WARREN*, 3 Ir. L. Rec. 1st ser. 85.—IR.

**e. Expenses of sale under chattel mortgage.]**—Where expenses of sale under a chattel mtgc. were not justified by evidence, particularly the solr.'s bill for costs & disbursements:—*Held*: the items were a subject for consideration by a referee.—*FISHER v. MCPHEE* (1896), 28 N. S. L. R. 523.—CAN.



**Sect. 1.—References for inquiry & report: Sub-sects. 1, 2, 3 & 4.]**

A referee under Jud. Acts, to whom the issues in an action are referred for trial, has no power to order judgment to be entered. His findings should be separate on each of the issues submitted to him, but *semble*: he may by consent of the parties find generally for pltf. or for deft.

The old forms of orders of reference under C. L. P. Act, 1854, are inapplicable to references under Jud. Acts.

Where a reference had been ordered to an official referee, & the order of reference was drawn up in the form known as the "Long Order," under C. L. P. Act, 1854, & the parties with knowledge of the terms of the order appeared before the referee, who gave his award:—*Held*: the referee must be taken to have sat as arbitrator by consent, & his award was binding on the parties, neither of whom could obtain a new trial.

R. S. C. have not enlarged, & could not enlarge, the powers of reference to official or special referees conferred by the stat.—*LONGMAN v. EAST, PONTIFEX v. SEVERN, MELLIN v. MONICO* (1877), 3 C. P. D. 142; 47 L. J. Q. B. 211; 38 L. T. 11; 26 W. R. 183, C. A.

—*Consd.* *Goodwin v. Budden* (1880), 42 L. T. 536. *Appld.* *Ward v. Pilley* (1880), 5 Q. B. D. 427, C. A.; *Badische Anilin und Soda Fabrik v. Levinstein* (1883), 24 Ch. D. 156. *Expld.* *Darlington Wagon & Engineering Co. v. Harding* (1890), 60 L. J. Q. B. 110, C. A.

**2443. Power of Court of Appeal to refer to expert for report.]**—The Ct. of Appeal has jurisdiction without the consent of the parties to refer to an expert to report to them on the matter.—*A.-G. v. BIRMINGHAM, TAME & REA DRAINAGE BOARD*, [1912] A. C. 788; 82 L. J. Ch. 45; 107 L. T. 353; 76 J. P. 481; 11 L. G. R. 194, H. L.

**PART V. SECT. 1, SUB-SECT. 2.**

**i. How entitled.]**—A reference to the master in the matter of a minor by which it is sought to affect the funds in a cause in ct. is irregular; it should be entitled in the cause.—*MASSEY v. MASSEY* (1825), 2 Moll. 365.—*IR.*

**g. Inquiry as to amount to be allowed for maintenance.]**—In a suit for maintenance out of the property of infants, the master is usually directed to inquire & state what would be a proper sum to allow.—*MURPHY v. LAMPHIER* (1866), 12 Gr. 241.—*CAN.*

**h. Reference as to title.]**—Where a purchaser under a decree for a sale applied for an order on pltf.'s solr. for copies of all deeds, etc., necessary to evidence title:—*Held*: the motion should be for a reference to the master as to title.—*BROWN v. DOWDALL* (1825), 2 Moll. 363.—*IR.*

**k. On reference back to master.]**—*MORLEY v. MATTHEWS* (1867), 3 C. L. J. O. S. 21.—*CAN.*

**PART V. SECT. 1, SUB-SECT. 3.**

**1. Jurisdiction in general.]**—The jurisdiction of the master's office is not co-extensive with that of the ct. in inquiring into & adjudicating upon the validity of documents; & there is no authority to support any implied or assumed delegation of the functions of the ct. to the master. Nor is there any practice in the master's office which allows parties to obtain a reference to the master so as to evade the ordinary judicial functions of the ct., & then invoke those judicial functions in a tribunal of delegated & subordinate jurisdiction.

Pltfs., when taking accounts before the master under the ordinary chambers order for the administration of personal estate, sought to have it declared that a bequest to R., who was one of the witnesses to the will, was valid:—*Held*:

the master had no jurisdiction, under such order & on oral pleadings, to adjudicate upon the validity of the will.—*Re MUNSIE* (1884), 10 P. R. 98.—*CAN.*

**n. General application of statutes & rules.]**—The stats. & rules applicable to references should not be so read as to produce the result of two distinct lines of practice in reference to reports of masters & referees. The well-settled procedure in the case of the ordinary report is extended to the statutory reports of referees under Ontario Jud. Act, R. S. O., 1887 (c. 44), s. 101.—*FREKORN v. VANDUSEN* (1893), 15 P. R. 264.—*CAN.*

**o. May delegate mechanical part of duties.]**—There is nothing to preclude the referee from delegating the mechanical part of his work, such as the preparation of the report, to his clerk.—*KING v. SEETON* (1888), 21 N. S. L. R. 20.—*CAN.*

**p. Duty to hear parties.]**—Upon a judicial reference it is always important that parties should be heard on matters of fact. The referee must hear the parties before making his report, otherwise the proceedings are objectionable.—*GLENNIE v. McPHAIL* (1825), 3 Sh. (Ct. of Sess.) 574.—*SCOT.*

**q. Duty of master where reference not proceeded with.]**—Where a party obtains an order for a reference, & does not proceed on it, a certificate of no proceeding from the master is irregular; he should make his report as if the party who is in default has failed.—*REED v. HODGENS* (1829), 3 Moll. 96.—*IR.*

**r. Power to allow interest.]**—In an action upon fire policies, a referee was directed to inquire, ascertain, & report the amount of loss:—*Held*: under R. S. O., 1887 (c. 44), ss. 87, 103, the referee had authority to allow interest on the amount of the loss as ascertained by him.—*A.-G. v. AETNA INSURANCE CO.* (1890), 13 P. R. 459.—*CAN.*

**s. Power to decide whether there had**

**SUB-SECT. 2.—FORM OF ORDER.**

**2444. Inquiry as to damages—To whom referred.]**—Where in an action to restrain deft. from polluting a stream, & for damages, judgment was given for pltf. with costs, & an inquiry as to damages ordered, the costs of such inquiry were reserved in order that the ct. might exercise control over the manner in which the inquiry was conducted & prevent the costs of it being unduly increased by pltf.

It is the usual practice to send such inquiry to the chief clerk & not to a referee.—*SLACK v. MIDLAND RY. CO.* (1880), 16 Ch. D. 81; 50 L. J. Ch. 196; 43 L. T. 434; 29 W. R. 302.

*Annotation*:—*Refd.* *Ewart v. Fryer* (1902), 86 L. T. 676.

**2445. Order failing to state section under which made.]**—An order for reference to a special referee ought to be drawn up so as to show on the face of it whether it was made under s. 56 or s. 57 of Jud. Act, 1873 (c. 66).—*WHITE v. PETO*, [1886] W. N. 165, C. A.

**SUB-SECT. 3.—PROCEEDINGS BEFORE REFEREE.**

**2446. Has jurisdiction to examine parties.]**—A master, to whom a matter has been referred to report upon, has, since 14 & 15 Vict. c. 99, jurisdiction to examine *viva voce* as a witness a party to the matter referred.—*Re KIRBY'S TRUST* (1852), 5 De G. & Sm. 228; 21 L. J. Ch. 464; 18 L. T. O. S. 315; 16 Jur. 758; 64 E. R. 1093.

**2447. Acts in quasi-judicial capacity—Should not be examined in action.]**—A surveyor appointed by the parties, at the instance of the judge, to make a report, acts in a *quasi-judicial* capacity & ought not

been settlement.]—Pending a reference to take accounts, a settlement was made between the parties, but there was a dispute as to the terms:—*Held*: it was competent for the master to deal with the question whether there was or was not a settlement, & report according to the result.—*CORRY v. LEMOINE* (1899), 18 P. R. 482.—*CAN.*

**t. Power to give leave to file further objections.]**—On a reference in a suit by a vendor for specific performance, deft. filed three objections to the title having reference to a small portion of the land, which were answered by pltf., & the reference was proceeding when deft. applied & obtained from the master leave to file other objections:—*Held*: the master in ordinary had no jurisdiction to grant such leave.—*CLARKE v. LANGLEY* (1884), 10 P. R. 208.—*CAN.*

**u. Powers on reference back.]**—Where a reference back to the master to review his report is directed, the master is at liberty to receive further evidence.—*MORLEY v. MATTHEWS* (1867), 3 C. L. J. O. S. 21.—*CAN.*

**v. Admissions before master.]**—Admissions made before the master in the course of a reference should be put into writing & signed by the party making same.—*FOSTER v. ALLISON* (1885), 11 P. R. 233.—*CAN.*

**w. When stay will be granted.]**—A judgment directed the master in ordinary to make partition of lands, ordered that the parties should execute & deliver all necessary conveyances, to be settled by the master, & should give possession to each other in accordance therewith, & directed the master to ascertain pltf.'s damages. Defts. appealed from the judgment to the Ct. of Appeal, & gave the security provided for by r. 826:—*Held*: the reference was stayed pending the appeal.—*MONRO v. TORONTO RY. CO.* (1902), 23 C. L. T. 12; 5 O. L. R. 15; 1 O. W. R. 25, 316, 813; 2 O. W. R. 207.—*CAN.*



to be examined in the action.—*BRODER v. SAILLARD* (1876), 24 W. R. 456; 2 Char. Pr. Cas. 121.

**2448. Power to appoint day for hearing—May proceed in absence of parties.]**—A referee, whether official or special, to whom questions may be referred under Jud. Act, 1873 (c. 66), s. 56, & whether he has to try a matter or report thereon, has power, subject to the control of the ct., peremptorily to appoint a day for the hearing of the reference, & in the absence of either party, to proceed with same.—*WENLOCK (BARONESS) v. RIVER DEE Co.* (1883), 53 L. J. Q. B. 208; 49 L. T. 617; 32 W. R. 220, C. A.

**2449. Duties limited to ascertaining facts.]**—It was not intended by Jud. Act, 1873, that an official referee should decide the issue in an action; he is only to ascertain the facts so as to enable the ct. to decide the issue.—*CARDINAL v. CARDINAL* (1884), 25 Ch. D. 772; 53 L. J. Ch. 636; 32 W. R. 411.

*Annotations:—*Consd. *Gardner v. Jay* (1885), 29 Ch. D. 50, C. A. *Refd.* *Green v. Bennett* (1884), 54 L. J. Ch. 85; *Phillips v. Beall* (1884), 50 L. T. 433, C. A.

**2450. Discretion as to manner of taking accounts.]**—An official referee is not bound to take accounts & inquiries referred to him for report under Jud. Act, 1873, s. 56, in the strict way usually adopted before a chief clerk in chambers, though he may adopt that method if he finds it convenient & likely to advance the ends of justice. Practice & method of taking accounts in chambers & before an official referee stated, compared, & discussed.—*Re TAYLOR, TURPIN v. PAIN* (1890), 44 Ch. D. 128; 59 L. J. Ch. 803; 62 L. T. 754; 38 W. R. 422.

#### SUB-SECT. 4.—THE REPORT AND PROCEEDINGS THEREON.

*See* Arbitration Act, 1889, s. 15.

**2451. Form of report—Whether necessary to state facts & principles.]**—Where the ct. had directed a reference to the official referee to inquire what damage (if any) defts. had sustained by reason of an undertaking given by them not to work within a certain distance of plths.' gasworks, & the official referee reported that defts. had received damage to the extent of £2,042, but did not state in his report the facts on which it was based, or on what principle the damages had been assessed, the ct.

referred back the report to the official referee to certify of what items the amount certified was composed, & for what reasons he had allowed them, & in the meantime directed the motion to stand over.—*BIRMINGHAM CORPN. v. ALLEN*, [1877] W. N. 190.

*Annotation:—**Refd.* *Pontifex v. Severn* (1877), 42 J. P. 40.

**2452. ———.]**—The referee is not bound, & as a general rule, ought not, to state his reasons for his findings. His duty is to state results in as concise a form as possible, similar to that of a chief clerk's certificate (*KAY, J.*).—*WALKER v. BUNKELL* (1883), 22 Ch. D. 722; 52 L. J. Ch. 596; 48 L. T. 618; 31 W. R. 138, C. A.

**2453. ——— Details must be given.]**—Where at the trial of an action an account arising on the action is ordered to be taken before the official referee & further consideration is adjourned, the report must not simply state the result of the account, but must state what items have been allowed & what items have been disallowed.—*BURRARD v. CALISHER* (1882), 51 L. J. Ch. 223; 45 L. T. 793; 30 W. R. 321.

*Annotation:—**Distd.* *Walker v. Bunkell* (1883), 52 L. J. Ch. 596, C. A.

**2454. ——— No power to order judgment to be entered.]**—An official referee has no power to order judgment to be entered on any questions referred to him under Jud. Act, 1873 (c. 66), s. 56.—*LONGMAN v. EAST, PONTIFEX v. SEVERN, MELLIN v. MONICO* (1877), 3 C. P. D. 142; 47 L. J. Q. B. 211; 38 L. T. 11; 26 W. R. 183, C. A.

*Annotations:—**Folld.* *Ward v. Pilley* (1880), 5 Q. B. D. 427, C. A.; *Badische Anilin und Soda Fabrik v. Levinstein* (1883), 24 Ch. D. 156. *Distd.* *Darlington Wagon & Engineering Co. v. Harding* (1890), 7 T. L. R. 20. *Mentd.* *Goodwin v. Budden* (1880), 42 L. T. 536.

**2455. Effect of report—Not equivalent to verdict of jury.]**—The report of a referee, whether official or special, to whom questions have been referred under Jud. Act, 1873, s. 56, is not equivalent to the verdict of a jury.—*WENLOCK (BARONESS) v. RIVER DEE Co.* (1883), 53 L. J. Q. B. 208; 49 L. T. 617; 32 W. R. 220, C. A.

**2456. ——— Court not bound to adopt wholly or in part.]**—The Act of 1889, s. 13 (2), does not bind the ct. to adopt wholly or in part a report by an official or special referee, to whom the ct. has referred a matter as an expert.—*A.-G. v. BIRMINGHAM, TAME & REA DRAINAGE BOARD*, [1912]

#### PART V. SECT. 1, SUB-SECT. 4.

**a. By whom made—Officer himself.]**—A judicial officer charged with a reference should himself draw his report, & not delegate it to the solr. for the successful party.—*KNARR v. BRICKER* (1894), 16 P. R. 363.—CAN.

**b. When report may be made.]**—Where the ct. directed comrs. to divide certain lands, & referred the matter to a barrister to take an account of the rents:—*Held*: the barrister might make his report without waiting for the comrs. to divide the land.—*FRASER v. DEWITT* (1878), 1 P. & B. 738.—CAN.

**c. Publication of report.]**—Any *ex p.* communication with a litigant as to the decision should be avoided, & both parties should have equal facilities of knowing the result.—*KNARR v. BRICKER* (1894), 16 P. R. 363.—CAN.

**2451 i. Form of report—Whether necessary to state facts & principles.]**—The master's report should contain such statement of the evidence, not in detail, but giving such specification of it as will enable the ct. to see with certainty the grounds upon which the master acted.—*JOHNSTON v. REARDON* (1827), 1 Moll. 54.—IR.

**2451 ii. ———.]**—The master's report under a reference, relative to the appointment of new trustees, under 1 Will. 4, c. 60, ought to state that the

persons approved of as new trustees had consented to act.—*Re DEANE* (1838), 1 Craw. & D. 475.—IR.

**2451 iii. ———.]**—A master, provided he sufficiently follows the directions of the decree, is not obliged to give reasons for, or enter into a detailed explanation of, his report.—*BOOTH v. RATTE* (1892), 21 S. C. R. 637.—CAN.

**2451 iv. ——— “Under the circumstances.”]**—It is incorrect in a master's report to state “under the circumstances,” without giving the ct. an opportunity of knowing the ground & circumstances on which the master reports the matter.—*KELLY v. BONYNGE*, 2 Ir. L. Rec. 1st ser. 43.—IR.

**2451 v. ——— Inferences drawn from facts.]**—Under an order of reference to take an account of assets, the master having reported that there were assets sufficient to satisfy pltf.'s legacy, although assets to an amount sufficient to satisfy the trusts of the will were not shown by the accounts, the master grounding his general finding upon the evidence of deft.'s admission of assets by his answer:—*Held*: the report was right, this being an inference directly arising from, although not strictly within the terms of, the reference, & the master not being so purely ministerial as to be precluded from drawing such inferences, but on the contrary bound to do so.—*M'CARTHY v. M'CARTHY* (1828), 1 Moll. 186.—IR.

**2451 vi. ——— Findings must be specific.]**

At the trial a compulsory order of reference was made, referring “questions arising upon the pleadings of this action between the parties, including any questions of account,” to an official referee “for inquiry & report”:—*Held*: this was a reference under Jud. Act, s. 47 & not one under s. 48, & the referee having made a general finding by his report, the case must be referred back to him to give specific findings.—*LUNNEY v. ESSERY* (1884), 10 P. R. 285.—CAN.

**2451 vii. ———.]**—A report must be specific, & a report that an estate was very small cannot be taken as a report; it should state how much, & not in round numbers, but set it out exactly; if otherwise, although not excepted to, the ct. will not act upon it, unless upon the consent of all persons interested.—*KNOX v. NEARY* (1828), 1 Moll. 214.—IR.

**2455 i. Effect of report—When *ex parte*.]**—A report is entitled to less weight where only one side has been heard.—*HOGAN v. GATES* (1893), 26 N. S. L. R. 85.—CAN.

**2455 ii. ——— Not equivalent to verdict of jury.]**—The report of a referee, to whom a matter of account is referred, is not to be treated as equivalent to the verdict of a jury.—*HOGAN v. GATES* (1893), 26 N. S. L. R. 85.—CAN.

**2456 i. ——— Court not bound to adopt.]**—Although the decision of a master on a

**Sect. 1.—References for inquiry & report: Sub-sects. 4 & 5.]**

A. C. 788; 82 L. J. Ch. 45; 107 L. T. 353; 76 J. P. 481; 11 L. G. R. 194, H. L.

**Annotations:—***Reid*. Metropolitan Water Board v. Dick Kerr, [1917] 2 K. B. 1, C. A. *Mentd*. Countess Warwick S.S. Co. v. Nickel Soc. Anon., Anglo-Northern Trading Co. v. Emlyn, Jones & Williams (1917), 87 L. J. K. B. 309, C. A.

**2456a.** S. P. WALMSLEY v. MUNDY (1884), 13 Q. B. D. 807; 53 L. J. Q. B. 304; 50 L. T. 317; 32 W. R. 602, C. A.

**Annotation:—***Reid*. Chance & Hunt v. G. W. Ry. Co. (1914), 15 Ry. & Can. Tr. Cas. 241.

**2456b.** S. P. *Re* SIMMONS (1885), 15 Q. B. D. 348; 53 L. T. 147; 49 J. P. 740; 33 W. R. 706.

**Annotation:—***Reid*. *Re* Incorporated Law Society & Four Solicitors (1891), 7 T. L. R. 672.

reference is open to review by the ct., it will not be set aside unless a case of gross mistake leading to a miscarriage of justice is established; & where the question is one solely as to the weight of evidence, the ct. will not disturb his finding.—*KEATINGE v. MORRIS* (1886), 20 I. L. T. 31, C. A.—**IR.**

**d.** *Master functus officio.* After the master has signed his report, he cannot receive objections to it.—*KANE v. BLOOMFIELD* (1818), 2 Moll. 331.—**IR.**

**PART V. SECT. 1, SUB-SECT. 5.**

**f.** *Confirmation—When made.*—A report made by a master in vacation can only be confirmed after five sitting days in the ensuing term.—*NASH v. DILLON* (1825), 2 Moll. 369.—**IR.**

**g.** ———. Unless by consent, a report cannot be confirmed until after the lapse of the time limited by con. r. 848.—*PATTERSON v. GILBERT* (1888), 12 P. R. 652.—**CAN.**

**2458 i.** ———. *Necessity for.*—Where the ct. ordered that certain matters in dispute in the action be referred for inquiry & report to a master under Jud. Act, s. 101:—*Held*: the report of the master under such reference was not subject to the provisions of con. r. 848 as to confirmation by filing & lapse of time, but any time after it was made, a motion for judgment upon it was in order under con. r. 753, & upon such motion the ct. could adopt it wholly or in part, & any party dissatisfied with it might, before or on the return of the motion for judgment, move to set it aside or vary it.—*RAYMOND v. LITTLE* (1890), 13 P. R. 364.—**CAN.**

**2458 ii.** ———. *Discretion of court on application.*—On an application to confirm the master's report the ct. made an order to refer the whole matter to an arbitrator, it appearing to the ct. that justice to the parties was most likely to be attained by such proceeding.—*CRUISE v. DAVIES* (1841), 3 I. L. R. 363.—**IR.**

**2458 iii.** ———. *Onus of supporting report.*—It is not the course to take the report to be right, unless it can be shown to be wrong. The ct. requires the party in whose favour it is to show how it is supported.—*KILBEE v. SNEYD* (1828), 2 Moll. 195.—**IR.**

**2458 iv.** ———. *Notice of filing—Service of.*—The provision of con. r. 769 that notice of filing a master's report is to be served upon the opposing party is a prerequisite to the report becoming absolute.—*Re* SUPREME LEGION SELECT KNIGHTS OF CANADA, CUNNINGHAM'S CASE (1898), 29 O. R. 708.—**CAN.**

**2458 v.** ———. ———. Rules 694 & 769, requiring notice of filing a master's report as a condition of its becoming absolute, are governed by r. 573; & therefore, notice of filing a master's report need not be served upon a deft. who has not entered an appearance in

the action; & where there is no deft. upon whom notice of filing need be served, the report becomes absolute upon the expiration of fourteen days from the filing.—*TORONTO GENERAL TRUSTS CORPN. v. CRAIG* (1901), 21 C. L. T. 502; 2 O. L. R. 238.—**CAN.**

**2458 vi.** ———. *Not equivalent to personal service.*—Where the report is upon a claim to rank on the assets of an insurance corp., under Ontario Insurance Act, R. S. O., 1897 (c. 203), notice of filing the report given in the *Ontario Gazette* & other newspapers, pursuant to s. 193 of that Act, is not tantamount to personal service.—*Re* SUPREME LEGION SELECT KNIGHTS OF CANADA, CUNNINGHAM'S CASE (1898), 29 O. R. 708.—**CAN.**

**2458 vii.** ———. *Grounds for refusing.*—A motion to confirm the report of a referee on an application for the appointment of a guardian was refused, where the order of reference was not attached to the report, & the evidence before the referee was in lead pencil & difficult to read, & was not intitled in the matter, & notice of the hearing before the referee was not given to the relatives.—*Re* TURNER (1901), 21 C. L. T. 510; 2 N. B. Eq. Rep. 318.—**CAN.**

**2458 viii.** ———. ———. Where the whole matter appears upon the face of the report, it may be open to object to a barrister's report being confirmed, although no exceptions have been filed to it.—*FRASER v. DEWITT* (1878), 1 P. & B. 738.—**CAN.**

**2458 ix.** ———. *Procedure in objecting.*—In an action to recover possession, the judge appointed a referee to take accounts relating to the rents of the lands during the time defts. withheld possession. The referee reported. On motion to confirm the report:—*Held*: it was competent for defts. to appear & oppose the motion, although they had not given notice of motion to vary or set aside the report.—*FRASER v. KAYE* (1892), 25 N. S. L. R. 102.—**CAN.**

**2458 x.** ———. ———. Objections to special findings in a report must be raised by notice of motion.—*LUXEY v. ESSERY* (1884), 10 P. R. 285.—**CAN.**

**2458 xi.** ———. *Review after—On what grounds.*—A report confirmed may be reviewed; but a case must be made of fraud, surprise, or mistake.—*DROUGHT v. REDFORD* (1827), 1 Moll. 575.—**IR.**

**2458 xii.** ———. ———. A decision of the Supreme Ct. of Nova Scotia confirming the report of a master on a reference reversed, on the ground that the master had exceeded his authority & reported on matters not referred to him.—*DOULL v. MCILREITH* (1887), 14 S. C. R. 739; 19 N. S. L. R. 341.—**CAN.**

**h.** *Entering judgment.*—By a rule of ct. it was ordered that any matter pending before the official arbitrators when Exch. Ct. Act (50 & 51 Vict. c. 16) came into force, that had been heard or partly heard by such arbitrators, should be continued before them as official

**2457.** Cannot be questioned on motion for judgment—*Matter for appeal.*—*Semble*: the findings of a referee in his report to the ct. cannot be questioned upon motion for judgment upon the report, but are matter for appeal in the ordinary course.—*MANSFIELD UNION GUARDIANS v. WRIGHT* (1882), 46 J. P. 200; *affd.* on another point, 9 Q. B. D. 683, C. A.

**Annotation:—***Consd.* Clarke v. Sonnenschein (1890), 59 L. J. Q. B. 561, C. A.

**SUB-SECT. 5.—POWER TO ADOPT OR VARY OR REMIT OR SET ASIDE REPORT.**

*See* Arbitration Act, 1889, s. 13 (2).

**2458.** Confirmation not necessary before continuation of trial.—After a report has been made, it is not necessary to confirm same before the trial

referees & that their report thereon should be made to the ct. in like manner as if such matter had been referred to them by the ct. under s. 26 of the above Act. Prior to the making of this rule a claim had been referred to the official arbitrators for investigation & award. This claim, however, was proceeded with & heard before two of such arbitrators only, & a report thereon in favour of claimant was made by them to the ct.:—*Held*: the hearing of the claim by two of the official arbitrators was not a hearing within the rule, & judgment could not be entered on the report.—*RIoux v. R.* (1889), 2 Ex. L. R. 91.—**CAN.**

**k.** *Where execution may be issued.*—Where a reference is directed to the master to ascertain & state the amount of alimony which deft. should pay, execution may be issued for the amount found by his report before confirmation thereof.—*BOCK v. BOCK* (1894), 16 P. R. 313.—**CAN.**

**l.** *Procedure after report—Appeal—In what cases.*—Where, in a consent judgment in the usual form in lien cases, a reference was made to a local registrar:—*Held*: an appeal lay from his report, the reference being to him as master.—*KENNEDY v. HADDOW* (1890), 19 O. R. 240.—**CAN.**

**m.** ———. ———. An appeal will not lie from the refusal of the referee to rescind his order.—*WALKER v. ROBINSON* (1905), 15 Man. L. R. 445; 1 W. L. R. 181.—**CAN.**

**n.** ———. ———. In con. rr. 848-850, there is no provision for an appeal from a ruling or certificate of a master or referee, but from a report only.—*MARKLE v. ROSS* (1889), 13 P. R. 135.—**CAN.**

**p.** ———. ———. A reference was by decree of the ct. made to W., one of the local masters, in his individual, not official capacity, the decree expressing same to be by consent, & that the award should be appealable in the same manner as a master's report, & the reference being of all matters in the suit & also of questions in difference between two defts.:—*Held*: notwithstanding such consent, the award could not be appealed from.—*BURNS v. CHAMBERLAIN* (1877), 25 Gr. 148.—**CAN.**

**q.** ———. ———. *No alteration without.*—There should be no alteration in the amount found due by the master when such amount has not been appealed against.—*GORDON v. GORDON* (1886), 12 O. R. 593.—**CAN.**

**r.** ———. ———. *To whom made.*—An action for an account & delivery up of a trust estate was referred at the trial to the master, the master to have all the powers of a judge as to certifying & amending pleadings, etc., & to inquire & report as to plffs.' right to bring an action, & the whole report to be reviewed or appealed from, according to the stat. in that behalf:—*Held*: an appeal was regularly set down to be heard before a



can be continued.—*DEACON v. DOLBY* (1882), 51 L. J. Ch. 248; 30 W. R. 317.

**2459. Application for judgment—To what court.]**—Where a referee, official or special, to whom questions have been referred under Jud. Act, 1873 (c. 66), s. 56, takes evidence under the order of the Ct. of Appeal, the application for judgment is to that ct. under s. 58.—*WENLOCK (BARONESS) v. RIVER DEE Co.* (1883), 53 L. J. Q. B. 208; 49 L. T. 617; 32 W. R. 220, C. A.

**2460. Procedure after report—Motion for judgment—Motion to set aside.]**—Where a preliminary account has been referred to an official referee, & the referee has made his report, the proper course is not to set the cause down for hearing, but for the party in whose favour the findings are to move for judgment on the report, & for the opposite party to move to set it aside.—*WALKER v. BUNKELL* (1883), 22 Ch. D. 722; 52 L. J. Ch. 596; 48 L. T. 618; 31 W. R. 661, C. A.

**2461. — Motion that action be dismissed.]**—An action for an injunction to restrain a nuisance was referred to an official referee for inquiry & report. The referee found there was no nuisance. Defts. moved under R. S. C., Ord. 40, r. 7, upon a two-days' notice of motion, that the action should be dismissed with costs:—*Held*: Ord. 36, r. 55, was a rule enabling the ct. to give effect to the report of a referee, irrespective of the trial of the action, where further consideration had not been

adjourned, & did not apply to a case like the then present, where the report directed no act to be done, & a two-days' notice of motion under Ord. 40, r. 7, was sufficient.—*LARKIN v. LLOYD* (1891), 64 L. T. 507.

**2462. — May be adopted — & enforced as judgment of court.]**—Under Jud. Act, 1873 (c. 66), s. 56, any question in any cause may be referred to a special referee, whose report may be adopted, & (if so) may be enforced as a judgment of the ct.—*WALLIS v. LICHFIELD* (1876), 3 Char. Pr. Cas. 302.

**2463. — Time for making application under R. S. C., Ord. 36, r. 34.]**—Where an official referee has made his report, any application under the above rule must be made within the time limited for moving against the verdict of a jury.—*SULLIVAN v. RIVINGTON* (1880), 28 W. R. 372.

*Annotations*:—*Distd. Cooke v. Newcastle & Gateshead Co.* (1882), 10 Q. B. D. 332. *Expld. & Distd. Dyke v. Cannell* (1883), 11 Q. B. D. 180. *Refd. Walker v. Bunkell* (1882), 31 W. R. 138.

**2464. — Application to set aside—To whom made.]**—Application to set aside the findings of a referee appointed under Jud. Act, 1873 (c. 66), s. 57, to try issues of fact in an action & report to the judge making the order of reference, must be made to a Divisional Ct., & not to the judge, as such findings are by s. 58 equivalent to the verdict of a jury & can only be set aside by the ct. *Qu.*: whether the time for making the application runs

judge in ct.—*CUMMING v. LOW* (1883), 2 O. R. 499.—*CAN.*

**s. — Within what time made.]**—An appeal from the ruling of a master in the course of a reference should be brought on within a month from the date of the ruling, irrespective of the date of the certificate of such ruling.—*MACLENNAN v. GRAY* (1888), 12 P. R. 431.—*CAN.*

**t. — The report in an action was filed during the Easter sitting of the ct. A motion was made against it within the first four days of the Michaelmas sitting:—Held: the motion was too late, for it should have been made to a vacation judge under rr. 482 & 483.—*GILES v. MORROW* (1884), 4 O. R. 649.—*CAN.***

**u. — Extension of time — How made.]**—An order extending the time for appealing from a report of an official referee under Ontario Jud. Act, s. 47, should not be made *ex p.*—*HAMILTON v. TWEED* (1883), 9 P. R. 448.—*CAN.*

**w. — Refusal of court to extend time.]**—In an action a reference was ordered to an official referee "for inquiry & report pursuant to s. 101 of Jud. Act & r. 552 of the High Ct. of Justice." The referee reported. The municipality appealed to the Divisional Ct. from the report:—*Held*: (1) the appeal not having been brought within one month from the date of the report, as required by cons. r. 848, it was too late; (2) the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; (3) the refusal to extend the time was an exercise of judicial discretion with which the Supreme Ct. would not interfere.—*COLCHESTER SOUTH TOWNSHIP v. VALAD* (1895), 24 S. C. R. 622.—*CAN.*

**x. — After what time incompetent.]**—After the report of a referee has become absolute & a judgment on further directions founded thereon has been pronounced, drawn up, & entered, a judge in chambers has no jurisdiction to entertain an application for leave to appeal; nor could any appeal be entertained unless the judgment on further directions were set aside; & that can be done only by the proper appellate tribunal.—*Re DINGMAN & HALL* (1889), 13 P. R. 232.—*CAN.*

**y. — Notice.]**—According to the true meaning of r. (1897) 769, each party is precluded from appealing against the report or certificate of a master, unless he serves his notice of appeal within fourteen days; & notice of appeal given in proper time by one party does not prevent the report from becoming absolute as regards another party.—*STEWART v. FERGUSON* (1899), 19 P. R. 21.—*CAN.*

**z. — Grounds for.]**—The report of a master in settling a matter of account was upheld where the evidence was conflicting, where the objections to the report were of a general character, & where it was not shown that he acted upon a wrong principle, or committed some manifest error.—*KING v. DRYSDALE* (1892), 24 N. S. L. R. 308.—*CAN.*

**a. — Waiver.]**—Appeal from a report or award of a referee, on the ground that it should have been made under the terms of the lease by the master in ordinary:—*Held*: the latter was the proper party, but as appct. had waived his right to object by appearing before the referee, the appeal should be dismissed.—*Re DENISON & FOSTER* (1908), 12 O. W. R. 1066; 18 O. L. R. 478.—*CAN.*

**b. — A reference was held at another place than that mentioned in the order. Defts. counsel objected in the first instance, but afterwards acquiesced. The objection was not taken in the notice of motion to set the report aside:—Held: the objection could not be entertained.—*HOGAN v. GATES* (1893), 26 N. S. L. R. 85.—*CAN.***

**c. — A reference was made to a local master who had, prior to his appointment, been the counsel of one of the litigants. Neither party objected to his taking the reference, but, on the contrary, the master certified that he acted in the reference at the pressing instance of both parties:—Held: the party against whom the master reported, having taken the chance of the master finding in his favour, could not raise that objection on an appeal from the report.—*COTTER v. COTTER* (1874), 21 Gr. 159.—*CAN.***

**d. — Appt. was estopped from appealing from the master's ruling that depositions taken on a former application would be read as evidence, by reason of appt. not**

having objected at a particular stage of the proceedings.—*MACLENNAN v. GRAY* (1888), 12 P. R. 431.—*CAN.*

**f. — Excepting to report — Right to except.]**—A creditor by coming into the master's office, & proving his debt, acquires a right to except to the report.—*WILSON v. WILSON* (1819), 2 Moll. 328.—*IR.*

**g. — In what cases.]**—An objection to the report, that the master from his state of health was incapable of understanding it, & that his signature was improperly obtained, should not be made by way of exception, but the party objecting should move for an order to quash the report, & take it off the file.—*KILBEE v. SNEYD* (1828), 2 Moll. 194.—*IR.*

**h. — Within what time.]**—The ct. will receive exceptions to a report, although the time for excepting is out, & the cause is in the paper of the day to be heard.—*KILDARE v. WHITE, Howard's Chancery Practice*, 246.—*IR.*

**k. — When exceptions will be overruled.]**—Exceptions to a report which is conformable to the decree will be overruled, although the decree is wrong; a wrong decree can be set right by rehearing only.—*CARMICHAEL v. WILSON* (1830), 3 Moll. 80.—*IR.*

**l. — Consideration of each ground separately.]**—It is not the course of the ct., when an order is made upon one deft.'s exceptions, to make the same order as to another deft.'s, without going into his case particularly. Each exception & each party excepting should have the benefit of the ct.'s judgment separately & independently exercised.—*KILBEE v. SNEYD* (1828), 2 Moll. 194.—*IR.*

**2464 i. — Application to set aside—Grounds for refusing.]**—In an action for an account the judge made an order referring to an accountant the evidence that had been taken before a master, that he might report on a number of questions specifically set out. If the accountant should desire the instructions of the judge on any point, he was to refer such point or matter to the judge for further instructions. A motion was made to set aside the report for irregularity. The judge refused the motion:—*Held*: the motion to set the report aside was premature.—*KING v. SEETON* (1888), 21 N. S. L. R. 20.—*CAN.*



*Sect. 1.—References for inquiry & report: Sub-sects. 5 & 6. Sect. 2: Sub-sect. 1, A.]*

from the time when the report is made to the judge.  
—*COOKE v. NEWCASTLE & GATESHEAD WATER CO.* (1882), 10 Q. B. D. 332; 52 L. J. Q. B. 337.

**2465. ——— Objection how taken—Notice of objection.]**—Objection to a part of a report of an official referee may be taken on the report coming before the ct. for adoption. But notice of objection should be given.—*Re BROOK, SYKES v. BROOK* (1881), 50 L. J. Ch. 744; 45 L. T. 172; 29 W. R. 821.

*Annotation:—*Refd. *Cooke v. Newcastle & Gateshead Water Co.* (1882), 10 Q. B. D. 332.

**2466. ——— Application to vary—Notice of motion.]**  
—Where, in an action which has by the judgment been referred to an official referee, & in which further consideration has been adjourned, either party desires to vary the referee's report, he should serve the opposite party with a notice of motion to vary, such notice to be given for the usual motion day. The motion will then be adjourned, as a matter of course, to come on with the further consideration. Where further consideration has not been adjourned, the proceeding to vary may be either a motion or a summons.—*BURRARD v. CALISHER* (1882), 19 Ch. D. 644; 51 L. J. Ch. 510; 46 L. T. 341; 30 W. R. 540.

**2467. ——— Necessity for.]**—The ct. will not, upon the further consideration of an action, go into the evidence upon which the referee, to whom matters in the action were referred, has based his report, unless one of the parties has given notice of motion to vary the report or remit the matter for re-hearing.—*Re FITTON'S ESTATE, HARDY v. FITTON* (1893), 70 L. T. 397; 42 W. R. 281; 38 Sol. Jo. 129; 8 R. 99.

**2468. ——— Grounds for refusal.]**—A petition having been presented for payment out of ct. of a fund to which there were numerous rival claimants, the matter was by consent referred to a special referee. After the hearing an application was made to vary the referee's report, on the ground (*inter alia*) that he had improperly rejected certain correspondence tendered to him, & was refused, as no substantial wrong had been done & the production of the letters would have been useless & a waste of time:—*Held*: (1) there was no evidence that the documents rejected were material & such as would have justified the grant of an adjournment of the hearing, supposing an application to that end had been made, & there had been no failure of duty on the part of the referee; (2) the application to vary was properly refused.—*Re MAPLIN SANDS* (1894), 71 L. T. 594; 39 Sol. Jo. 43, C. A.

**2469. ——— ]**—Pltfs., in an action against three defts., obtained judgment against defts. for an injunction to restrain infringement of pltfs.' trade marks, with costs, & by the judgment it was referred to an official referee to inquire &

**2466 i. ——— Application to vary.]**—In an action a reference was directed to ascertain what was due, & an order was made permitting sureties to appear upon the reference & contest the claims of the municipality. This order was varied by making provision for awarding costs as between the municipality & the sureties.—*ESSEX COUNTY v. WRIGHT, ESSEX COUNTY v. DUFF* (1890), 13 P. R. 474.—CAN.

**2466 ii. ——— Within what time.]**—A motion to vary a report upon a reference under Ontario Jud. Act, R. S. O., 1887 (c. 44), s. 101, although made at the same time as a motion for judgment on the report, cannot be entertained unless made within the time limited by rr. 848 & 849.—*FREERORN v. VANDUSEN* (1893), 15 P. R. 264.—CAN.

**2466 iii. ——— Grounds for.]**—Where the report is based upon a wrong

principle it may be varied.—*HOGAN v. GATES* (1893), 26 N. S. L. R. 85.—CAN.

**2466 iv. ——— Appeal from order varying.]**—An objection to an order varying a referee's report, on the ground that the application for the order was out of time, should be taken before the judge who made the order, & if not so taken is waived, as the judge could have extended the time.—*FULTZ v. MCNEIL* (1906), 38 N. S. L. R. 506.—CAN.

**m. ——— Power of court to re-open report.]**—Pending a reference to take accounts, a settlement was made between the parties, in the absence of their solrs., but there was a dispute as to the terms. On appeal from the master's report:—*Held*: defts. should not be prejudiced by having withheld before the master any evidence to support the settlement in the terms which they asserted, & the report should be opened

report what sums of money, if any, were fit to be awarded to pltfs. for any damage sustained by them by the use of the infringing tickets. The referee by his report found, for the reasons assigned by the report, that £3,067 ought to be paid by first two defts. & £5,000 by the third. Defts. moved to vary the report, & pltfs. moved that it be adopted:—*Held*: the report should be adopted, & defts.' motions dismissed.—*ALEXANDER v. HENRY* (1895), 12 R. P. C. 360.

**2470. ——— Appeal where motion dismissed.]**  
—An action was commenced in 1903, claiming an account of the dealings & transactions by deft. as manager on behalf of pltfs. of the business of an engineering co. The account was directed to be taken before an official referee, who in due time lodged his report. The further consideration of the action & a motion by deft. to vary the report of the official referee were heard in May, 1907, & by an order of May 7, 1907, the motion to vary was dismissed:—*Held*: an appeal set down on Aug. 1, 1907, was not presented in time & must be dismissed, as R. S. C., Ord. 58, r. 15a, must be construed strictly & did not apply to a motion to vary a report.—*SAUNDERS DAVIES v. BAILLIE* (1907), W. N. 237, C. A.

**2471. ——— Power of court to alter report.]**  
Where, on an application to alter or vary the report of a special referee, on the ground that the damages had been assessed on a wrong principle, the ct. revised the report &, on the shorthand notes of the evidence taken before the special referee, assessed the damages, without remitting the matter to the referee, the Ct. of Appeal, after the making of Ord. 36, r. 34, in Mar. 1879, affirmed that variation, & the House of Lords, on appeal, upon the facts & evidence affirmed the judgment of the Ct. of Appeal with a variation.—*ELLIS LEVER & Co. v. DUNKIRK COLLIERY CO.* (1880), 43 L. T. 706, H. L., *affg. S. C. sub nom. DUNKIRK COLLIERY CO. v. LEVER* (1879), 41 L. T. 633, C. A.; earlier proceedings (1878), 9 Ch. D. 20; 39 L. T. 239; 26 W. R. 841, C. A.

*Annotations:—*Expld. *Cooke v. Newcastle & Gateshead Water Co.* (1882), 10 Q. B. D. 332. Refd. *Burrard v. Calisher* (1882), 19 Ch. D. 644; *Walker v. Bunkell* (1883), 22 Ch. D. 722, C. A.; *Re Taylor, Turpin v. Pain* (1890), 44 Ch. D. 128. Mentd. *Jones v. Andrews* (1887), 57 L. T. 843; *Biddell v. Clemens Horst* (1911), 104 L. T. 577, C. A.; *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. Co. of London*, [1912] A. C. 673, H. L.

**2472. ——— No power to order payment into court of sum in report.]**—An order was made by consent that the value of certain coal taken, which formed part of the subject-matter of the suit, should be referred to two persons named by the respective parties, whose certificate was directed to be evidence in the cause. Such referees having certified that coal to a certain value had been abstracted by deft. from under pltf.'s land:—*Held*: an order

up on payment of costs.—*CORRY v. LEMOINE* (1899), 18 P. R. 482.—CAN.

**n. ——— In what cases cited.]**—On application for an order for foreclosure & sale, the judge to whom the application is made has authority to open up the question of the correctness of the report of a referee as to the amount due.—*WALLACE v. HARRINGTON* (1901), 34 N. S. L. R. 1.—CAN.

**o. ——— Grounds for.]**—There is no distinction between an award in a judicial reference & a decree-arbitral, in so far as relates to the character of the objections which will be sufficient to open either of them up.—*CAMPBELL v. CAMPBELL* (1843), 5 Dunl. (Ct. of Sess.) 530.—SCOT.

**p. ——— ]**—*BRAKING v. MENZIES* (1841), 4 Dunl. (Ct. of Sess.) 274.—SCOT.

to pay that sum into ct. was erroneous.—**BAYNALL v. WHITEHOUSE** (1846), 8 L. T. O. S. 309.

**2473. — Report remitted back—Form of order remitting.]**—In an action for damages in respect of the wrongful sale of goods comprised in a bill of sale, inquiries were directed before an official referee. The referee reported that there were no damages which he could assess. On pltf.'s application the ct. remitted the action to the referee, with a direction that regard was to be had to the fact that the bill of sale was admitted to be void, but declined to exclude from the consideration of the referee any evidence showing that the sale was made at the request or with the consent of pltf. :—**Held**: the order directing inquiries should be varied & the matter should be referred back to the referee on the footing of the sale itself being wrongful.—**WALLIS v. SAYERS** (1890), 6 T. L. R. 356, C. A.

**Annotation**:—**Reid**. **Spalding v. Gamage** (1918), 35 R. P. C. 101, C. A.

#### SUB-SECT. 6.—COSTS.

**2474. Costs of reference usually costs in cause.]**—The costs of referring a question arising in an action to a special referee are usually costs in the cause.—**BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN** (1883), 24 Ch. D. 156; 52 L. J. Ch. 704; 48 L. T. 822; 31 W. R. 913.

**Annotations**:—**Consd.** **Haslam Foundry & Engineering Co. v. Hall** (1887), 4 T. L. R. 154. **Mentd.** **Easterbrook v. G. W.**

**2473 i. — Power of court to remit back.]**—A reference was ordered to a master to ascertain the amount of the interest of C., as a residuary legatee, in the estate of N., & also the amount of receipts & expenditure by the deceased trustee of the estate in the trustee's lifetime. After receiving the report of the referee the judge referred the report back to be varied & with further instructions:—**Held**: the whole cause & matters in controversy being still before the judge, he had power in giving further directions to the referee to correct errors into which he had fallen, in this respect, being unlike a common law action.—**CAIRNS v. MURRAY** (1905), 37 N. S. L. R. 451.—**CAN.**

**2473 ii. — — — (Grounds for.)**—Where the master's report was objected to, & it appeared to be in perfect conformity with the order of reference, it was referred to the master to report upon what evidence he reported.—**JOHNSON v. REARDON**, 1 Ir. L. Rec. 1st ser. 51, 129, 390.—**IR.**

**2473 iii. — — — .]**—Where a party has had an opportunity of raising a question in the master's office but does not, & afterwards applies to the ct. for liberty to do it, the report will for that purpose be sent back to the master to review, but the party applying must pay the other party his costs, as between attorney & client.—**KELLY v. BONYNGE**, 2 Moll. 383.—**IR.**

**2473 iv. — — — .]**—Where a third person's rights are injured by an *ex p.* report, he should move to have the report sent back to the master to review it, having regard to appct.'s rights.—**SHINKIN v. IVERS** (1827), 2 Moll. 440.—**IR.**

**2473 v. — — — .]**—The master is the final judge of the credibility of witnesses, & his report should not be sent back because some irrelevant evidence may have been given of a character not likely to have affected his judgment, especially when no appeal has been taken from his ruling on the evidence.—**BOOTH v. RATT** (1892), 21 S. C. R. 637.—**CAN.**

**2473 vi. — — — .]**—On motion to send back a report to the master, in

order to reconsider same, some specific objection should be stated, in order to enable the ct. to form an opinion, as to whether the report is wrong or not.—**VILLIERS v. REDMOND**, 2 Ir. L. Rec. 1st ser. 260.—**IR.**

**2473 vii. — — — .]**—That matter, as reported, is outside the reference & surplusage is not ground of exception to the report, for it is not the practice to send back a report to the master to expunge a few unnecessary words.—**M'CARTHY v. M'CARTHY** (1828), 1 Moll. 186.—**IR.**

**2473 viii. — — — .]**—The ct. will refer a report back to the master, at the expense of parties wishing to object thereto, where he signed his report before the objections were handed in, if the delay is accounted for & injustice might be done to the parties.—**KANE v. BLOOMFIELD** (1818), 2 Moll. 331.—**IR.**

**2473 ix. — — — .]**—**BAXTER v. MACARTHUR** (1836), 11 Fac. Coll. N. S. 468.—**SCOT.**

**2473 x. — Procedure in remitting back.]**—Where a report is sent back to be reviewed, there must be a rule *nisi* to confirm it, unless otherwise provided in the order sending it back; & if no such provision, the new report is until confirmation open to objection.—**READ v. HODGENS**, 2 Moll. 387.—**IR.**

#### PART V. SECT. 1, SUB-SECT. 6.

**q. Power of referee over costs.]**—The referee had dismissed a petition for a certificate of title, with costs. On motion to set aside such order as irregular:—**Held**: the referee had power over costs, & order not set aside.—**Re REFEREE** (1866), 2 Ch. Ch. 22.—**CAN.**

**r. Costs of action — Include costs of reference, award, & subsequent proceedings.]**—The rule of T. T., 24 Vict., applies, in the case of a compulsory reference, to the whole costs in the action, including the costs of the reference & award & proceedings subsequent thereto, & is not restricted to what may strictly be called the costs of the action.—**JOHNSON v. MORLEY** (1863), 3 P. R. 217.—**CAN.**

**s. When no costs allowed.]**—Where neither can blame his opponent as the

**Ry. Co.** (1886), **Griffin**, Patent Cases (1887), 81; **Kurty v. Spence** (1887), 58 L. T. 438; **Siddell v. Vickers, Sons** (1887), 4 T. L. R. 191; **Cole v. Saqui & Lawrence** (1888), 40 Ch. D. 132, C. A.; **Malan v. Young** (1889), 6 T. L. R. 38; **Vickers, Sons v. Siddell** (1890), 7 R. P. C. 292; **Lane-Fox v. Kensington & Knightsbridge Electric Lighting Co.**, [1892] 3 Ch. 424, C. A.; **Re Martindale**, [1894] 3 Ch. 193; **Atkins & Applegarth v. Castner-Kellner Alkali Co.** (1901), 18 R. P. C. 281; **Scott v. Scott**, [1913] A. C. 417, H. L.; **Osram Lamp Works v. Pope's Electric Lamp Co.** (1917), 34 R. P. C. 369.

**2475. Remuneration of referee determined by court.]**—Under Jud. Act, 1873 (c. 66), any question in any cause may be referred to a special referee, whose report may be adopted, & the remuneration to be paid to such referee is to be determined by the ct.—**WALLIS v. LICHFIELD** (1876), 3 Char. Pr. Cas. 302.

*See, now*, Arbitration Act, 1889, s. 15 (3).

#### SECT. 2.—REFERENCES FOR TRIAL.

*See* Arbitration Act, 1889, s. 14.

##### SUB-SECT. 1.—POWER TO REFER.

###### A. In General.

**2476. Judge at Nisi Prius.]**—A judge of *Nisi Prius* may by consent make a rule to refer, & oblige the parties to stand by it.—**HOLFORD v. LAWRENCE** (1695), 12 Mod. Rep. 87; 88 E. R. 1182.

**2477. Judge of Lord Mayor's Court.]**—A judge of the Lord Mayor's Ct., & at *Nisi Prius*, has no

cause of a reference to ascertain the amount of "reasonable rebate of rent," no costs should be allowed either party.—**HESSEY v. QUINN** (1911), 20 O. W. R. 779; 3 O. W. N. 442.—**CAN.**

**2474 i. Costs of reference.]**—A cause was referred to a master to ascertain what amount was due on a judgment upon which pltf. had issued execution, directing the sheriff to levy for \$454. The master reported only \$62 due, & exceptions being taken to the report, it was confirmed:—**Held**: deft. was entitled to the costs of the reference.—**LYNCH v. O'BRIEN** (1873), R. E. D. 396.—**CAN.**

**t. Costs of appeal.]**—An application, on behalf of pltf., to confirm the master's report, was dismissed with costs, on the ground that the application should have been to the ct., the fact that the cause had been adjourned for further hearing being overlooked or forgotten. Pltf.'s appeal was allowed, & costs reserved:—**Held**: pltf. should have the costs of that appeal.—**FRASER v. KAYK** (1892), 25 N. S. L. R. 102.—**CAN.**

**2475 i. Remuneration of referee—How entitled to payment.]**—A referee having entered upon a reference is not entitled to payment of his fees from day to day as a condition of proceeding with the reference.—**GALLAGHER v. MONCTON** (1901), 21 C. L. T. 485; 2 N. B. Eq. Rep. 269.—**CAN.**

**2475 ii. — Security for.]—Semble**: where there is a probability that the fees of a referee will not be paid, the ct. will require that his fees be secured to him before ordering the reference to be proceeded with.—**GALLAGHER v. MONCTON** (1901), 21 C. L. T. 485; 2 N. B. Eq. Rep. 269.—**CAN.**

**2475 iii. — Remedy for.]**—Upon a reference under Jud. Act, s. 102, the referee apportioned the amount of his fees between pltf. & defts. according to the time occupied by each upon the reference. Pltf. paid their share, but defts. did not:—**Held**: the referee should issue his report to pltf. without further payment by them, & look to defts. for their share of his fees.—**BROOKS v. GEORGIAN BAY SAW-LOG SALVAGE CO., RUMLEY v. GEORGIAN BAY SAW-LOG SALVAGE CO.** (1895), 17 P. R. 34.—**CAN.**



**Sect. 2.—References for trial: Sub-sect. 1, A. B. & C. (a).]**

power under C. L. P. Act, 1854, to order a cause to be compulsorily referred against the will of one of the parties.—*MORGAN v. AINSLIE* (1873), 28 L. T. 120.

**2478. Power to refer to special referee—Before Act of 1889—Reservation as to costs.]**—The ct. or a judge has no power to refer any cause or matter to a special referee without the consent of the parties thereto.

One of the parties to a cause objected to a reference to a special referee, & the judge, in ordering the cause to be tried by an official referee, ordered that "the extra costs occasioned by a trial before an official referee instead of a special referee be reserved":—*Held*: the judge had jurisdiction to insert these terms in the order.—*LONDON & LANCASHIRE FIRE INSURANCE CO. v. BRITISH AMERICAN ASSOCN.* (1885), 54 L. J. Q. B. 302; 52 L. T. 385.

**2479. Judicature Act, 1873 (c. 66), s. 56—Act of 1889, s. 14.]**—Pltfs. brought an action for an injunction to restrain deft. from interfering with pltfs.' ancient lights. Special issues were raised in the action, & a question arose whether, according to the plans & evidence, a proposed erection would materially obscure the ancient lights:—*Held*: (1) under Jud. Act, 1873, s. 56, the ct. had a discretion to send the whole case to be tried by a referee, & having regard to the evidence of deft., that seemed to be a very convenient course to take; (2) as a question of law might arise, & it would be most unfortunate if the referee should adopt a view in regard to the latter which the ct. might think incorrect, the proper course was to refer the whole case to an official referee under the Act of 1889, s. 14 (b), & to direct him to send a special case (s. 19) of any question of law which might arise in the course of the inquiry.—*PARKS v. EAMES*, [1890] W. N. 143.

**2480. Married Women's Property Act, 1882 (c. 75), s. 17.]**—The ct. has no jurisdiction under the above sect. to refer the whole subject-matter of an originating summons taken out under the sect. to an official referee for trial. *Qu.*: whether, having regard to the special & peculiar jurisdiction conferred by the above sect., the ct. has jurisdiction to refer a matter arising under that sect. to an official referee for trial under s. 14 of the Act of 1889.—*Re HUMPHERY & HUMPHERY*, [1917] 2 K. B. 72; 86 L. J. K. B. 775; 117 L. T. 7; 61 Sol. Jo. 382, C. A.

**2481. One defendant out of jurisdiction—Form of order.]**—By consent of pltf. & deft. within the jurisdiction, partnership accounts, etc., & all matters in difference, were referred to arbn., notwithstanding the absence beyond the jurisdiction of other deft., who had been a partner with pltf. & deft. before the ct. Form of order of reference.—*DUXBURY v. ISHERWOOD* (1864), 10 L. T. 712; 12 W. R. 821.

**2482. Only parties on record can consent to reference of cause.]**—A submission to an award between A. & B., the parties on the record, having been made a rule of ct., which award not having been made in time, the dispute had been referred to a second arbitrator by B. & C., the real parties in the suit, no attachment can issue against B. for not obeying the award made by the second arbitrator, because the reference should be made by the parties on the record.—*OWEN v. HURD* (1788), 2 Term Rep. 643; 100 E. R. 346.

*Annotation*:—*Mentd.* *R. v. Christian* (1842), Car. & M. 388.

**B. Prolonged Examination of Documents or Scientific Inquiry.**

**2483. General rule.]**—The ct. or a judge has no power under Jud. Act, 1873 (c. 66), s. 57, to order

an action to be referred to an official referee, for s. 57 only allows any question or issue of fact, or any question of account, to be tried before an official referee, if the parties consent in any cause, & if they do not consent, in any cause requiring a prolonged examination of documents or accounts or any scientific or local investigation.—*LONGMAN v. EAST, PONTIFEX v. SEVERN, MELLIN v. MONICO* (1877), 3 C. P. D. 142; 47 L. J. Q. B. 211; 38 L. T. 11; 26 W. R. 183, C. A.

*Annotations*:—*Consd.* *Goodwin v. Budden* (1880), 42 L. T. 536; *Ward v. Pilley* (1880), 5 Q. B. D. 427, C. A. *Mentd.* *Badische Anilin und Soda Fabrik v. Levinstein* (1883), 24 Ch. D. 156; *Darlington Wagon & Engineering Co. v. Harding* (1890), 60 L. J. Q. B. 110, C. A.

**2484. Prolonged examination of documents—What is—Reading letters.]**—Reading a lot of letters is not what Jud. Act, 1873, s. 57, means by a "prolonged examination of documents" (*LUSH, J.*).—*GREEN'S TRUSTEE v. BARRETT, BARRETT v. ROSENTHAL* (1875), Bitt. Prac. Cas. 22.

**2485. ——— Appeal from order of reference.]**—The Ct. of Appeal has power to review the order made by a judge under Jud. Act, 1873, s. 57, who, having jurisdiction to make such order, has in the exercise of his discretion ordered the issues of fact in an action to be tried by an official referee, on the ground that they required prolonged examination of documents & also scientific & local investigation; but the Ct. of Appeal, whose discretion in such case is to be substituted for that of the judge, will not exercise such discretion except in a strong case where it clearly thinks the judge has wrongly exercised his discretion, & that an injustice has been done by the order he has so made. *Semble*: the "prolonged examination of documents" intended by the above sect. is an examination required to enable the judge to leave questions of fact to the jury, & not an examination to enable him to determine a question of legal right (*BRETT, L.J.*).—*ORMEROD v. TODMORDEN JOINT STOCK MILL CO., LTD.* (1882), 8 Q. B. D. 664; 51 L. J. Q. B. 348; 46 L. T. 669; 30 W. R. 805, C. A.

*Annotations*:—*Refd.* *Swyny v. N. E. Ry. Co.* (1896), 74 L. T. 88, C. A. *Mentd.* *Huxley v. London Extension Ry. Co., Hughes v. Merrett, Wood v. Madge* (1886), 17 Q. B. D. 373.

**2486. Solicitor's negligence—Delay.]** Where an action was one of negligence alleged against solrs., who had reported favourably on a mtge. investment which resulted in loss:—*Held*: (1) no order to refer could be made; (2) there was a difficulty about directing trial before a special referee when a cause was on the point of being tried.—*ANON.* (1875), 1 Char. Cham. Cas. 26; Bitt. Prac. Cas. 6.

**2487. ——— Reference of whole cause.]**—Where a cause requires any prolonged investigation of documents or accounts within Jud. Act, 1873, s. 57, all the issues in such cause may be compulsorily referred to an official referee for trial, & the power to refer is not limited to such issues as involve questions of account.

A summons to refer all the issues for trial to an official referee need not be taken out within four days after notice of trial under R. S. C., Ord. 36, r. 5.—*WARD v. PILLEY* (1880), 5 Q. B. D. 427; 49 L. J. Q. B. 705; 43 L. T. 301; 28 W. R. 937, C. A.

*Annotations*:—*Consd.* *Martin v. Fyfe* (1883), 49 L. T. 107; *Knight v. Coales* (1887), 19 Q. B. D. 296, C. A.

**2488. ——— Constructive total loss—Evidence on commission.]**—In an action for constructive total loss, the main question to be decided was whether a particular twist in a vessel was congenital, or caused by perils of the sea. Evidence taken on commission amounted to three hundred pages of print, & six scientific witnesses were to be called:—



**Held:** this was not a case involving such "prolonged examination of documents or accounts, or any scientific or local investigation," as to fall within Jud. Act, 1873, s. 57, & an application at chambers to direct the trial of the action to be taken before a special referee or referees, instead of before a jury, was properly refused.—*HAMILTON v. MERCHANTS' MARINE INSURANCE CO.* (1889), 58 L. J. Q. B. 544.

**Annotation:**—*Consd. Swyny v. N. E. Ry. Co.* (1896), 74 L. T. 88, C. A.

**2489. Scientific or local examination—What is—Patent action—Appeal.]**—At the trial of an action for the alleged infringement of a patent, the judge, during the opening of the case but before its conclusion, intimated that in his opinion the issues of fact ought to be tried before an official referee. Accordingly he adjourned the case, & after the lapse of a few days an order was drawn up as an order of the High Ct. referring the issues to an official referee:—**Held:** it was impossible to say that such an action did not require a scientific investigation, & the judge having decided that it did, the ct. would not interfere with his discretion. **Qu.:** whether the appeal was to the Ct. of Appeal or not.—*SAXBY v. GLOUCESTER WAGON CO.*, [1880] W. N. 28.

**2490. — Furniture to be examined.]**—Where furniture in a house has to be examined, a local investigation is required & a reference may be ordered without the consent of all the parties interested.—*ANON.* (1875), Bitt. Prac. Cas. 46; 1 Char. Cham. Cas. 29.

**2491. — Obstruction of light.]**—The power to direct a compulsory reference does not enable the ct., in an action for obstruction of light & air, to appoint a surveyor at deft.'s instance to view the premises, etc., & report to the ct. as to any injury sustained, there not being involved a "prolonged examination of documents or any scientific or local investigation."—*BALTIC CO. v. SIMPSON* (1876), 24 W. R. 390; 2 Char. Pr. Cas. 119.

**2492. — Allegation of fraud.]**—Deft., in an action for money due for work done under a contract, pleaded that the work had not been done to the satisfaction of his architect, the terms of the contract being that pltf. should be paid only on the completion of the work to the satisfaction of deft. & of his architect, whose decision in case of dispute was to be final & binding. Deft. then counter-claimed, in respect of delay & defective machinery supplied, for a sum greater than pltf.'s claim. In reply pltf. alleged that the architect had refused to say he was satisfied unfairly & improperly in collusion with deft. & by his procurement. Subsequently pltf. obtained an order for the trial of the action by a referee under s. 14 of the Act of 1889:—**Held:** the order ought not to have been made because pltf.'s allegation was one of fraud, which, being capable of being tried separately, he had a right to have tried by a jury.—*RUSSELL & CO. v. HARRIS* (1891), 65 L. T. 752.

#### C. Matters of Account.

(a) *Under Common Law Procedure Act, 1854* (c. 125), s. 3.

**2493. Claim for deduction for timber improperly cut.]**—In an action for freight where the items of the account were admitted, but deft. claimed a deduction in respect of timber alleged to have been improperly cut by the master at Quebec, which claim was answered by the allegation of a custom at Quebec authorising the master so to cut the timber, deft. applied to the ct. to order a reference under the above sect.:—**Held:** the sect. did not apply.—*SIM v. OLIVER* (1854), 24 L. T. O. S. 71.

**2494. Cross claim for security.]**—An action, in which either the terms of an agreement declared

on or the nature of the pleadings necessarily involve "matter of account," will not be tried, but will be referred by the judge under the above sect., & a cross claim for security will also be referred.—*JONES v. BEAUMONT* (1858), 1 F. & F. 336.

**2495. Dilapidations—Amount only in dispute.]**—An action for dilapidations, when money is paid into ct., & the question in dispute is only as to the amount of the damages, may be a matter of account & the subject of a compulsory reference within the above sect.—*CUMMINS v. BIRKETT* (1858), 3 H. & N. 156; 27 L. J. Ex. 216; 157 E. R. 425; *sub nom. Re GURDON, CUMMINS v. BIRKETT*, 30 L. T. O. S. 334; 22 J. P. 179; 4 Jur. N. S. 242; 6 W. R. 366.

**Annotation:**—*Folld. Angell v. Felgate* (1861), 7 H. & N. 396.

**2496. — — —.]**—In an action by an incumbent against the exors. of a deceased incumbent for dilapidations in the chancel of the parish church, the only question was as to the degree or amount of repair requisite having regard to the state of the chancel, & a question arising as to the rule of law upon that subject:—**Held:** a fit case for a reference to arbn. under the above sect., as a mere "matter of account."—*PELL v. ADDISON* (1860), 2 F. & F. 291.

**Annotation:**—*Refd. Angell v. Felgate* (1861), 10 W. R. 83.

**2497. — Sufficiency of amount paid into court.]**—In an action by a landlord against his tenant for breach of contract in not repairing the demised premises, & delivering same up in proper repair, deft. pleaded payment of £10 into ct. Pltf. replied that was not sufficient. A judge of chambers then made an order under the above sect. against deft.'s consent that the whole matter be referred:—**Held:** the order for a compulsory reference was correct.—*ANGELL v. FELGATE* (1861), 7 H. & N. 396; 31 L. J. Ex. 41; 5 L. T. 322; 10 W. R. 83; 158 E. R. 527.

**2498. Bills of exchange.]**—The ct. refused to refer an action upon bills of exchange to the master, under the compulsory clauses of the above sect., pltf. suing deft. as drawer, which was not a matter of mere account.—*PELLATT v. MARKWICK* (1858), 3 C. B. N. S. 760; 30 L. T. O. S. 275; 6 W. R. 254; 140 E. R. 941.

**Annotation:**—*Refd. Angell v. Felgate* (1861), 10 W. R. 83.

**2499. Matter of account between one of parties to cause & third party.]**—There may be a reference of a cause or of matter of account therein by the judge at the trial, on the application of either party, under the above sect., & this, although the "matter of account" is not between pltf. & deft., but between one of the parties to the cause & a third party, provided it is by plea or otherwise mixed up with the cause of action or defence.—*ADAMS v. YEOMAN* (1860), 2 F. & F. 92.

**2500. Solicitor's bill—Set-off—Retainer.]**—Where there was a set-off on an attorney's bill, & the question of retainer might arise on many of the items:—**Held:** the cause involved "matter of account," which could not be conveniently tried, & must be referred.—*GOODRED v. SEALE* (1861), 2 F. & F. 382.

**2501. — Negligence.]**—In an action on an attorney's bill, there being a dispute as to items, & also a defence on the ground of negligence, & a judge having made an order at chambers to refer the matter to the arbn. of the master under the above sect., the ct. refused to disturb the order, it not having been made to appear on the part of deft. at chambers that the defence of negligence was so distinct as that it ought to be tried by a jury.—*REECE v. CHAFFERS* (1863), 7 L. T. 781; 11 W. R. 307.

**2502. Joint adventure accounts.]**—Where goods were agreed to be shipped for certain ports as a "joint adventure":—**Held:** as to the joint adventure, the matter, being one of account, was a

*Sect. 2.—References for trial: Sub-sect. 1, C. (a),*

fit subject for a reference to arbn.—KAHNWEILER v. DOBSON (1863), 3 F. & F. 709.

**2503. Commission—Part only.]**—In an action for goods sold, money had & received, & money lent, pltfs.' claim consisted partly of matters of mere account, which could not be conveniently tried by a jury, & partly of commission, which pltfs. had paid defts. in respect of orders for goods, & which pltfs. sought to recover back, on the ground that such orders were fictitious:—*Held*: a judge had jurisdiction under the above sect. to refer the case compulsorily to a master, & the ct. refused to interfere with the judge's exercise of such jurisdiction.—IMHOF v. SUTTON (1867), L. R. 2 C. P. 406; 36 L. J. C. P. 130; 15 L. T. 578.

**2504. Action for work & labour.]**—Pltf. sued deft. for work & labour as an auctioneer, & before plea deft. applied to a judge for an order to refer the matter to one of the masters, upon an affidavit which stated "that the matter in dispute in this action consists of mere matter of account, which cannot be conveniently tried in the ordinary way," which order, though opposed by pltf., was accordingly made. Upon a subsequent application by pltf. to set aside such order, upon the ground that an action for "work & labour" was not within the operation of C. L. P. Act, 1854, s. 3, & that it would be competent to deft. to set up a defence of non-liability:—*Held*: such action was within the operation of the Act, & if when before the master deft. set up any other matter of defence, then it would be the proper time for pltf. to apply to rescind the order.—CLARK v. WARE (1867), 17 L. T. 144.

**2505. Question of law.]**—A ct. of common law may, at least with the consent of the parties, refer a cause to arbn. under the above sect., although it has been sent from the Ct. of Ch. as one involving matters fit to be disposed of by a ct. of law.

Where it was suggested that a cause to be referred to the master under that sect. turned almost entirely on a question of law, the ct., with consent of the parties, referred it to the master, with a direction that, if that question arose before him, he should make an interlocutory report referring it to the ct., which, in the event of the decision of that question being insufficient to end the dispute, would send it back to him to go into the rest of the account.—MASTER v. HAMILTON, HAMILTON v. MASTER (1857), 3 Jur. N. S. 722.

**2506. — Accounts agreed.]**—In an action to recover the amount due to pltfs. for the insertion by them, on the order of deft., of certain advertisements from time to time in various newspapers, the ct. made absolute a rule to set aside a compulsory order of reference by a judge at chambers under the above sect., it appearing to the ct., on the affidavit of deft. made subsequent to the order, that the amount sued for was admitted, & that the only question was as to the liability of deft., as the agent of a third party, in giving the orders for insertion to pltfs.—BROWN v. GIRARD (1868), 19 L. T. 324.

**2507. Allegations of fraud.]**—Pltfs. sued deft. for over seven million cubic feet of gas sold & delivered, during a period of nearly five years, at a price of 2s. 5d. per cubic foot. Dft., as to part of the claim, paid money into ct., & pleaded, as to the residue, "never indebted" & payment. He then obtained an order under the above sect. compulsorily referring the action, on the ground that the matter in dispute was wholly or in part one of "mere account," which could not conveniently be tried by a jury. Pltfs. applied to rescind this order, alleging that they proposed at the trial to attempt to prove that deft. had been guilty of fraudulent conduct by

the secret abstraction of their gas, & that upon this question, which would regulate the damages awarded, they were entitled to the verdict of a jury:—*Held*: the nature of the dispute was not altered because pltfs. imputed fraud to deft. in relation to it, & substantially, the matter was one wholly or in part of mere account, which could not be conveniently tried by a jury, & the order was rightly made.—BIRMINGHAM & STAFFORDSHIRE GAS CO. v. RATCLIFF (1871), L. R. 6 Exch. 224; 40 L. J. Ex. 136.

**2508. Preliminary question as to liability.]**—In an action for breach of covenant to repair, deft. denied his liability. A judge having ordered the action to be referred compulsorily under the above sect., the Exchequer Division affirmed the order:—*Held*: the order must be reversed, for the judge had wrongly exercised his discretion in referring it. *Semble*: as there was a preliminary question as to the liability of deft. to be decided before any question of account could arise, there was no power to refer the action compulsorily under the above enactment.—CLOW v. HARPER (1878), 3 Ex. D. 198; 47 L. J. Q. B. 393; 38 L. T. 269; 26 W. R. 364, C. A.

*Annotations*:—*Consd.* Goodwin v. Budden (1880), 42 L. T. 536; Martyn v. Fyfe (1883), 49 L. T. 107. *Expld.* Knight v. Coales (1887), 19 Q. B. D. 296, C. A. *Refd.* Sheard v. Learoyd (1886), 2 T. L. R. 632. *Mentd.* Rhodes v. Pateley Bridge Union Grdns. (1884), 51 L. T. 235.

**2509. Part only matters of account—Reference of whole cause.]**—Where the matter in dispute in a cause consists wholly, or in part, of matters of mere account, the ct. or a judge may in either case, if they or he think fit, order the whole matter in dispute to be referred, or a part only, under the above sect.—BROWNE (BROWN) v. EMERSON (1856), 17 C. B. 361; 25 L. J. C. P. 104; 26 L. T. O. S. 260; 2 Jur. N. S. 190; 4 W. R. 295; 139 E. R. 1112.

*Annotations*:—*Refd.* Angell v. Fellgate (1861), 10 W. R. 83; Trickett v. Green (1865), Har. & Ruth. 63.

**2510. — — —.]**—An action may be referred under the above sect., although the question in dispute does not consist entirely of matters of mere account.—MARTIN v. FYFE (1883), 50 L. T. 72, C. A.

*Annotation*:—*Folld.* Knight v. Coales (1887), 19 Q. B. D. 296, C. A.

**2511. — Reference of part.]**—In an action by an engineer for professional services, the claim depending partly upon his right to commission, & partly on the propriety of charges for work done, the items of which were numerous, the judge ordered the latter to be referred to arbn. under the above sect. as a matter of account, consenting to try the question with regard to the right to commission as a question of fact.—MURRAY v. SUNDERLAND DOCK CO. (1858), 1 F. & F. 179.

(b) *Under Judicature Act, 1873 (c. 66), s. 57.*

**2512. Allegations of fraud.]**—The ct. will not, without consent of the parties, order a case to be tried before an official referee under the above sect., where there are charges of fraud, & the issues to be tried involve the character & reputation of one of the parties. Such a case is not within the purview of the sect. *Semble*: the ct. would have no jurisdiction to make such an order.—LEIGH v. BROOKS (1877), 5 Ch. D. 592; 46 L. J. Ch. 344; 25 W. R. 401, C. A.

*Annotations*:—*Distd.* Hoch v. Boor (1880), 49 L. J. Q. B. 665, C. A. *Consd.* Sacker v. Ragozine (1881), 44 L. T. 308. *Folld.* Dimmock v. Randall (1889), 5 T. L. R. 358, C. A. *Appld.* Russell v. Harris (1891), 65 L. T. 752. *Refd.* Hoult v. Anderson (1886), 2 T. L. R. 257, C. A.

**2513. — — —.]**—A charge of fraud was brought against a party to an arbn., & the ct. held that



though it is not an absolute rule of law that a man is entitled to a trial in open ct., yet, unless in most peculiar circumstances, he ought to have a charge of fraud tried in open ct., & not in a private room, so that his enemies may not be able to say that they did not know how the charge was met & how far the man was absolved.—**DIMMOCK v. RANDALL** (1889), 5 T. L. R. 358, C. A.

**2514. — Appeal.]—**A judge has jurisdiction, under the above sect., to refer compulsory issues which involve questions of fraud, affecting the character & reputation of the parties, though, as a general rule, such issues ought not to be referred.

An appeal from a compulsory order of reference, made under the above sect. by a judge sitting at *Nisi Prius* or assizes, must be brought direct to the Ct. of Appeal.—**HOCH v. BOOR** (1880), 49 L. J. Q. B. 665; 43 L. T. 425, C. A.

*Annotations:—***Folld.** Sacker v. Ragozine (1881), 44 L. T. 308. **Consd.** Dimmock v. Randall (1889), 5 T. L. R. 358, C. A. **Distd.** Russell v. Harris (1891), 65 L. T. 752. **Refd.** Ormerod v. Todmorden Joint Stock Mill Co. (1882), 8 Q. B. D. 664, C. A.

**2515. Order obtained as to trial — Application for reference too late.]—**In a suit to ascertain boundaries pltf. gave notice of trial before a judge & obtained an order that the evidence should be taken *viva voce* at the trial. Five weeks afterwards he applied that the suit might be referred to an official referee, on the ground of saving expense & that a local investigation was necessary:—**Held**: (1) the application was out of time; (2) pltf., having already selected the mode in which his action should be tried, could not afterwards resort to another mode of trial.—**LASCELLES v. BUTT** (1876), 2 Ch. D. 588; 35 L. T. 122; 24 W. R. 659; 3 Char. Pr. Cas. 290, C. A.

*Annotation:—***Dbtd.** Ward v. Pilley (1880), 5 Q. B. D. 427, C. A.

**2516. "Accounts"—Not construed narrowly.]—**The ct. will order a matter to be referred to a special referee if the parties consent, or to an ordinary official referee where there is not such consent, if it is satisfied that there are difficult questions of account to be settled, or that scientific investigation is necessary, & the ct. will not give a narrow meaning to the word "accounts" used in the above sect.—**Re LEIGH, ROWCLIFFE v. LEIGH** (1876), 3 Ch. D. 292; 24 W. R. 782; 2 Char. Pr. Cas. 128.

**2517. Where part referable—All issues may be referred.]—**Any question of account which may be referred compulsorily to a master under C. L. P. Act, 1854, s. 3, may also be referred compulsorily to an official referee under Jud. Act, 1873, s. 57. In any case in which the ct. has jurisdiction to refer compulsorily a question of account to an official referee, it has also jurisdiction so to refer all the other issues in the action.—**WARD v. PILLEY** (1880), 5 Q. B. D. 427; 49 L. J. Q. B. 705; 43 L. T. 301; 28 W. R. 937, C. A.

*Annotations:—***Folld.** Martin v. Fyfe (1883), 49 L. T. 107; **Knight v. Coales** (1887), 19 Q. B. D. 296, C. A.

**2518. — Partnership disputes.]—**To an action for money had & received, deft. pleaded that "ptf. & deft. still are partners or co-adventurers in holding certain horse races & race meetings, which partnership still subsists, & the alleged causes of action arose out of such partnership & not otherwise." An order having been made by a judge at chambers referring all the issues in the action to an official referee:—**Held**: the order was right.—**GOODWIN v. BUDDEN** (1880), 42 L. T. 536.

**2519. —.]—**If any part of the matter in dispute can be brought within C. L. P. Act, 1854, s. 3, as being matter of mere account which cannot conveniently be tried in the ordinary way, then Jud. Act, 1873, s. 57, applies, & the ct. or a judge has jurisdiction to refer compulsorily under that sect. all the issues in the cause (**LORD ESHER, M.R.**).—**KNIGHT v. COALES** (1887), 19 Q. B. D. 296; 56 L. J. Q. B. 486; 35 W. R. 679; 3 T. L. R. 659, C. A. *Annotations:—***Apld.** Hurlbatt v. Barnett, [1893] 1 Q. B. 77, C. A. **Refd.** Case v. Willis (1892), 8 T. L. R. 610.

**2520. Account & wrongful dismissal—Justification.]—**Pltf. brought an action against defts. for damages for 'wrongful dismissal, for balance of amount of money paid to defts.' use, & for an account of profits on sales on which pltf. claimed commission. Defts. justified the dismissal on the ground that pltf. had misconducted himself by wilfully disobeying the reasonable orders of defts., & by habitually neglecting his duties, & by converting to his own use money which he had received to the use of defts. By order of a judge at chambers the issues in the action were referred to an official referee pursuant to the above sect., the statement of defence being amended by omitting the allegation that pltf. converted money to his own use:—**Held**: the order of the judge at chambers was right.—**SACKER v. RAGOZINE & Co.** (1881), 44 L. T. 308.

*Annotation:—***Refd.** Russell v. Harris (1891), 65 L. T. 752.

(c) *Under Arbitration Act, 1889 (c. 49), s. 14.*

**2521. Preliminary questions of law & fact.]—**In an action for damages for an alleged breach of a mining lease, by not working a coal mine in a proper & workmanlike manner & in breach of the provisions of the lease, defts. denied that they had improperly worked the mine, stating that the flooding of a certain seam was rendered necessary by the fiery character of the coal, & contended that, on the true construction of the covenant, their action was right:—**Held**: an order of a judge at chambers ordering the case to be tried before an official referee was wrong, & must be set aside.

It is very undesirable that parties should be deprived of their right to have questions of law determined by a judge, & questions of fact determined by a jury. Defts. object to have their case tried by a private tribunal, & they are justified in their objection (**DAY, J.**).—**CASE v. WILLIS (WALLIS)** (1892), 8 T. L. R. 610; 36 Sol. Jo. 463.

**2522. Part of case involving matters of account.]—**If the ct. think that any part of a case does or may involve a matter of account, the whole case may be compulsorily referred under the above sect., although in certain events it may become unnecessary to determine the matter of account.—**HURLBATT v. BARNETT & Co.**, [1893] 1 Q. B. 77; 62 L. J. Q. B. 1; 67 L. T. 818; 41 W. R. 33; 9 T. L. R. 23; 37 Sol. Jo. 8; 4 R. 103, C. A.

**2523. Accounts of unusual difficulty.]—**A very difficult account was directed to be taken by an official referee instead of in chambers, on account of the great saving of time which would thus be effected.—**ROCHEFOUCAULD v. BOUSTEAD**, [1897] 1 Ch. 196, C. A.

*Annotations:—***Mentd.** *Re Gallard, Ex p. Gallard*, [1897] 2 Q. B. 8; **Isaacs v. Evans** (1899), 16 T. L. R. 113; **Brooks v. Muckleston**, [1909] 2 Ch. 519.

#### D. Under Colonial Statutes and Rules.

See cases *infra*.

#### PART V. SECT. 2, SUB-SECT. 1.—D.

**a. Making of reference—Under what Act.]—****MACDONNELL v. BAIRD** (1890), 13 P. R. 331. —CAN.

v.

**CONNICE v. CANA-**

**DIAN PACIFIC RY. Co.** (1889), 16 O. R. 639.—CAN.

**W. ASSURANCE Co.** (1878), 7 P. R. 341. —CAN.

**a. Who may make order of reference—Yukon court.]—**Power to make an order of reference in an action is a matter of jurisdiction, & not merely a question of "procedure & practice," within s. 3 of Judicature Ordinance, & the Yukon



**Sect. 2.—References for trial: Sub-sect. 1, D., E. &****E. Appeals from Order referring.**

**2524. Not after acquiescence & delay.]—Where, upon a summons at chambers to refer a suit to**

the master, as involving matter of account, an order so to refer it has been assented to on the part of pltf., & it has been arranged that he shall have the carriage of the order so to refer it, he cannot, after some delay, apply to rescind the order, on the ground that it is not a matter of mere

Ct. has no power under this sect. to make an order of reference. — **WILLIAMS v. FAULKNER & KROENERT, RAYMOND v. FAULKNER & KROENERT** (1900), 8 B. C. R. 197.—CAN.

**b. — Master in chambers, local masters, county judges.]—**The master in chambers, & local masters & county judges, acting under r. 422, Ontario Jud. Act, have no jurisdiction under Ontario Jud. Act, ss. 47 & 48, to order references in opposed cases.—**WHITE v. BEEMER** (1885), 10 P. R. 531.—CAN.

**c. To whom reference may be made — Judge of different county.]—**An action cannot, under C. L. P. Act, 1856, be referred to the judge of any other county than that in which the venue is laid, unless by consent.—**MCEDWARD v. MCEDWARD** (1857), 3 U. C. L. J. 75.—CAN.

**d. — Officer of court or county judge.]—**Under C. L. P. Act, s. 158, a country cause may be referred to the arbn. of an officer of the proper ct. at Toronto as well as to the county judge.—**BIGELOW v. CLEVERDON** (1872), 6 P. R. 3.—CAN.

**e. — Master of which county.]—**Testator lived & died in S.; deft., exor., lived there, & one of the two parcels of land which made up the real estate of testator was in that county. The other & smaller parcel of land was in the county of Y., & pltf.'s solrs. practised there:—**Held:** the reference for administration should be to the master at S.—**Re ARMSTRONG, ARMSTRONG v. ARMSTRONG** (1898), 18 P. R. 55.—CAN.

**f. — Only to official referee or judge of county court.]—**Except by consent, the ct. has no power to order a reference under s. 101 of Ontario Jud. Act, R. S. O., 1887 (c. 44), to any person other than an official referee or the judge of a county ct.—**FEWSTER v. RALEIGH TOWNSHIP** (1892), 14 P. R. 429.—CAN.

**g. — Discretion of court to interfere.]—**Pltf.'s claim was upon an oral agreement entitling him to one-half of certain commission received by deft.; deft. filed a counterclaim, as to which there was no question that it would be proper to direct a reference either to arbn. or to an official referee. Pltf. subsequently made a motion to refer to an official referee under Ontario Jud. Act, s. 48, & deft. moved to refer to a named arbitrator, or to some other arbitrator to be named by the ct. The ct. refused to interfere with the discretion exercised in referring the action to the referee.—**SHIELDS v. MACDONALD** (1886), 14 A. R. 118.—CAN.

**h. — Accountant.]—**In an action to recover moneys alleged to have been paid to resp. as his share of profits, which applt. alleged afterwards proved to be losses, the ct. may without the consent of the parties refer the matters in dispute to an accountant, when the ct. is of opinion that the evidence is unsatisfactory.—**CANADA PAPER CO. v. HANNATYNE** (1881), 26 L. C. J. 124.—CAN.

**i. In what cases — Action on policy.]—**In an action upon a policy of insurance on goods, the pleas denied the policy, setting up that the goods were not destroyed, that pltf. gave no notice of the loss as required, misrepresentations as to the value of the goods & mode of heating the premises, & increase of risk by alteration. After the examination of one witness the judge ordered a compulsory reference:—**Semble:** the compulsory reference was authorised.—**NEWMAN v. NIAGARA DISTRICT MUTUAL INSURANCE CO.** (1866), 25 U. C. R. 435.—CAN.

**j. — Questions of account.]—**A judge has jurisdiction under Ontario Jud. Act, s. 48, to make a compulsory order referring questions of account to an official referee.—**SHIELDS v. MACDONALD** (1886), 14 A. R. 118.—CAN.

**k. — Investigation of long accounts.]—**Actions involving the investigation of long accounts will not be referred as a matter of course. There is nothing to prevent parties agreeing to a consent reference of all matters in dispute in an action, even though involving investigation of long accounts.—**WEBSTER v. HAGGART** (1885), 9 O. R. 27.—CAN.

**l. — Mutual set-off.]—**If the matters in dispute are matters of account, as when the parties claim the benefit of mutual sets-off, the ct. will, on application, direct a reference under 19 & 20 Vict. c. 102, s. 6.—**CREDIN v. CREDIN** (1858), 3 Ir. Jur. 252.—IR.

**m. — Long accounts — Discretion of judge to determine what constitutes.]—**It is for the judge to determine whether a case will involve the investigation of "long accounts" within C. L. P. Act, 1856, subject to review by the ct. only when it can be said that he plainly did not exercise any discretion on this point, but applied the Act where it was altogether inapplicable.—**WELLS v. GZOWSKI** (1857), 14 U. C. R. 553.—CAN.

**n. — Sale of goods—No likelihood of question of quality or price.]—**Where in an action on the common counts for goods sold, interlocutory judgment having been signed, pltf. desires a reference to the master under C. L. P. Act, 1856, s. 143, it must be shown that no dispute is likely to arise either as to quality or price.—**HUTCHISON v. SIDEWAYS** (1857), 14 U. C. R. 472.—CAN.

**o. — Mesne profits or damages.]—**Where in ejectment judgment is given in favour of pltf. for the possession of the land in question, the trial judge has power to direct a reference as to mesne profits or damages.—**HESSLEIN v. WALLACE** (1897), 29 N. S. L. R. 424.—CAN.

**p. Grounds for refusing — Matters precedent to reference.]—**A question of deft.'s liability expressly raised on the pleadings should be determined before a reference of all the questions of fact in controversy, including the amount of damages, is ordered.—**FEWSTER v. RALEIGH TOWNSHIP** (1892), 14 P. R. 429.—CAN.

**q. — Not consisting of matters of account in whole or part.]—**When the matters in dispute do not appear to the ct. to consist, either wholly or in part, of matters of account, the ct. will not, without the consent of parties, refer the matter to an arbitrator.—**M'DONNELL v. JAMESON** (1856), 2 Ir. Jur. 100.—IR.

**r. — Matter of account depending on issue for jury.]—**Under C. L. P. Act, 1856, s. 6, if the account in dispute depends on an issue for the jury, the ct. will not refer it, in the first instance, to an arbitrator.—**PRIOR v. PERRY** (1857), 2 Ir. Jur. 422.—IR.

**s. — Material question of fact.]—**Where a material question of fact is in dispute, the case is not a proper one in which to make an order for compulsory reference.—**GANNON v. GIBB** (1879), 8 P. R. 115.—CAN.

**t. — Mixed question of law & fact.]—**In an action in which the question in issue was as to the true boundary between a creek & a hill claim, a reference to ascertain the boundary was ordered:—**Held:** the reference was a nullity, as it involved the determination

of a mixed question of law & fact, & was not a matter of "practice & procedure," but of jurisdiction, & it was beyond the power of the ct. to order the reference even by consent.—**STEVENSON v. PARKS** (1903), 10 B. C. R. 387.—CAN.

**u. — —.]—**On a reference of the matters in question in an action, unless the line between the questions of law & fact is clear & distinct, it is inadvisable to divide up the reference by first directing the evidence to the legal liability, leaving the quantum of damages & all other matters to be afterwards disposed of.—**RYAN v. CARLETON PLACE VILLAGE** (1900), 31 O. R. 639.—CAN.

**v. — Substantial part not within submission.]—**The power of compulsory reference, conferred by s. 14 of C. L. P. Act, 1856, is discretionary, to be exercised consistently with justice & convenience, having regard to the special circumstances of each case; & *semble:* where a substantial part of the claim does not fall within the submission, the ct. will be reluctant to interfere.—**MOYERS v. SOADY** (1886), 18 L. R. Ir. 499.—IR.

**w. — Action entered for trial.]—**After a cause has been entered for trial it cannot be referred under C. L. P. Act, 1856, s. 84.—**SHAE v. O'NEIL** (1856), 2 U. C. L. J. 229.—CAN.

**x. — Opinion of jury desirable.]—**No reference will be made under C. L. P. Act, 1856, s. 84, if it appear that defences are intended, upon which the opinion of a jury is desirable.—**EVANS v. JACKSON** (1857), 3 U. C. L. J. 88.—CAN.

**y. Form of order.]—**An order of reference recited that "the matters in dispute consist in part of matters of mere account . . . to ascertain & certify what amount, if anything, defts. should pay to pltf. under the policy in the pleadings mentioned":—**Held:** not an order for compulsory reference under C. L. P. Act.—**ANHALT v. PHOENIX ASSURANCE CO., ANHALT v. LONDON ASSURANCE CO.** (1878), 7 P. R. 341.—CAN.

**z. — —.]—****Held:** an order must be set aside, for the judge could not direct a reference making the award subject to the opinion of the ct.—**WELLS v. GZOWSKI** (1857), 14 U. C. R. 553.—CAN.

**aa. — —.]—**The reference in administration actions should *prima facie* be to the place where the person whose estate is to be administered resided.—**THOMPSON v. FAIRBAIRN** (1885), 10 P. R. 533.—CAN.

**bb. — Provision for arbitrators differing necessary.]—**Where an order of reference to arbn. does not provide for difference of opinion among the arbitrators, & for authorising a majority to decide the case, the award will be set aside.—**FUTTEH SINGH v. GANGO** (1865), 4 W. R. 4.—IND.

**cc. — Whether time for delivery of award must be fixed.]—**The provision contained in s. 508 of Civil Procedure Code, requiring the ct. to fix a reasonable time for the delivery of the award, is not imperative, but directory, & non-compliance with it does not make the order of reference abortive & any subsequent arbn. proceedings ineffectual & bad.—**HAR NARAIN SINGH v. BHAGWANT KUAR** (1887), 1 I. L. R. 10 All. 137.—IND.

**dd. Power to make second order.]—**Parties to a suit pending referred the matters in dispute. An award was made, but it was afterwards discovered that one pltf. had died before termination of the arbn., & the award was set aside:—

account.—**ROGERS v. KEARNS** (1860), 29 L. J. Ex. 328.

**2525. Discretion not interfered with.]**—Where in the exercise of his discretion a judge, without full knowledge of the facts, had refused to make an order under C. L. P. Act, 1854, s. 3, referring both the issues & matters of account in an action, the ct., though in possession of facts which would justify the making of such an order, would not interfere with such discretion, where it was not shown that such order would be best in the interest of either party.—**SHEARD v. LEAROYD** (1886), 2 T. L. R. 632.

**2526. Not where order made by consent.]**—The ct. refused to rescind an order of reference made by consent.—**EVANS v. SAUNDERS** (1887), 3 T. L. R. 610, O. A.

See, also, Nos. 2536—2542, *post*.

#### F. Amendment of Order referring.

**2527. Mistake—Transposition of names.]**—Where the christian name & surname are transposed by mistake in an error of reference, the ct. will allow that mistake to be amended.—**PRICE v. JAMES** (1833), 2 Dowl. 435.

Annotation :—**Consd. Winn v. Nicholson** (1849), 7 C. B. 819.

**2528. As to costs.]**—Where it appeared that the parties had drawn up a rule in a general form, under the mistaken belief that nothing being said the costs would abide the event, the ct., after the award had been published, amended the rule of reference so as to make it express the intention of the ct.—**BELL v. POSTLETHWAITE** (1855), 5 E. & B. 695 ; 25 L. J. Q. B. 63 ; 1 Jur. N. S. 1167 ; 4 W. R. 89 ; 119 E. R. 640.

Annotations :—**Distd. West London Ry. Co. v. Fulham Union** (1870), L. R. 5 Q. B. 361. **Refd. Smith v. G. W. Ry. Co.** (1856), 2 Jur. N. S. 668 ; **Wimshurst, Hallick v. Barrow Shipbuilding Co.** (1877), 2 Q. B. D. 335.

**2529. "All matters in difference" wrongly inserted.]**—Where the words "& all matters in difference" were improvidently inserted in an order of reference, made under C. L. P. Act, 1854, s. 3, & the arbitrator made his award in favour of pltf., stating that there were no matters in difference but those in the cause, the ct., on a motion to set aside a *fi. fa.* issued to enforce the award, amended the order by striking out the words "& all matters in difference."—**KENDIL v. MERRETT** (1856), 18 C. B. 173 ; 25 L. J. C. P. 251 ; 2 Jur. N. S. 523 ; 4 W. R. 594 ; 139 E. R. 1333.

Annotations :—**Refd. Talbot v. Fisher** (1857), 2 C. B. N. S.

*Held* : the ct. had no power to make a second order on the same agreement again referring to arbn. the matters in dispute.—**PACHKAURI RAM v. NAND RAI** (1908), 1 L. R. 30 All. 505.—**IND.**

#### PART V. SECT. 2, SUB-SECT. 1.—E.

**k. What must be shown.]**—The right of the trial judge to refer the question of damages, as a question arising in the action, under s. 101 of Jud. Act, is indisputable, at all events as a matter of discretion & subject to review ; & it is for the party objecting to the reference to show that the discretion has been wrongly exercised.—**RATTE v. BOOTH** (1894), 16 P. R. 185.—**CAN.**

**l. — Official referee not determining whole matter.]**—Action by contractors for moneys claimed to be due on a building contract. Official referee found that the contractors were bound by certificates of the architects, & that if they had any claim for extras, it should be determined by arbn. Divisional Ct. allowed appeal from above order, & referred the matter back to the referee to hear the evidence & to ascertain the sum due to the contractors.—**CONTRACTORS SUPPLY CO v. HYDE** (1912), 21 O. W. R. 530 ; 3 O. W. N. 723 ; 2 D. L. R. 161.—**CAN.**

J.—VOL. II.

**471. Mentd. Robertson v. Sterne** (1862), 13 C. B. N. S. 248.

**2530. Order of Nisi Prius—Amendment refused.]**—Order of *Nisi Prius* refused to be amended, according to the terms contained in a paper containing terms on which the cause was referred, signed by the counsel at the trial, the intention of the parties appearing from their subsequent acts to have been in favour of the terms of the order.—**PEARMAN v. CARTER** (1815), 2 Ohit. 29.

Annotation :—**Consd. Winn v. Nicholson** (1849), 7 C. B. 819.

**2531. — After award.]**—A cause was referred by an order of *Nisi Prius*, & it was agreed that the balance due to pltf. in Feb., 1842, was £700, & in 1843 £400, & that these sums (*inter alia*) should be inserted in a statement of account & annexed to the order of reference. By consent the order was drawn up by pltf.'s attorney, whose clerk by mistake inserted in the account annexed to the order £400 as the balance due to pltf. for 1842. The arbitrator acted on the figures laid before him, & the mistake was discovered when the award was published. Pltf. applied to the ct. to amend the order & send back the award to the arbitrator :—*Held* : the mistake was the mistake of the party, & the ct. would not interfere.—**WINN (WYNN) v. NICHOLSON** (1849), 7 C. B. 819 ; 18 L. J. C. P. 231 ; 137 E. R. 325.

Annotation :—**Consd. Grafham v. Turnbull** (1875), 44 L. J. Ch. 538.

**2532. — Striking out terms—No bill in equity.]**—A cause was referred by order of *Nisi Prius* on the usual terms of (*inter alia*) "filing no bill in equity." The condition was erased because it was found essential to the justice of the case that a bill should be filed.—**GRIMSTONE v. BELL** (1812), 4 Taunt. 254 ; 128 E. R. 326.

**2533. — Inserting matter incidental.]**—The ct. will amend an order of reference at *Nisi Prius*, made a rule of ct., by inserting such omitted matters as are incident to the substance of the agreement between the parties.—**EVANS v. SENOR** (1814), 5 Taunt. 662 ; 128 E. R. 851.

Annotations :—**Distd. Winn v. Nicholson** (1849), 7 C. B. 819. **Mentd. Vanderbyl v. M'Kenna** (1868), L. R. 3 C. P. 252.

**2534. — Two orders in different terms.]**—On a reference of a cause two orders of *Nisi Prius* were drawn up for the respective solrs. of pltf. & defts., which were not duplicates, but varied in their terms. Defts. made their order a rule of ct. & moved to set aside the award, the arbitrator having acted on pltf.'s order only. There was a counter-motion by pltf. to set aside the rule of ct. con-

**2524 i. Not after acquiescence & delay.]**—*Held* : defts. having attended at the arbn. without protest, were precluded from an objection to an order for compulsory reference.—**NEWMAN v. NIAGARA DISTRICT MUTUAL INSURANCE CO.** (1866), 25 U. C. R. 435.—**CAN.**

**m. Not merely because of plea of negligence.]**—Where deft. appealed from an order referring a cause to arbn., on the ground that there was a plea of negligence in the conduct of the services for which the action was brought, but it was not shown that the defence would really be raised, the appeal was dismissed.—**EATON v. ROUE** (1882), 3 R. & G. 274.—**CAN.**

**n. Not that matter should have been decided by judge referring.]**—The objection that the judge at the trial should himself have decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that an appeal ct. will entertain.—**FEATHERSTONE v. VAN ALLEN** (1884), 12 A. R. 133.—**CAN.**

**o. Not question of fraud being involved in accounts.]**—In actions upon insurance policies the questions in issue were not confined to matters of mere

account, but defts. disputed their liability, & issues of fraud, misrepresentation, & concealment of facts were raised upon the pleadings :—*Held* : an order referring all issues in the action to a referee for inquiry & report was improperly made, & pltf. was entitled to have a trial in the ordinary way.—**CLARRY v. BRITISH AMERICA ASSURANCE CO.** (1887), 12 P. R. 357.—**CAN.**

**2526 i. Not where order expressed to be by consent.]**—A reference cannot be treated as compulsory, when expressed to be by consent in the order of reference, which has been made a rule of ct. ; if not by consent, a party objecting should have the order amended.—**WILSON v. RICHARDSON** (1878), 43 U. C. R. 365.—**CAN.**

**p. Right to object not waived.]**—The judge intimated that he should refer the suit to arbn., & allowed a certain time to the parties to object to that course. No objection was made within such time, & thereupon the judge referred the cause. After the day fixed defts. objected :—*Held* : the reference was not warranted, there having been no express consent by the parties.—**DEGUMBUR CHATTERJEE v. RAM PREA DEBEA** (1863), Marsh, 517 ; 2 Hay. 583.—**IND.**



**Sect. 2.—References for trial: Sub-sect. 1, F. & G.]**

firming deft.'s order as incorrect. The ct. directed a reference to the associate to ascertain which of the two orders was drawn up in accordance with his minutes of the agreement made at the trial, & on receiving his report set aside the rule of ct. confirming defts.' order. — *ALDER v. SAVILL* (1814), 5 Taunt. 454; 128 E. R. 766.

**2535. Verdict subject to award — Mistake as to amount.]**—Where a verdict was taken for pltf., subject to a reference, & the arbitrator awarded a larger sum than that mentioned in the order of reference, & there appeared to be a mistake in that order as to the sum:—*Semble*: the ct. would amend the order.—*HANNAN v. JUBE* (1846), 10 Jur. 926; subsequent proceedings *sub nom.* *ANNAN v. JOB*, 10 Jur. 1083.

**2536. Consent order of reference—No power to amend unless mistake or fraud.]**—It is not competent to the ct. to amend an order of reference, which has been drawn up "by consent," unless it be made manifest that there has been some omission on the part of its officer, or that by some accident or mistake the order is not in accordance with the intention of the parties, or that some fraud has been practised.

A consent order was drawn up in a printed form, which contained no power to the arbitrator to amend:—*Held*: the order could not be amended by inserting therein a power to amend.—*VANDERBYL v. M'KENNA* (1868), L. R. 3 C. P. 252.

**2537. — Order wrongly drawn up.]**—If all matters in difference in the cause are agreed to be referred, & the associate by mistake draws up the order of reference generally as to all matters in difference between the parties, it cannot be amended, but the parties must go down to another trial.—*RAWTREE v. KING* (1821), 5 Moore, C. P. 167.

*Annotation*:—*Mentd.* *Ashworth v. Heathcote* (1830), 6 Bing. 596.

**2538. — — —.]**—An order of reference of a cause, made by a judge at chambers by consent of both parties "on the usual terms," includes such power to the arbitrator to amend as a judge would have at *Nisi Prius*, & if after such consent, the formal order drawn up by the judge's clerk accidentally omits such power, the judge may insert it therein at the request of either party, notwithstanding the reference has been proceeded with.—*THOMPSETT (THOMPSON) v. BOWYER* (1860), 9 C. B. N. S. 284; 30 L. J. C. P. 1; 3 L. T. 276; 7 Jur. N. S. 243; 9 W. R. 35; 142 E. R. 112.

*Annotations*:—*Expld. & Distd.* *Vanderbyl v. M'Kenna* (1868), L. R. 3 C. P. 252. *Mentd.* *Smurthwaite v. Richardson* (1863), 15 C. B. N. S. 463.

**2539. — Fresh term added.]**—On an application to a judge at chambers under Interpleader Act, an

order was made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed. The ct. refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers.—*DRAKE v. BROWN* (1835), 2 Cr. M. & R. 270; 5 Tyr. 1067; 4 L. J. Ex. 313; 150 E. R. 117.

**2540. — Increasing amount of item.]**—Where a cause is referred to arbn. without power of amendment, a judge has no power, except by consent of the parties, to order the particulars of demand specially indorsed on the writ to be altered by increasing the amount of one of the items.—*MORGAN v. TARTE* (1855), 11 Exch. 82; 3 C. L. R. 970; 156 E. R. 754.

*Annotations*:—*Distd.* *Gibbs v. Knightley* (1857), 26 L. J. Ex. 294; *Thompsett v. Bowyer* (1860), 7 Jur. N. S. 243. *Mentd.* *Re Rouse & Meier* (1871), L. R. 6 C. P. 212.

**2541. — Insertion of declaration as to basis of valuation.]**—Pltf. filed a bill to restrain deft. from injuring his farms by copper smoke, & also brought an action for damages. Before trial of the action an order was made by consent in the suit that deft. should purchase pltf.'s interest in the farms at a price to be ascertained & certified by a surveyor, & that pltf. should be at liberty to claim damages in the action down to the date of the surveyor's certificate. A dispute took place before the surveyor whether the valuation ought to be according to the existing state of the farms, or according to their state before they were injured by the copper smoke. The parties being unable to agree, the surveyor stated that he would hear arguments & decide the question of principle. The ct. then made an order, declaring that the valuation ought to be according to the existing state of the farms:—*Held*: such declaration ought not to have been made, & it should be discharged without prejudice to any question.—*HOUGHTON v. BANKART* (1861), 3 De G. F. & J. 16; 30 L. J. Ch. 182; 3 L. T. 606; 7 Jur. N. S. 57; 9 W. R. 215; 45 E. R. 783.

**2542. — New cause of action.]**—The ct. will not allow an amendment so as to introduce a new cause of action, where a cause has been referred by consent under an order, which does not reserve power to the arbitrator to amend.—*SMURTHWAITE v. RICHARDSON* (1863), 15 C. B. N. S. 463; 143 E. R. 866.

*Annotation*:—*Folld.* *Vanderbyl v. M'Kenna* (1868), L. R. 3 C. P. 252.

*G. Effect of Order referring.*

**2543. Effect on receiver appointed by a previous order.]**—Where one of the parties in a cause is appointed receiver, & afterwards, by a consent order, all the matters in dispute in the cause are referred to arbn., this order & the pending reference will not be any objection to making such application to the

**PART V. SECT. 2, SUB-SECT. 1.—F.**

**q. Changing venue.]**—Where the business in question in a suit had been carried on in S., & the parties resided there, & it was found that the master in ordinary could not proceed with the reference directed for two months, the place of reference was changed to B.—*ATKIN v. WILSON* (1881), 9 P. R. 75.—*CAN.*

**PART V. SECT. 2, SUB-SECT. 1.—G.**

**r. As regards infant parties.]**—An application was made on behalf of pltf. for an order referring it to the master to ascertain whether a submission to arbn. would be for the benefit of an infant deft.:—*Held*: the effect of the order would be to bind the infant by the award, & that was the only way in which an infant could be bound by a submission without

the aid of an Act of Parliament.—*ALLAN v. O'NEILL* (1866), 2 Ch. Ch. 22.—*CAN.*

**s. Does not fall by death of party.]**—*Held*: a judicial reference did not fall by the death of one of the parties.—*WATMORE & TAYLOR v. BURNS* (1839), 1 Dunl. (Ct. of Sess.) 743.—*SCOT.*

**t. Where no interlocutor or signing of minute by judge.]**—The parties in a cause about to be tried by jury, in presence of the judge, made a reference by signed minute to a judicial referee, who thereafter pronounced an award; the ct. was moved to interpose its authority thereto:—*Held*: the cause was not out of ct., although the judge had not authorised the reference by an interlocutor or by his signature to the minute.—*FAIRLEY v. M'GOWN* (1836), 14 Sh. (Ct. of Sess.) 470.—*SCOT.*

**u. No power to adjudicate on validity of mortgage.]**—Pltf., as mtgee. of defts., by an instrument dated Jan. 30, 1883, purporting to be duly executed by defts., commenced an action for the sale of the mtged. property. On default being made, judgment was obtained under r. 78, Ontario Jud. Act, referring it to a master to make & take the inquiries & accounts as prescribed by G. O. Ch. 441. The master gave certain execution creditors priority over pltf., on the ground that the instrument in question was invalid:—*Held*: under the decree the master had no power to adjudicate upon the validity of the instrument in question as a mtge.—*MCDUGALL v. LINDSAY PAPER MILL Co.* (1884), 10 P. R. 247.—*CAN.*

**v. No power to adjudicate on validity of lease.]**—*Held*: on a chambers refer-



ct. as may be necessary in order to compel the party who is receiver to pay in, to the credit of the cause, such sums as the master shall have reported due from him, in his character of receiver.— *v. JARMAN* (1824), 3 L. J. O. S. Ch. 12.

**2544. Revocable until made rule of court.]**—A cause was referred to arbn. by an order of one of the barons which was not made a rule of ct. An award was made, & a rule for setting aside that award was obtained on the ground (*inter alia*) that the arbitrators' authority had been revoked by writing prior to the making of their award:—*Held*: an order at *Nisi Prius* might be revoked until made a rule of ct., & the rule for setting aside should be made absolute.—*GREENWOOD v. MISDALE* (1825), M'Cle. & Yo. 276; 148 E. R. 416.

*See, now, Arbitration Act, 1889 (c. 49), s. 1.*

**2545. Power to appoint surveyor to report.]**—An action on a builder's bill was referred to the master:—*Held*: he might appoint a surveyor to report as to value, but he must receive the report in the same way as other evidence & could not refuse to hear any additional evidence tendered by the parties.—*GRAY v. WILSON* (1865), L. R. 1 C. P. 50; 35 L. J. C. P. 123; 14 W. R. 584.

**2546. Matter outside jurisdiction—County court—Title to land—Prohibition.]**—Where the parties to a plaint in the county ct. appeared before the judge, & consented to a reference without objecting to the want of jurisdiction, but one of them, during the progress of the reference, objected to the jurisdiction of the arbitrators, on the ground that title to land came into question, & the arbitrators proceeded with the reference:—*Held*: he was entitled to a prohibition.—*Re KNOWLES v. HOLDEN* (1855), 24 L. J. Ex. 223; 25 L. T. O. S. 102; 19 J. P. 580.

*Annotations*:—*Apprvd.* London Corpn. v. Cox (1867), L. R. 2 H. L. 239. *Distd.* Combe v. De La Bere (1882), 22 Ch. D. 316. C. A. *Foll.* R. v. Shropshire County Court Judge (1887), 20 Q. B. D. 242; R. v. Rogers (1887), 57 L. J. Q. B. 143; Farquharson v. Morgan, [1894] 1 Q. B. 552, C. A.

**2547. Reference to county court judge—Obligatory on judge.]**—An order referring a cause to the arbn. of a county ct. judge under C. L. P. Act, 1854, s. 3, is obligatory on the judge, who has no option of declining the reference. If for any reason the judge is desirous to have the propriety of the reference to him questioned, the proper course is to apply to set aside the order.—*CUMMINS v. BIRKETT* (1858), 3 H. & N. 156; 27 L. J. Ex. 216; 157 E. R. 425; *sub nom.* *Re GURDON, CUMMINS v. BIRKETT*, 30 L. T. O. S. 334; 22 J. P. 179; 4 Jur. N. S. 242; 6 W. R. 366.

*Annotation*:—*Apld.* Angell v. Felgate (1861), 7 H. & N. 396.

**2548. Stay of action on cross-claim.]**—Where, in an action of ejectment against a builder, on a clause of forfeiture in a building contract, an order of *Nisi Prius* had been made, under which the build-

ings were to be sold & the builder paid the balance due to him out of the proceeds, & he afterwards sued the employers for money had & received & also for improperly selling, the ct. declined either to stay the action or to refer it to the master.—*ORPHAN WORKING SCHOOL TRUSTEES v. HENLEY, HENLEY v. ORPHAN WORKING SCHOOL TRUSTEES* (1858), 27 L. J. Ex. 426.

**2549. Order excluding writ of error.]**—Where an order of reference contains a clause restraining the parties from bringing a writ of error, they are precluded from moving in arrest of judgment.—*CHOWNES v. BROWN* (1845), 2 Dow. & L. 703; 14 L. J. Ex. 216; 4 L. T. O. S. 418.

**2550. Order restraining action or suit.]**—An order of reference contained a clause restraining either party from bringing or prosecuting any action or suit in any ct. concerning the premises referred:—*Held*: the finding of the arbitrator was conclusive, & pltf. could not afterwards move for judgment *non obstante veredicto*.—*BRITT v. PASHLEY* (1847), 1 Exch. 61; 5 Dow. & L. 97; 2 New Pract. Cas. 307; 16 L. J. Ex. 240; 9 L. T. O. S. 200; 151 E. R. 27.

**2551. Binding on parties consenting.]**—A cause stood for trial at *Nisi Prius*. The action was for rent in arrear. One issue was on a plea of an eviction by P. by title paramount to that of pltf. P. was not a party to the cause, but claimed the reversion in the premises held by deft. P. became, by parol, party to an arrangement, by which the matter was to be settled by a reference of the cause to an arbitrator, who was to determine on what terms pltf.'s interest in the premises should be purchased, & in what proportion P. should contribute to the payment, & to the amount of the damages. An order of *Nisi Prius* was drawn up, incorporating these terms, & containing a provision that P. should become a party to the reference; it was not expressed to be drawn up by his consent, but it was shown by other evidence that it was in fact by his consent. P. afterwards refused to be bound by the order:—*Held*: having submitted to the order in fact, he was bound by it, & could not retract, & the ct. had jurisdiction to enforce obedience in a summary manner.—*WILLIAMS v. LEWIS* (1857), 7 E. & B. 929; 29 L. T. O. S. 195; 3 Jur. N. S. 1324; 119 E. R. 1492.

**2552. Causes set down struck out—Subpœna for judgment set aside with costs.]**—Several actions & suits being pending between pltf. & deft., one of such actions came on for trial in the Queen's Bench, when all matters in difference, including the suits at law & in equity then pending between the parties, were, by consent, referred to arbn. Pltf. in equity afterwards served a *subpœna* to hear judgment & set down the causes. The ct., on motion, set aside the *subpœna* with costs, & struck

ence for partition or sale of lands, made by the master in chambers, the master in ordinary had no jurisdiction to try the question of the validity of a lease under seal from the intestate.—*Re ROGERS, ROGERS v. ROGERS* (1885), 11 P. R. 90.—**CAN.**

**w. Power to add parties.]**—An action was referred to the district registrar, the referring order giving that officer all the powers of a judge as to certifying & amending. On this authority the district registrar, on application, added certain parties pltf's. The writ of summons & statement of claim were afterwards amended:—*Held*: the order conferring power to amend would also authorise the addition of parties.—*HILL v. HAMBLY* (1906), 12 B. C. R. 253.—**CAN.**

**x. Entitles referee to deal with costs.]**—A judicial reference of the mutual claims of parties in a process requiring

the authority of the judge to be interposed to the award entitles the referee, without express power, to give judgment for the expenses, both of the process & reference.—*SMITH v. BANKS* (1830), 5 Fac. Coll. N. S. 869; 8 Sh. (Ct. of Sess.) 923.—**SCOT.**

**y. Power to decide different matters separately.]**—An order of reference, conferring on the arbitrator power to make such orders as could be made by the Supreme Ct. in Equity, authorises him to make a final order as to one matter separately & apart from the other matters in dispute. The order is not affected or suspended in its operation by reference back. It takes effect from its date, & is enforceable by action.—*SUTTON v. MOORE* (1885), 6 N. S. W. L. R. 197.—**AUS.**

**z. Whether appointee to act as arbitrator or officer of court.]**—“Upon hearing the solrs. on both sides, & by their con-

sent, I order that all matters in difference between the parties in this cause be referred to the certificate of the local master of this ct. at Orangeville, with all the powers as to certifying & amending of a judge of the High Ct. of Justice, & that the costs of the suit & of the reference be in the discretion of the said local master”:—*Held*: the master was to act as an arbitrator under C. L. P. Act, not as an officer of the ct. under ss. 47, 48 of Ontario Jud. Act, & deft. might sign judgment on his report.—*WALLACE v. WHALEY* (1882), 9 P. R. 248.—**CAN.**

**2551 i. Binding on parties consenting.]**—The ct. will not allow a party in a cause referred to put an end to an arbn. once begun when there is no fault in the other party.—*SUPPLE v. —* (1821), 2 Moll. 345.—**IR.**

**2551 ii. —.]**—When on the eve of trial the parties agree to a reference, the ct. cannot afterwards, except by

*Sect. 2.—References for trial: Sub-sect. 1, G.; sub-sects. 2 & 3.]*

out the causes from the list.—*AMBLER v. TEBBUTT* (1840), 2 Beav. 442; 48 E. R. 1253.

**2553. — Order silent as to consent.]**—In the proceedings of a superior ct. of law everything is to be presumed in favour of the judgment of the ct., & where, therefore, a jury has been discharged & the case referred, & the record is silent as to consent, it must be assumed that the discharge took place by proper authority.—*SCOTT v. BENNETT* (1871), L. R. 5 H. L. 234; 20 W. R. 686, H. L.

#### SUB-SECT. 2.—POWER OF COURT OVER REFEREE AND PROCEEDINGS BEFORE HIM.

*See, now, Arbitration Act, 1889, ss. 16, 17.*

**2554. No power to order delivery of particulars.]**—By a judge's order, deft. was required, within a limited time, to deliver to pltf. particulars of set-off, & in default thereof, deft. was to be precluded from giving evidence in support of his set-off at the trial. Deft. neglected to comply with the terms of the order, & the cause was afterwards referred by an order of *Nisi Prius*. After the arbitrator had proceeded with the reference, a judge, during the assizes, made an order for the delivery of the particulars of deft.'s set-off:—*Held*: he had no authority so to do under 1 Geo. 4, c. 55, s. 5, as, after the order of reference, the cause was out of ct.—*ASHWORTH v. HEATHCOTE* (1830), 6 Bing. 596; 4 Moo. & P. 396; 8 L. J. O. S. C. P. 206; 130 E. R. 1411.

**2555. Whether power to order discovery.]**—A compulsory reference to arbn., under C. L. P. Act, 1854, s. 3, is different from a reference by consent, & in such a case a bill of discovery, in aid of the proceedings before the arbitrator, will lie.—*BRITISH EMPIRE SHIPPING CO., LTD. v. SOAMES (SOMES)* (1857), 3 K. & J. 433; 26 L. J. Ch. 759; 29 L. T. O. S. 178; 3 Jur. N. S. 883; 5 W. R. 813; 69 E. R. 1179.

*Annotation:—Reid. Re Mysore West Gold Mining Co. (1889), 42 Ch. D. 535.*

*See, also, cases in Part III., Sect. 1, ante.*

express consent, supersede the agreement & resume jurisdiction.—*WALKER v. STEWART* (1855), 2 Macq. 424.—*SCOT.*

**a. — Abandonment of trial of issue.]**—If the parties agree to refer the case to arbn. instead of a trial by jury, the effect is not only to abandon the trial of the issue, but the suit in equity, & the ct. has no further jurisdiction except to see that there was consent.—*WOODLEY v. JOHNSON* (1828), 1 Moll. 394.—*IR.*

**b. As to what is referred.]**—A judgment directed that the master should take the usual accounts for redemption or foreclosure of mtged. premises, & should also take the accounts in respect to certain other matters set out in the pleadings. Under this deft. contended that the master should take into account a certain sale by pltf., as mtgee., to a person who, it appeared, had not paid his purchase money. There was no specific mention of this sale in the pleadings or judgment:—*Held*: the questions which the proposed inquiry would raise were questions which ought to have been raised by the pleadings & determined by the ct., & not delegated to the master.—*ROWLAND v. BURWELL* (1888), 12 P. R. 607.—*CAN.*

#### PART V. SECT. 2, SUB-SECT. 2.

**2555 i. Discovery.]**—A reference being before trial & for the purpose of trial, the referee can properly direct one to be examined for discovery who is a

party or who is to be treated as a party to the litigation.—*GARLAND v. CLARKSON* (1905), 5 O. W. R. 62; 9 O. L. R. 281.—*CAN.*

**c. Right of party to request interference by court.]**—A party to any reference has a right to come to the ct. at any stage, with any well-founded complaint against the conduct of the referee, either personal misconduct or error in receiving or rejecting evidence, or otherwise.—*MARKLE v. ROSS* (1889), 13 P. R. 135.—*CAN.*

**d. Warrant to proceed — Grounds for refusing.]**—Where there has been undue delay in the prosecution of a reference, the party having the conduct of it should not be refused a warrant to proceed, if he applies therefor before any action has been taken by the master under r. 51, & there is nothing but delay to interfere with the granting of it.—*Re CANNON, OATES v. CANNON* (1892), 14 P. R. 502.—*CAN.*

**1. Power to stay proceedings in reference.]**—In an action for damages, pltf. was given judgment, & a reference to the official referee was directed. Defts. appealed to the Privy Council. The official referee directed that, notwithstanding the appeal, the reference should be proceeded with. An order staying proceedings on the reference, pending the determination of the appeal, was affirmed on the ground that the order was within the discretion of the

**2556. —.]**—The ct. does not, by directing a reference, deprive itself of the power of making any order which may facilitate the reference, & the judge, not the referee, is the proper person to make an order for discovery of documents which may be necessary for the purposes of the reference.—*ROWCLIFFE v. LEIGH* (1876), 25 W. R. 56; *reversd.* on another point (1877), 37 L. T. 557, C. A.

**2557. — No power to order.]**—An order was taken by consent in an action, referring the action & all matters in difference to the award of a named arbitrator. The order provided that the parties should produce before the arbitrator all documents in their or either of their custody or power relating to the matter in difference; also that the party in whose favour the award should be made should be at liberty, after the service of a copy of the award on the other party, to apply for final judgment in accordance with the award. Pltf. having during the pendency of the arbn. applied by summons in the action under R. S. C., 1875, Ord. 31, r. 12, for an affidavit of documents, the application was dismissed on the grounds (1) in consequence of the order of reference, the ct. had no jurisdiction to grant the application, not having before it "any matter in question in the action" within the above rule; (2) under the order the whole jurisdiction as to discovery was in the hands of the arbitrator.

The rule that an order of the ct. carries with it "liberty to apply," though not expressly reserved, only applies where the order is one not of a final character.—*PENRICE v. WILLIAMS* (1883), 23 Ch. D. 353; 52 L. J. Ch. 593; 48 L. T. 868; 31 W. R. 496.

**2558. Inspection of property — Referee should order, not court.]**—Pltf. brought an action against a co. for working from their mine into a seam of his, which he himself had not yet worked, so that he had no "pit" or other access into it except through their mine, & the question as to the amount of damages was by agreement referred to arbn., the trespass being admitted & money paid into ct. While the arbn. was pending an order was made by a judge at chambers that pltf. should be at liberty to enter into the co.'s mines & all the workings of the co. near to the boundary between the co.'s colliery & pltf.'s, & to enable the inspection to be made, to clear away rubbish, etc.:—*Held*:

Chief Justice, & the ct. could not say that the discretion was wrongly exercised.—*SHARPE v. WHITE* (1910), 15 O. W. R. 683; 20 O. L. R. 575.—*CAN.*

**g. — On what grounds.]**—In a motion to stay proceedings on a reference, deft. alleged that pltf. had not paid the costs of an appeal as ordered, that there was delay on pltf.'s part, that, since the original deft. was dead, the present proceedings were vexatious, that another action at the instance of pltf. had been commenced, & that this reference should not be proceeded with till it had terminated:—*Held*: insufficient.—*HULL v. ALLEN* (1911), 2 O. W. N. 897.—*CAN.*

**h. Power to enlarge time.]**—Arbn. Act, 1890, s. 17, enables the ct. to exercise, in the case of a reference under the order of the ct., the powers as to enlarging the time for making an award given by s. 11 of the Act in the case of references by consent out of ct.—*BELL v. FINN* (1896), 14 N. Z. L. R. 447.—*N.Z.*

**k. Conduct of proceedings.]**—In an administration action which had been referred, the solr. for certain debts, other than the exors. asked for the conduct of the reference in the event of its being taken from pltf.:—*Held*: the solr. could not obtain the conduct of the reference unless by a substantive application, & request refused, without prejudice to a substantive application.—*THOMPSON v. FAIRBARN* (1885), 10 P. R. 533. *CAN.*



the order was wrong, & it should be left to the arbitrator whether the inspection should take place, & in what way.—**BARNETT v. ALDRIDGE COLLIERY Co., LTD.** (1887), 4 T. L. R. 16.

*Annotation* :—**Refd.** *Macalpine v. Calder* [1893] 1 Q. B. 545, C. A.

**2559.** ——— **But court may order.**—The ct. has still jurisdiction to make an order to inspect property, the subject of a reference or arbn., notwithstanding the reference or arbn., but the more convenient course is to apply in the first instance to the referee or arbitrator, & not to the judge in chambers.—**MACALPINE & Co. v. CALDER & Co.**, [1893] 1 Q. B. 545; 62 L. J. Q. B. 607; 68 L. T. 426; 41 W. R. 436; 9 T. L. R. 311; 4 R. 314, C. A.

**2560. Order of Nisi Prius—Amendment of reply.**—A cause was referred at *Nisi Prius*, & a verdict taken for pltf., subject to a reference. The arbitrator certified to the ct., pending the reference, that it would be agreeable to the justice of the case to allow pltf. to amend his replication, by substituting *de injuria*, or some other replication which should put in issue all the allegations in the plea:—**Held**: such amendment could not be ordered without consent of both parties.—**CROSS v. METCALFE** (1836), 5 Ad. & El. 800; 2 Har. & W. 377; 1 Nev. & P. K. B. 232; 6 L. J. K. B. 58; 111 E. R. 1369.

**2561. Verdict subject to award—Amendment of particulars.**—An action was brought for work & labour in 1837, in which year particulars of pltf.'s demand were delivered. In 1841 the cause came on for trial, & a verdict was taken, subject to a reference. After several meetings had taken place under the reference, the ct. allowed pltf., on payment of costs, to amend his particulars by the insertion of other items, in respect of services during the period covered by the former particulars, it not being suggested that deft. wished to have the option to abandon the reference or to plead *de novo*.—**BLUNT v. COOKE** (1842), 4 Man. & G. 458; 5 Scott, N. R. 232; 11 L. J. C. P. 321; 134 E. R. 188.

**2562. Amendment of particulars.**—When, on the application of pltf., a compulsory order of reference of the action has been made under C. L. P. Act, 1854, the ct. has power, at any time before the award, to amend the particulars of demand.—**GIBBS v. KNIGHTLY (KNIGHT)** (1857), 2 H. & N. 34; 26 L. J. Ex. 294; 29 L. T. O. S. 129; 3 Jur. N. S. 472; 5 W. R. 562; 157 E. R. 15.

*Annotation* :—**Refd.** *Smurthwaite v. Richardson* (1863), 15 C. B. N. S. 463.

**2563. Security for costs ordered after reference.**—A cause was referred to arbn. in Nov., 1846. Several meetings were held, & by a judge's order, on Jan. 3, 1848, the time was enlarged until Jan. 1, 1849. The last appointment was for May 24, 1848, but no meeting took place at that time. A vesting order under Insolvent Act was made as to pltf.'s property on Aug. 14, 1849. On Dec. 18, 1849, a judge's order, enlarging the time to Trinity Term, 1850, was obtained on behalf of pltf.:—**Held**: (1) the attorney for pltf. should give security for costs, it not being clear upon the affidavits that the proceedings were not for his benefit; (2) the application was in time.—**GELL v. CURZON (LORD)** (1850), 4 Exch. 813; 19 L. J. Ex. 225; 154 E. R. 1445.

**2564. Power to appoint receiver.**—An agreement, by which S. & Co. had undertaken to build a ship for pltf.s., contained an arbn. clause. Pltf.s. alleged that the ship was not properly constructed

in accordance with the agreement & commenced an action against S. & Co. & W. & Co., their assignees, claiming a lien upon the ship for sums which pltf.s. had paid, repayment of such sums, the appointment of a receiver, & an injunction. S. & Co. & W. & Co. moved that all proceedings in the action might be stayed, & the matters in dispute referred to arbn., & there was a counter-motion of pltf.s. for a receiver, & they contended that, as it was necessary to appoint a receiver, no order could be made on the other motion:—**Held**: the ct. had power to appoint a receiver & to send all the rest of the action to be determined by arbn., & to stay all further proceedings, except for the purpose of carrying out the order for a receiver, with general liberty to apply, so as to enable the parties to make any necessary application pending the arbn.—**COMPAGNIE DU SENEGAL ET DE LA CÔTE OCCIDENTALE D'AFRIQUE v. SMITH & Co. & WOODS & Co.** (1883), 53 L. J. Ch. 166; 49 L. T. 527; 32 W. R. 111.

*Annotation* :—**Folld.** *Pini v. Roncoroni*, [1892] 1 Ch. 633.

**2565. Power over official referee.**—The trial of an action was, by an order expressed to be made under Jud. Act, 1873 (c. 66), s. 57, transferred to an official referee, who directed inquiries & accounts to be taken before himself, & also the further consideration of the action. The order, as drawn up & entered, directed that the inquiries & accounts only should be taken before the official referee, & reserved further consideration. The official referee having refused to proceed under the order as drawn up & entered, on the ground that it was not in the form pronounced by him:—**Held**: (1) the further consideration should be taken before the official referee; (2) an official referee was to be deemed an "officer of the ct." when an action went to him for "trial," & notwithstanding the Act of 1889 the ct. had the right to order the official referee to suspend proceedings.—**Re PALMER, PALMER v. HARDWICK** (1890), 63 L. T. 302.

**2566. Compulsory reference—Remitting.**—A reference under C. L. P. Act, 1854, confers upon the master the same powers & imposes upon the parties the same liabilities as in the case of a reference under an ordinary submission or rule or order, & the ct. will not remit the matter to the master for reconsideration, except where there is ground for setting aside his certificate; nor will they, where the master has declined to state a case for the opinion of the ct. under s. 5, remit the matter to him, in order to give one of the parties an opportunity of applying to the ct. to direct a case to be stated under s. 4.—**BAGGALAY v. BORTHWICK** (1861), 10 C. B. N. S. 61; 142 E. R. 372; *sub nom.* **BAGULEY (BAGUELLY) v. MARKWICK (MARTHWICK)**, 30 L. J. C. P. 342; 4 L. T. 245; 9 W. R. 537.

*Annotation* :—**Mentd.** *Gibbon v. Parker* (1862), 5 L. T. 584.

#### SUB-SECT. 3.—PROCEEDINGS BEFORE REFEREE.

*See* Arbitration Act, 1889, s. 15 (2).

**2567. Third party procedure—Official referee can order.**—The lessee for a term of years under a lease containing a covenant to repair agreed with D. to sell & assign to him the residue of the term, he undertaking to indemnify the lessee, without mentioning her assigns, in respect of any breach of covenant. D. entered into possession under that agreement, but no deed of assignment to him was

#### PART V. SECT. 2, SUB-SECT. 3.

##### 1. Motion to appoint administrator

*ad litem.*—A motion made under R. S. O., 1877 (c. 49), s. 9, to appoint an administrator *ad litem* of the estate of a

deceased person may be made before the referee.—**COLLIER v. SWAYZIE** (1879), 8 P. R. 42.—CAN.



2.—*References for trial: Sub-sects. 3, 4, 5 & 6.]*

executed, & upon the lessee's death her exors. having distributed her estate, assigned for a nominal consideration the residue of the term to her son, who thenceforth received the rent from D. & paid it to the lessors. At the expiration of the term the lessors sued the son for breach of the covenant to repair, & he claimed indemnity from, & brought in, D. as third party. The action was referred to an official referee, who, upon the application of deft., made an order adding the lessee's exors. as defts. in order to enable them to claim indemnity from D. Neither plffs. nor the exors. objected to this order being made, but D. opposed it:—*Held*: upon these facts, the official referee in adding the exors. as defts. rightly exercised his discretion under R. S. C., Ord. 16, r. 11.—*BYRNE v. BROWN* (1889), 22 Q. B. D. 657; 60 L. T. 651; 5 T. L. R. 255, C. A.

**2568. No jurisdiction to order production of documents.]**—The official referees have no jurisdiction to make an order for the production of documents, the proper course being to take out a summons for the purpose in the chambers of the judge to whom the action is attached.—*DAUVILLIER (DANVILLIER) v. MYERS* (1881), 17 Ch. D. 346; 29 W. R. 535.

*Annotation*:—*Consd. Macalpine v. Calder*, [1893] 1 Q. B. 545, C. A.

**2569. Examination of witnesses abroad—Power to order.]**—An official referee, to whom an action is referred for trial, has jurisdiction to make an order granting a commission to examine witnesses abroad, & a judge at chambers has jurisdiction to review the decision of the official referee granting or refusing such an order.—*HAYWARD v. MUTUAL RESERVE ASSOCN.*, [1891] 2 Q. B. 236; 65 L. T. 491; 39 W. R. 624; 7 T. L. R. 575.

*Annotation*:—*Apld. Macalpine v. Calder*, [1893] 1 Q. B. 545, C. A.

**2570. What matters are before referee—All matters—Counterclaim.]**—In an action by a firm of solrs. against E. & J., two partners, for a bill of costs incurred by the firm, on application under R. S. C., Ord. 14, r. 1, E. consented that judgment should be entered against him, but J. obtained leave to defend. "All matters in difference in the action" were afterwards referred to a master. J. raised a counterclaim. The master found in favour of J. in the original action, & awarded him £230 on the counterclaim:—*Held*: under the terms of the reference, "all matters in difference in the action" included the counterclaim, so that that, as well as the original action, was properly before the master.—*WEALL v. JAMES* (1893), 68 L. T. 54; 37 Sol. Jo. 194; 5 R. 157.

*Annotations*:—*Refd. M'Leod v. Power* (1898), 67 L. J. Ch. 551; *Morrel v. Westmoreland* (1902), 87 L. T. 635, C. A.

**2571. Matter of account—Question of fraud raised.]**—Where a case is referred to a master under C. L. P. Act, 1854, s. 3, on the ground of the matter

in dispute being matter of mere account, the master must proceed as in an ordinary arbn., & he has no right to refuse to inquire into a question of fraud raised before him as to a part of the accounts in dispute.—*INSULL v. MOOJEN* (1857), 3 C. B. N. S. 359; 27 L. J. C. P. 75; 30 L. T. O. S. 153; 6 W. R. 126; 140 E. R. 779.

**2572. — Question of misrepresentation arising.]**—Pltf. sued for work done under a deed relating to the construction of a railway, which deft. had contracted with the railway co. to make, & in which deed there was a stipulation by which pltf. was not to be entitled to recover anything in respect of such work, if not done to the satisfaction of the engineer of the railway co. The cause having been compulsorily referred to a master, at the instance of pltf., under C. L. P. Act, 1854, s. 3, & a question having arisen on the reference whether pltf. had been induced to sign such deed on a representation by deft. that the above stipulation in it would not be used against pltf., unless the railway co. enforced against deft. a similar clause in the contract between the co. & deft., the ct. refused an application by deft. under s. 4 of the Act to grant an issue for the trial of such question by a jury.—*TRICKETT v. GREEN* (1865), Har. & Ruth. 63; 35 L. J. C. P. 69; 13 L. T. 405; 11 Jur. N. S. 1037; 14 W. R. 141.

**2573. Duty to sit de die in diem.]**—The words of Ord. 36, r. 30, requiring a referee to sit *de die in diem* are directory only, & though a neglect to comply with such requirement would be misconduct in the referee, a party, who has at the time acquiesced in such non-compliance, cannot move to set aside the award on that ground merely.—*ROBINSON v. ROBINSON* (1876), 35 L. T. 337; 24 W. R. 675; 3 Char. Pr. Cas. 316.

**2574. Form of report—Findings as to issues.]**—A cause in which deft. had pleaded never indebted, Stat. Limitations, payment, set-off, & accord & satisfaction, was referred to a county ct. judge under C. L. P. Act, 1854, the costs of the cause to abide the event of the cause, & the costs of the reference to be in the discretion of the arbitrator. The county ct. judge having certified that deft. was not at the time of the commencement of the action indebted to pltf., & having found a general verdict for deft. & directed that pltf. should pay the costs of the reference, the ct. sent the certificate back to be amended by stating the manner in which the several issues were found.—*HOLLAND v. JUDD* (1858), 3 C. B. N. S. 826; 30 L. T. O. S. 275; 6 W. R. 248; 140 E. R. 968.

SUB-SECT. 4.—REFEREE'S FINDING AND ITS EFFECT.

*See Arbitration Act, 1889, s. 15 (3).*

**2575. Viewed as decree.]**—The result of a reference under an order of the ct. is viewed by the

**2569 i. Examination of witnesses abroad.]**—A referee under s. 102 of Jud. Act, R. S. O., 1887 (c. 44), has jurisdiction to order the examination of foreign witnesses under a commission.—*BROOKS v. GEORGIAN BAY SAW-LOG SALVAGE CO.* (1895), 16 P. R. 511.—CAN.

**m. Who should have conduct.]**—An accounting party should not have the carriage of the proceedings in the master's office, especially where there is a competition between an exor. & beneficiaries as to who should be first in obtaining an administration order.—*Re CURRY, CURRY v. CURRY* (1896), 17 P. R. 69.—CAN.

**n. Power to dismiss action by consent of parties.]**—A referee has power,

under r. 422 (d) of King's Bench Act, to dismiss an action by the consent of the parties.—*WALKER v. ROBINSON* (1905), 15 Man. L. R. 445; 1 W. L. R. 181.—CAN.

PART V. SECT. 2, SUB-SECT. 4.

**o. No power to order entry of judgment.]**—A referee has no jurisdiction under r. 449 of King's Bench Act, or otherwise, even with the consent of the parties, to make an order for the entry of judgment for deft., after action has been entered for trial. Such judgment can only be pronounced by a judge sitting in ct.—*WALKER v. ROBINSON* (1905), 15 Man. L. R. 445; 1 W. L. R. 181.—CAN.

**p. Power to order as to judgment of non-suit.]**—Under Consolidated Rules 648, 729, an official referee has power to direct that a judgment of non-suit shall not have the effect of a judgment on the merits.—*HENDERSON v. MANUFACTURERS' NATURAL GAS CO.* (1909), 14 O. W. R. 313.—CAN.

**q. No power to interfere with solicitor's lien.]**—A referee before whom administration proceedings are taken has no authority to make an order depriving a solr. of his lien for costs.—*BELL v. WRIGHT* (1895), 24 S. C. R. 656.—CAN.

**r. No power to rescind his own order.]**—The referee in chambers has no power to rescind his own order not mad

ct. as a decree, & even stronger, since it supersedes all errors but corruption or partiality.—**TRAVERS v. STAFFORD (LORD) (1750)**, Amb. 104 ; 2 Ves. Sen. 19 ; 27 E. R. 66.

*Annotation* :—**Refd.** *Edwards v. Edwards (1792)*, Dick. 756.

*See, also*, Nos. 1703, 1704, *ante*.

**2576. Order precluding action or suit—Finding conclusive.**—An order of reference contained a clause restraining either party from bringing or prosecuting any action or suit in any ct. of law or equity :—*Held* : the finding of the arbitrator was conclusive, & pltf. could not have judgment *non obstante veredicto* on a bad plea.—**BRITT v. PASHLEY (1847)**, 1 Exch. 64 ; 5 Dow. & L. 97 ; 2 New Pract. Cas. 307 ; 16 L. J. Ex. 240 ; 9 L. T. O. S. 200 ; 154 E. R. 27.

**2577. Reference for decision—Finding conclusive.**—The old law & practice with regard to references to arbn. are not abolished by Jud. Acts, & where a cause is referred to an arbitrator for decision according to the old practice, the arbitrator cannot be called on to report to the ct. with regard to the matter referred to him, but his decision is final.

An order was made that a cause should be referred to the master, & that the subsequent proceedings should be continued & concluded according to the new practice :—*Held* : the reference was not merely for report by the master under the new powers given by Jud. Acts, but for decision, & the master could not be made to report to the ct., but his decision was final.—**CRUIKSHANK v. FLOATING SWIMMING BATHS CO. (1876)**, 1 C. P. D. 260 ; 45 L. J. Q. B. 684 ; 34 L. T. 733 ; 24 W. R. 644, C. A.

*Annotations* :—**Appld.** *Lloyd v. Lewis (1876)*, 2 Ex. D. 7, C. A. **Distd.** *Longman v. East, Pontifex v. Severn, Mellin v. Monico (1877)*, 47 L. J. Q. B. 211, C. A.

**2578. Form of report.**—A referee under Jud. Act, 1873 (c. 66), s. 57, is not bound to give his reasons for his findings ; he may simply find the affirmative or the negative of the issues, & the issues in an action cannot be sent back to him for re-trial or further consideration, merely on the ground that his report does not set out the reasons for his findings.—**MILLER v. PILLING (1882)**, 9 Q. B. D. 736 ; 51 L. J. Q. B. 481 ; 47 L. T. 536, C. A.

*Annotations* :—**Appld.** *Cooke v. Newcastle & Gateshead Water Co. (1882)*, 10 Q. B. D. 332. **Consd.** *Clark v. Sonnenschein (1890)*, 25 Q. B. D. 464, C. A. **Refd.** *Dyke v. Cannell (1883)*, 11 Q. B. D. 180.

**2579. When exception will lie—Reference ad computandum—Final.**—Exception will lie to an award of a referee under a decree, if only *ad computandum*, but not if to all matters in difference.—**WOODBIDGE v. HILTON (1784)**, 1 Bro. C. C. 398 ; Dick. 640 ; 28 E. R. 1202.

**2580. Equivalent to verdict of jury.**—An order was made by consent of the parties to an action to refer all matters in difference to arbn. The order did not in terms refer the action, but it gave directions as to the costs of it. On an application to set aside or remit the award of the arbitrator, on the ground that he had taken an erroneous view of the law & facts of the case :—*Held* : (1) the finality of the award was not affected by s. 15 of the Act of

1889 ; (2) the order of reference, as it included matters other than the action, was not one that could be made under the authority either of Jud. Act, 1873 (c. 66), s. 37, or of the Act of 1889, but owed its validity to the consent of the parties only, & the award was final, & could not be reviewed by the ct.—**DARLINGTON WAGON CO., LTD. v. HARDING & TROUVILLE PIER & STEAMBOAT CO., LTD.**, [1891] 1 Q. B. 245 ; 60 L. J. Q. B. 110 ; 64 L. T. 409 ; 39 W. R. 167 ; 7 T. L. R. 20, 106, C. A.

*Annotation* :—**Consd.** *M'Alpine v. Calder (1893)*, 9 T. L. R. 219.

*See, also*, Nos. 1705, 1706, *ante*.

#### SUB-SECT. 5.—COSTS.

*See cases in Part IV., Sect. 20, ante.*

#### SUB-SECT. 6.—POWERS OF COURT OVER FINDINGS AND JUDGMENT.

*NOTE*—*In regard to appeals see, now, R.S.C., Ord. 59a (R.S.C. (March), 1919).*

**2581. When appeal lies—Not when no power to refer except by consent—All matters in difference.**—In an action an order by consent was made for the reference of all matters in difference to arbn., & not merely "the whole cause or matter" :—*Held* : the ct. had no jurisdiction to review the findings of the arbitrator.—**DARLINGTON WAGON CO., LTD. v. HARDING & TROUVILLE PIER & STEAMBOAT CO., LTD.**, [1891] 1 Q. B. 245 ; 60 L. J. Q. B. 110 ; 64 L. T. 409 ; 39 W. R. 167 ; 7 T. L. R. 106, C. A.

*Annotation* :—**Appld.** *M'Alpine v. Calder (1893)*, 9 T. L. R. 219.

**2582. — Not from official referee as to costs.**—Where the whole of an action is referred by order of ct. to an official referee, without any direction as to costs in the order, his decision as to costs cannot be appealed against except by his leave.—**MINISTER & CO. v. APPERLEY**, [1902] 1 K. B. 643 ; 71 L. J. K. B. 452 ; 86 L. T. 625 ; 50 W. R. 510.

**2583. Clause precluding appeal—Effect of.**—Where an order of reference contains a clause restraining the parties from bringing a writ of error, they are precluded from moving in arrest of judgment.—**CHOWNES v. BROWN (1845)**, 2 Dow. & L. 706 ; 14 L. J. Ex. 216 ; 4 L. T. O. S. 418.

**2584. — — — — —**—By an order of reference made by consent, & before the coming into operation of Jud. Acts, it was ordered that neither pltf. nor defts. should bring any writ of error against each other concerning the matters referred. The arbitrator made an award dependent on the opinion of the ct. upon a special case stated by him. The ct. gave judgment for pltf. Defts. appealed :—*Held* : no appeal could be brought.—**JONES v. VICTORIA GRAVING DOCK CO. (1877)**, 2 Q. B. D. 314 ; 36 L. T. 347 ; 25 W. R. 501, C. A.

*Annotations* :—**Mentd.** *Re Great Northern Salt & Chemical Works, Ex p. Fenwick (1891)*, 36 Sol. Jo. 42 ; *Evans v. Hoare*, [1892] 1 Q. B. 593 ; *Re Queensland Land & Coal*

*ex p.*—**WALKER v. ROBINSON (1905)**, 15 Man. L. R. 445 ; 1 W. L. R. 181.—**CAN.**

**t. Duty of master to report.**—On a compulsory reference to the master under s. 6 of C. L. P. Act, 1856, to take an account between the parties, & to strike a balance, & that pltf. should be at liberty to enter judgment for the balance that should be due to him, the officer found a balance due to pltf., & declared his intention to grant a certificate to enable pltf. to mark judgment, &

refused to order the party having carriage of the proceedings to make a report :—*Held* : deft. was entitled to have a report made up, in order that the proceedings before the master should be reviewed.—**DE FREYNE v. FRENCH (1867)**, 1 R. 1 C. L. 311.—**IR.**

#### PART V. SECT. 2, SUB-SECT. 6.

**2581 i. When appeal lies.**—When the judgment entered in an action is unauthorised & unsupported by any order or pronouncement of the ct., an appeal will

lie from the refusal of the referee to set it aside on motion before him.—**WALKER v. ROBINSON (1905)**, 15 Man. L. R. 445 ; 1 W. L. R. 181.—**CAN.**

**2581 ii. — From Court of Appeal.**—A judgment of the Ct. of Appeal affirming that of the Divisional Ct., which affirmed a report of the referee, is not a final judgment from which an appeal lies to the Supreme Ct. of Canada.—**MCDUGALL v. CAMERON, BICKFORD v. CAMERON (1892)**, 21 S. C. R. 379.—**CAN.**



**Sect. 2.—References for trial: Sub-sects. 6 & 7.**  
**Sect. 3.]**

Co., *Davis v. Martin* (1894), 63 L. J. Ch. 810; *Griffiths Cycle Corpn. v. Humber*, [1899] 2 Q. B. 414, C. A.; *Daniels v. Trefusis*, [1914] 1 Ch. 788.

See, now, R. S. C. Ord. 59A (R.S.C. (March), 1919).

**2585. To what court—Court referring.]**—Where a ct. of law has referred an action to arbn., & the arbitrator makes a mistake in his award, any application to remedy the mistake must be made to the ct. of law in which the arbn. originated, & not to a ct. of equity.

Certain actions between A. & B., a discharged bkpt., were referred by the Ct. of Queen's Bench to one of the masters of that ct., who in his award made the mistake of crediting A. (1) with a debt which he claimed to be due from B., but which had been barred by Bkpcy. Act, 1861 (c. 134), s. 164, & (2) with the whole of a debt for which A. had proved in B.'s bkpcy., instead of the amount of the composition then agreed on. The master, however, did not admit his mistake, & declined to reconsider his award, whereupon A. obtained an order to sign judgment on the award. A motion by B. to the Ct. of Ch. for an injunction to restrain A. from signing judgment & issuing execution was dismissed with costs.—*GRAHAM v. TURNBULL* (1875), 44 L. J. Ch. 538; 23 W. R. 645.

**2586. — Appeal from official referee in interlocutory matters.]—Held:** an appeal from an official referee's refusal to postpone the hearing until deft.'s return to England was to the judge at chambers.—*RICHARD v. TALBOT* (1890), 38 W. R. 478.

**2587. Application to set aside findings—How made—Motion not ex parte.]**—Where a referee under Jud. Act, 1873 (c. 66), has made his report, an application to send the case back to him should be made on notice of motion, & not *ex p.* in the first instance.—*GRAVES v. TAYLOR* (1879), 27 W. R. 412.

**2588. — Time for.]**—Where on a reference under Jud. Act, 1873 s. 57, the unsuccessful party desires to question the findings of the referee, the proper course is to move the ct. on notice under Ord. 53 to the other party, & such a motion need not be made within the time limited by Ord. 39, r. 1A, for moving for a new trial in an action tried by a jury.—*DYKE v. CANNELL* (1883), 11 Q. B. D. 180; 49 L. T. 174; 31 W. R. 747.

**Annotations:—Fold.** *Bedborough v. Army & Navy Hotel Co.* (1884), 53 L. J. Ch. 658. **Apld.** *Clark v. Sonnenschein* (1890), 25 Q. B. D. 226; *Serle v. Fardell* (1890), 44 Ch. D. 299.

**2589. — —.]**—Where there has been a reference under Jud. Act, 1873, s. 57, & one of the parties is dissatisfied with the findings of the referee, he may move to set the report aside at any time before judgment has been given upon it.

The practice as laid down in *Dyke v. Cannell*, No. 2588, *ante*, is not altered by R. S. C.—*BEDBOROUGH v. ARMY & NAVY HOTEL CO.* (1884), 53 L. J. Ch. 658; 50 L. T. 173.

**2590. Application to set aside judgment—Judgment entered—Court of Appeal.]**—When judgment has been actually entered up pursuant to a direction of an official referee under R. S. C., Ord. 36,

rr. 50, 52a, it is too late for the unsuccessful party to apply to a ct. of first instance to move by way of appeal to set aside the judgment; his proper course is to go direct to the Ct. of Appeal.—*SERLE v. FARDELL* (1890), 44 Ch. D. 299; 62 L. T. 359; 38 W. R. 733.

**Annotation:—Consd.** *Bannister v. McDonald*, [1890], W. N. 50.

**2591. —.]**—On a motion by deft. to set aside the findings & award, & judgment entered thereon, of an official referee, a preliminary objection that deft. ought to have delivered his notice of motion to set aside the findings & award of the official referee before judgment had been entered was overruled by the Ct. of Appeal, inasmuch as R. S. C., Ord. 40, r. 6, gave deft. power to move in the Q. B. Div. after the judgment directed by the official referee to be entered had been entered.—*PROUDFOOT v. HART* (1890), 25 Q. B. D. 42; 59 L. J. Q. B. 129; 63 L. T. 171; 54 J. P. 547; 38 W. R. 730; 6 T. L. R. 305, C. A.

**Annotations:—Consd.** *Munday v. Norton*, [1892] 1 Q. B. 403, C. A. **Refd.** *Wynne-Finch v. Chaytor*, [1903] 2 Ch. 475, C. A. **Mentd.** *Jacob v. Down*, [1900] 2 Ch. 156; *Wright v. Lawson* (1903), 19 T. L. R. 203; *Torrens v. Walker*, [1906] 2 Ch. 166; *Lurcott v. Wakely & Wheeler*, [1911] 1 K. B. 905, C. A.

**2592. Application to set aside judgment directed—Divisional Court.]**—Where an action has been referred for trial to an official referee, who has ordered judgment to be entered for pltf., the Divisional Ct. has jurisdiction to set aside the findings & the judgment of the official referee, & enter judgment for deft.—*CLARK v. SONNENSCHN* (1890), 25 Q. B. D. 464; 59 L. J. Q. B. 561; 38 W. R. 743, C. A.

**Annotations:—Refd.** *Wynne-Finch v. Chaytor*, [1903] 2 Ch. 475, C. A. **Mentd.** *Fraser v. Fraser* (1905), 74 L. J. K. B. 183, C. A.

**2593. — Chancery Division.]**—Where an official referee, under R. S. C., Ord. 40, r. 2, directs judgment to be entered in an action brought in the Ch. Division & referred to him under Ord. 36, r. 7a, an application to set aside such judgment, under Ord. 40, r. 6, should be made to the Ch. Division, & not in the first instance to the Ct. of Appeal. *Daglish v. Barton*, No. 2604, *post*, *overd.*—*WYNNE-FINCH v. CHAYTOR*, [1903] 2 Ch. 475; 72 L. J. Ch. 723; 89 L. T. 123; 52 W. R. 24; 19 T. L. R. 631, C. A.

**Annotations:—Apld.** *Fraser v. Fraser*, [1905] 1 K. B. 368, C. A. **Refd.** *Billington v. Billington* (1907), 76 L. J. K. B. 664; *O'Driscoll v. Manchester Insee. Committee*, [1915] 3 K. B. 499, C. A.

**2594. Application for new trial—Time limit.]**—Upon an appeal from the judgment & finding of an official referee, by way of asking for a new trial, resp. took the preliminary objection that the application was out of time:—**Held:** the case came within R. S. C., Ord. 39, rr. 3 & 4, & the objection was good.—*FORREST v. TODD* (1897), 76 L. T. 500.

**2595. — Divisional Court.]**—Where an action is tried by an official referee, an appeal or motion for a new trial ought to be made to the Divisional Ct.—*GLASBROOK v. OWEN* (1890), 7 T. L. R. 62.

**2596. — —.]**—Where there has been a trial before an official referee, a motion for a new trial

**2585 i. To what court—Single judge sitting as court.]**—A single judge sitting as the ct. has power to review the findings of an official referee upon a reference under s. 48, Ontario Jud. Act.—*HILL v. NORTHERN PACIFIC JUNCTION RY. CO.* (1885), 11 P. R. 103.—**CAN.**

**u. Entering judgment—Order for leave to enter unnecessary.]**—Judgment may be entered upon an award made on a reference under the compulsory clauses of C. L. P. Act, although no verdict has

been taken, without the formalities formerly required in the case of an attachment for non-payment of the amount awarded. An order for leave to enter such judgment is not necessary.—*MCNEIL v. LAWLESS* (1866), 2 C. L. J. O. S. 190.—**CAN.**

**2592 i. Application to set aside—Ground for.]**—Findings of the referee cannot be set aside, if based upon a reasonable conflict of testimony, & appearing to deal fully with all matters in difference.—

*UNION BANK v. CRATE* (1911), 19 O. W. R. 299; 2 O. W. N. 1147.—**CAN.**

**v. Objection to award—Arbitrator acting after expiry of time.]**—It is no objection to an award in a reference under order of the ct. that the arbitrator has acted after the expiry of the time allowed him & before any order has been made extending the time, where his so acting has been matter of arrangement.—*BELL v. FINN* (1896), 14 N. Z. L. R. 447.—**N.Z.**



must be made in the Q. B. Div., & not in the Ct. of Appeal.—*GOWER v. TOBITT* (1891), 39 W. R. 193; 7 T. L. R. 182, C. A.

**Annotation :—***Reid. Fraser v. Fraser*, [1905] 1 K. B. 368, C. A.

**2597. No appeal against findings pending trial.]—**Where a whole action has been referred by consent to an official referee, who, pending the trial, has tried certain questions of fact & arrived at certain conclusions thereon & done no more, an application pending trial to reverse & rescind such conclusions is misconceived & will be dismissed. The Act of 1889, s. 15 (2), does not apply in such case, because there has been no report of the referee & no award. —**LEWIS v. WALKER (1891), 36 Sol. Jo. 110.**

**2598. Power to enter correct judgment.]—**Where an official referee adopted a wrong principle in assessing the damages for breach of a repairing covenant, & awarded only nominal damages, the Divisional Ct. set aside his judgment, but would not enter judgment for £70, the correct sum, & sent the matter back for a new trial. On appeal by deft. pltf. asked that judgment might be entered for him for £70 :—*Held* : pltf. entitled to such judgment.—**JOYNER v. WEEKS**, [1891] 2 Q. B. 31 ; 60 L. J. Q. B. 510 ; 65 L. T. 16 ; 55 J. P. 725 ; 39 W. R. 583 ; 7 T. L. R. 509, C. A.

**Annotations :—****Apld.** *Henderson v. Thorn*, [1893] 2 Q. B. 164. **Refd.** *Ebbetts v. Conquest* (1895), 73 L. T. 69, C. A.; *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. Co. of London*, [1912] A. C. 673, H. L. **Mentd.** *Barf v. Probyn* (1895), 73 L. T. 118; *Lewis v. Baker*, [1905] 1 Ch. 46; *Rose v. Spicer*, *Rose v. Hyman*, [1911] 2 K. B. 234, C. A.; *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516, C. A.; *Hill v. Showell (Edwin)* (1918), 87 L. J. K. B. 1106, H. L.

**2599. Evidence of proceedings at trial—Affidavit.]**—Upon a motion to set aside or vary the judgment in a case tried before an official referee under Jud. Act, 1873 (c. 66), ss. 58, 59, an affidavit, or some evidence of what took place at the trial, must be furnished to the ct.—**STUBBS v. BOYLE** (1876), 2 Q. B. D. 124 ; 35 L. T. 906 ; 25 W. R. 184.

**Annotation :—Distd.** *Re Brook, Sykes v. Brook* (1881), 45 L. T. 172.

**2600. Security for costs of appeal—Power to order.]—**On an appeal from an official referee the K. B. Div. has an inherent jurisdiction to order applt. to give security for costs.—**BILLINGTON (J. H.), LTD. v. BILLINGTON**, [1907] 2 K. B. 106 ; 76 L. J. K. B. 664 ; 96 L. T. 665 ; 23 T. L. R. 473.

**2601. Appeal from Divisional Court to Court of Appeal—Whether leave necessary.]—**Where under s. 14 of the Act of 1889 a question has been referred for trial to an official referee, there is an appeal to the Ct. of Appeal without leave from an order of the Divisional Ct. on an application to review the decision of the official referee.—**MUNDAY v. NORTON**, [1892] 1 Q. B. 403 ; 61 L. J. Q. B. 456 ; 66 L. T. 173 ; 40 W. R. 355 ; 8 T. L. R. 396 ; 30 Sol. Jo. 306, C. A.

**2602.** ———.]—Where a case was tried by an official referee under an order of the ct. :—*Seemle* : it was not necessary to obtain leave to appeal to the Ct. of Appeal from the Divisional Ct.—**MURDOCK & CAMERON v. BOURNEMOUTH CORPN.** (1897), 41 Sol. Jo. 258.

**2603. — In what cases—Final or interlocutory.]**  
—An arbitrator, under an order of reference, stated a case for the opinion of the ct., which provided that, if the opinion of the ct. should be one way, the case was to be referred back to the arbitrator; if the other way, judgment was to be entered for deft. with costs. A Divisional Ct. decided in favour of pltf's., & referred the case back to the arbitrator. Deft. appealed:—*Held*: (1) an appeal could be brought from the order; (2) it was a final order, & the appeal must be entered in the general & not in the interlocutory

list.—SHUBROOK v. TUFNELL (1882), 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740, C. A.

**Annotations:—***Folld. Bozson v. Altrincham* U. C. (1903), 72 L. J. K. B. 271, C. A. *Consd. Isaacs v. Salbstein*, [1916] 2 K. B. 139.

**2604. Application to review findings—No appeal from Divisional Court to Court of Appeal.]—**Where an action has been referred to an official referee, a motion to a Divisional Ct. to review the findings of the official referee, & to enter judgment accordingly, is "an appeal to the High Ct. from any ct. or person" within Jud. Act, 1894 (c. 16), s. 1 (5), & the decision of the Divisional Ct. is final, unless leave be given to appeal.—**DAGLISH v. BARTON**, [1900] 1 Q. B. 284; 68 L. J. Q. B. 1044; 81 L. T. 551; 48 W. R. 50; 44 Sol. Jo. 24, C. A.

**Annotation:—Overd.** *Wynne-Finch v. Chaytor*, [1903] 2 Ch. 475, C. A. With the greatest respect, we are unable to agree with *Daglish v. Barton*, & think it ought not to be followed, & it is, therefore, overruled (STIRLING, L.J.).

**2605. County court—Refusal of judge to set aside award—No appeal to Court of Appeal.]—**A suit in a county ct. having been referred by the judge thereof to an arbitrator, under County Cts. Act, 1846 (c. 95), s. 77, & the arbitrator's award having been entered up as the judgment, an application was made to the judge to set aside the award, on the ground that the arbitrator had exceeded his jurisdiction by taking into consideration matters not referred to him. The judge having refused the application:—*Held*: the Ct. of Appeal had no jurisdiction under County Cts. Act, 1850 (c. 61), s. 14, to entertain an application on appeal from the judge to set aside the award.—**MAYER v. FARMER** (1878), 3 Ex. D. 235; 47 L. J. Q. B. 760; 26 W. R. 760.

*See, now, R. S. C., Ord. 59A (R. S. C (March), 1919).*

**SUB-SECT. 7.—REFERENCES TO MASTER UNDER  
R. S. C., Ord. 14, r. 7.**

**2606. Appeal lies to Divisional Court.]—**When, under R. S. C., Ord. 14, r. 7, an action is, with the consent of the parties, ordered to be referred to a master, an appeal lies from his decision to a Divisional Ct.—**FRASER v. FRASER**, [1905] 1 K. B. 368 ; 74 L. J. K. B. 183 ; 92 L. T. 341 ; 53 W. R. 310 ; 21 T. L. R. 186 ; 49 Sol. Jo. 203, C. A.

**Annotations:—****Refd.** Cox v. Bowen, [1911] 2 K. B. 611.  
**Mentd.** Blair v. Clark, [1908] 2 K. B. 548.

*See, now, R. S. C., Ord. 54, r. 22A (R. S. C. (March), 1919).*

**2607. Powers as to costs.]—STREET v. STREET,**  
No. 2238, *ante*.

**2608.** ———.]—HAYCOCKS, LTD. v. MULHOLLAND,  
No. 2240, *ante*.

### SECT. 3.—REFERENCES TO MASTER TO ASSESS DAMAGES.

**2609. Reference to master as arbitrator—Findings of fact.]**—Where on the execution of a writ of inquiry, the parties agree to withdraw the case from the jury, & to submit to the master under a judge's order, the master sits as an arbitrator appointed by the parties, & the ct. will not interfere with his finding as to the facts.—**FISHER v. PYNE** (1840), 1 Man. & G. 265 ; 133 E. R. 334.

**Annotations:—****Mentd.** *Victors v. Davis* (1844), 1 Dow. & L. 984; *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A.

**2610. "Matters of calculation."—**The amount due on a judgment, deducting payments made & proved at the trial, or the amount due for costs on a contract to pay costs of suing, are "matters of

**Sect. 3.—References to master to assess damages. Part VI.]**

calculation," which may be referred to the master to inquire.—**NATIONAL ASSURANCE & INVESTMENT ASSOCN. v. BEST** (1857), 2 H. & N. 605; 27 L. J. Ex. 19; 30 L. T. O. S. 169; 6 W. R. 78; 157 E. R. 249.

**Annotations:—Mentd.** *Futcher v. Hinder* (1858), 3 H. & N. 757; *Semple v. Keen* (1858), 32 L. T. O. S. 96; *Warburg v. Tucker* (1858), E. B. & E. 914.

**2611. Reference to assess damage—Appeal to Court of Appeal.]**—An appeal from the decision of a master, on a reference to him by a judge to assess under R. S. C., Ord. 36, r. 57, the amount of the damages in an action should be entered in the Ct. of Appeal, & not in the Divisional Ct.—**DUNLOP PNEUMATIC TYRE CO., LTD. v. NEW GARAGE & MOTOR CO., LTD.**, [1913] 2 K. B. 207; 82 L. J. K. B. 605; 108 L. T. 361; 29 T. L. R. 344; 57 Sol. Jo. 357, C. A.

**Annotation:—Distd.** *O'Driscoll v. Manchester Insee. Committee*, [1915] 3 K. B. 499, C. A.

*See, now, R. S. C., Ord. 54, r. 22A (R. S. C. (March), 1919).*

**2612. Reference to ascertain amount due—Appeal to Divisional Court.]**—Where a garnishee issue is tried by a judge without a jury, & the judge finds that there is a debt owing or accruing, but refers it to the master to ascertain the amount with an order for payment of the amount so found to be due, an appeal from the finding of the master lies to the Divisional Ct. & not direct to the Ct. of Appeal.—**O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE**, [1915] 3 K. B. 499; 85 L. J. K. B. 83; 113 L. T. 683; 79 J. P. 553; 13 L. G. R. 1156, C. A.  
*See, now, R. S. C., Ord. 54, r. 22A (R. S. C. (March), 1919).*

**2613. In Chancery Division.]**—In the Ch. Div., where an inquiry as to damages has been directed, it is usual to take same before the chief clerk, & not before a referee.—**SLACK v. MIDLAND RY. CO.** (1880), 16 Ch. D. 81; 50 L. J. Ch. 196; 43 L. T. 434; 29 W. R. 302.

**Annotation:—Reid.** *Ewart v. Fryer* (1902), 86 L. T. 676.

## Part VI. Application of Arbitration Act, 1889, to References under Statute.

*See Arbitration Act, 1889, s. 24.*

**2614. Building Societies Act, 1874 (c. 42).]**—The Act of 1889, s. 19, applies to arbn. under the above Act of 1874.—**TABERNACLE PERMANENT BUILDING SOCIETY v. KNIGHT**, [1892] A. C. 298; 62 L. J. Q. B. 50; 67 L. T. 483; 56 J. P. 709; 41 W. R. 207; 8 T. L. R. 616; 36 Sol. Jo. 538, H. L.

**Annotations:—Mentd.** *Re Spillers & Baker*, [1897] 1 Q. B. 312, C. A.; *Re Montgomery, Jones & Liebenthal* (1898), 78 L. T. 406, C. A.; *Re Palmer & Hosken*, [1898] 1 Q. B. 131, C. A.; *Re Lobitos Oilfields & Admiralty Comrs.*, *Re Crown S.S. Co. & Lobitos Oilfields & Admiralty Comrs.* (1917), 117 L. T. 28.

*See, further, BUILDING SOCIETIES.*

**2615. Companies Act, 1862 (c. 89).]**—Where a co. was in voluntary liquidation & a dispute had arisen as to the price to be paid for the purchase of the interest of a dissentient member which, under s. 162 of the above Act of 1862, had been referred to arbn., the ct., on the application of the liquidators, had jurisdiction under R. S. C., Ord. 37, r. 5, to order a commission to issue for the examination of witnesses abroad, the matter being one arising in the winding-up within s. 138 of the Act, & the reference to arbn. being compulsory under the

Act.—**Re MYSORE WEST GOLD MINING CO.** (1889), 42 Ch. D. 535; 58 L. J. Ch. 731; 61 L. T. 453; 37 W. R. 794; 5 T. L. R. 695; 1 Meg. 347.

**Annotation:—Consd.** *Taylor v. Cripps* (1914), 7 B. W. C. C. 623, C. A.

*See, further, COMPANIES.*

**2616. Industrial & Provident Societies Act, 1893 (c. 39).]**—J., a member of an industrial society, nominated his daughter to receive his interest in the society, & died on May 19, 1898, without having revoked the nomination. Both his widow & the daughter claimed the amount standing to his credit in the books of the society. On Sept. 20 the daughter wrote a letter to the society nominating an arbitrator, & asking the society to name an arbitrator to act on their behalf in accordance with one of their rules. The society took no notice of this application, & on Oct. 19 the daughter gave notice that the arbitrator named in her former letter had been appointed by her as sole arbitrator under the Act of 1889, s. 6 (b). The society replied that they would refuse to be bound by the decision of an arbitrator so appointed. On Nov. 1 the sole arbitrator gave an *ex p.* award in favour of the daughter. On Nov. 17 a plaint was taken out by

### PART V. SECT. 3.

**2611 i. Reference to assess damage—Wrongful dismissal.]**—Pltf. agreed with deft. to serve him as manager of a tannery for six years. Deft. discharged pltf. after about seven months:—**Held**: deft. had no right to dismiss pltf., & a reference was, therefore, directed as to the damages sustained by pltf.—**BLAKE v. KIRKPATRICK** (1881), 6 A. R. 212.—CAN.

**2611 ii. — Breach of contract.]**—In an action for contract price of work done for defts. & for extras, & counterclaim for damages, etc.:—**Held**: a reference should be directed to estimate the damages, since the evidence offered was not sufficiently specific.—**BANNERMAN v. DETROIT YUKON MINING CO.** (1908), 8 W. L. R. 714.—CAN.

**2611 iii. — Sale of goods—Discretion as to allowing reference.]**—Pltf. sued for breach of a contract to sell & deliver goods. Pltf. gave evidence of shortage

& defective quality, & asked for a reference as to damages; the judge who tried the case refused the reference, & gave judgment for deft.:—**Held**: the matters in question were proper for trial by a judge, & pltf. was not entitled to give *prima facie* evidence of a breach of contract & then have a reference as to damages.—**COOK v. PATTERSON** (1884), 10 A. R. 645.—CAN.

**2611 iv. — Several defendants—Not bound to apportion.]**—In an action against several mill-owners for obstructing the O. river, a reference was made to the master to ascertain the amount of damages:—**Held**: the master was not called upon to apportion the damages according to the injury inflicted by each deft., & was not obliged to apportion them according to the different grounds of injury claimed by pltf.—**BOOTH v. RATTE** (1892), 21 S. C. R. 637.—CAN.

### PART VI.

a. 9 *Vict.* c. 37—10 & 11 *Vict.* c. 24.]—In dealing with awards made

under the above Acts, the ct. will be governed by the ordinary rules of law as applicable to awards between party & party.—**PUBLIC WORKS COMR. v. DALY** (1849), 9 U. C. R. 33.—CAN.

b. *Arbitration Act, 1892.]*—The above Act, by s. 24, enacts that Arbn. Act shall apply to every arbn. under any Act, passed before or after the commencement of that Act, as if the arbn. were pursuant to a submission, "except in so far as this Act is inconsistent with the Act regulating the arbn., or with any rules or procedure authorised or recognised by that Act":—**Held**: the effect of that sect. was not to introduce, into arbn. conducted under that Act, provisions for arbn. contained in other Acts, but merely to apply the arbn. provisions of that Act to arbn. under other Acts, so far as such arbn. were not conducted under statutory provisions inconsistent with the provisions of Arbn. Act.—**ZELMA GOLD MINING CO. v. HOSKINS** (1894), 11 R. 350, P. C.—N.Z.

the daughter in the county ct. under Industrial & Provident Societies Act, 1893 (c. 39), s. 49, & the judge enforced the award in favour of the daughter. The society appealed on the ground that the Act of 1889 could not apply, as s. 6 (b) of that Act was inconsistent with s. 49 (5) of the Act of 1893:—*Held*: it was not necessary to decide whether the Act of 1889 was or was not applicable, since the plaint in the county ct., as the forty days mentioned in s. 49 (5) of the Act of 1893 had elapsed, might be regarded as an application under that sub-sect.—*JESSOP v. HUDDERSFIELD INDUSTRIAL SOCIETY* (1899), 80 L. T. 598.

*See, further*, INDUSTRIAL, PROVIDENT & SIMILAR SOCIETIES.

**2617. Lands Clauses Consolidation Act, 1845 (c. 18).**—The provisions of C. L. P. Act, 1854, with regard to remitting matters to the reconsideration of the arbitrator, & enlarging the time for making the award, apply to references under the above Act.—*Re DARE VALLEY RY. CO.* (1869), 4 Ch. App. 554; *sub nom.* *DARE VALLEY RY. CO. v. RHYS*, 20 L. T. 291, 717; 17 W. R. 550, 717, C. A.

*Annotations*:—**Distd.** *Re Mackenzie & Ascot District Gas Co.* (1886), 55 L. J. Q. B. 309. **Appld.** *Knowles v. Bolton Corpn.* (1900), 69 L. J. Q. B. 481, C. A. **Mentd.** *Rhodes v. Airedale Drainage Comr.* (1876), 1 C. P. D. 402, C. A.

*See, further*, COMPULSORY PURCHASE OF LAND & COMPENSATION.

**2618. Light Railways Act, 1896 (c. 48).**—A railway co., acting under the powers of the above Act of 1896, gave claimant notice to treat for certain land. The amount of the compensation was referred, in pursuance of s. 13, & Lands Clauses Consolidation Act, 1845 (c. 18), to a single arbitrator, who in his award said nothing as to the costs. By s. 13 of the Act of 1896 the provisions of the Act of 1889 were to apply to an arbn. under that sect. in lieu of the Lands Clauses Acts. Under the Act of 1889 the costs of a reference & award were in the discretion of the arbitrator. Claimant applied to have the award remitted to the arbitrator, upon the ground that by mistake he had omitted to deal with the question of costs, & the arbitrator made an affidavit in support of the application, stating that he thought that the arbn. was under Lands Clauses Consolidation Act, 1845, which would have given the costs of the reference to claimant:—*Held*: there was an omission by the arbitrator to deal with the question of costs, over which he had jurisdiction, & the ct. would, upon the affidavit of the arbitrator, refer the award

back to him to deal with the costs.—*Re BAXTERS & MIDLAND RY. CO.* (1906), 95 L. T. 20; 70 J. P. 445; 22 T. L. R. 616, C. A.

*See, further*, TRAMWAYS & LIGHT RAILWAYS.

**2619. Local Government Act, 1888 (c. 41).**—Where under the above Act of 1888 differences are to be determined by the arbn. of the Local Govt. Board, the Board must proceed under s. 63, & they or the arbitrator appointed by them may be compelled under the Act of 1889 to state a case for the opinion of the ct.—*Re KENT COUNTY COUNCIL & SANDGATE LOCAL BOARD*, [1895] 2 Q. B. 43; 64 L. J. Q. B. 502; 72 L. T. 725; 59 J. P. 456; 43 W. R. 601; 11 T. L. R. 421; 39 Sol. Jo. 505; 15 R. 452.

*See, further*, LOCAL GOVERNMENT.

**Disputes in connection with—Agricultural holdings.**—*See* AGRICULTURE.

— **Compulsory purchase of land.**—*See* COMPULSORY PURCHASE OF LAND & COMPENSATION.

— **Electric lighting.**—*See* ELECTRIC LIGHTING & POWER.

— **Factories & workshops.**—*See* FACTORIES & SHOPS.

— **Friendly societies.**—*See* FRIENDLY SOCIETIES.

— **Gasworks.**—*See* GAS.

— **Housing of working classes.**—*See* COMPULSORY PURCHASE OF LAND & COMPENSATION; PUBLIC HEALTH & LOCAL ADMINISTRATION.

— **Husband & wife.**—*See* HUSBAND & WIFE.

— **Industrial disputes.**—*See* TRADE & TRADE UNIONS.

— **Lunatic asylums.**—*See* LUNATICS & PERSONS OF UNSOUND MIND; PUBLIC HEALTH & LOCAL ADMINISTRATION.

— **National health insurance.**—*See* WORK & LABOUR.

— **Public health.**—*See* PUBLIC HEALTH & LOCAL ADMINISTRATION.

— **Railways.**—*See* CARRIERS; RAILWAYS & CANALS.

— **Savings banks.**—*See* BANKERS & BANKING.

— **Telegraphs & telephones.**—*See* TELEGRAPHS & TELEPHONES.

— **Tramways.**—*See* TRAMWAYS & LIGHT RAILWAYS.

— **Waterworks.**—*See* COMPULSORY PURCHASE OF LAND & COMPENSATION; WATER SUPPLY.

— **Workmen's compensation.**—*See* MASTER & SERVANT.



## ARCHES.

Court of.—*See* COURTS ; ECCLESIASTICAL LAW.

## ARCHITECT.

*See* BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS.

## ARMORIAL BEARINGS.

*See* NAME AND ARMS, CHANGE OF ; REVENUE ; WILLS.

## ARMY.

*See* CONSTITUTIONAL LAW ; ROYAL FORCES.

## ARRANGEMENT WITH CREDITORS.

*See* BANKRUPTCY AND INSOLVENCY.

## ARREST.

*See* ADMIRALTY; BANKRUPTCY AND INSOLVENCY; CRIMINAL LAW AND PROCEDURE;  
EXECUTION; TRESPASS.

## ARSON.

*See* CRIMINAL LAW AND PROCEDURE.

## ARTICLES.

Of Apprenticeship.—*See* INFANTS AND CHILDREN; MASTER AND SERVANT; SOLICITORS,  
Of Association.—*See* COMPANIES.  
Thirty-nine.—*See* ECCLESIASTICAL LAW.

## ARTISANS' DWELLINGS.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## ASSAULT.

*See* CRIMINAL LAW AND PROCEDURE; TRESPASS.

## **ASSEMBLY.**

*See* CONSTITUTIONAL LAW ; CRIMINAL LAW AND PROCEDURE.

## **ASSESSMENT.**

*See* LANDLORD AND TENANT ; POOR LAW ; RATES AND RATING.

## **ASSETS.**

Of Deceased Persons.—*See* EXECUTORS AND ADMINISTRATORS.

Of Insolvent Persons.—*See* BANKRUPTCY AND INSOLVENCY.

## **ASSIGNMENT.**

Of Choses in Action.—*See* CHOSSES IN ACTION.

Of Leaseholds.—*See* LANDLORD AND TENANT ; SALE OF LAND.

For Benefit of Creditors.—*See* BANKRUPTCY AND INSOLVENCY.

## **ASSIZES.**

*See* COURTS ; CRIMINAL LAW AND PROCEDURE.



## ASSOCIATIONS.

*See* BUILDING SOCIETIES; CLUBS; FRIENDLY SOCIETIES; INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES; LOAN SOCIETIES; TRADE AND TRADE UNIONS.

## ASYLUMS.

*See* CHARITIES; LUNATICS AND PERSONS OF UNSOUND MIND; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## ATTACHMENT.

Of Persons.—*See* CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL.

Of Debts.—*See* BANKRUPTCY AND INSOLVENCY; EXECUTION; PRACTICE AND PROCEDURE.

## ATTAINDER.

*See* CRIMINAL LAW AND PROCEDURE.

## ATTEMPTS TO COMMIT CRIME.

*See* CRIMINAL LAW AND PROCEDURE.

# ATTESTATION.

*See* DEEDS AND OTHER INSTRUMENTS; WILLS.

# ATTORNEY.

*See* SOLICITORS.

*Power of.*—*See* AGENCY.

# ATTORNEY-GENERAL.

*See* CHARITIES; CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE;  
PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

# ATTORNMENT.

*See* LANDLORD AND TENANT; MORTGAGE; SALE OF GOODS.

END OF VOL. II.







